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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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**S.C. Supreme Court**

Certiorari to Charleston County

Deadra L. Jefferson, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

JAKE ANTONIO WILSON,

PETITIONER

APPELLATE CASE NO. 2012-212043

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BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether the Court of Appeals erred in affirming the trial judge when the judge allowed the police officer who interrogated Wilson to testify that Wilson had changed his mind and exercised his right to counsel after he had initially waived his rights and agreed to speak with the officer concerning the shooting death of his girlfriend, as this testimony violated the Fifth and Fourteenth Amendments to the United States Constitution, as applied in Doyle v. Ohio, 426 U.S. 610 (1976).

## STATEMENT

On November 17 through 21, 2008, Jake Antonio Wilson stood trial in Charleston County, before Judge Deadra L. Jefferson and a jury, on indictments charging him with murder, first-degree burglary and possession of a firearm during the commission of a violent crime. Wilson was represented by Andrew Grimes and Mary Beth Mullaney. The state was represented by Julie Cardillo and Nathan Wilson. Wilson admitted that he shot and killed his longtime girlfriend, Toya Pendergrass, with whom he had two small children, but testified that it had been an accident. ROA.. p. 542 lines 12-15. "I was playing with the gun, waving it around," he explained, when "[s]he hit my hand and the gun went off and shot her." ROA. p. 542 lines 16-22. In addition to the charges contained in the indictments, the judge instructed the jury on involuntary manslaughter and accident. The jury acquitted Wilson of burglary and convicted him of murder and possession of a firearm during the commission of a violent crime. The judge then sentenced Wilson to life imprisonment. Wilson's attorney filed a notice of appeal. The Court of Appeals affirmed Wilson's convictions on February 22, 2012. App. 1-2. Appellate counsel filed a petition for rehearing which was denied by the Court of Appeals on April 13, 2012. App.8. Appellate counsel filed a petition for a writ of certiorari which the Supreme Court granted on October 18, 2013. This brief of petitioner follows.

## ARGUMENT

The Court of Appeals erred in affirming the trial judge when the judge allowed the police officer who interrogated Wilson to testify that Wilson had changed his mind and exercised his right to counsel after he had initially waived his rights and agreed to speak with the officer concerning the shooting death of his girlfriend, as this testimony violated the Fifth and Fourteenth Amendments to the United States Constitution, as applied in *Doyle v. Ohio*, 426 U.S. 610 (1976).

Jake Wilson and Latoya Pendergrass were involved in a romantic relationship, and had two small children together. However, Wilson had recently moved out of the apartment, and Pendergrass had a restraining order against Wilson. ROA. P. 544, lines 11 – 25; ROA 588, lines 1 – 589, line. 2. On July 8, 2007, Pendergrass was found in her bed with a gunshot to her head. She was pronounced dead at the scene. ROA. P. 123 – 135.

After being arrested at the scene of the shooting, Tony Wilson waived his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and denied that he had killed Toya Pendergrass. ROA. p. 446 lines 16 and 17. “He told me he was downstairs in the living room by the couch,” the interrogating officer testified, and “he was going up the staircase when heard a gunshot.” ROA. p. 453 lines 18- ROA. p. 454 line 3. When the officer began pressing him for details, Wilson invoked his right to counsel. ROA. p. 444 line 5- ROA. p. 445 line 4.

Defense counsel objected to the admission of this testimony under *Doyle v. Ohio*, 426 U.S. 610 (1976). ROA. p. 431, lines 1 – 435, ll. 8. The trial judge overruled the objection, holding, “I think them simply saying that once they Mirandized him he asked for counsel, that’s part of the investigative process.” ROA. p. 431 lines 21-23.

Defense counsel unsuccessfully renewed his objection when the Assistant Solicitor elicited this testimony during the direct examination of the officer who had interrogated Wilson. ROA. p. 444 lines 18-23. From the trial transcript:

Q.: [H]ow did the defendant respond when asked whether he wanted an attorney before speaking with you at that time?

A.: He advised me that he would speak to me orally but would not give a written statement.

Q.: So he agreed to speak with you without an attorney at that time?

A.: Yes.

Q.: And did he in fact waive his rights?

A.: Yes.

Q.: Did he later change his mind and ask to speak to an attorney?

A.: Yes, he did.

[Objection overruled.]

Q.: Did he ever change his mind and ask to speak to an attorney?

A.: Yes, he did.

Q.: And did the questioning stop at that time?

A.: I stopped it at that time.

ROA. p. 444 line 5- ROA. p. 445 line 4. The trial judge committed reversible error by allowing this testimony into evidence over defense counsel's objection.

Wilson testified at trial that he did not murder Pendergrass as the shooting was an accident. He was holding the gun waving it around when Pendergrass hit his hand, and the gun went off shooting her accidentally. ROA. P. 542, lines 1 -25.

“It is impermissible for the State to argue in favor of guilt or punishment based upon the accused’s assertion of a constitutional right.” State v. Brown, 289 S.C. 581, 347 S.E.2d 882, 887 (1985) (emphasis omitted), citing Doyle v. Ohio. “In particular, the State may neither comment upon nor present evidence in trial of a defendant’s decision to exercise his **right to remain silent or to be represented by an attorney.**” [ Emphasis added]. Edmond v. State, 341 S.C. 340, 534 S.E.2d 682, 685 (2000).

The testimony concerning Wilson’s request for counsel when pressed about the shooting by the interrogating officer constituted prototypical Doyle error and should have been excluded on defense counsel’s objection. Inasmuch as the evidence of guilt was not overwhelming – involuntary manslaughter and accident were charged to the jury in addition to murder – this error can not have been harmless.

The Court of Appeals affirmed the trial court by holding that the testimony allowed was not introduced as substantive evidence of guilt, but was used to show that Wilson’s statement to police was voluntary, and to challenge Wilson’s testimony that he was too intimidated to request an attorney. App. 2.

The Court of Appeals misapprehended the issue and the arguments presented on this issue. The fact that Wilson had agreed to talk to the police without an attorney, and then changed his mind was indicative of guilt to the jury. This did not show Wilson’s statement was voluntary but that he did not want to talk about substantive issues without an attorney.

In Doyle v. Ohio, 426 U.S. 610 (1976), the United States Supreme court held that the due process clause of the Fourteenth Amendment was violated when the state sought to impeach a defendant’s exculpatory story, told for the first time at the trial, by cross examining him about his post-arrest silence after receiving *Miranda* warnings. In State v. Weston, 367 S.C. 279, 625 S.E.2d

641 (2006), the South Carolina Supreme Court wrote that the “rationale for Doyle is that it would be a violation of due process to allow the state to comment on the silence which Miranda warnings have encouraged.

The Court of Appeals relied on the case of State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (2004). App. 2. However, Simmons is distinguished because Simmons asserted his right to silence only in the context of the November 23 psychological examination. The defense strategy was that Simmons did not comprehend the Miranda warnings, and sent him for psychological testing. Simmons invoked his right to counsel in response to psychological testing which did not involve the facts of the case.

Wilson’s case is distinguished because his invocation of his right to counsel was in response to questioning by police regarding the alleged murder. The state argued that the “testimony regarding Petitioner’s invocation of his right to counsel was not presented as evidence of guilt, as prohibited by Doyle, but rather could be used by the jury in determining collateral matters.”


The function of the jury is to determine guilt or innocence—not to determine collateral matters. The state’s purpose was to prove that Wilson was guilty, and this was the goal of all of the evidence. The only purpose of the testimony regarding Wilson’s invocation of his right to counsel was to lead the jury to believe Wilson was guilty.

This was not harmless error.

CONCLUSION

Based on the above, Petitioner's conviction and sentence should be reversed, and his case remanded for a new trial.

Respectfully submitted,



LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER:

This 18th day of December, 2013

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County

Deadra L. Jefferson, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

JAKE ANTONIO WILSON,

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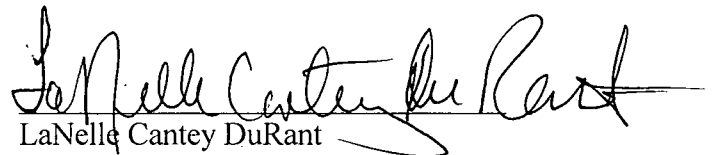
APPELLATE CASE NO. 2012-212043

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CERTIFICATE OF SERVICE

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I certify that a true copy of the brief of petitioner, in this case has been served on Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Jake Wilson, at this 18th day of December, 2013.

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day  
of December, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.