RECEIVED
Apr 14 2022
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Charleston County
Honorable Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TAPPIA DANGELO GREEN,

APPELLANT

APPELLATE CASE NO. 2021-000313

BRIEF OF PETITIONER

JOANNA K. DELANY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ISSUE PRESENTED 1

STATEMENT 2

STANDARD OF REVIEW 3

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*[1] warnings to establish a *Doyle*[2] 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 4

Relevant facts 4

Discussion 13

CONCLUSION 23

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

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

TABLE OF AUTHORITIES

Cases

Brown v. State, 375 S.C. 464, 652 S.E.2d 765 (Ct. App. 2007) 17, 18

Caprino v. Com., 670 S.E.2d 36 (Va. Ct. App. 2008) 17

Chapman v. United States, 547 F.2d 1240 (5th Cir.1977).....19, 20

Doyle v. Ohio, 476 U.S. 610 (1976) ..... passim

Fletcher v. Weir, 455 U.S. 603 (1982)..... passim

Gov't of Virgin Islands v. Davis, 561 F.3d 159 (3d Cir. 2009) 16

Greer v. Miller, 483 U.S. 756 (1987) 18, 19

Jackson v. Denno, 378 U.S. 368 (1964) 15

Mattox v. State, 395 S.E.2d 288 (Ga. Ct. App. 1990).....12, 15, 16

Miranda v. Arizona, 384 U.S. 436 (1966) ..... passim

Neil v. Biggers, 409 U.S. 188 (1972).....15

South Dakota v. Neville, 459 U.S. 553 (1983).....15

State v. Bell, 347 S.C. 267, 554 S.E.2d 437 (Ct. App. 2001) 17, 18

State v. Dial, 405 S.C. 247, 746 S.E.2d 495 (Ct. App. 2013).....3, 18

State v. Gray, 304 S.C. 482, 405 S.E.2d 420 (Ct. App. 1991).....20, 21

State v. Hill, 360 S.C. 13, 598 S.E.2d 732 (Ct. App. 2004).....20, 21

State v. Leecan, 504 A.2d 480 (Conn. 1986) 17

State v. McIntosh, 358 S.C. 432, 595 S.E.2d 484 (2004) 19, 20

State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996) 20

State v. Rowlands, 343 S.C. 454, 539 S.E.2d 717 (Ct. App. 2000) 3

State v. Truesdale, 285 S.C. 13, 328 S.E.2d 53 (1984).....19

State v. Wiley, 387 S.C. 490, 692 S.E.2d 560 (Ct. App. 2010).....3

Truesdale v. Aiken, 480 U.S. 527 (1987).....19

United States v. Cummiskey, 728 F.2d 200 (3rd Cir. 1984).....passim

United States v. Foster, 995 F.2d 882 (9th Cir. 1993).....16

Weir v. Fletcher, 658 F.2d 1126 (6th Cir. 1981) 16

Williams v. Zahradnick, 632 F.2d 353 (4th Cir. 1980).....19

Constitutional provisions

U.S. CONST. amend. V.....15, 21

U.S. CONST. amend. XIV.....15, 21

Rules

Fed. R. Evid. 104(b).....14

Rule 104(b), SCRE 14, 21

ISSUE 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

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. R. 739 – 744. His case was called to trial before the Honorable Roger L. Couch and a jury, 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 Judge Couch sentenced Petitioner to incarceration for terms 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, with sentences to run concurrently. R. 745 – 747.

On May 27, 2017, Petitioner served his notice of intent to appeal. On February 3, 2021, the South Carolina Court of Appeals affirmed the convictions in a published opinion. *State v. Green*, 432 S.C. 572, 854 S.E.2d 626 (Ct. App. 2021). A petition for rehearing was filed on February 18, 2021, and then denied on March 12, 2021. The petition for writ of certiorari was filed on March 25, 2021. The State made its return on April 26, 2021. On March 15, 2022, this court granted the petition for writ of certiorari. This brief of petitioner follows.

STANDARD OF REVIEW

A trial judge's decision denying a mistrial will be reversed on appeal if the denial amounts to an abuse of discretion. *State v. Rowlands*, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000). "Whether a mistrial is manifestly necessary is a fact specific inquiry. It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge." *Id.* at 457–58, 539 S.E.2d at 719 (internal quotations and citations omitted).

Although the decision to grant or deny a mistrial is within the sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law. *State v. Dial*, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) (citing *State v. Wiley*, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010)).

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.

The Court of Appeals erred in holding that when the prosecution impeaches an accused with his post-arrest silence, the burden is on a defendant to show the questioning violated *Doyle v. Ohio* instead of the burden being on the prosecution, as proponent of the evidence, to show his silence was relevant such that impeachment was proper. The State did not meet its burden here, given evidence that Petitioner did receive *Miranda* warnings, and a mistrial should have been granted.

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.

---

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

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

Lee claimed he was in the parking lot at Wells Fargo in North Charleston waiting for his girlfriend when a stranger in a gold PT Cruiser asked for a battery jump. R. 121, l. 7 – 122, l. 24. Lee helped jump the battery, but he alleged the stranger forced him in the backseat of the PT Cruiser at gunpoint. R. 124, ll. 6-9. Lee said there were two other men in the car and he later learned that the man who approached him (the driver) was Johnathan Johnson, and that Petitioner was the front passenger.[7] 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 Johnson forced him to go pick up his paycheck from Hardee's; Lee claimed the men tied him up and drove to the Hardee's in Mount Pleasant. R. 129, l. 25 - 131, l. 12. Lee 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 while Johnson was armed with a pistol. Lee picked up and signed for his paycheck. R. 134, ll. 2-3; R. 136, ll. 2-3. Lee alleged that on the way in, Johnson promised to protect him because Johnson's mother worked there. R. 135, ll. 2-10. The restaurant manager who gave Lee his check said Lee did not act in an unusual manner or ask 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.

[7] Law enforcment showed Lee lineups that contained photographs of Petitioner and of Johnson. R. 283, l. 13 – 286, l. 23. Despite allegedly having more interaction with Johnson, Lee did not pick Johnson out of a lineup, although he picked out Petitioner. R. 326, ll. 18-19; R. 284, l. 24 – 285, l. 10.

141, ll. 14-15. Lee claimed when they 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, he did not call 911.[8]

Police searched the gold PT Cruiser belonging 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 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 telephoning Johnson while Johnson and Lee were inside the restaurant. R. 306, ll. 5-18; R. 339, l. 24 – 341, l. 15.

Although Johnson had pleaded guilty for his role in the case, 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, 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.

Petitioner testified and 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 touched the check stub when Lee handed it to

[8] Lee's girlfriend did not believe that he had been robbed until they got home and Lee got out a gun, saying he was going to look for the men. R. 144, ll. 12-25. At that point, Lee's girlfriend called the police and said Lee was walking down the highway with a firearm. R. 145, ll. 2-5. Lee was quickly surrounded by a large number of police officers with guns drawn telling him to drop his weapon. R. 146, ll. 7-13. When police officers retrieved his gun, Lee claimed that he had been robbed. R. 146, ll. 13-19.

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. He 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. R. 493, ll. 16-21. Petitioner also denied having a weapon or threatening to kill anyone, and 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. 1-12.

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. He 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 this line of questioning, protesting that the State was improperly commenting on Petitioner's Fifth Amendment rights. R. 505, l. 6-24. Defense counsel argued: "[I]t's his absolute constitutional right not to talk to the police, and it's an improper comment on his Fifth Amendment right," and the court sustained the objection. R. 506, ll. 1-9. The court had a conference with the attorneys in chambers to discuss whether the State's questioning of Petitioner on his failure to offer an exculpatory statement prior to trial violated

Doyle v. Ohio.[9] R. 540, ll. 8-19. The State argued that because nothing indicated Petitioner had been given his *Miranda* rights,[10] *Doyle* was inapplicable. R. 540, l. 19 – 23.

Petitioner was not arrested the day of the alleged robbery. Instead, Petitioner was served warrants for this case when he was arrested on August 19, 2015, for failure to stop for a blue light. R. 541, ll. 4-9. The solicitor said he had spoken with Danielle Smoak, who he believed to be the arresting officer, and Smoak told him she did not read Petitioner *Miranda* warnings. R. 540, l. 23 – 541, l. 19. Defense counsel argued: "I don't think we know that he was not *Mirandized* at that time," and noted the court had not heard from "the officer who stopped him for the blue light." R. 541, ll. 21-22; R. 542, ll. 3-4. Defense counsel argued Petitioner said he was read his *Miranda* rights. R. 543, ll. 6-8.

The court determined it would hold a hearing *in camera* on whether Petitioner was given *Miranda* warnings, and defense counsel said: "[I]f that's critical to whether or not he's entitled to a mistrial, I think we need to put evidence up on it." R. 545, ll. 3-19.

Petitioner was sworn and 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. There were multiple officers at the scene. R. 556, ll. 16-17; R. 547, 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

---

9 *Doyle v. Ohio*, 426 U.S. 610 (1976).

10 *Miranda v. Arizona*, 384 U.S. 436 (1966).

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.[11] 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 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 the vehicle and ran into a building. R. 598, ll. 21-23. Smoak was one of a team assisting the officers, and handcuffed Petitioner, putting him in a 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 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.

---

[11] Officers Riley and Norwood wrote reports that stated Petitioner was served with outstanding warrants from the North Charleston Police Department for kidnapping, armed robbery, possession of a weapon during a violent crime, and forgery, and was taken to the detention center. R. 729 – 734. The reports stated that "the entire incident was captured on the Body Camera of Pfc. Norwood," and: "This incident was recorded with the department issued body worn camera" of MPO Cummins. R. 733 – 734. Neither of these officers testified, nor were the recordings reviewed by the court. The court stated it would watch the body camera footage if it was immediately available, but no footage was produced for the court to review. R. 620, ll. 18-21.

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 said she could not be sure that no other officers talked to Petitioner, explaining 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 testified at the hearing that he was a K-9 officer called in to assist, and 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 did not see who served warrants on Petitioner for this case. 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 line of 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 judge stated the police reports did not say that Petitioner was read *Miranda*, and that two officers present at his arrest (Smoak and VanAusdal) 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*, 432 S.C. at 592, 854 S.E.2d at 637. 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, 432 S.C. at 592, 854 S.E.2d at 636-37.

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*, 432 S.C. at 593, 854 S.E.2d at 637.

> 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, 432 S.C. at 593, 854 S.E.2d at 637 (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." *Id.* 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,* 432 S.C. at 594, 854 S.E.2d at 637-38 (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.

Id., 432 S.C. at 594, 854 S.E.2d at 638.

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." *Id*., 432 S.C. at 595, 854 S.E.2d at 638. "As previously noted, there is evidence to support the trial court's finding that Green was not given *Miranda* warnings." *Id*., 432 S.C. at 596, 854 S.E.2d at 639.

The Court of Appeals found no abuse of discretion in the trial court's denial of Petitioner's mistrial motion. *Id*., 432 S.C. at 598, 854 S.E.2d at 640. 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*." *Id*., 432 S.C. at 593 n. 7, 854 S.E.2d at 637).

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.

As the party seeking to admit evidence of Petitioner's post-arrest silence, the burden of showing its conditional relevance should be undertaken by the prosecution. In addressing which party had the burden in this context, the Third Circuit has 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 200, 205 (3rd Cir. 1984). 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.

As seen, the Court of Appeals found that *Fletcher v. Weir*, *supra*, implied that such a burden did not lie with the State. However, the Court of Appeals' reliance on the Georgia appellate court's parsing of *Fletcher v Weir* in *Mattox v. State*, 395 S.E.2d 288 (Ga. Ct. App. 1990), *supra*, was misplaced. *Cummiskey*, *supra*, helpfully discussed and rejected the argument that *Fletcher v. Weir* supports placing the burden on the defendant here. 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's overly expansive interpretation of that case in *Mattox v. State*, 395 S.E.2d at 288. *See State v. Green*, 432 S.C. at 594, 854 S.E.2d at 638.

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) claimed 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).

Other states addressing this issue have found no *Doyle* violation where the record was devoid of evidence the accused was provided *Miranda* warnings. *State v. Leecan*, 504 A.2d 480, 485 (Conn. 1986) (absence of any indication in the record that the silence of a defendant had been preceded by a *Miranda* warning rendered *Doyle* inapplicable); *Caprino v. Com.*, 670 S.E.2d 36, 39 (Va. Ct. App. 2008) (absence of any evidence demonstrating that defendant's silence was in response to *Miranda* warnings precludes the application of the *Doyle* due process doctrine).

Here, the solicitor's attempt to impeach Petitioner with his silence was improper and a mistrial should have been granted. Petitioner testified he received the warnings, he was able to state what the warnings were, and the trial court did not find that his testimony was not credible.

R. 546, l. 17 – 555, l. 8. The testimony of the state's witnesses was not in conflict with Petitioner's testimony, and the State did not meet its burden to show impeachment was proper.

Of the two officers who testified, neither officer said Petitioner did not receive *Miranda* warnings. The officers explained that although they did not provide Petitioner with *Miranda* warnings, they were unsure whether any other officers else did so. It was undisputed there were multiple officers at the scene. The court did not hear from at least two—Officers Riley or Norwood, the authors of the incident reports that reflect the warrants for this case were served on Petitioner. Officer Smoak said she could "absolutely not" say that another officer at the scene did not *Mirandize* Petitioner. R. 602, ll. 21-25. The court's denial of a mistrial here was an abuse of discretion amounting to an error of law. *See Brown*, 375 S.C. at 480-481, 652 S.E.2d at 773-774; *Bell*, 347 S.C. at 271, 554 S.E.2d at 437; *see also State v. Dial*, 405 S.C. at 257, 746 S.E.2d at 500 (although decision to grant or deny a mistrial is within sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law).

Moreover, the procedure of an *in camera* hearing prior to the defendant's testimony on the admissibility of his silence for impeachment would 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 arises infrequently.

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 the 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). This Court has evaluated error in the *Doyle* violation context, approving the Fifth Circuit's analysis in *Chapman v. United States*.

> In *Chapman v. United States*, 547 F.2d 1240 (5th Cir.1977), *cert. denied*, 431 U.S. 908, 97 S.Ct. 1705, 52 L.Ed.2d 393, the Court harmonized decisions holding *Doyle* violations to be reversible error with those holding such violations to be harmless error beyond a reasonable doubt. In order for a violation to constitute harmless error, *Chapman* requires a trial record which establishes the following: 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*, *supra*).

In *State v. McIntosh*, 358 S.C. 432, 447, 595 S.E.2d 484, 492 (2004), this Court determined a *Doyle* violation was not harmless, reasoning that the solicitor tied McIntosh's silence directly to his alibi defense at trial by questioning why this was the first time he had told this story in the two and half years since his arrest. This Court reasoned McIntosh's story was not

entirely implausible, and that the evidence against him was not overwhelming. *Id.* at 447-448, 595 S.E.2d at 492. "To be harmless, the record must establish the reference to the defendant's right to silence was a single reference, which was not repeated or alluded to; the solicitor did not tie the defendant's silence directly to his exculpatory story; the exculpatory story was totally implausible; and the evidence of guilt was overwhelming." *Id.* (internal quotations omitted) (quoting *State v. Pickens*, 320 S.C. 528, 530-31, 466 S.E.2d 364, 366 (1996)).

In *State v. Hill,* 360 S.C. 13, 15-16, 598 S.E.2d 732, 733 (Ct. App. 2004), Hill was provided *Miranda* warnings and remained silent until he testified to acting in self-defense at trial. The solicitor cross-examined Hill on why he did not explain this to police upon arrest; defense counsel objected and moved for a mistrial. *Id.* The court allowed the questioning to continue, and Hill responded that he had talked to his attorney about the case. *Id.* The Court of Appeals reversed, performing the analysis laid out in *Truesdale*, *McIntosh*, and *Chapman*, concluding the *Doyle* violation was not harmless and noting the State directly tied Hill's silence to his defense. *Id.* at 17-18, 598 S.E.2d at 734. *See also State v. Gray*, 304 S.C. 482, 405 S.E.2d 420 (Ct. App. 1991).

Application of the *Doyle* violation error analysis laid out in *Truesdale* and *Chapman* to this case favors reversal. 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.

Other than Lee's testimony, the evidence was circumstantial, and the testimony of Petitioner contradicted the testimony of Lee. Lee did not act in an unusual manner when he picked up his check. R. 584, l. 14 – 586, l. 22. Lee claimed he just happened to be released by his captors at the same location where his girlfriend was purchasing food. He did not call 911 to report the alleged incident; he did not report the robbery to authorities until he himself was stopped by law enforcement for carrying a gun. R. 142, l. 22 – 146, l. 19.

The error was not harmless on these facts. *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 reverse his convictions and remand for a new trial.

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

ATTORNEY FOR PETITIONER

This 14th day of April, 2022.