STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Roger L. Couch, Circuit Court Judge

Opinion No. 5800 (S.C. Ct. App. Filed February 3, 2021)

THE STATE,

RESPONDENT,

V.

TAPPIA DANGELO GREEN,

PETITIONER

APPELLATE CASE NO. 2017-001296

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

[2] *Doyle v. Ohio*, 476 U.S. 610 (1976).

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on March 12, 2021.

QUESTION PRESENTED

Whether the Court of Appeals erred by affirming the trial judge's denial of Petitioner's mistrial motion, where it held that a testifying defendant had the burden to prove he received *Miranda*[3] warnings to establish a *Doyle*[4] violation rather than concluding the prosecution, as the proponent of the evidence, had the burden to show a testifying defendant did not receive *Miranda* warnings before it could permissibly use his post-arrest silence for impeachment, particularly given evidence Petitioner received the warnings?

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

[4] *Doyle v. Ohio*, 476 U.S. 610 (1976).

STATEMENT OF THE CASE

On November 3, 2015, Petitioner was indicted by a Charleston County Grand Jury for the offenses of armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime. The indictments alleged that on or about April 14, 2015, Petitioner kidnapped and robbed Keith Lee at gunpoint. R. 739 – 744.

Petitioner's case was called to trial before the Honorable Roger L. Couch and a jury, from May 22 – May 25, 2017. R. 1. Daniel Cooper and Burns Wetmore represented the State; Mark Archer represented Petitioner. R. 1. The jury returned verdicts of guilty, and Petitioner was sentenced to concurrent terms of imprisonment of fifteen years for armed robbery, fifteen years for kidnapping, and five years for possession of a weapon during the commission of a violent crime. R. 715, ll. 1-5; R. 724, l. 22 – 725, l. 8; R. 745 – 747.

On May 27, 2017, Petitioner served his notice of appeal. The Court of Appeals affirmed in *State v. Tappia Deangelo Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 47). Petitioner sought rehearing. Rehearing was denied in an order filed March 12, 2021.

Petitioner now files this petition for writ of certiorari.

ARGUMENT

The Court of Appeals erred by affirming the trial judge's denial of Petitioner's mistrial motion, where it held that a testifying defendant had the burden to prove he received *Miranda*[5] warnings to establish a *Doyle*[6] violation rather than concluding the prosecution, as the proponent of the evidence, had the burden to show a testifying defendant did not receive *Miranda* warnings before it could permissibly use his post-arrest silence for impeachment, particularly given evidence Petitioner received the warnings.

Reasons to grant certiorari

This Court should grant the petition for writ of certiorari because there is a novel question of law and it directly involves substantial constitutional issues. *See* Rule 242(b)(1), SCACR; Rule 242(b)(4), SCACR.

The prosecution may not use the post-*Miranda* silence of an accused to impeach his exculpatory story told for the first time at trial. *Doyle v. Ohio*, 426 U.S. 610, 611 (1976). However, if the accused was not provided with *Miranda* warnings, his silence may permissibly be used for impeachment. *Fletcher v. Weir*, 455 U.S. 603, 607 (1982). Here, the Court of Appeals held that where a testifying defendant objected to the prosecution's attempts to impeach him with his post-arrest silence, the burden was on the defendant to show a *Doyle* violation occurred instead of the burden being on the prosecution to show that *Fletcher v. Weir* applied. This is a novel issue of law in South Carolina.

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

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

[6] *Doyle v. Ohio*, 476 U.S. 610 (1976).

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." *United States v. Cummiskey,* 728 F.2d 200, 205 (3d Cir. 1984). "Thus, 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 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." The Third Circuit explained that as to the similar federal rule, Fed. R. Evid. 104(b) "plainly contemplates that the moving party bears the burden of introducing such supporting evidence." *Id*. at 206. Because it was the prosecution that needed to establish the relevancy of Petitioner's post-arrest silence to use it for impeachment, the burden should have been on the State, as the moving party, to introduce evidence sufficient to support a finding of the fulfillment of the condition.

Moreover, in this context, it was Petitioner who had rights and the State that had obligations—Petitioner had rights to remain silent prior to trial and to receive due process of law. U.S. CONST. amend. V; U.S. CONST. amend. XIV. In contrast, the State had the obligation to establish the relevancy of Petitioner's post-arrest silence pursuant to the evidence rules and to afford him due process.

The decision of the Court of Appeals here improperly discounted Petitioner's constitutional protections and failed to account for Rule 104, SCRE. This Court should grant the petition for writ of certiorari.

Relevant facts

The State alleged that on April 14, 2015, Keith Lee was kidnapped and robbed by three men: Jonathan Johnson, Petitioner, 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 Petitioner 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 Petitioner 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. 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 bound his hands and feet and drove to Hardee's in Mount Pleasant. R. 131, ll. 10-12. He alleged Petitioner 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. 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 Petitioner. 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 they identified the fingerprints of Johnson and Petitioner 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 Petitioner 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.

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

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.

Petitioner 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. Petitioner said Lee commented: "[D]amn, my gal is going to trip." R. 498, ll. 11-12.

On cross-examination, the solicitor challenged Petitioner: "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. Petitioner 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 Petitioner'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 Petitioner 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 Petitioner had been given his *Miranda* rights, *Doyle* was inapplicable. R. 540, l. 19 – 23. Defense counsel argued Petitioner had been given *Miranda* warnings and he was therefore entitled to a mistrial. R. 543, ll. 6-8; R. 545, ll. 3-19.

Petitioner had been arrested several months after the alleged kidnapping and 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. Petitioner 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. Petitioner 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 robbery from North Charleston Police Department, some bad checks and failure to stop for a blue light." R. 546, ll. 18-21. Petitioner 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 Petitioner about the officer's appearance; Petitioner described the man as bald with a stocky build and green uniform, and he suggested the court check the officer's body camera.[7] R. 551, ll. 12-16. Petitioner testified that the bald officer said: "[H]ey that's Tappia Green. You got several warrants from our department," read him *Miranda*, and asked him to "come down to City Hall and talk about it." R. 552, ll. 9-22. Petitioner said the

[7] Defense counsel noted the incident reports from Petitioner's arrest for failure to stop for a blue light said Petitioner 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 Petitioner'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. However, no footage was produced for the court to review.

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 Petitioner 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 Petitioner and put 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 Petitioner *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 Petitioner could be moved to the transport unit car. R. 606, ll. 6-12.

Smoak testified Officers Riley and Norwood chased Petitioner for failure to stop for a blue light, and she was not certain whether they talked to Petitioner. 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 [Petitioner]?
>
> 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 Petitioner *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 out to assist, and he said that he did

not give Petitioner *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 Petitioner 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 Petitioner did not violate Petitioner's Fifth Amendment rights. R. 620, ll. 5-11. Defense counsel argued that the burden was on the State to prove Petitioner 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 announce which party had the burden of proof, the judge had earlier stated, "[H]e's [Petitioner] 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 [Petitioner] was not *Mirandized* at that time." R. 621, ll. 6-8. The court stated that the incident reports did not say Petitioner was read *Miranda*, and two officers present at Petitioner'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 [Petitioner]." 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 Petitioner lacked credibility because he did not talk to the police. R. 625, l. 24 – 626, l. 2.

The Court of Appeals found "contrary evidence was submitted by [Petitioner] and the State" as to whether Petitioner was read his *Miranda* rights, and therefore concluded 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). The Court of Appeals 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).

The Court of Appeals determined that as to prior South Carolina cases 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).

The Court of Appeals 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, the Court of Appeals 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). The Court of Appeals concluded,

> 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).

The Court of Appeals 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).

The Court of Appeals found no abuse of discretion in the trial court's denial of Petitioner'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, the Court of Appeals 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).

Discussion

Silence in the wake of *Miranda* warnings may be nothing more than an accused's exercise of his rights. "In such circumstances it would be 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." *Doyle v. Ohio*, 426 U.S. at 617-18. However, a state court may permit cross-examination about post-arrest silence if the testifying defendant did not receive the assurances contained in *Miranda*. *Fletcher v. Weir*, 455 U.S. at 607.

The Third Circuit 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." *United States v. Cummiskey*, 728 F.2d at 205.

Fed. R. Evid. 104(b) provides: "When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later."

Rule 104(b), SCRE is similar 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 Fed. R. Evid. 104(b), 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, under Rule 104(b), SCRE, the moving party bears the burden of introducing such supporting evidence. As proponent of impeachment evidence, the burden should lie with the State to show a defendant's silence is relevant (because it was not preceded by *Miranda* warnings) under Rule 104(b), SCRE.

Placing the burden on the State is also in keeping with the State's role in a criminal case. In this context, it is the defendant who has rights and the government that has obligations—Petitioner had constitutional rights to remain silent prior to trial and to receive due process of law. U.S. CONST. amend. V; U.S. CONST. amend. XIV. *See 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 admissibility of Petitioner's post-arrest silence pursuant to the evidence rules and to afford Petitioner due process. And *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, the State is tasked with establishing admissibility in other, similar circumstances. For example, pursuant to *Jackson v. Denno*, 378 U.S. 368, 395 (1964), the State has the burden to establish the voluntariness of a confession outside the presence of the jury before the confession may be admitted into evidence. Pursuant to *Neil v. Biggers*, 409 U.S. 188, 198 (1972), the State has the burden to establish an out-of-court identification was not unnecessarily suggestive out of the presence of the jury before evidence of such may be admitted.

An *in camera* hearing prior to the defendant's testimony on the admissibility of his silence for impeachment would also alleviate a concern identified by the Court of Appeals—that an accused might provoke a mistrial by claiming he was *Mirandized* after an impeachment attempt. However, the dearth of caselaw about this issue suggests it is one which has arisen infrequently.

The Court of Appeals' reliance on the Georgia court's parsing of *Fletcher v Weir* in *Mattox*, *supra*, was misplaced. 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*. *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.") The Court of Appeals misapprehended *Fletcher v. Weir* when it relied on the Georgia Court of Appeals' overly expansive interpretation of that case in *Mattox v. State*, 395 S.E.2d at 288. *See State v. Green*, Op. No. 5800 (S.C. Ct. App. filed February 3, 2021) (Shearouse Adv. Sh. No. 4 at 61).

Few jurisdictions have considered this question, but both the Third and the Ninth Circuits have held that the burden of proof lies properly with the prosecution 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).

As the Third Circuit explained 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. The State did not meet its burden here, since there was evidence that Petitioner had been *Mirandized* (Petitioner's testimony) and neither of the State's witnesses (two officers out of a number of

officers at the scene) could say that Petitioner was not read his rights by another police officer. Prior appellate decisions in this state have allowed impeachment with post-arrest silence only when there was no evidence in the record that an accused received *Miranda* warnings. *See Brown v. State*, 375 S.C. 464, 480-481, 652 S.E.2d 765, 773-774 (Ct. App. 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). Pursuant to the reasoning of those cases, the solicitor's attempt to impeach Petitioner with his silence here was improper since Petitioner testified he did receive the warnings and the trial court did not find that his testimony was not credible.

The solicitor violated *Doyle* when he improperly called the jury's attention to Petitioner's silence in the wake of *Miranda* warnings. In *Greer v. Miller*, 483 U.S. 756, 764 (1987), the United States Supreme Court found no *Doyle* violation where the trial court "did not permit the inquiry that *Doyle* forbids. Instead, the court explicitly sustained an objection to the only question that touched upon Miller's postarrest silence. No further questioning or argument with respect to Miller's silence occurred, and the court specifically advised the jury that it should disregard any questions to which an objection was sustained." Although the court sustained the objection here, there was a *Doyle* violation because multiple questions were asked about Petitioner's silence, the solicitor touched on it in closing by implication, and the jury was not instructed to disregard questions to which an objection was sustained. *See Greer v. Miller*, 483 U.S. at 767 (Stevens, J., concurring) (concluding "that the rule of the *Doyle* case was violated when the prosecutor called the jury's attention to respondent's silence").

"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) (overruled on other grounds by *Truesdale v. Aiken*, 480 U.S. 527, 527, 107 (1987)) (citing *Chapman v. United States*, 547 F.2d 1240 (5th Cir. 1977)); *accord State v. McIntosh*, 358 S.C. 432, 447, 595 S.E.2d 484, 492 (2004).

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. There was more than a single reference to Petitioner's silence. The solicitor repeatedly questioned Petitioner about his post-arrest silence and directly tied Petitioner's silence to his defense at trial. "So this story about you having a little bit to drink, riding around in the car, why not tell the police back in 2015? . . . Why not speak to law enforcement when you got arrested? . . . now we're having this brand new story that you've had two years to come up with." R. 502, l. 24 – 505, l. 1. Credibility was the central issue to be decided by the jury, as the solicitor admitted in closing argument. "[W]hat this case is going to come down to is who you believe." R. 624, ll. 7-8. Petitioner's exculpatory story was not totally implausible and the evidence against him was not overwhelming—Petitioner's version of what happened and the complainant's version of what happened were both compatible with the evidence.

The error was not harmless. *Truesdale*, 285 S.C. at 18–19, 328 S.E.2d at 56. *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 where solicitor made multiple references to Hill's silence and directly tied Hill's silence to his defense); *State v. Gray*, 304 S.C. 485, 405 S.E.2d 421 (Ct. App. 1991) (*Doyle* violation was not harmless and failure to order mistrial was reversible error where trial hinged on credibility of Gray and the alleged victim).

The trial court improperly denied Petitioner's mistrial motion. The Court of Appeals' decision here was inconsistent with Petitioner's constitutional protections and with the evidence rules. U.S. CONST. amend. V; U.S. CONST. amend. XIV; *Doyle v. Ohio*, 426 U.S. 610 (1976); Rule 104(b), SCRE.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented.

Respectfully Submitted,

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

ATTORNEY FOR PETITIONER

This 25th day of March, 2021.

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Roger L. Couch, Circuit Court Judge

Opinion No. 5800 (S.C. Ct. App. filed February 3, 2021)

THE STATE,

RESPONDENT,

V.

TAPPIA DANGELO GREEN,

PETITIONER

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 Writ of Certiorari to the Court of Appeals in this case has been served on William F. Schumacher, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Tappia Dangelo Green, #340000, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936; and the Court of Appeals, at 1220 Senate Street, Columbia, SC 29201, this 25th day of March, 2021.

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