

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to York County

Paul M. Burch, Circuit Court Judge  
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Opinion No. 2013-UP-150 (S.C. Ct. App. filed 4/10/2013)

10-GS-46-03853-54  
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**RECEIVED**

JUL 25 2013

**S.C. Supreme Court**

THE STATE,

RESPONDENT,

v.

CONNIE DUMAS,

PETITIONER

Appellate Case No. 2013-001371  
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PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS  
\_\_\_\_\_

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on May 23, 2013. App. 12.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in affirming the trial judge's erroneous finding that Petitioner's statements to police were admissible, where the interrogating officer misinformed Petitioner of her Miranda rights by stating she would receive an attorney at a later date if she could not afford one?

II: Did the Court of Appeals err in affirming the trial judge's failure to charge the jury on the lesser-included offense of common law robbery where the defense presented evidence that Petitioner did not present a weapon to the store clerk?

STATEMENT OF THE CASE

A York County Grand Jury indicted Petitioner on armed robbery pursuant to indictment 2010-GS-46-3853 and possession of a firearm during the commission of a violent crime pursuant to indictment 2010-GS-46-3854. R. 259. E.B. Springs prosecuted Petitioner on behalf of the state, and Michael Atwater represented Petitioner. R. 1. The trial proceeded before the Honorable Paul M. Burch during the week of May 16, 2011. R. 1. The jury returned its verdict finding Petitioner guilty of both counts. R. 238, lines 15-22. Judge Burch sentenced Petitioner to eighteen years on the armed robbery conviction and five years concurrent on the possession of a firearm conviction. R. 256, lines 2-4.

Petitioner filed a timely notice of appeal. Undersigned counsel perfected Petitioner's appeal in the South Carolina Court of Appeals. Petitioner raised two issues before the Court of Appeals: (1) whether the trial court erred in failing to suppress Petitioner's statement to police due to the officer's inadequate advisement of rights, and (2) whether the trial court erred in failing to charge the jury as to a lesser-included offense. On April 10, 2013, the Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion. State v. Dumas, Op. No. 2011-193106 (filed April 10, 2013); App. 1-3. On April 25, 2013, Petitioner filed a timely petition for rehearing concerning both issues presented. App. 4-11. The Court of Appeals denied the petition by order filed on May 23, 2013. App. 12.

Petitioner now files this petition for writ of certiorari asking this Court to review the Court of Appeals' decision as it concerns both issues: (1) whether the trial court erred in finding her statement to police admissible where the police provided incorrect and misleading advice regarding her right to counsel prior to and during the interrogation; and (2) whether the trial court erred in

failing to instruct the jury on the lesser-included offense of strong armed robbery where Petitioner presented evidence that she was not armed during the alleged robbery of the store clerk.

## ARGUMENT

I. The Court of Appeals err in affirming the trial judge erroneous finding that Petitioner's statements to police were admissible where the interrogating officer misinformed Petitioner of her *Miranda* rights by stating she would receive an attorney at a later date if she could not afford one.

Review in this Court "is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. The Rule provides a list of indicating "the character of reasons" this Court will consider in determining whether to grant review. One of those reasons is "[w]here substantial constitutional issues are directly involved." Rule 242(b)(4), SCACR. Petitioner's case involves the substantial constitutional issue of the rights of individuals not to incriminate themselves and to be afforded counsel prior to and during custodial interrogations. Therefore, this Court should grant review of Petitioner's case.

In a pre-trial hearing, the prosecution moved for a finding that statements made by Petitioner were admissible as voluntarily made. Detective Jerry Waldrop testified that he placed Petitioner, who was handcuffed, in a police car after stopping her on the side of the road. R. 7, lines 15-19. He then advised Petitioner of her rights as follows:

Before I ask you anything, you've got the right to remain silent. Anything you say can and may be used against you in a court of law. You have the right to have an attorney present for your questioning. If you cannot afford to hire one - - if you cannot afford one, one will be appointed to you by the courts at a later date. You can stop answering questions at any time you so desire.

R. 8, lines 12-18 (emphasis added). This was captured on the in-car video camera. R. 8, lines 2-14.

Detective Waldrop then began questioning Petitioner, who incriminated herself. R. 8, lines 23-24;

R. 11, lines 5-19.

After obtaining the incriminating statement, the police transported Petitioner to the police station. R. 11, lines 21-23. Waldrop then advised Petitioner of her Miranda<sup>1</sup> rights in writing as follows:

Before we ask you any questions you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to an attorney for advice before we ask you any questions and have them with you during questioning. You have this right to advice and presence of an attorney even if you cannot afford to hire one. We have no way of appointing you an attorney, but one will be appointed by the court for you, if you wish. If you wish, you may answer the questions without the presence of an attorney and you may stop answering any time you desire until an attorney is present.

R. 13, lines 5-16. Subsequently, Petitioner provided Waldrop with another incriminating statement.

R. 15, line 24 – R. 16, line 17.

Petitioner testified during the pre-trial hearing that based on what Waldrop told her, “it was [her] understanding that [she] had no representation and no choice but to be asked questions without an attorney.” R. 34, lines 2-6.

As presented to the trial court and the Court of Appeals, Petitioner’s statements were not admissible because Waldrop advised that “at some later date that she would be able to get an attorney.” R. 45, lines 4-8. This misinformation made her reasonably believe that she did not have the right to have an attorney present during the questioning on the side of the street or during the interrogation at the police station. R. 45, lines 8-12. Petitioner was not properly advised of her rights; therefore, any statement given by her was not admissible. R. 45, lines 19-23. Although the Supreme Court required “no exact verbiage” for advising a suspect of her rights, the Court did not give law enforcement “artistic license to change the meaning of Miranda.” R. 47, lines 3-14.

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

The trial judge held that “the basics of the Miranda warning w[ere] given both times.” R. 47 lines 19-20. Per the trial judge, “the business about a later date, that’s just simply explaining the way the system works.” R. 47, line 25 – R. 48, line 2.

During the trial, Waldrop admitted that after placing Petitioner in the back of a patrol car, he questioned her. Waldrop again testified that he advised Petitioner that if she could not afford an attorney one would be appointed for her by the courts at a later date. R. 109, lines 20-22; R. 128, lines 22-25. Waldrop further testified that he interrogated Petitioner and ultimately obtained incriminating statements from her while she sat in the back of the patrol car. R. 113, line 18 – R. 114, line 9. Later, Petitioner was transported to the police station. R. 116, line 24 – R. 117, line 4. Waldrop then advised Petitioner of her rights using different language than he did during the roadside interrogation. R. 119, lines 10-23. According to Waldrop, Petitioner then provided another incriminating statement. R. 121, line 15 – R. 122, line 8.

Concerning this issue, the Court of Appeals cited State v. Tyson, 283 S.C. 375, 378, 323 S.E.2d 770, 771 (1984) for the proposition that Miranda does not require rigidity and that an effective equivalent of the warnings will suffice. Additionally, the Court of Appeals cited Duckworth v. Eagan, 492 U.S. 195, 198, 203-205 (1989) for the proposition that “an officer’s Miranda warnings adequately informed a defendant of his right to have counsel present before and during questioning and a portion of the Miranda warnings that stated a defendant could have an appointed attorney ‘if and when [the defendant] [went] to court’ merely described the appointment procedure.” App. 2. The Court of Appeal’s opinion misapprehends the United States Supreme Court’s holding of Duckworth and Miranda’s progeny.

In 1966, the United States Supreme Court issued its landmark decision Miranda, *supra*. As explained by the Court in Duckworth, 492 U.S. at 201, 109 S.Ct. at 2879 (1989), Miranda

established “certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation.” In Miranda, the Court delineated four specific warnings: “(1) the right to remain silent; (2) that anything he says can be used against him in a court of law; (3) that he has the right to the presence of an attorney, and (4) that if he cannot afford an attorney one will be appointed for him prior to any questioning if he wants.” Miranda, 384 U.S. at 479, 86 S.Ct. at 1630. Concerned that the circumstances surrounding a custodial interrogation can quickly overbear one’s will, the Court held advising an individual of his right to consult with a lawyer and to have the lawyer present during interrogation was “an absolute prerequisite to interrogation.” Id. at 471, 86 S.Ct. at 1626.

In California v. Prysock, 453 U.S. 355, 361, 101 S.Ct. 2806, 2810 (1981), the Court held an officer’s warnings were sufficient where the officer informed the defendant of his right to the presence of appointed counsel prior to and during interrogation, but did not use the verbatim language set out in Miranda. In examining the issue, the Court noted this was not a case in which the offer of an appointed attorney was associated with a future time in court. Id.

In Duckworth, the Court determined the following advisement of rights satisfied the requirements of Miranda:

Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer question now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you’ve talked to a lawyer.

Id. at 198, 109 S.Ct. at 2877-2878 (emphasis in original). According to the Court, the relevant state law provided that an attorney would be appointed at the defendant’s initial appearance; therefore,

the advice regarding when an attorney would be appointed anticipated a question that a defendant would ask after being advised that he had the right to an attorney. Id. at 204, 109 S.Ct. at 2880-2881. In arriving at its conclusion, the Court focused on the totality of the warnings, including the advisement that the defendant could speak with an attorney prior to questioning, have an attorney present during questioning, and could stop answering questions until he spoke to an attorney. Additionally, the Duckworth Court explained the concerns expressed in Prysock were that warnings linking the appointment of counsel to a future point in time after the police interrogation were not present in Duckworth as the warnings specifically provided for counsel prior to and during any questioning and that the suspect could stop answering questions at any time until he spoke to an attorney. Id. at 205, 109 S.Ct. at 2881.

Recently, in Florida v. Powell, 130 S.Ct. 1195 (2010), the Supreme Court examined the requirement of Miranda that an individual be informed of his right to consult with an attorney. In Powell, the arresting officer informed Powell that he had the right to talk to a lawyer before answering any of law enforcement's questions and that if he could not afford to hire a lawyer, one would be appointed for him without cost and before any questioning. Id. at 1200. Additionally, the officer advised Powell that he had the right to use any of his rights at any time during the interview. Id. The Court concluded that these warnings were sufficient because "[t]he first statement communicated that Powell could consult with a lawyer before answering any particular question, and the second statement confirmed that he could exercise that right while the interrogation was underway." Id. at 1205. Thus, the Court determined when read together, "the two warnings reasonably conveyed Powell's right to have an attorney present not only at the outset of the interrogation, but at all times." Id.

Not only were the rights as given on the roadside inadequate, the rights given at the law enforcement system failed to cure the earlier error. In Missouri v. Seibert, 542 U.S. 600 (2004), the United States Supreme Court confronted a case in which an officer failed to advise a suspect of her rights until the suspect gave an incriminating statement; thereafter, the officer advised the suspect of her rights and obtained the same incriminating statement. The Court explained “[t]he object of question-first is to render Miranda warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed.” Id. at 611. Thus, the “threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function ‘effectively’ as Miranda requires.” Id. at 611-612. The Court held “when Miranda warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and ‘deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.’” Id. at 613-614 (quoting Moran, 475 U.S. at 424).

This Court confronted the issue in State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010). This Court found Navy’s second and third statements to police were inadmissible as they were obtained in violation of the rule announced in Seibert. Courts examine four factors to determine whether a constitutional violation occurred in this setting, including (1) the completeness and detail of the questions and answers in the first interrogation; (2) the timing and setting of the first and second interrogations; (3) the continuity of police personnel; and (4) the degree to which the interrogator’s questions treated the second round as continuous with the first. Navy, 386 S.C. at 302, 688 S.E.2d at 841-842.

This Court found the officers initiated the questioning with the knowledge of the cause of death and with the intention of eliciting a confession. After obtaining Navy’s first statement,

officers introduced the suffocation and healing rib information to Navy. Then, officers “began an unwarned custodial interrogation designed to elicit incriminating information.” After receiving those incriminating statements, officers permitted Navy a break, and then gave him his Miranda warnings. The interrogation resumed with the same officers immediately. The officers made no attempt to cure by warning Navy that his statement made prior to the administration of the warnings may not be admissible or by providing a substantial break in time or change in circumstances. The Court found all four Seibert factors met. Navy, 386 S.C. at 303, 688 S.E.2d at 842.

“[T]he right to have counsel present at [an] interrogation is indispensable to the protection of the Fifth Amendment privilege.” Miranda, 384 at 469, 86 S.Ct. at 1625. This right to counsel includes “not merely a right to consult with counsel prior to questioning, but to have counsel present during any questioning.” Id. at 470, 86 S.Ct. at 1625-1626. Without question, Waldrop failed to advise Petitioner correctly concerning her rights to counsel. Even taken as a whole, the advisement of rights provided by Waldrop on the roadside was inadequate. Although Waldrop advised Petitioner that she had the right to have an attorney present for questioning, his next statement completely negated the advisement. Unlike the warnings in Duckworth, Waldrop did not advise Petitioner that she had the right to an attorney prior to questioning or that she had the right to stop answering questions at any time until she had spoken to an attorney. What the Court warned against in Prysock is a reality in Petitioner’s case. Law enforcement connected the appointment of counsel for Petitioner with a future unknown time without clearly conveying Petitioner’s rights to her prior to interrogation.

II. The Court of Appeals erred in affirming the trial judge's failure to charge the jury on the lesser-included offense of common law robbery where the defense presented evidence that Petitioner did not present a weapon to the store clerk.

As explained, non-capital criminal defendants are not entitled to review in this Court as "a matter of right." Rather, review is exercised based upon this Court's "sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. One of "the character of reasons" this Court will consider in determining whether to grant review is "[w]here substantial constitutional issues are directly involved." Rule 242(b)(4), SCACR. Petitioner's case involves the substantial constitutional issue of the rights of individuals to receive a fair trial through due process of law. In order for Petitioner to receive due process, the jury must be instructed appropriately concerning lesser-included offenses when requested and where the evidence supports the lesser-included offenses. Therefore, this Court should review the Court of Appeals' decision due to the substantial constitutional issues involved.

Petitioner presented evidence that she was not armed during the alleged robbery. She stated that she went to the counter at the store and asked for change for a hundred dollar bill. R. 163, lines 12-15. She was informed she must make a purchase in order to receive change. R. 163, line 17. Petitioner placed the bill on the counter and walked the aisles looking for a purchase. R. 163, line 19 – R. 164, line 8; R. 199, line 15-22. Petitioner re-approached the counter with a bottled water to purchase. R. 171, lines 16-17; R. 200, lines 14-16. She also had her car keys and cell phone in her hands. R. 171, lines 20-22. Petitioner then asked the clerk about the bill she had left on the counter. R. 172, lines 13-21; R. 200, lines 20-22. The clerk denied receiving any money from Petitioner. R. 172, lines 22-23; R. 200, line 23 – R. 201, line 1. The clerk then removed the cash drawer from the register and placed it on the counter to show

Petitioner that she did not have the bill. R. 176, lines 17-19; R. 201, lines 18-22. Petitioner took the money that was in the cash drawer. R. 174, lines 11-24; R. 204, line 25 – R. 202, line 6. When asked on direct examination if she had a gun at any time at all during the day of the incident, Petitioner responded she “never had a gun or been in possession or had access to a weapon or gun.” R. 193, lines 3-5. On cross-examination, the prosecutor pressed Petitioner on the issue of the gun, and Petitioner continued to deny having a gun while in the store. R. 194, line 15 – R. 195, line 9.

Nevertheless, the state presented evidence that Petitioner used a gun to rob the store. The prosecutor’s first witness, the initial responding officer, testified that he observed a gun in the video captured by the store’s surveillance cameras. R. 54, line 18 – R. 55, line 15. The store clerk also testified that she was robbed at gun point. R. 72, lines 11-17; R. 73, line 14 – R. 74, line 2; R. 80, lines 11-19. The prosecutor presented a customer in the parking lot, who testified he saw Petitioner walk out of the store with a gun. R. 98, lines 24-25. Through Detective Waldrop, the prosecution presented evidence that Petitioner admitted to having a gun. R. 113, line 18 – R. 114, line 13; R. 121, line 16 – R. 122, line 8.

At the close of the case, Petitioner asked for a jury instruction on the lesser-included offense of common law robbery. R. 221, line 25 – R. 222, line 2. Petitioner argued that the prosecution’s position was that Petitioner had a gun, but the Petitioner put up evidence that she did not have a gun. R. 222, lines 6 – 14. The trial judge denied the request. R. 222, line 15; R. 222, lines 21-22. Later, the prosecutor attempted to get Petitioner to agree that the evidence did not support the judge charging any lesser-included offenses, but Petitioner refused to do so. R. 223, lines 2-5.

The Court of Appeals affirmed the trial court's decision based upon its decision in State v. Golston, 399 S.C. 393, 398, 732 S.E.2d 175, 178 (Ct. App. 2012) that "to warrant a jury charge on [a] lesser offense, the evidence viewed as a whole must be such that the jury could conclude the defendant is guilty of the lesser offense instead of the indicted offense." App. 2. The Court of Appeals' opinion misapprehended the status of South Carolina jurisprudence in the area of jury charges and lesser-included offenses.

A jury charge to a lesser-included offense is required when the evidence warrants such an instruction. State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006). South Carolina law mandates a jury instruction on a lesser-included offense when there is any evidence from which it could be inferred that the lesser, rather than the greater, offense was committed. State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002); see also State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). In other words, the evidence must allow "a rational inference" that the defendant committed the lesser offense. Geiger, 370 S.C. at 607, 635 S.E.2d at 673. In determining whether such a rational inference exists the court must examine the totality of evidence. Id. As explained in State v. Patterson, 337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999), "[i]n order to justify a charge of a lesser included offense, the evidence must be capable of sustaining either the greater or the lesser offense, depending on the jury's view of the facts."

Strong arm robbery, or common law robbery, is a lesser-included offense of armed robbery. S.C. Code Ann. § 16-11-330 (defining armed robbery as the commission of robbery while armed with a deadly weapon); Gourdine, *supra*; State v. Tasco, 292 S.C. 270, 356 S.E.2d 117 (1987); State v. Keith, 283 S.C. 597, 325 S.E.2d 325 (1985). In light of the contradictory

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evidence presented by the state and Petitioner regarding the presence of a weapon, the trial judge was required to charge the jury on the lesser-included offense of common law robbery.

CONCLUSION

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

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER.

This 25th day of July, 2013

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to York County

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THE STATE,

RESPONDENT,

V.

CONNIE DUMAS,

PETITIONER

Appellate Case No. 2013-001371

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CERTIFICATE OF SERVICE

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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William M. Blich, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room-519, Columbia, SC 29201, Connie Dumas, #346178, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, and the S.C. Court of Appeals this 25th day of July, 2013.

*Susan B. Hackett*

Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 25th day  
of July, 2013.

*Emily R...* (I.S.)  
Notary Public for South Carolina  
My Commission Expires: November 16, 2022.