STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Roger L. Couch, Circuit Court Judge

Opinion No. 5800

THE STATE,

RESPONDENT,

V.

TAPPIA DEANGELO GREEN,

APPELLANT.

APPELLATE CASE NO. 2017-001296

PETITION FOR REHEARING

On February 3, 2021, this Court affirmed Appellant's conviction in *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 47). Pursuant to Rule 221(a), SCACR, counsel for Appellant respectfully requests this Court rehear the matter based upon the significant points overlooked and/or misapprehended by this Court.

On appeal, Appellant argued in Issue 2 that the trial court erred in allowing evidence of his post-arrest silence in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976), where the court determined the matter hinged on whether Appellant had been provided with *Miranda* warnings, then disregarded testimony Appellant had been read *Miranda*, and refused to hear and consider

body camera recordings from two officers on scene at Appellant's arrest given time considerations. This Court affirmed Appellant's convictions.

Counsel respectfully asserts that this Court overlooked or misapprehended critical points in issuing its decision as to Issue 2. First, Appellant asserts that this Court misapprehended testimony regarding whether Appellant was provided with *Miranda*[1] warnings.

Second, in deciding the novel issue of law of which party has the burden of proof before the State may impeach a testifying defendant with his post-arrest silence without running afoul of *Doyle*, Appellant respectfully asserts that, in holding the burden is on the defendant, this Court overlooked Rule 104(b), SCRE. That rule provides, "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." Silence following the giving of *Miranda* warnings is "ordinarily so ambiguous as to have little probative value." *Fletcher v. Weir*, 455 U.S. 603, 604-05 (1982) (citing *United States v. Hale*, 422 U.S. 171 (1975)). Here, whether Appellant's post-arrest silence was relevant for impeachment purposes depended upon whether he had been provided with *Miranda* warnings. Since the State was the proponent of the impeachment evidence, it should have borne the burden of introducing evidence sufficient to support a finding of the fulfillment of the condition.

In determining which party has the burden of proof on this novel issue, Appellant also asserts that this Court overlooked the helpful analysis of this issue laid out in *United States v. Cummiskey*, 728 F.2d 200, 206 (3d Cir. 1984). *Cumminskey* held the burden of proof was on the prosecution to show the defendant had not received *Miranda* warnings before it could impeach

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

him with his post-arrest silence, pursuant to Fed. R. Evid. 104(b). *Id*. at 206. Rule 104(b), SCRE is identical to the federal rule.

The State alleged that on April 14, 2015, Keith Lee was kidnapped and robbed by three men: Jonathan Johnson, Appellant, and an unidentified third man. R. 105, l. 13 – 107, l. 6. The defense advanced the theory that Lee owed Johnson money for drugs and Lee gave Johnson the money voluntarily while Appellant was present. R. 113, l. 12 – 114, l. 13. The defense posited Lee lied about being robbed to avoid his girlfriend's anger that his paycheck was used to pay for drugs. R. 656, ll. 14-25.

Lee claimed he was in the parking lot at Wells Fargo in North Charleston when a stranger forced him in the backseat of a PT Cruiser at gunpoint. R. 121, l. 7 – 124, l. 9. Lee said there were two other men in the PT Cruiser and he later learned that the man who approached him (the driver) was Johnathan Johnson, and that Appellant was the front passenger. R. 127, ll. 1-6.

Lee claimed the men demanded money and jewelry from him at gunpoint. R. 128, ll. 19-21; R. 128, ll. 23-24. Strangely, Lee alleged that although he did not know the men, Johnson said: "I know you work at Hardee's," and suggested they pick up his paycheck from Hardee's. R. 129, l. 25 – 130, l. 2. Lee claimed the men tied him up and drove to Hardee's in Mount Pleasant. R. 131, ll. 10-12. He alleged Appellant threatened to kill him and everyone in Hardee's if he tried to signal for help. R. 134, ll. 2-6. Lee claimed Johnson took him into Hardee's armed with a pistol, where Lee picked up and signed for his paycheck. R. 134, ll. 2-3; R. 136, ll. 2-3.

Shania Burden, the restaurant manager who gave Lee his check, said Lee neither acted in an unusual manner nor asked her to push a panic button that he knew existed. R. 584, l. 14 – 586, l. 22.

Lee alleged the men tied him up again as they left Hardee's and drove back across the Mount Pleasant Bridge to Ace Check Cashing in North Charleston, where Lee cashed his check. R. 139, ll. 14-17; R. 140, ll. 2-7. Lee said that after cashing the check, he returned to the car and gave the envelope to the unidentified third man in the back seat, who passed it to Appellant. R. 141, ll. 14-15. Lee claimed when the men stopped the car by a gas station he happened to see his girlfriend in the drive-through lane of a nearby fried chicken restaurant. R. 142, ll. 22-25. Lee alleged the men then released him and he got in his girlfriend's car. R. 144, ll. 5-7. Notably, Lee did not call 911.

Although Johnson had pleaded guilty, he was called as a defense witness and said Lee was not kidnapped or robbed. R. 369, ll. 23; R. 380, ll. 9-11. Johnson said that he previously sold Lee drugs, Lee owed him money for the drugs, and when Johnson saw Lee at Wells Fargo he asked Lee for the money. R. 369, ll. 10-13; R. 369, ll. 14-15. Lee told him he needed to get his paycheck, so Johnson took him to pick up and cash his check, and Lee gave him the money. R. 369, ll. 16-19.

Police searched the PT Cruiser, which belonged to Johnson's girlfriend. R. 205, ll. 13-22. Inside, officers found an envelope and paystub belonging to Lee, and identified the fingerprints of Johnson and Appellant on the stub. R. 216, 25 – 216, l. 12; R. 250, ll. 8-12. The State introduced phone records and security footage from the Hardee's parking lot that showed Appellant outside the PT Cruiser phoning Johnson while Johnson and Lee were in the restaurant. R. 306, ll. 5-18; R. 339, l. 24 – 341, l. 15.

Appellant testified in his defense and confirmed Johnson's testimony that Lee got in the car at Wells Fargo because he owed Johnson money. R. 489, ll. 4-14; R. 490, ll. 1-3. Appellant said Lee rode with them voluntarily and explained that he, Appellant, touched the check stub

when Lee handed it to him to give to Johnson. R. 490, ll. 5-21; R. 491, ll. 13-15; R. 495, l. 23 – 496, l. 9. Appellant said he phoned Johnson while Johnson was in Hardee's because it was hot and he wondered what was taking so long. R. 500, l. 13 – 501, l. 1. Appellant explained that he got out of the car at Hardee's to see what was going on because it appeared a car accident had occurred nearby. R. 493, ll. 16-21.

Appellant denied having a weapon and threatening to kill anyone and he said no one in the car pointed a gun at Lee. R. 497, ll. 1-22; R. 497, ll. 21-25. He noted Lee did seem upset at some point during the drive, expressing that his girlfriend was going to be angry with him. R. 498, ll. 1-4. Appellant said Lee commented: "[D]amn, my gal is going to trip." R. 498, ll. 11-12.

On cross-examination, the solicitor challenged Appellant: "So this story you have about having a little bit to drink, riding around in the car, why not tell the police back in 2015?" R. 502, l. 24 – 503, l. 1. "Why not speak to law enforcement when you got arrested?" R. 504, ll. 10-11. The solicitor remarked: "now we're having this brand new story that you've had two years to come up with." R. 504, l. 22 – 505, l. 1. The solicitor asked: "instead of trying to get a hold of somebody while you were sitting in jail two years and say, hey, that's not what happened, you wanted to sit in jail for two years to come to trial?" R. 503, ll. 22-25. Appellant replied that he had "talked to [his] lawyer about this several times." R. 504, ll. 2-3.

Defense counsel objected to the line of questioning; he protested that the State was improperly commenting on Appellant's Fifth Amendment rights. The trial court sustained the objection. R. 505, l. 6 – 506, l. 9. The court had a conference with the attorneys in chambers and then held an *in camera* hearing on whether the State's questioning of Appellant on his failure to offer an exculpatory statement prior to trial violated *Doyle v. Ohio*. R. 540, ll. 8-19. The State argued that because nothing indicated Appellant had been given his *Miranda* rights, *Doyle* was

inapplicable. R. 540, l. 19 – 23. Defense counsel argued Appellant had been given *Miranda* warnings and he was therefore entitled to a mistrial. R. 543, ll. 6-8; R. 545, ll. 3-19.

Appellant had been arrested several months after the alleged robbery for another offense—failure to stop for a blue light—and he was served warrants for this case on the same date. R. 541, ll. 4-9. Appellant testified *in camera* that when he was arrested for failure to stop for a blue light, he was told of the outstanding warrants for this case. R. 545, l. 21 – 546, l. 18. He said there were many officers at the scene of his arrest. "There was like 30 polices out there." R. 556, ll. 16-17; R. 546, ll. 15-16. Appellant testified that an officer, a "guy I don't know his name he ask me – he read me my rights." R. 546, ll. 17-18. "He told me I got warrants for arm[ed] robbery from North Charleston Police Department, some bad checks and failure to stop for a blue light." R. 546, ll. 18-21. Appellant said: "He read me my *Miranda* rights and he put me in the car with this female officer who transported me to the North Charleston county jail." R. 546, ll. 21-23. "I definitely was read my *Miranda* rights and he ask me did I want to come down to City Hall." R. 547, ll. 10-13.

The solicitor questioned Appellant about the officer's appearance; Appellant described the man as bald with a stocky build and green uniform, and he suggested the court check the officer's body camera.[2] R. 551, ll. 12-16. Appellant testified that the bald officer said: "[H]ey that's Tappia Green. You got several warrants from our department," read him *Miranda*, and

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2 Defense counsel noted the incident reports from Appellant's arrest for failure to stop for a blue light said Appellant was served with outstanding warrants for the case at hand before being taken to the detention center. R. 617, l. 1-10; R. 732. The incident reports were made part of the record. R. 615, l. 19 – 616, l. 15; R. 729 – 734. Defense counsel noted that the incident reports stated Appellant's arrest was captured on body-worn cameras. R. 618, ll. 1-2; R. 620, ll. 14-17. The court responded: "If that evidence is available, I'll watch it right now, but I've delayed this case today for a whole morning on this issue. The issue arose yesterday." R. 620, ll. 18-21. No footage was produced for the court to review.

asked him to "come down to City Hall and talk about it." R. 552, ll. 9-22. Appellant said the officer told him, "You have the right to remain silent . . . anything you say can and will be hold against you in a court of law." R. 555, ll. 5-8.

The court heard testimony from two police officers at the hearing. Officer Danielle Smoak said two of her coworkers were pursuing Appellant when he got out of his car and ran into a building. R. 598, ll. 21-23. Smoak was one of a team assisting those officers, and she handcuffed Appellant, putting him in her police car when he came out of the building. R. 598, ll. 23-25; R. 599, ll. 6-8. Officer Smoak said she did not read Appellant *Miranda* warnings, but she called a transport unit to take him to jail. R. 599, ll. 21-25; R. 600, ll. 19-21. When the female transport officer arrived, Smoak unlocked her patrol car door so that Appellant could be moved to the transport unit car. R. 606, ll. 6-12.

Smoak testified Officers Riley and Norwood chased Appellant for failure to stop for a blue light, and she was not certain whether they talked to Appellant. R. 602, ll. 7-14; R. 602, l. 23 – 603, l. 5. Smoak said,

> A Usually whenever I detain someone and put them in the car, nobody really talks to them after that.
>
> Q Usually. Can you say for certain they didn't talk to [Appellant]?
>
> A No absolutely not.

R. 602, ll. 21-25. Officer Smoak reiterated that she could not say "with absolute certainty" that another officer did not give Appellant *Miranda* warnings at the scene of his arrest. R. 607, l. 23 – 608, l. 1. Officer Smoak explained that a couple of years had passed and she had been involved "in multiple pursuits and incidents since then." R. 608, ll. 1-6.

When asked if she could recall an officer who was bald and wearing green present, Smoak offered that Brandon VanAusdal fit the description. R. 601, ll. 4-16. Officer VanAusdal

was called and testified that he was a canine officer called in to assist, and that he did not give Appellant *Miranda* warnings. R. 611, l. 19 – 612, l. 3. VanAusdal did not remember "who's bald and who's not" among the officers that responded, and he did not see who served warrants on Appellant for these offenses. R. 614, ll. 17-23; R. 613, ll. 20-24.

The State argued that if no *Miranda* warning is given, then *Doyle* and its progeny do not apply, and its cross-examination of Appellant did not violate Appellant's Fifth Amendment rights. R. 620, ll. 5-11. Defense counsel argued that the burden was on the State to prove Appellant had not been given *Miranda* warnings before it could question him on his post-arrest silence without running afoul of *Doyle*. R. 620, ll. 22-23; R. 618, ll. 6-7. Although the trial court did not explicitly say which party had the burden of proof, it stated, "[H]e's [Appellant] getting ready to testify that he got his *Miranda* rights, that's what I've been told. If you want to counter that testimony, that's up to you [solicitor]." R. 545, ll. 16-19.

At the conclusion of the hearing, the court found "sufficient evidence to indicate that [Appellant] was not *Mirandized* at that time." R. 621, ll. 6-8. The court stated that the incident reports did not say Appellant was read *Miranda*, and two officers present at Appellant's arrest testified they did not read him *Miranda*. R. 621, ll. 12-19. The court found the State's line of questioning did not violate *Doyle* and it denied the defense's mistrial motion. R. 621, ll. 21-23.

In closing argument, the solicitor said: "what this case is going to come down to is who you believe. Not whether you believe me or Mr. Archer, whether you believe Keith Lee, Johnathan Johnson or [Appellant]." R. 624, ll. 7-10. "[I]t's going to come down to who you believe was telling the truth and who you believe wasn't." R. 625, ll. 4-5. The solicitor also told the jury Lee had credibility because "he's told the same story to you. He's told the same story to

the North Charleston Police Department," implying Appellant lacked credibility because he did not talk to the police. R. 625, l. 24 – 626, l. 2.

This Court found "contrary evidence was submitted by [Appellant] and the State" as to whether Appellant was read his *Miranda* rights, and therefore there was evidence to support the trial court's decision. *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 60). This Court wrote,

> Thus, the proffered testimony reflects, while Green claimed he was given *Miranda* warnings at the scene of his arrest by a male officer who then placed him into the car of a female transport officer, the only person known to have contact with Green at the scene of his arrest other than Officer Smoak was Officer VanAusdal; Officer VanAusdal fit the description of the individual Green claimed read him his rights; Officer Smoak did not give Green his *Miranda* rights and did not hear anyone else read him his rights; being in the first position, Officer Smoak placed Green in handcuffs and secured him in her locked car, which meant no one else had access to Green until the transport officer arrived; Officer Smoak unlocked her door for the female transport officer, who then took Green to jail; and Officer VanAusdal denied reading Green his *Miranda* rights.

State v. Green, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 59-60).

This Court determined that as to prior South Carolina caselaw holding there was no *Doyle* violation only where no evidence appeared in the record that the accused had been provided *Miranda* warnings, "it does not necessarily follow that when the question of whether a defendant has been given *Miranda* warnings is in contention, *Doyle* automatically applies. *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 60-61).

> We believe the question is not whether any evidence has been presented that a defendant received *Miranda* warnings when determining whether a *Doyle* violation has occurred. Rather the

> question is whether the trial judge, who saw and heard testimony on the matter and is in a better position to judge credibility, has the authority to make a factual determination on whether *Miranda* warnings have been given for purposes of determining a *Doyle* violation issue when contrary evidence is presented, and the standard of review to be applied to the trial court's determination in such a matter.

State v. Green, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 61) (footnote omitted).

This Court cited *Mattox v. State*, 395 S.E.2d 288 (Ga. Ct. App. 1990), noting that Georgia "has held the burden rests on the defendant to show a *Doyle* violation has occurred." *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 61). In particular, this Court quoted the *Mattox* court's statement that, "the determination of whether the defendant has the burden of showing a *Doyle v. Ohio* violation or the State has the burden of showing the applicability of *Fletcher v. Weir* is one of first impression in this State." *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 61) (quoting *Mattox*, 395 S.E.2d at 290). This Court reasoned,

> As observed by the *Mattox* court, the USSC in *Fletcher* reversed the lower court's grant of habeas corpus, noting the record there failed to indicate the defendant received any *Miranda* warnings during the period in which he remained silent immediately after his arrest. Had the burden been upon the State to affirmatively demonstrate *Doyle* was not applicable, the failure of the record to indicate whether or not the defendant received any *Miranda* warnings during the period of silence after his arrest would have presumably been fatal to the State meeting its burden of proof and would have resulted in affirmance of the grant of habeas corpus. Accordingly, we believe the burden is upon the defendant to show a *Doyle* violation has occurred.

State v. Green, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 62).

This Court also found that, "even assuming the burden shifted to the State to show *Doyle* was inapplicable once Green proffered evidence *Miranda* warnings were provided to him, we find no error." *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 62). "As previously noted, there is evidence to support the trial court's finding that Green was not given *Miranda* warnings." *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 63).

This Court found no abuse of discretion in the trial court's denial of Appellant's mistrial motion. *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 65). In its earlier discussion of South Carolina caselaw which held impeachment with pre-trial silence was only proper where there had been no evidence the accused had received *Miranda* warnings, this Court disagreed with those holdings because, "Were that the case, any defendant could wait until he or she testifies and then upon being challenged for giving a story the very first time in his testimony, automatically receive a mistrial by claiming for the first time that he or she was *Mirandized*." *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 61, n. 7).

Appellant respectfully asserts that this Court misapprehended testimony regarding whether Appellant was provided with *Miranda* warnings. As seen, this Court found "contrary evidence" was submitted by Appellant and the State as to whether Appellant was read his *Miranda* rights. However, Appellant's *in camera* testimony that he received *Miranda* warnings was not totally in conflict with the *in camera* testimony by Officer Smoak and Officer VanAusdal. Neither officer said that Appellant did not receive *Miranda* warnings. Officer Smoak testified that although no one typically speaks with a suspect after he has been placed in her patrol car, she "absolutely [could] not" say that no one spoke with and *Mirandized* Appellant. R.

602, ll. 21-25. Officer Smoak explained that a couple of years had passed and she had been involved "in multiple pursuits and incidents since then." R. 608, ll. 1-6.

Officer VanAusdal testified that he did not give Appellant *Miranda* warnings but said he quickly returned to his police car after Appellant was taken into custody. R. 612, l. 7 – 613, l. 13. Therefore, neither Officer Smoak nor Officer VanAusdal said that Appellant could not have been given *Miranda* warnings.

Appellant also asserts this Court's finding that "the only person known to have contact with Green at the scene of his arrest other than Officer Smoak was Officer VanAusdal" misapprehends the testimony on this matter. Smoak and VanAusdal were not certain that they were only people who had contact with Appellant. Also, only those two out of many officers were called to testify. There were at least two additional officers present (Officers Riley and Norwood per incident reports) and possibly as many as thirty officers present per Appellant's testimony.

It is a novel issue of law in South Carolina whether, in order for a prosecutor to impeach a testifying defendant with his post-arrest silence, the burden is upon the State to show that such cross-examination does not violate *Doyle v. Ohio*, or whether the burden is upon the defendant to show that such cross-examination does violate *Doyle v. Ohio*.

This case stands primarily before the backdrop of two United States Supreme Court decisions: *Doyle v. Ohio* and *Fletcher v. Weir*. *Doyle v. Ohio*, 426 U.S. at 611, held that a prosecutor may not use the post-*Miranda* silence of an accused to impeach his exculpatory story told for the first time at trial. However, when an accused has not received the assurances contained in *Miranda* warnings, a state court may permit cross-examination about post-arrest silence if the accused takes the stand. *Fletcher v. Weir*, 455 U.S. at 607.

Appellant respectfully asserts that, in holding the burden is on the defendant, this Court overlooked *United States v. Cummiskey*, 728 F.2d 200 (3d Cir. 1984), which, while not binding on this Court, contains an explanation of why *Mattox* (the Georgia case relied on by this Court, *supra*) incorrectly decided this issue. In *United States v. Cummiskey*, 728 F.2d at 202-03, the Third Circuit addressed whether the admission of questions and comments on the defendant's silence was in violation of *Doyle v. Ohio* such that the defendant was entitled to a mistrial. Specifically, the Third Circuit addressed whether the trial court erred when it placed the burden on the defendant to show his silence was post-*Miranda* rather than placing the burden on the prosecution to show the defendant's silence was not post-*Miranda*. *Id*. at 204.

As to the argument that, based upon a reading of *Fletcher v. Weir*, "the Supreme Court has placed on the testifying defendant the obligation to establish the giving of *Miranda* warnings," the Third Circuit explained, "*Fletcher* does not support the government's position. It only holds that an arrest alone, not accompanied by *Miranda* warnings, is insufficient to place the testifying defendant within the rule of *Doyle v. Ohio*." *Cummiskey*, 728 F.2d at 206.

The Third Circuit explained, "In that case the Sixth Circuit had declined the state's invitation to order a remand for factual findings, holding that no such remand was required because the giving of *Miranda* warnings was irrelevant as a matter of law." *Id*. "Consequently, the issue of which party bears the burden of establishing the giving (or absence) of warnings was not addressed by the Sixth Circuit, and was not before the Supreme Court." *Id*. A review of the case history of *Fletcher v. Weir* bears this out. *See Weir v. Fletcher*, 658 F.2d 1126, 1129 n. 8 (6th Cir. 1981), *rev'd*, 455 U.S. 603 (1982) ("The Commonwealth argues on appeal that because the record is so unclear, we should remand for an evidentiary hearing as to when *Miranda*

warnings were given. Because we conclude that it makes no difference whether warnings were given or not, there is no need to remand.")

Counsel respectfully asserts this Court misapprehended *Fletcher v. Weir* when it relied on the Georgia Court of Appeals' erroneous reading of *Fletcher* in *Mattox v. State*, 395 S.E.2d at 288. *State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 61).

The Third Circuit in *Cummiskey* explained that the "relevance of post-arrest silence depends entirely upon its impeaching character as an arguably prior inconsistent assertion by the action of remaining silent. *Doyle v. Ohio* holds that when the action of remaining silent occurs after the witness has received *Miranda* warnings, that action is not relevant as a prior inconsistent assertion." *Cummiskey*, 728 F.2d at 205. The *Cummiskey* court determined that under Fed. R. Evid. 104(b), "the absence of *Miranda* warnings is a typical instance of a condition of fact on the fulfillment of which relevancy of other evidence, in this case post-arrest silence, depends." *Id*.

Rule 104(b), SCRE is identical to the federal rule, and it provides: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." In discussing the identical federal rule, the Third Circuit explained, "Because it is the prosecutor who is attempting to establish the relevancy, for impeachment or any other purpose, of post-arrest silence, the government bears the burden of introducing evidence sufficient to support a finding of the fulfillment of the condition." *Id*. at 205-06. Fed. R. Evid. 104(b) "plainly contemplates that the moving party bears the burden of introducing such supporting evidence." *Id*. at 206.

Here, Rule 104(b), SCRE plainly contemplates that the moving party bears the burden of introducing such supporting evidence. The burden of proof lies properly with the State in this instance. *See United States v. Foster*, 995 F.2d 882, 883 (9th Cir. 1993) ("In accordance with the reasoning of the Third Circuit, we hold that the government has the burden of demonstrating that the warnings were not given"); *Gov't of Virgin Islands v. Davis*, 561 F.3d 159, 164, n. 4 (3d Cir. 2009) (recognizing that prosecution has burden of establishing defendant did not receive *Miranda* warnings prior to using his post-arrest silence for impeachment). *See generally South Dakota v. Neville*, 459 U.S. 553, 565 (1983) ("the right to silence underlying the *Miranda* warnings is one of constitutional dimension, and thus cannot be unduly burdened").

Moreover, in this context, it is the defendant who has rights and the government that has obligations—Appellant had fundamental constitutional rights to testify in his defense and to remain silent prior to trial. U.S. CONST. amend. V; U.S. CONST. amend. VI; U.S. CONST. amend. XIV. *See Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (right to testify on one's own behalf at a criminal trial has sources in the Fourteenth, Sixth, and Fifth Amendments); *Doyle v. Ohio*, 426 U.S. at 619 ("the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment"). In contrast, the State had the obligation to establish the relevancy of Appellant's post-arrest silence pursuant to the evidence rules and to accord Appellant due process.

Appellant respectfully asserts that the proper holding here is as was explained by the Third Circuit in *Cummiskey*: "[W]hen a testifying defendant makes an objection to the prosecutor's cross-examination with respect to post-arrest silence, it is the prosecutor's burden, under Rule 104(b), to establish that *Miranda* warnings were not given prior to the silence relied

upon for impeachment purposes." *Cummiskey*, 728 F.2d at 206. Here, Appellant's objection placed the burden upon the State.

This Court has previously allowed impeachment with post-arrest silence only when there is no evidence in the record that an accused received *Miranda* warnings. *Brown v. State*, 375 S.C. 464, 480-481, 652 S.E.2d 765, 773-774 (2007) (no *Doyle* violation where "there is no evidence in the record that Brown ever received *Miranda* warnings"); *State v. Bell*, 347 S.C. 267, 271, 554 S.E.2d 437 (Ct. App. 2001) (no due process violation where there is no evidence in the record the defendant ever received *Miranda* warnings). This Court should adhere to those holdings, pursuant to which the solicitor's attempts to impeach Appellant with his silence were improper. Appellant testified that he did receive the warnings and the trial court did not find his testimony was not credible.

As to this Court's concern that an accused might provoke a mistrial by claiming he was *Mirandized* after an impeachment attempt, Appellant asserts this concern may be alleviated by an *in camera* hearing. Also, the dearth of caselaw about this issue suggests it is one which has arisen infrequently.

The trial court erred by denying Appellant's mistrial motion after the jury heard evidence of Appellant's post-arrest silence in violation of *Doyle*. "Because the nature of a *Doyle* error is so egregious and so inherently prejudicial, reversal is the norm rather than the exception." *Williams v. Zahradnick*, 632 F.2d 353, 363 (4th Cir. 1980). In order for a *Doyle* violation to be harmless, the record must show "that the reference to silence be a single reference; that the single reference never be repeated or alluded to in either the trial or in jury argument; that the prosecutor does not directly tie the defendant's silence to his exculpatory story; that the exculpatory story be totally implausible, transparently frivolous; and that evidence of guilt be overwhelming." *State v.*

Truesdale, 285 S.C. 13, 18–19, 328 S.E.2d 53, 56 (1984) (citing *Chapman v. United States*, 547 F.2d 1240 (5th Cir.1977)). *See also State v. Hill,* 360 S.C. 13, 17-18, 598 S.E.2d 732, 734 (Ct. App. 2004) (mistrial should have been granted based on *Doyle* violation); *State v. Gray*, 304 S.C. 485, 405 S.E.2d 421 (Ct. App. 1991) (application of *Truesdale* analysis showed *Doyle* violation was not harmless and failure to order mistrial was reversible error). Application of the *Doyle* violation error analysis laid out in *Truesdale* and *Chapman* to the case at hand demonstrates that a mistrial should have been granted. Here, there was more than a single reference to Appellant's post-*Miranda* silence. The solicitor directly tied Appellant's silence to his defense at trial and credibility was the central issue to be decided by the jury. Appellant's exculpatory story was not totally implausible and the evidence against him was not overwhelming.

The burden should have been on the State to prove that questioning Appellant on his post-arrest silence was permissible. It did not meet that burden here, since neither of the two officers it called could say that Appellant did not receive *Miranda* warnings, and since Appellant testified that he did receive those warnings. *Doyle v. Ohio*, 426 U.S. 610 (1976); Rule 104(b), SCRE. Based on the above arguments, counsel for Appellant respectfully seeks rehearing pursuant to Rule 221(a), SCACR, due to the significant points overlooked and/or misapprehended by the Court in affirming Appellant's convictions.

Respectfully Submitted,

s/ *Joanna K. Delany*
JOANNA K. DELANY
Appellate Defender

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TAPPIA DEANGELO GREEN,

APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above referenced case has been served upon William Schumacher, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Tappia Deangelo Green, at Ridgeland Correctional Institution, 5 Correctional Road, Ridgeland, SC, 29936, this 18th day of February, 2021.

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT