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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS
Appeal from Charleston County
Court of General Sessions
Roger L. Couch, Circuit Court Judge

Appellate Case No. 2021-000313

THE STATE, ...RESPONDENT,

v.

TAPPIA DEANGELO GREEN, ... PETITIONER.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF ISSUE PRESENTED

The Court of Appeals properly affirmed the trial judge's denial of Petitioner's mistrial motion because the record indicated Petitioner was never given Miranda warnings.

STATEMENT OF THE CASE

On November 3, 2015, the Charleston County Grand Jury indicted Petitioner for armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime. On May 22–25, 2017, Petitioner proceeded to a jury trial before the Honorable Roger L. Couch. Mark Archer, Esquire, represented Petitioner; Assistant Solicitors Daniel Cooper, Esquire, and Burns Wetmore, Esquire, represented the State. The jury found Petitioner guilty as charged. The trial judge sentenced Petitioner to fifteen years' incarceration for armed robbery, fifteen years' incarceration for kidnapping, and five years' incarceration for the possession of a weapon during the commission of a violent crime, with all sentences running concurrently.

Petitioner appealed his convictions and sentence. On February 3, 2021, the South Carolina Court of Appeals affirmed petitioner's convictions and sentence in a published opinion. See State v. Green, 432 S.C. 572, 854 S.E.2d 626 (Ct. App. 2021). Thereafter, Petitioner filed a petition for rehearing which was denied on March 12, 2021. On March 25, 2021, Petitioner submitted a Petition for a Writ of Certiorari to this Court. This Return, filed on behalf of the State, follows.

STATEMENT OF FACTS

In April of 2015, Victim lived in North Charleston with his then-girlfriend Karissa Aiken. Both Victim and Aiken were employed by the Hardee's restaurant located in the Mount Pleasant area. On April 14, 2015, Victim took Aiken to deposit her paycheck at a local Wells Fargo bank. He waited for her in their car until an individual, later identified as Jonathan Johnson, exited the bank and went to his vehicle, a gold PT Cruiser. Johnson tapped on Victim's passenger-side door and asked whether Victim had jumper cables and would be willing to jump start his car. After Victim jump-started the PT Cruiser, he was about to enter his vehicle when Johnson pressed a silver revolver against his head. Johnson forced Victim into the backseat of the PT Cruiser. (R.p.116, line 23–R.p.125, line 14).

Victim discovered two more individuals were in the PT Cruiser. Petitioner, who wore a black shirt and black shorts and gold plating in his mouth, sat in the front passenger seat, and an unidentified man[1] was in the back seat wearing a white t-shirt and black pants. Johnson drove the vehicle while Petitioner and the unknown man pointed their guns at Victim and demanded his money and jewelry. Unsatisfied with what they received, Petitioner threatened to kill Victim if he could not produce any additional loot. Johnson informed Victim he knew the latter worked at Hardee's and that he knew it was the day employees could pick up paychecks because he had just taken his own girlfriend to pick up hers. Petitioner gave Victim's phone back so that the latter could call Hardee's and notify the manager he was picking up his paycheck early. The three men bound Victim's hands and feet and took him to the Hardee's in Mount Pleasant. (R.p.125, line 15–R.p.133, line 12).

[1] This man was never positively identified.

Once they arrived at Hardee's, Petitioner told Victim that if he signaled for help, the men would kill everyone inside the Hardee's. Petitioner and the unknown man remained in the vehicle while Johnson escorted Victim into the restaurant. As they entered the restaurant, Johnson told Victim he did not want to hurt him and that he was forced to participate in the crime as part of a gang initiation. Johnson also told him that his mother worked at that same Hardee's, and that Victim and Aiken often gave the mother rides home from work. Johnson promised he would not let anyone harm Victim. (R.p.150, line 13–R.p.135, line 23).

While signing for his paycheck, Victim tried to mouth the word, "help" to his manager, but Victim was forced to cease his efforts when Johnson moved beside him. As they exited the building, Victim and Johnson heard the sirens from emergency vehicles and saw Petitioner and the unknown man walking towards them because they assumed Victim had triggered an alarm or alerted law enforcement. Petitioner informed Victim the men were about to enter the building to kill Victim and everyone else inside. The men reentered the PT Cruiser, bound Victim's hands and feet, and Petitioner took possession of Victim's paycheck. Shortly thereafter, the men forced Victim to cash his paycheck at a local check-cashing business. Again, they threatened to kill everyone in the store if Victim sought help. After Victim and Johnson returned to the vehicle, Petitioner took the cash and stated they needed to kill Victim because he had seen their faces. Johnson stood up for Victim, noting Victim had been completely cooperative and that Victim and Aiken look out for his mother. Petitioner relented, and the men decided to drop Victim off at a local gas station. As Victim exited the PT Cruiser, he saw Aiken in the drive-through of a nearby fast-food restaurant. After the two went home, Aiken called the North Charleston Police Department to report the situation, and Victim grabbed a gun and went looking for the three men

in the hopes of performing a citizen's arrest. The police intercepted Victim and convinced him to work with them. (R.p.135, line 24–R.p.147, line 21).

Officer Tracey Williams realized one of the descriptions provided by Victim matched Johnson. She left her contact information at Johnson's grandfather's house, a place he frequently stayed, and requested to speak with him. Johnson contacted Officer Williams and admitted the kidnapping and armed robbery occurred, but claimed he was also a victim and was unaware of the plan until he was forced to kidnap Victim. Johnson agreed to an official interview at the police station and showed up in the PT Cruiser used in the crime. At the station, he repeated the information from the phone conversation with Officer Williams and then-detective Alexander Kaufman. He also identified Petitioner as the man in the front seat of the PT Cruiser who participated in the crime. Kaufman noted he found Victim and Aiken very credible due to their cooperation and the evidence discovered during his investigation. He further claimed it was not uncommon for victims of violent crimes to arm themselves afterwards and seek retribution. Trial counsel failed to object to any remarks concerning Kaufman's belief in Victim's credibility until Kaufman's redirect examination. (R.p.183, line 10–R.p.194, line 5; R.p.295, line 15–R.p.334, line 18).

Detective Jennifer Butler met with Victim and Aiken in the hours following the crime. She testified the two appeared genuinely shaken up and fearful, even more so than the average violent crime victim. The solicitor asked whether, based on their perceived fear, she believed Victim's and Aiken's stories. Trial counsel objected, arguing whether Detective Butler believed their stories was irrelevant to the case. In response, the trial judge stated Detective Butler could testify as to whether she "gave credibility" to their stories. Ultimately, Detective Butler stated that their attitudes and very real fear caused her to find their stories credible. On cross-

examination, Detective Butler admitted she could not say what caused Victim and Aiken to appear fearful and conceded the source of the fear could have been that they had reported a crime and implicated Johnson, a man they knew through a coworker, as a participant. (R.p.197, line 19–R.p.202, line 8; R.p.208, line 8–R.p.211, line 11).

A search of the PT Cruiser uncovered Victim's paystub, its envelope, and other documents such as Victim's earning statement between the front driver and passenger seats of the vehicle. Six identifiable fingerprints were found on these items; five belonged to Petitioner and one belonged to Johnson. Johnson's phone records, footage from the security camera at the Hardee's, and Petitioner's Facebook page showed Petitioner spoke with Johnson on the phone while the latter was inside the restaurant. Petitioner's Facebook page also had a picture of him with gold plating in his mouth. (R.p.212, line 21–R.p.261, line 7; R.p.335, line 22–R.p.358, line 11; State's Exhibits 31–36).

Shortly after the crime, Victim was able to identify Petitioner as one of the kidnappers in a photographic lineup. (R.p.147, line 22–R.p.151, line 13; R.p.280, line 21–R.p.289, line 4; State's Exhibits 37–38).

Johnson's trial testimony differed drastically from the information he provided police; notably, he claimed he could not remember any information he provided to the officers and was drunk when he "fabricated" the story about the armed robbery. Johnson claimed that on the day in question, he ran into Victim at the bank by happenstance when he went to cash his own check. Prior to that, he had met Victim when he and Aiken had transported his mother to and from work. After requesting Victim jump start his car, he asked him for money owed from the prior

sale of drugs[2] and Victim suggested they pick up his paycheck at the Mount Pleasant Hardee's and willingly cashed his paycheck and gave it to Johnson. Petitioner accompanied them throughout the experience, but no crime occurred. Johnson also claimed Petitioner wore white, not black, on the day in question. (R.p.368, line 20–R.p.370, line 18; R.p.373, line 11–R.p.376, line 19; R.p.463, line 19–R.p.464, line 22).

However, Johnson's letters to the solicitor contradicted his story to police and his trial testimony. In them, he claimed he and Victim planned to meet at the bank because the latter did not want Aiken to discover his drug habit. In the second letter, Johnson claimed Victim called him and asked to be picked up. In a letter to his prior defense attorney, Johnson did not deny a crime occurred, but said Petitioner did not participate and he only identified Petitioner as being involved to alleviate the pressure on himself. (R.p.370, line 19–R.p.373, line 10; R.p.376, line 20–R.p.380, line 8; R.p.386, line 14–R.p.387, line 6).

On cross-examination, Johnson vacillated between his claims that he unexpectedly saw Victim at the bank and that the men had arranged to meet. He claimed Victim called him that morning but he could not explain why Victim's phone number failed to appear in his cell phone records. He also claimed only three people were in the vehicle at any time. However, when confronted with the photographs from the Hardee's, Johnson admitted a fourth person was in the vehicle, but claimed he only knew that individual by his initials, L.B. Johnson confusingly claimed both Petitioner and L.B. wore white, despite photographs to the contrary. He also alleged L.B. was using Petitioner's phone that day. Johnson also claimed he did not own a gun and did not take pictures with guns; however, once again, Johnson recanted after the solicitor

[2] Johnson later claimed he began selling drugs to Victim because, two to three months prior to the crime, Victim dropped Johnson's mother off at home and immediately asked him whether he sold drugs. (R.p.464, lines 5–24).

provided photographs of Johnson posing with guns. Johnson readily admitted he knew Hardee's employees could pick up their paychecks that day because he had taken his mother to do the same that morning. Johnson could not explain why Victim abandoned his girlfriend and their vehicle at the bank. Similarly, despite claiming he had taken his mother to Hardee's earlier that day, Johnson then claimed he and Petitioner had worked construction with Johnson's father all morning. (R.p.389, line 12–R.p.421, line 23).

Finally, the solicitor impeached Johnson's testimony with a video recording of his interview with police in which he admitted to the robbery, identified Petitioner as a coconspirator, told officers Petitioner wore an all-black outfit, and described the statements Victim made during the ordeal. Additionally, Johnson conceded he had pled guilty to his charges in the case[3] and the solicitor pointed out that during his plea hearing, Johnson agreed with the State's version of the facts. (R.p.380, lines 9–16; R.p.422, line 4–R.p.441, line 22; R.p.465, line 15–R.p.471, line 21; R.p.478, line 24–R.p.480, line 10; State's Exhibits 45–46).

Petitioner testified he was with Johnson and Victim on the day in question. He claimed Johnson did not plan to meet Victim at the bank. Johnson talked to Victim about purportedly owed payment for drugs, and the men left for the Mount Pleasant Hardee's without jump starting the PT Cruiser. Petitioner admitted he, not L.B., called Johnson while he was in the bank and in Hardee's. He admitted he touched Victim's paystub and its envelope after Victim cashed his paycheck. (R.p.487, line 12–R.p.449, line 16).

During cross-examination, Petitioner admitted he was wearing black the day of the robbery and it was him in the photographs presented at trial. He claimed he had been drinking

[3] Johnson was charged with armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime. (R.p.381, lines 4–18).

and smoking weed and got out of the PT Cruiser at Hardee's because he heard emergency sirens and thought there might have been a car accident on the other side of Hardee's. (R.p.499, line 24–R.p.502, line 23).

The solicitor also asked Petitioner whether he had a gun that day. Petitioner claimed he did not have one that day, but he owns guns because it was his constitutional right to bear arms. The trial judge found this was a misstatement due to Petitioner's criminal history and the fact he is forbidden by law to own a firearm. Accordingly, the judge allowed the solicitor to mention Petitioner has a felony conviction which prevents him from owning a gun. When the solicitor resumed his cross-examination, he questioned Petitioner about this fact. Petitioner noted he was forbidden by law to own a firearm but that if he decided it was important, he would disregard the law and buy one. (R.p.508, line 6–R.p.536, line 9; R.p.557, line 15–R.p.573, line 22).

When asked why he failed to tell police his side of the story, Petitioner noted:

> What do you mean, why not tell the police. **I was never questioned. There was, like, a warrant was issued directly for my arrest. I [] never wrote a statement; I [] never did an interview; I [] never did any of those things.** This is the first time I'm [telling] this story since I was locked up.
>
> ...
>
> I didn't get locked up until three months later after this crime and **there was no talking. It was just straight, we have a warrant for your arrest, take you to county jail, that's that, deal with it with the courts.** You know how police do.

(emphasis added). After several questions and responses on the subject, trial counsel objected, arguing the questions amounted to an "improper comment" on Petitioner's Fifth Amendment rights. The trial judge sustained the objection. (R.p.502, line 24–R.p.506, line 9).

The following morning, the Court further discussed whether a potential Doyle violation occurred. The solicitor explained nothing in Petitioner's file indicated he was Mirandized when

he was arrested after the crime. Petitioner claimed he was Mirandized by a bald officer, who appeared to be around thirty years old and wearing all green, outside the apartment complex where he was arrested. He claimed he was not questioned, and a female officer immediately drove him to the police station in her cruiser. (R.p.540, line 1–R.p.557, line 14).

Officer Danielle Smoak, the officer who performed Petitioner's arrest, explained that after Petitioner fled from police, he hid in an apartment complex. When officers announced they were about to release a K-9 unit, he exited the building. She placed him in handcuffs and sat him in her patrol car until a transport van arrived. She explained transport officers do not Mirandize or question arrestees and that she did not Mirandize or question him about his various charges. She noted the only officer at the scene who matched the description of the man Petitioner described was K-9 officer Brandon VanAusdal, who notably was bald and had a green uniform due to his position. Officer Smoak did not see any other officer Mirandize or otherwise communicate with Petitioner. (R.p.598, line 11–R.p.608, line 6).

Officer VanAusdal noted he never provided Petitioner with Miranda warnings; instead, he warned Petitioner several times that he would release his K-9 if he did not surrender to police. Similarly, he did not witness Officer Smoak or any other officer Mirandize Petitioner. As soon as Officer Smoak arrested Petitioner, he returned his dog to his vehicle. (R.p.608, line 12–R.p.615, line 14).

Trial counsel moved for a mistrial, arguing the State did not prove, beyond a reasonable doubt, that no officer spoke with Petitioner and Mirandized him. The solicitor countered, noting the officers' testimonies demonstrated no Doyle violation occurred. The trial judge noted it was not incumbent upon the solicitor to prove, beyond a reasonable doubt, that Petitioner did not

receive Miranda warnings, and that trial counsel provided insufficient evidence to support his argument. (R.p.615, line 15–R.p.621, line 25).

STANDARD OF REVIEW

"In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. Id. "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id.

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Inman, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011); State v. Meggett, 398 S.C. 516, 524, 728 S.E.2d 492, 496 (Ct. App. 2012). The granting of a motion for a mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. Inman, 395 S.C. at 565, 720 S.E.2d at 45. "Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial." State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. Meggett, 398 S.C. at 524. 728 S.E.2d at 496.

REASONS AGAINST GRANTING CERTIORARI

Rule 242(b), SCACR states that a writ of certiorari is not a "matter of right," but should be granted only where special and important reasons merit this Court's review. In the instant case, certiorari is not appropriate in this case for two critical reasons. First, the issue as described in the petition is not the same one raised to the Court of Appeals. At trial, Petitioner argued a mistrial was appropriate because the State failed to prove, beyond a reasonable doubt, that he was not Mirandized. (R.p.615, line 15–R.p.621, line 25). On appeal, Petitioner's argument was the trial judge erred in his ruling because there was conflicting evidence in the record as to whether he was Mirandized, rendering impeachment with his pre-trial silence improper. See, e.g., (Br. of Appellant p.14) ("The appellate courts of South Carolina have allowed impeachment with post-arrest silence when there is **no evidence** in the record than an accused received Miranda warnings"; "The court's factual finding that [Petitioner] had not been provided with Miranda warnings was an abuse of discretion, as it was unsupported by the evidence. [Petitioner] testified that he was read Miranda warnings by a bald officer who recognized him."); (Br. of Appellant, p.15) ("Alternatively, [Petitioner] asserts that it was legal error for the court to allow the [S]tate to impeach [Petitioner] with his pre-trial silence where there was evidence in the record that he had been provided with Miranda warnings."). Now, Petitioner argues the Court of Appeals erred in finding it was his burden to prove he was not Mirandized after his arrest. See (Petition for Writ of Certiorari, p.15) (claiming "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.") Stated succinctly, Petitioner's argument has changed from initially arguing the State has the burden of proving he was not Mirandized to, on appeal, claiming reference to post-arrest silence is error unless a record is completely devoid of any evidence suggesting a defendant was Mirandized, and evolving to his third interpretation of the

issue, mirroring his initial argument to the trial judge. Accordingly, because Petitioner has changed his argument throughout the appellate process, it is improper for a meritorious review by this Court. See, e.g., State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal.")

The second reason certiorari is improper in this case is related to the first ground: the petition does not challenge all of the grounds upon which the Court of Appeals affirmed Petitioner's convictions. Petitioner argues the Court of Appeals erred in finding he had the burden of proving he **was** Mirandized instead of finding the State had the burden of proving Petitioner **was not** Mirandized. However, Petitioner ignores that the Court of Appeals found that, whether the burden belonged to him or the State, the trial judge acted within his discretion in finding Petitioner was not given Miranda warnings. Green, 432 S.C. at ____, 845 S.E.2d at 638–39. Because Petitioner failed to address this alternative ground for affirmation, it is the law of the case and certiorari is inappropriate. See Dreher v. S.C. Dep't of Health & Envtl. Control, 412 S.C. 244, 250, 772 S.E.2d 505, 508 (2015) ("[S]hould the appealing party fail to raise all of the grounds upon which a court's decision was based, those unappealed findings—whether correct or not—become the law of the case."); Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."); State v. Branham, 392 S.C. 225, 231, 708 S.E.2d 806, 809 (Ct. App. 2011) (finding unappealed alternate ruling was the law of the case).

ARGUMENT

The Court of Appeals properly affirmed the trial judge's denial of Petitioner's mistrial motion because the evidence presented by the parties indicated Petitioner was not Mirandized and thus no Doyle violations occurred at trial.

Petitioner argues the Court of Appeals erred in affirming the trial judge's denial of his mistrial motion, claiming both courts erred in finding he had the burden of proving Miranda warnings were not given before he could establish a Doyle violation occurred. The State disagrees with this allegation of error.

Issue Preservation

As an initial matter, the State notes this issue was inappropriate for a review on its merits by the Court of Appeals and now this Court because it was not properly preserved[4] for appellate review. Regarding the requirement that a timely objection be raised, a defendant must make a contemporaneous objection to a perceived error during trial in order to preserve the issue for further review. State v. Blalock, 357 S.C. 74, 79, 591 S.E.2d 632, 635 (Ct. App. 2003); see State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."). Thus, when a perceived error arises, the defendant must object at the first opportunity to do so or the issue is waived. State v. Sullivan, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993); see State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) ("A defendant must object at his first opportunity to preserve an issue for appellate review."); see also State v. King, 349 S.C. 142, 157, n.1, 561 S.E.2d 640, 647

[4] In its opinion, the Court of Appeals found the issue was preserved for review because trial counsel "did object during this unbroken line of questioning," and the trial judge sustained the objection at that time before holding in camera proceedings to determine whether the questioning amounted to a Doyle violation. Green, 432 S.C. at ____ n.6, 854 S.E.2d at 634–35, n.6. In reaching this conclusion, the Court of Appeals ignored the specific portions of the State's argument as explained in this return.

(Ct. App. 2002) ("[N]o objection was made contemporaneously with this testimony so as to preserve the issue for review. King's belated objection to subsequent testimony came too late.").

Pursuant to our issue preservation requirements in South Carolina, an issue must also be raised in a sufficiently specific manner to call attention to the exact error to the trial court. State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005); see State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) ("[A]n objection should be sufficiently specific to bring into focus the precise nature of the alleged error **so it can be reasonably understood by the trial judge.**" (emphasis added)). Importantly, "[a] party need not use the exact name of a legal doctrine in order to preserve it[.]" State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). However, in order for an issue to be preserved for review, "it must be clear that the argument has been presented on that ground." Id. Significantly, "[w]here an objection and the ground therefor is not stated in the record, there is no basis for appellate review." State v. Morris, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct. App. 1991); see State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970) ("It is well settled that an issue which has not been presented to or passed upon by the trial judge will not be considered on appeal."). "When a witness answers a question before an objection is made, the objecting party must make a motion to strike the answer to preserve the issue of that statement's admissibility." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011); see also State v. Saltz, 346 S.C. 114, 129, 551 S.E.2d 240, 248 (2001) (finding a motion to strike unnecessary because the objection to the hearsay testimony was overruled).

In the instant case, Petitioner's issue is unpreserved for appellate review because he both failed to timely object and to move to strike the testimony in dispute. Notably, the solicitor questioned Petitioner for several minutes as to why he failed to tell police he was not involved in

a crime. Petitioner spoke at length about sitting in jail and not speaking to law enforcement about the crime before trial counsel objected. Because trial counsel failed to object at his first opportunity, this issue is not preserved for review. See Williams, 303 S.C. at 411, 401 S.E.2d at 169.

Further, when trial counsel finally objected and it was sustained by the trial judge, counsel failed to request the prior testimony regarding Petitioner's silence be stricken from the record. This is problematic for Petitioner because he is arguing the trial judge committed error in refusing to grant a mistrial over testimony he failed to request be stricken from the record. Accordingly, this issue is also unpreserved due to this failure. See Byers, 392 S.C. at 444, 710 S.E.2d at 58.

Doyle

As to the merits of Petitioner's argument, he argues the trial judge erred primarily because of the Third Circuit's opinion in United States v. Cummiskey,[5] 745 F.2d 278 (3d Cir. 1984), in which that court found it was the prosecution's burden to prove Miranda warnings were not given before a defendant could be impeached with post-arrest silence. It based this conclusion on its own analysis of the case history of Fletcher v. Weir, 455 U.S. 603 (1982), and its belief that both the Sixth Circuit and the United States Supreme Court (USSC) had failed to address the question as to which party had the burden of proving/disproving Miranda compliance. Citing these "failures," the Cummiskey court interpreted Fed. R. Evid. 104(b) [6] to

[5] Petitioner also cites to Gov't of Virgin Islands v. Davis, 561 F.3d 159 (3d Cir. 2009), and State v. Foster, 995 F.2d 882 (9th Cir. 1993), to support his argument. However, both courts reached this conclusion only by strictly adopting Cumminskey. See Davis, 561 F.3d at 164, n.4; Foster, 995 F.2d at 883. Accordingly, the State will focus its efforts on Cumminskey and its analysis.

[6] Fed. R. Evid. 104(b) states: "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."

place the burden on the prosecution. However, as explained in the Court of Appeals' decision, there are compelling reasons why the Cummiskey court's opinion is an incorrect application of Fletcher. In Mattox v. State, 395 S.E.2d 288 (Ga. Ct. App. 1990), Georgia's Court of Appeals observed Cummiskey was predicated on the Federal Rules of Evidence and the incorrect conclusion that Fletcher failed to indicate which party had the burden of establishing the existence of Miranda warnings. The court also observed that in Fletcher, the USSC observed the record did **not** indicate whether that defendant had been Mirandized during the relevant period of time yet it still reversed the lower court's grant of a writ of habeas corpus; if the burden had been on the State of proving Miranda warnings were not given, the absence of the evidence in the record should have resulted in the USSC's affirmance of the writ. Id. at 64–65.

This interpretation of Fletcher is not new to South Carolina. In both Brown v. State, 375 S.C. 464, 652 S.E.2d 765 (Ct. App. 2007), and State v. Bell, 347 S.C. 267, 554 S.E.2d 437 (Ct. App. 2001), the Court of Appeals found that, because there was no evidence in the record that the defendants received Miranda warnings, no Doyle violations occurred. Brown, 375 S.C. at 480–81, 652 S.E.2d at 773–74; Bell, 347 S.C. at 271, 554 S.E.2d at 437. If those courts believed it was the State's burden to prove no Miranda warnings were given, then both defendants would have prevailed in their cases.

Further, contrary to the Third Circuit's assumption, the Sixth Circuit understood Fletcher placed the burden upon defendants. In Weir v. Wilson, 744 F.2d 532 (6th Cir. 1984), Weir, the same defendant who sought a writ of habeas corpus in Fletcher v. Weir, filed a second petition for a writ of habeas corpus. Following its denial, he appealed the decision to the Sixth Circuit which found:

> [I]t is enough for our purposes here to observe that the prosecutor's cross-examination was not shown to have extended to any silence which occurred after

> the Miranda warnings were administered. We believe that in the present posture of the law, **it is necessary that the defense make such a showing** before Doyle . . . comes into play.

Wilson, 744 F.2d at 535 (emphasis added). Thus, the Sixth Circuit determined that it should be the defendant's burden to prove Miranda warnings were not given before a Doyle violation can be established. Notably, Weir petitioned for certiorari to the USSC, but the court denied his petition. Weir v. Wilson, 469 U.S. 1223 (1985).

South Carolina, the Sixth Circuit and Georgia are not alone in finding the burden is placed on the defense. Numerous courts have found the same. See Lainhart v. State, 916 N.E.2d 924, 936 (Ind. Ct. App. 2009); State v. Cummings, 779 S.W.2d 10, 12 (Mo. App. 1989); Royal v. State, 761 P.2d 497, 500–01 (Okl. Cr. 1988); State v. McGinnis, 320 S.E.2d 297, 300 (N.C. App. 1984); also 3 Wayne R. LaFave, *Criminal Procedure* § 9.6(a) n.52 (4th ed. 2019) ("The defendant ordinarily bears the burden of showing that Miranda warnings were given prior to the post-arrest silence used by the state for impeachment purposes.").

Evidence at Trial

Petitioner fails to acknowledge the Court of Appeals found, regardless of which party had the burden of proving the existence of Miranda warnings, the evidence presented at trial supported the trial judge's finding under either scenario. Petitioner himself initially testified the police never attempted to speak with him or otherwise solicit information about his charges: Petitioner even claimed there was "no talking" during his arrest. (R.p.502, line 24–R.p.506, line 9). Suspiciously, it was only after trial counsel's objection and the start of a new day of trial before Petitioner claimed he was Mirandized. When Petitioner was asked who Mirandized him, he could only recall that it was a bald officer approximately thirty years' old and wearing all green. In response, the State called Officer Danielle Smoak, the officer who performed the

arrest, to discuss the events that occurred. She explained Petitioner fled from police and hid in an apartment complex until officers announced they would release a K-9. When Petitioner exited the building, Petitioner was placed in cuffs and placed in a vehicle. Officer Smoak did not witness any officers Mirandize Petitioner and she identified K-9 officer Brandon VanAudal as the only officer matching Petitioner's description at the scene. Officer VanAusdal testified and noted he never Mirandized Petitioner and his only communication with him was to announce that he would release his K-9 if Petitioner did not surrender. Officer VanAusdal did not arrest Petitioner and instead returned his dog to his vehicle. Thus, considering the totality of the evidence, the trial judge acted within his discretion, under either standard, in finding Petitioner was not Mirandized. See State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001) ("The trial court's factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion.").

CONCLUSION

Based on the foregoing reasons, Respondent submits this Court should deny the petition for a writ of certiorari and let stand the decision of the Court of Appeals affirming the trial court. If the Court grants the petition for a writ of certiorari, Respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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