

STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY  
Court of General Sessions

Deadra L. Jefferson, Circuit Court Judge

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Opinion No. 2012-UP-099 (S.C. Ct. App. filed Feb. 22, 2012)

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S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

JAKE ANTONIO WILSON,

PETITIONER.

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**BRIEF OF RESPONDENT**

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## QUESTIONS PRESENTED

- I. Whether the Court of Appeals erred in finding the trial court properly admitted testimony regarding Petitioner's post-*Miranda* invocation of his Fifth Amendment right to counsel where the State offered the testimony, not as substantive evidence of guilt, but in an effort to prove a collateral matter
  
- II. If the Court of Appeals did in fact err, was the error harmless pursuant to the standards set forth in *Brecht v. Abrahamson*, and *State v. Pickens*?

## **INTRODUCTION**

During the early morning hours of July 8, 2007, twenty-four year old Latoya Pendergrass (“Victim”) was shot and killed in the townhouse she occupied with her two small children. (R. 135, 99). Her estranged boyfriend, Jake Antonio Wilson (“Petitioner”) was later charged with murder, burglary and possession of firearm during the commission of a violent crime. (R. 10-11).

## **STATEMENT OF THE CASE**

Petitioner was indicted on charges of murder (#2007-GS-10-12312), possession of a firearm during the commission of a violent crime (#2007-GS-10-12313) and first-degree burglary (#2007-GS-10-12314). (R. 1). On November 17, 2008, Petitioner stood trial in Charleston County before the Honorable Deadra L. Jefferson and a jury. (R. 3-5, 12). Four days later, Petitioner was convicted of murder and possession of a firearm during the commission of a violent crime. (R. 761). He was sentenced to life without the possibility of parole. (R. 777). Following a denial of his motion for a new trial, Petitioner filed a notice of appeal. (R. 766-768). On February 22, 2012, the Court of Appeals affirmed in an unpublished opinion, after which Petitioner unsuccessfully sought rehearing. (App. 1-2, 8). He then filed a petition for writ of certiorari and the State filed a return to the petition. This Court granted certiorari.

## **STATEMENT OF THE FACTS**

On July 8, 2007, at approximately five in the morning, Charleston authorities were dispatched to Victim’s residence to respond to reports of a shooting. (R. 93-95). As he pulled up, Officer Brian Ambrose, who was first on the scene, encountered bystanders who informed him “somebody had been screaming inside the apartment about somebody being dead or hurt.” (R. 118). In an effort to aid the victim, Ambrose entered the residence and with direction from

Petitioner, made his way to an upstairs bedroom. (R. 119-23). At the entrance to the bedroom, Ambrose observed a handgun, which would later be identified as Petitioner's .32 caliber Smith and Wesson revolver, in the floor.<sup>1</sup> (R. 122). Being careful not to touch the handgun, Ambrose entered into the bedroom where he discovered Victim sprawled across the bed with her two young children on either side of her. (R. 123). She was shot in the head. (R. 123). EMS arrived shortly thereafter, but was unable to revive her. (R. 129, 135). At 5:44AM, Victim was pronounced dead. (R. 135). Both of her children were fathered by Petitioner. (R. 99).

Upon their arrival, police began taking statements from witnesses including Petitioner. (R. 163-64). After being questioned at the scene, Petitioner was taken into custody and transferred to the police station. (R. 437). In transit to the police station Petitioner reportedly requested an attorney. (R. 563). Upon their arrival at the station, Petitioner was mirandized and a gunshot residue ("GSR") swab was performed. (R. 290-92). Petitioner then proceeded to waive his rights agreeing to answer investigators' questions regarding the shooting, but declined to give a statement in writing. (R. 444). During the interview, Petitioner denied shooting Victim explaining he was downstairs when he heard a gunshot. (R. 446). In spite of his statement, Petitioner admitted that he and Victim were the only adults in the house and the children were incapable of firing the weapon in question. (R. 446). Approximately twenty minutes into the interview, Petitioner requested an attorney, thereby invoking his right to counsel. (R. 444). Questioning immediately ceased. (R. 445).

The ensuing investigation yielded the following evidence: (1) the round recovered from Victim's head was a .32 caliber bullet which SLED Agent David Black would later testify, was fired from Petitioner's gun (R. 366); (2) according to Black's notes and testimony, the gun had

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<sup>1</sup> Crime scene technician Anita Maestas testified the revolver was found approximately three feet from the bed upon which Victim was found. (R. 242).

two safety mechanisms, both of which were in working order at the time the weapon was examined (R. 372); (3) according to Black, the weapon required either two and three quarters ( $2\frac{3}{4}$ ) or eleven (11) pounds of pressure to depress the trigger depending upon whether the hammer was manually cocked<sup>2</sup> (R. 373-74); (4) a GSR swab of Victim revealed only traces of GSR, which defense expert Jeffrey Hollifield would later suggest, indicated Victim's hands were more than a foot from the gun at the time it was fired<sup>3</sup> (R. 651); (5) Victim's wound did not indicate stripling, which Dr. Cynthia Schandl would later testify, suggested Victim was shot at an intermediate range (R. 518); and (6) a DNA analysis of the revolver, while excluding Victim as a possible DNA contributor, was consistent with the DNA profile of Petitioner. (R. 478).

The State theorized that Victim's murder was the product of a jealous boyfriend who simply refused to let her go. (R. 12). Supporting this theory, the State, via cross examination, elicited testimony from Petitioner that at the time she was murdered, Victim had a restraining order against Petitioner.<sup>4</sup> (R. 587-88). Additionally, the State presented testimony from Victim's sister, Latasha, indicating Petitioner, who was recently "put out" of the house, had threatened to kill Victim in the days leading up to her death. (R. 492-93).

The State also introduced trace evidence indicating Petitioner broke into the house via the upstairs bedroom window. (R. 231-35). Specifically, the State introduced testimony from Officer Kalisha Gill of the Charleston Police Department, stating a palm print matching Petitioner's was found on the outside of the bedroom window. (R. 273). At trial, Petitioner never disputed that he shot Victim, instead casting the shooting as an accident. (R. 542). In fact in his opening statement, defense counsel stated, "[t]he only person who was there who can

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<sup>2</sup> In his testimony, Petitioner would later explain that the hammer was not cocked when the gun was fired. (R. 595).

<sup>3</sup> In addition to the physical evidence presented at trial, the couple's oldest child testified that Petitioner shot Victim. (R. 181-82).

<sup>4</sup> While the jury was unaware of the reason for the restraining order, the record reveals Petitioner had a history of abusing Victim and had an outstanding warrant for Criminal Domestic Violence ("CDV"). (R. 540-41).

testify is [Petitioner]. He is not going to hide behind the Fifth Amendment. He is going to get up here and look you in the eye and tell you what happened.” (R. 24-25). In so doing, counsel acknowledged the credibility question submitted to the jury stating, “[t]his is a very simple case . . . you have to decide whether he is telling the truth.” (R. 25).

Supporting his defense of accident, Petitioner testified to purchasing the murder weapon on the afternoon prior to the shooting and drank at least twelve beers before arriving at Victim’s townhouse. (R. 577, 550). Petitioner further noted he was invited into the residence.<sup>5</sup> (R. 553-54). In his explanation of the shooting, Petitioner admitted to recklessly handling the loaded revolver, stating, “I was playing with the gun, waving it around,” when “[s]he hit my hand and the gun went off and shot her.” (R. 542).

At the close of evidence, Petitioner moved for a directed verdict on all charges. (R. 659). The motion was denied. (R. 660-61). The trial court then discussed the jury charge with counsel. (R. 661-74, 675-79). Thereafter, the jury was charged and sent back for deliberations. (R. 732-55). Petitioner was subsequently acquitted on the burglary charge, but was convicted of murder and possession of a firearm during the commission of a violent crime. (R. 761). Following the verdict, trial counsel renewed his directed verdict motion to no avail. (R. 777). Petitioner was sentenced to life in prison without the possibility of parole.

### **PRESENTATION OF ISSUE AT TRIAL**

During the State’s case in chief, trial counsel sought to introduce Petitioner’s initial statements made to police while in custody. (R. 389). Accordingly, the trial court conducted an in-camera, Jackson v. Denno, 378 U.S. 368 (1964) hearing to determine whether Petitioner knowingly and voluntarily waived his rights prior to giving his statement. (R. 390-436). In the

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<sup>5</sup> In his testimony, Petitioner corroborated the testimony of Ellesse James and Tiani Lee indicating Victim “put him out” around the end of June 2007. (R. 208).

hearing, Petitioner claimed he initially requested an attorney while in the squad car on his way to the police station, but after being mirandized at the station, felt too intimidated to again request an attorney.<sup>6</sup> (R. 415). In turn, the State, addressing the Jackson v. Denno issue, called Detective Barry Goldstein who recounted the booking and interview process. (R. 390-412). Goldstein first explained that Petitioner was mirandized, after which he answered additional questions related to the Jackson v. Denno issue. (R. 390-99). The State then asked whether Petitioner later invoked his Miranda<sup>7</sup> rights, specifically, his right to counsel asking:

The State: Did he ever change his mind later and ask to speak to an attorney?

The Witness: He did, yes.

The State: And what did you do when that happened?

The Witness: That would be 20 minutes later from when we went upstairs in the interrogation room. When he said he wanted a lawyer, I terminated the questioning based on that fact.

(R. 398-99).

The trial court ruled Petitioner knowingly and voluntarily waived his Miranda rights stating, “[Petitioner] does not strike me as the kind of person that has trouble articulating himself if he decides to make his desires known.” (R. 425). The trial court cited to Petitioner’s invocation of his right to counsel as proof that he understood his rights and had no problem asserting them. (R. 425). Defense counsel then objected to the State offering testimony regarding Petitioner’s invocation of his right to counsel claiming the testimony would amount to an improper comment on the exercise of one’s rights pursuant to Doyle v. Ohio, 426 U.S. 610 (1976). (R. 430). The trial court disagreed, ruling the State could introduce testimony that Petitioner invoked his right to counsel as part of the investigative process. (R. 430-32).

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<sup>6</sup> Petitioner acknowledged that Officer Inabinett, who was transporting Petitioner to the police station, gave no response following his request for a lawyer. (R. 415).

<sup>7</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

Following the hearing, Goldstein's testimony resumed and the following colloquy occurred:

The State: And how did the defendant respond when asked whether he wanted an attorney before speaking with you at that time?

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

The State: So he agreed to speak with you without an attorney at that time?

Witness: Yes.

The State: And did he, in fact, waive his rights?

Witness: Yes.

The State: Did he later change his mind and ask to speak to an attorney?

Witness: Yes he did.

Def. Counsel: Objection, Your Honor.

The Court: Basis?

Def. Counsel: Comment upon one's exercise of those rights.

The Court: Overruled. It was part of the investigation. You may continue.

The State: Did he ever change his mind and ask to speak to an attorney?

Witness: Yes, he did.

The State: And did the questioning stop at that time?

Witness: I stopped it at that time.

(R. 444-45). Shortly thereafter, defense counsel objected on the same grounds and a side bar was held. (R. 446). Goldstein then recounted his conversation with Petitioner wherein Petitioner denied shooting Victim. (R. 446).

#### **STANDARD OF REVIEW**

A trial judge's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant. State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003). An abuse of discretion occurs where the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

## ARGUMENTS

- I. The Court of Appeals was correct in finding the trial court properly admitted testimony regarding Petitioner's post-Miranda invocation of his right to counsel being that Petitioner's invocation of his rights was not introduced as substantive evidence of guilt, but was instead introduced to address a collateral matter raised by Petitioner

Petitioner contends the Court of Appeals erred in finding the trial court properly admitted his post-Miranda invocation of his Fifth Amendment right to counsel under Doyle v. Ohio, 426 U.S. 610 (1976) and Edmond v. State, 341 S.C. 340, 534 S.E.2d 682 (2000) claiming both cases prohibit the State from ever commenting upon or presenting evidence of a defendant's decision to exercise his right to counsel. Br. of Pet. p. 6. The State disagrees and submits the case at bar falls into an exception to Doyle in that the testimony regarding Petitioner's invocation of his right to counsel was not presented as evidence of guilt, as prohibited in Doyle, but rather could be used by the jury in determining collateral matters, especially those raised by Petitioner. See State v. Simmons, 360 S.C. 33, 40, 599 S.E.2d 448, 451 (2004) (recognizing the State may present evidence concerning the accused's invocation of his Miranda rights so long as it is not introduced as substantive evidence of guilt). Specifically, the State submits Petitioner's invocation of his right to counsel could be introduced as evidence his statement was freely and voluntarily given, or in the alternative, as evidence that the police scrupulously honored his invocation of his right to counsel by immediately terminating the interview.

A. Doyle, Charles, Robinson, Edmond and Simmons: Exceptions to the General Rule

In Doyle, the United States Supreme Court reversed a drug conviction where the state impeached a defendant using his post-arrest silence. 426 U.S. at 619-20. In reaching this conclusion, the Court premised its ruling on preserving the prophylactic safeguard Miranda warnings place on one's Fifth Amendment rights, stating, "while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings." Id. at 617-18 (emphasis added). Further explaining their ruling, the Court, in footnote ten, noted the error in Doyle stemmed from a fear that one's exercise of their right to silence could, via subsequent impeachment at trial, be perceived by the jury as evidence of guilt. Id. at 619 n.10. It was in this context that the Court found "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." Id. at 618.

In footnote eleven of Doyle, the Court illustrated other uses of post-arrest silence which, it explained, did not violate Due Process:

*It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest.*

Id. at 620 n.11. (emphasis added).

Four years later, the Court, in Anderson v. Charles, 447 U.S. 404 (1980), addressed the factual scenario contemplated in footnote eleven of Doyle stating:

Doyle does not apply to cross-examination that merely inquires into prior inconsistent statements. *Such questioning makes no unfair use of silence* because a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all.

Charles, 447 U.S. at 409. (emphasis added).

A similar question was presented in United States v. Robinson, 485 U.S. 25, 33-34 (1988) where the United States Supreme Court was faced with the issue as to whether the Fifth Amendment flatly restricts comment by the prosecution on the silence of the accused. Arguing in favor of this proposition, Robinson's counsel cited to Griffin v. California, 380 U.S. 609 (1965), a pre-Doyle case in which the Court found a prosecutor's reference to a defendant's exercise of his Fifth Amendment right to silence violated due process. Robinson, 485 U.S. at 33-34. Addressing Robinson's argument, the Court acknowledged the difference between using one's exercise of their constitutional rights as evidence of guilt versus offering it as a response to an issue presented by a defendant or his counsel. In so doing, the Court explained, "[t]he broad dicta in Griffin to the effect that the Fifth Amendment forbids comment by the prosecution on the accused's silence, must be taken in the light of the facts of that case." Id. at 33-34 (citations omitted) (quotations omitted). Continuing, the Court, stated "[i]t is one thing to hold, as we did in Griffin, that the prosecutor may not treat a defendant's exercise of his right to remain silent at trial as substantive evidence of guilt; it is quite another to urge, as defendant does here, that the same reasoning would prohibit the prosecutor from fairly responding to an argument of the defendant by advertng to that silence." Id. at 34.

In Edmond v. State, 341 S.C. 340, 534 S.E.2d 682 (2000) this Court, while reversing the PCR court's denial of relief, acknowledged the rationale advanced in Doyle, Robinson, and Charles. See Edmond 341 S.C. at 346, 534 S.E.2d at 685 (explaining the purpose of preventing testimony and commentary on the accused's invocation of his Miranda rights is to prevent jurors from improperly inferring guilt from the exercise of those rights). The Court further noted the exceptions Robinson and Charles carved from the general rule in Doyle. Specifically, in

footnote three of Edmond, the Court cited to Robinson as one of the “limited instances” in which the State may raise a defendant’s invocation of his Fifth Amendment right to silence. See Edmond, 341 S.C. at 347 n.3, 534 S.E.2d at 686 n.3 (“The State also may in limited instances raise a defendant’s silence when the *defendant* or his counsel “open the door.”) (emphasis in original).

This Court expounded upon the Doyle exceptions alluded to in Edmond in State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (2004) finding:

Other courts have found the [United States] Supreme Court’s holding in Charles is not limited to situations involving inconsistent statements. See Splunge v. Parke, 160 F.3d 369 (7th Cir. 1998) (initial silence used to show police scrupulously honored defendant’s rights); Allen v. State, 686 N.E.2d 760 (Ind. 1997) (refusal to give written statement after oral statement used to show rights respected); Commonwealth v. Waite, 422 Mass. 792, 665 N.E.2d 982 (1996) (reassertion of silence used to show context in which questioning ended); State v. Correia, 707 A.2d 1245 (R.I. 1998) (same).

Simmons, 360 S.C. at 40, 599 S.E.2d at 451. The Simmons court, in rejecting Petitioner’s claim that testimony regarding his right to silence was error, explained, “[t]he limited evidence of Simmons’ silence in this context was *not designed to draw meaning from silence regarding the substantive crime* and therefore does not violate Doyle.” Id. (emphasis added).

Thus, while the State acknowledges that it is restricted from commenting upon or presenting evidence at trial of a defendant’s exercise of his right to counsel where it is used as substantive evidence of guilt, it is not restricted from doing the same in an effort to prove a collateral matter. Edmond, 341 S.C. at 345, 534 S.E.2d at 685. Therefore, the State urges this Court to view the testimony at issue in light of the context in which it occurred, either as evidence that Petitioner’s statement was freely and voluntarily given as discussed in Section I(B); or as detailed in Section I(C), as evidence that, upon invoking his right to counsel, the

police scrupulously honored Petitioner's wishes and terminated the interview as part of the investigative process.

B. Where Petitioner contested the waiver of his right to counsel, the trial court properly admitted testimony of his right to counsel being that Petitioner's invocation served as evidence that his statement was freely and voluntarily given, a factual issue which the jury is required to determine under South Carolina law

Apparently rejecting the holdings discussed in Section I(A), that Doyle, Charles, Robinson, Edmond and Simmons all permit the State to introduce evidence of an accused's exercise of his right to counsel to prove (or disprove) a collateral matter, Petitioner maintains that since "the function of the jury is to determine guilt or innocence," the goal of the State in introducing such evidence must have been to show that Petitioner was guilty. Br. of Pet. at 8. This assertion, aside from being legally incorrect as discussed in Section I(A), is at odds with the context in which the testimony at issue occurred—immediately following an in-camera hearing in which Petitioner alleged his statement was not voluntarily tendered as a result of authorities purportedly speaking to him in a threatening manner. (R. 412-15). Because the State may introduce evidence of an accused's exercise of his right to counsel to prove a collateral matter, and since South Carolina law actually requires the State to prove a defendant's statement was voluntary beyond a reasonable doubt, the trial court did not abuse its' considerable discretion when it admitted testimony that Petitioner invoked his right to counsel after being advised of his Miranda rights.

### **1. The Context in Which the Testimony Occurred**

While the State admittedly never announced its intention behind introducing Petitioner's invocation of his right to counsel, the context in which the testimony occurred is instructive. The testimony at issue followed an in-camera, Jackson v. Denno, 378 U.S. 368 (1964) hearing in

which Petitioner testified he invoked his right to counsel in the squad car, but, after being mirandized, chose to waive his rights and answer questions regarding the incident. (R. 412-15).

In the hearing, Petitioner explained to the trial court that the officer's tone of voice threatened him, which defense counsel argued, went to the issue of whether a valid Miranda waiver occurred and whether Petitioner's statement was voluntarily tendered. (R. 415). In its ruling, the trial court found the State met its burden, concluding that Petitioner had in fact waived his Miranda rights. (R. 426); see State v. Franklin, 299 S.C. 133, 137, 382 S.E.2d 911, 913 (1989) ("The State has the burden to show by the preponderance of the evidence that a defendant has voluntarily waived his right to counsel.").

By proving Petitioner's statement was voluntary in accord with the requirements of Jackson v. Denno, 378 U.S. 368 (1964), the State had effectively cleared the initial hurdle regarding Petitioner's valid Miranda waiver and could now present the statement to the jury. However, because state law requires the State to prove to the jury that a defendant's statement was voluntary beyond a reasonable doubt, it was incumbent upon the State to ask questions regarding the statement and whether it was voluntarily tendered. See State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009) (holding that once a court has determined a defendant received and understood his Miranda rights, the court should allow the statement into evidence and let the jury determine whether the statement was freely and voluntarily given). As noted in Goodwin, a jury, when determining whether a defendant's statement was voluntarily and freely given, should review the totality of the circumstances surrounding the defendant and his statement.<sup>8</sup> See Goodwin, 384 S.C. at 602, 683 S.E.2d at 507 (holding the trial court must

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<sup>8</sup> The trial court later elaborated on some of these factors used to evaluate whether a defendant's statement was freely and voluntarily given in its charge to the jury, highlighting the following factors: (1) the defendant's education; (2) the defendant's mental ability or capacity; (3) his IQ or intelligence; (4) the place and length of detention; (5) the defendant's background and environment; (6) the nature of the question eliciting the statement;

instruct the jury that it cannot consider a defendant's statement unless it finds, beyond a reasonable doubt, that the accused gave his statement freely and voluntarily under the totality of the circumstances). Thus, when the jury was called in and Detective Goldstein was put on the stand to recount his interview with Petitioner, the State was clearly aware that it needed to prove Petitioner's statement was freely and voluntarily given. To that end, the State asked Detective Goldstein a variety of questions on this issue including his perceptions as to the following: (1) Petitioner's education (R. 443); (2) Petitioner's mental ability (R. 438, 443); (3) Petitioner's capacity (R. 438, 443); (4) Petitioner's intelligence (R. 438, 443); (5) the place and length of Petitioner's detention (R. 438-39); (6) Petitioner's background (R. 437-38); and (7) whether Petitioner was advised of his Miranda rights. (R. 440-42). It was only then that the State began to ask whether Petitioner waived and understood his rights asking the following:

The State: And how did the defendant respond when asked whether he wanted an attorney before speaking with you at that time?

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

The State: So he agreed to speak with you without an attorney at that time?

Witness: Yes.

The State: And did he, in fact, waive his rights?

Witness: Yes.

The State: Did he later change his mind and ask to speak to an attorney?

Witness: Yes he did.

(R. 443-44). After defense counsel's objection and the trial court's subsequent ruling, the State's questioning briefly continued asking whether the interview stopped following Petitioner's

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and (7) any advice given regarding Miranda rights including, the right to remain silent, and the right to counsel. (R. 739).

invocation of his right to counsel. (R. 445). Detective Goldstein responded in the affirmative. (R. 445). Immediately following Detective Goldstein's response the State's asked whether, in the opinion of Detective Goldstein, Petitioner's statement was freely and voluntarily given. (R. 445). As Detective Goldstein's testimony clearly went to the voluntary nature of Petitioner's statement, and not his guilt, the State submits the trial court did not abuse its discretion in admitting Goldstein's testimony into evidence.

## **2. What the Jury had not Heard when the Testimony was Introduced**

Moreover, Petitioner, turning a blind eye to the requirement of Goodwin, suggests "[t]he only purpose of the testimony regarding [Petitioner's] invocation of his right to counsel was to lead the jury to believe [Petitioner] was guilty." Br. of Pet. at 8. In response, the State submits this allegation, as with the allegation in Section I(B)(1) above, ignores the context in which the testimony at issue occurred and simply assumes that the State introduced the testimony for an illicit purpose, despite the trial court's ruling to the contrary.

Specifically, Petitioner, in asserting that the State introduced the testimony at issue as substantive evidence of guilt, ignores the evidence the State had placed before the jury when it made its' isolated inquiry into Petitioner's invocation of his right to counsel. Notably, at the time the State elicited testimony regarding Petitioner's invocation of his right to counsel, the jury had yet to hear testimony regarding the substance of Petitioner's initial statement to police. Thus, the jury was unaware that Petitioner previously made a statement in which he denied shooting Victim. (R. 446, 565). Accordingly, the immediate inference taken from Petitioner's invocation of his right to counsel would not be that when questioning became difficult, he asked for an attorney—the jury was unaware of the substance of the statement at that time—but rather that Petitioner, after being informed of his rights, demonstrated his understanding of those rights by

invoking them twenty minutes into questioning. Thus, the State submits that the context in which the testimony at issue was elicited, shows the State, consistent with established case law, was attempting to prove a collateral matter—that Petitioner’s statement was voluntarily tendered—rather than trying to use Petitioner’s exercise of his constitutional rights as substantive evidence of guilt. As a result, the trial court did not abuse its discretion in admitting Goldstein’s testimony.

C. Where Petitioner argued the police failed to honor his initial request for a lawyer, the trial court properly admitted testimony regarding Petitioner’s invocation of his Fifth Amendment right to counsel as it was offered not as substantive evidence of guilt, but as evidence that the police honored his request by immediately terminating the interview

In the alternative, the State submits Petitioner’s invocation of his right to counsel could, when viewed against the backdrop of the interview, be used to show that the State scrupulously honored Petitioner’s invocation of his right to counsel. See Splunge v. Parke, 160 F.3d 369 (7<sup>th</sup> Cir. 1998) (holding a defendant’s initial silence can be used to show police scrupulously honored his rights). Specifically, Detective Goldstein’s testimony regarding Petitioner’s invocation of his right to counsel provided the jury with evidence rebutting Petitioner’s contention that he initially asked for an attorney in the squad car, a request which Petitioner claimed, was never honored. (R. 563).

Again, the State asks the court to review the context in which the testimony occurred—following Petitioner’s Jackson v. Denno, 378 U.S. 368 (1964) hearing where Petitioner claimed the police initially ignored his request for an attorney. (R. 415). In the hearing, Petitioner testified as follows:

Defense Counsel:       When you were in the car with Officer Inabinett, did you have any conversations with him?

Petitioner: When I was in the backseat, when they locked me up and took me from [the address of the crime scene], I was in the back of the car telling them I want a lawyer, I keep saying, I want a lawyer.

Defense Counsel: Who did you tell that to?

Petitioner: Officer Inabinett.

Defense Counsel: Okay and what did he say to you?

Petitioner: He did not respond to me.

(R. 415). Continuing, Petitioner testified that upon his arrival at the police station he was read his Miranda rights, but did not invoke his right to counsel because, “they basically pressured me[.]” (R. 415). Petitioner later testified he requested an attorney approximately twenty minutes into the interview, a request the police honored by immediately terminating the interview. (R. 415-16).

After the trial court ruled on the Jackson v. Denno issue, the jury was called in and Detective Goldstein was again put on the witness stand. (R. 436). At this point in time, the State, based upon Petitioner’s testimony in the Jackson v. Denno hearing, was keenly aware that Petitioner was contesting whether the police honored his initial request for a lawyer. See Miranda v. Arizona, 384 U.S. 436, 474 (1966) (holding that where the accused requests an attorney “the interrogation must cease until an attorney is present.”). Thus, when Petitioner put at issue the question of whether the State honored his initial request, it was incumbent upon the State to prove that his request was in fact honored. Accordingly, the State asked Detective Goldstein the following questions:

The State: Did he later change his mind and ask to speak to an attorney?

Witness: Yes he did.

The State: And did the questioning stop at that time?

Witness: I stopped it at that time.

(R. 445). As noted in Section I(B)(2) above, this line of questioning took place prior to the State's line of questioning regarding the content of Petitioner's prior inconsistent statement, making it nearly impossible for the jury to infer guilt from Petitioner's invocation of his right to counsel, the inference prohibited in Doyle. As such, the State submits the trial court did not abuse its discretion in allowing testimony regarding Petitioner's invocation of his right to counsel and asks this Court to affirm the ruling of the trial court.<sup>9</sup>

II. Even if the Court of Appeals erred in finding the trial court properly admitted testimony regarding Petitioner's post-Miranda invocation of his right to counsel, any error was harmless under the standard set forth in *Brecht v. Abrahamson* and the factors mentioned in *State v. Pickens*

Even if this Court finds that the Court of Appeals erred in finding the trial court properly admitted testimony regarding Petitioner's invocation of his right to counsel, any error should be harmless pursuant to the standard set forth in Brecht v. Abrahamson, 507 U.S. 619 (1993) and the factors announced in State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996).<sup>10</sup> In particular, the testimony regarding Petitioner's invocation of his right to counsel was an isolated incident, which the State never commented upon at any point in the trial and never connected to the exculpatory statement. Furthermore, Petitioner, in his testimony at trial and as part of his trial

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<sup>9</sup> As noted in Simmons, this Court could also choose to adopt the Doyle exception announced in both Commonwealth v. Waite, 422 Mass. 792, 665 N.E.2d 982 (1996) and State v. Correia, 707 A.2d 1245 (R.I.1998) that testimony regarding the assertion of one's Miranda rights does not violate Doyle where it is used to give context to the interview.

<sup>10</sup> As an initial note, the State asks this Court to consider whether Petitioner's argument with respect to prejudice is conclusory pursuant to In re: McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001). See In re McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) (holding an issue is deemed abandoned on appeal if the argument in the brief is not supported by authority or is only conclusory). Specifically, Petitioner provides no supporting authority for the one sentence prejudice argument stating only, "[i]nasmuch as the evidence was not overwhelming—involuntary manslaughter and accident were charged to the jury in addition to murder—this error can not have been harmless." Pet. Br. p. 7. While Petitioner's contention that the evidence in the case is not overwhelming is dubious in itself—twelve jurors found Petitioner guilty beyond a reasonable doubt—the State contends this statement is simply too conclusory to be considered a valid argument.

strategy, admitted the exculpatory statement he initially made was false. Finally, the evidence supporting Petitioner's guilt was overwhelming as he admitted to shooting the victim.

In Brecht v. Abrahamson, 507 U.S. 619 (1993), the United States Supreme Court held that Doyle violations squarely fit into the category of Constitutional violations termed by the Court as "trial error." 507 U.S. at 529. Trial error "occur[s] during the presentation of the case to the jury," and is subject to harmless-error analysis because it "may ... be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial]." Arizona v. Fulminante, 499 U.S. 279, 307-308 (1991). Accordingly, on direct review, an alleged Doyle violation is subject to the harmless error standard first laid out in Champan v. California, 386 U.S. 18 (1967) that the error in question must be "harmless beyond a reasonable doubt." Brecht, 507 U.S. at 630.

In Pickens, this Court followed the lead of Brecht and Chapman, holding that harmless-error analysis was proper in reviewing an alleged Doyle violation. See State v. Pickens, 320 S.C. 528, 530, 466 S.E.2d 364, 366 (holding in the context of a Doyle violation, the Court applies a harmless-error analysis). Giving further guidance to the bench and bar, the Pickens court elaborated on the relevant factors a court should consider when reviewing whether a Doyle violation is harmless, stating, "[t]he 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. at 531, 466 S.E.2d at 366.

Applying the Pickens factors, it is clear the Doyle violation alleged by Petitioner, if it is error at all, is harmless. First, there was only one reference with respect to Petitioner's invocation of his right to counsel, specifically the reference by Detective Goldstein.

Additionally, the State never commented upon or alluded to Petitioner's invocation of his right to counsel in argument, and therefore, in no way tied Petitioner's invocation of his rights to the exculpatory story which he initially offered police. Furthermore, the Petitioner, pursuant to his trial strategy of claiming the incident in question was an accident, admitted at trial, that the exculpatory story he offered in the interview was false, thereby making it implausible. (R. 565-66). Petitioner's guilt was overwhelming. As mentioned above, Petitioner admitted to shooting Victim with his handgun, which he admitted he was "waving around." (R. 598). There was also testimony from Petitioner that the hammer was not cocked when Victim was shot, requiring eleven pounds of pressure to fire the fatal round. (R. 595). Finally, even Petitioner's expert testified that the trace amounts of GSR on Victim's hands were not consistent with Petitioner's explanation that Victim hit the gun causing it to discharge. (R. 651). Accordingly, should this Court find the trial court erred in admitting Officer Goldstein's testimony, the State asks the Court to further find that, when viewed against the entirety of the record, any error was harmless beyond a reasonable doubt. See Chapman, 386 U.S. at 24 (concluding an error must be harmless beyond a reasonable doubt in order to be considered harmless).

### CONCLUSION

As the trial court did not err by allowing Detective Goldstein's testimony into evidence, and even if it did, such error was harmless, the State asks this Court to affirm Petitioner's conviction pursuant to the aforementioned authorities.

Respectfully Submitted,

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January 31, 2014.

STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY  
Court of General Sessions

Deadra L. Jefferson, Circuit Court Judge

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Opinion No. 2012-UP-099 (S.C. Ct. App. filed Feb. 22, 2012)

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THE STATE,

RESPONDENT,

V.

JAKE ANTONIO WILSON,

PETITIONER

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**CERTIFICATE OF SERVICE**

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The undersigned attorney hereby certifies that a true copy of the Brief of Respondent in the above referenced case has been served upon LaNelle Cantey Durant, at the South Carolina Office of Indigent Defense, P.O. Box 11589, Columbia, SC 29211-1589, on this 31st day of January, 2014.



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