STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Beaufort County

Honorable R. Scott Sprouse, Circuit Court Judge

JERRY L. SCANTLING,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-002084

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Was defense counsel ineffective for failing to timely object to the solicitor's closing argument that petitioner failed to tell the police that he was not the man in the incriminating photograph in Savannah, Georgia following the decedent's murder, since petitioner had been read his Miranda warnings, and this was an impermissible comment on petitioner's post-arrest right to remain silent, which violated Doyle v. Ohio, 426 U.S. 610 (1976), particularly where the appellate court refused to address the Doyle issue, finding there was no contemporaneous objection to the closing argument?

STATEMENT

Petitioner was indicted by the Beaufort County Grand Jury for the offenses of murder, armed robbery, possession of a weapon during a violent crime, and possession of a stolen weapon. App. 882 – 887. Petitioner's case was called to trial on February 25, 2013, before the Honorable Carmen T. Mullen, and a jury. App. 1. Petitioner was represented by Matthew Walker and Lauren Carroway. The solicitor was Sean Paul Thornton. App. 1. The murdered man was Leonard Green, a gay man, and his red truck was allegedly also stolen by Petitioner Scantling.

One witness, Ishmil Frazier, testified that although he lived in Bluffton, South Carolina, he was on "the Island" on May 23, 2010, staying at the Hilton Head Gardens Apartments. Frazier claimed that day he saw petitioner in possession of a stolen red truck. Frazier knew Green, and he knew the truck Green drove. App. 284, l. 1 – 301, l. 9. This occurred at one or two o'clock in the morning, and petitioner was having a "friendly conversation" with other people at that time. App. 301, l. 16 – 302, l. 24. Frazier added that he also had seen petitioner around the apartment complex "sleeping in the breezeway and stuff." App. 301, ll. 13-24.

The state's case mainly revolved around the word of petitioner's ex-girlfriend, and his ex-girlfriend's mother. Both of them were incarcerated at the Beaufort County detention center at the same time as petitioner. App. 625, l. 14 – 626, l. 9.

The ex-girlfriend, Brittany Raines, claimed she talked to petitioner through a vent on the men's side of the jail to the women's side of the jail. She maintained that petitioner "continued to tell me that he did kill a gay man." Raines said petitioner told her he shot the gay man with a Highpoint .45 twice. Raines also claimed that petitioner said he pistol whipped the gay man. App. 627, ll. 1-18.

Further, Raines maintained petitioner told her he stole the man's truck, and went to Savannah. Finally she said petitioner told her that he stole a Monte Carlo in Savannah to get home, and that he used the dead man's cell phone a few times. App. 627, l. 1 – 628, l. 7.

Raines had a criminal record for stealing, providing false information, drugs, and driving under suspension. Raines was awaiting a federal indictment for dealing in counterfeit payroll checks. App. 628, ll. 12-22.

The mother of petitioner's ex-girlfriend Raines, Cynthia Padgett, also claimed she talked to petitioner through the same jail vent. Padgett said that petitioner told her that he met the decedent gay man through Donald Cooper. She said that Cooper worked with the decedent at a Pizza Hut, and that petitioner had an altercation with the decedent where he felt "disrespected." Padgett maintained petitioner told her that he shot the decedent, stole his truck, went to Savannah to sell the car, and then came back to South Carolina. App. 640, l. 16 – 643, l. 9.

When Padgett testified that petitioner told her he had a pending burglary charge, defense counsel immediately objected, and the court struck that testimony. Defense counsel later moved for a mistrial on this ground. The Court of Appeals affirmed petitioner's conviction on the denial of a mistrial ground, finding it was not "absolutely necessary" to grant a mistrial given Padgett's comment about petitioner's pending burglary charge. See State v. Jerry Scantling, 2015-UP-363 (filed February 15, 2015).

Padgett also admitted, that like her daughter, she had a "pretty extensive criminal record." Many of her convictions dealt with crimes of dishonesty, such as financial transaction card frauds, giving false information, and she also was awaiting a federal indictment. App. 643, l. 6 – 645, l. 3.

Besides the claimed confessions to two hardened criminals, petitioner's ex-girlfriend and her mother, the state's DNA evidence showed that Green's DNA was recovered from the gun found at the crime scene. The gun also had the DNA of an unknown person. Petitioner was *excluded* as being that unknown person whose DNA was found on the gun. App. 560, l. 1 – 561, l. 24.

DNA was also found inside Green's stolen truck. Petitioner was excluded as a contributor to those DNA profiles found in Green's truck. App. 589, l. 20 – 591, l. 1.

Four witnesses testified they saw petitioner inside a red truck which matched the description of Green's truck on the night of the murder. App. 288, ll. 4-17; App. 295, l. 3 – 297, l. 8; App. 308, l. 2 – 310, l. 15. This included testimony petitioner was allegedly trying to sell the red truck. App. 310, ll. 6-18.

The police interrogated petitioner, and they lied to him. The police told him they had his DNA on incriminating evidence, and they a videotape of him from the apartment complex. Petitioner denied he had anything to do with Green's murder, and he asserted Green made a homosexual advance at a Wal-Mart on the morning of the murder. Petitioner rejected the homosexual advance. Green offered him money later that day if petitioner would go to Ridgeland with him. Petitioner told Green he was not a homosexual, and nothing else occurred. App. 503, l. 10 – 544, l. 18.

Lead investigator Robert Bromage interrogated petitioner. Bromage testified and he identified a print from a video outside of the Wal-Mart in Savannah, Georgia, taken on May 23, 2010. The decedent's cell phone was located in the trash can in the men's room of the Wal-Mart. It was undisputed that petitioner had been read his Miranda warnings at this time. During the third interview with petitioner, Bromage said he asked petitioner to identify whether the man in

the photograph was him. Bromage said petitioner responded: I ain't going to say it's me, I ain't going to say it ain't. I don't wanna incriminate myself." Defense counsel immediately objected, and he stated there should not be any comments on petitioner exercising his rights. The judge stated, "Subject to your prior, yes, objection. Noted for the record. Thank you, sir." The judge told the solicitor to continue. App. 514, l. 9 – 515, l. 19.

Despite the immediate contemporaneous objection to this testimony, defense counsel *failed to object* to the solicitor's closing argument about the photograph used during interrogation. The solicitor reminded the jury of the objectionable testimony: "Who else was seen at Wal-Mart? I ain't going to say it's me and I ain't going to say it's not. Is this picture fantastic? No. It's blurry. Did Jerry Scantling tell Bob Bromage, no, man, I wasn't in Savannah; no, that's not me. No, he didn't." App. 721, ll. 11-16.

After the solicitor finished his closing argument, defense counsel told the judge: "I've got a matter of law. We can do that maybe after my close, or do you want to do it now?" The judge responded, "Afterwards is fine." App. 727, ll. 14-22.

After closing arguments, and before the jury was charged on the law, defense counsel told the judge that the solicitor's argument constituted a Doyle[1] violation. The solicitor had argued that petitioner did not tell Bromage that he was not in Savannah, and not the man in the photograph, and that was a comment on petitioner's right to silence after being informed of his "Miranda[2] warnings."

The solicitor argued that he was telling the jury about something petitioner said during interrogation, and he was not talking about the exercise of petitioner's right to silence. Defense

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

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

counsel responded that the spirit of Doyle had been violated because the solicitor was asking for the jury to infer petitioner's guilt from the fact that he did not tell the investigator that he was not in Savannah at the time, which would have been consistent with his trial defense. The judge responded that everyone would have "plenty of time to re-read Doyle over the break." App. 758, l. 2 – 759, l. 8.

After moving for the mistrial, petitioner also requested a new trial given the Doyle violation. Counsel argued this was an unfair comment on petitioner not telling the police he was not in Savannah, which the solicitor argued an innocent person would have done. App. 808, ll. 14-20.

The jury found petitioner guilty on all counts. App. 793, l.16 -794, l. 2. Judge Mullen sentenced petitioner to life imprisonment pursuant to S.C. Code §17-25-45 given his prior record. App. 800, ll. 14-25; app. 806, ll. 2-17.

On direct appeal, the Court of Appeals found the closing argument issue above was not preserved since defense counsel did not immediately object to the solicitor's closing argument on petitioner's failure to deny he was the man in the inculpatory photograph in Savannah, Georgia. State v. Jerry Scantling, 2015-UP-363 (filed July 15, 2015), *citing* State v. Black, 319 S.C. 515, 521, 462 S.E.2d 311, 315 (Ct. App. 1995).

Petitioner filed an application for post-conviction relief on August 20, 2015. App. 611–617. The state filed a return requesting an evidentiary hearing on July 7, 2016. App. 818-823.

An evidentiary hearing was convened on February 15, 2017 before the Honorable Scott Sprouse. James K. Falk represented petitioner, and Rushton Neely represented the state. App. 824-825.

During the evidentiary hearing, defense counsel admitted that he thought about making a contemporaneous objection to the Doyle violation closing argument by the solicitor. However, counsel admitted he failed to make a contemporaneous objection. Counsel also agree that the evidence against petitioner was not overwhelming. App. 834, l. 1 – 838, l. 24.

In the order of dismissal, the PCR judge acknowledged that this Doyle issue was found to be unpreserved on direct appeal. Further, an unpreserved issue could be raised in a context of post-conviction relief alleging ineffective assistance of counsel for the issue being unpreserved. See McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013).

The PCR judge wrote that petitioner also had to show the issue was meritorious, and that it "would have resulted in a reversal on appeal to a reasonable probability." App. 872 – 873.

The PCR judge found the solicitor's argument that petitioner did not "tell Bob Bromage, no, man, I wasn't in Savannah; that's not me. No, he didn't," was not a comment on petitioner's right to silence in violation of Doyle v. Ohio, 426 U.S. 610 (1976). The PCR judge wrote that "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." Doyle v. Ohio, 426 U.S. 617-618 (1976). App. 873.

The PCR judge also found the solicitor comment on petitioner's failure to make an exculpatory statement during interrogation was not, in effect, the same thing as impeaching a defendant with his silence during interrogation. The PCR judge found even if commenting on petitioner's failure to make an exculpatory statement during interrogation was the equivalent to commenting on his right to remain silent, that the error was harmless pursuant to Brect v. Abrahamson, 507 U.S. 619 (1993), and State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996). App. 874 – 878. Those are direct appeal cases.

From this order, petitioner is seeking a writ of certiorari pursuant to Rule 243 of the SCACR.

ARGUMENT

Defense counsel was ineffective for failing to timely object to the solicitor's closing argument that petitioner failed to tell the police that he was not the man in the incriminating photograph in Savannah, Georgia, following the decedent's murder, since petitioner had been read his *Miranda* warnings, and this was an impermissible comment on petitioner's post-arrest silence, which violated *Doyle v. Ohio*, 426 U.S. 610 (1976), particularly where the appellate court refused to address the *Doyle* issue, finding there was no contemporaneous objection to the closing argument.

As seen, defense counsel immediately objected to Bromage's testimony that petitioner failed to make an exculpatory assertion – that he was not the man in the inculpatory photograph -- when asked if he was the man in the photograph during interrogation. It was clear that the solicitor was asking the jury to find petitioner's failure to deny being the man in the Savannah photograph was the result of guilty knowledge.

The evil condemned in Doyle v. Ohio was having the jury infer that because the defendant remained silent in the face of an accusation during interrogation that he must be guilty. This is because the defendant had been promised implicitly that his failure to talk to the police would not result in any penalty.

A classic Doyle violation occurs when the testimony or argument is about a defendant remaining silent after being Mirandized. However, the same thing happened in this case when the solicitor argued petitioner's failure to deny being the man in the photograph spoke volumes about his guilt.

For example, a classic Doyle violation occurred in State v. Gray, 304 S.C. 482, 484, 505 S.E.2d 420, 421 (1991), on cross-examination of Gray by the solicitor:

Q: When you got to the police station, they read you your rights?

A: Yes, sir.

Q: And you understood them?

A: Yes, sir.

Q: And, of course, you immediately told them the story you're telling the jury right now?

A: I didn't tell them no story. I just told them I was not going to make a statement.

Q: Right, but yet, you want these ladies and gentlemen of the jury to believe you're telling them the truth?

While this is the more classic Doyle error, the evil involved is using the defendant's failure to make an exculpatory statement, a denial, -- or tell the police his defense -- is proof of his guilt. What happened in petitioner's case violated the meaning of Doyle, and it accomplished the same evil end, and it respectfully should not be tolerated.

In State v. McIntosh, 358 S.C. 432, 595 S.E.2d 484 (2004), this Court found that the Court of Appeals erred in finding that McIntosh opened the door to a Doyle error. The Court noted that in State v. Garcia, 118 N.M. 773, 887 P.2d 767 (Ct. App. 1994), the prosecutor asked the defendant why he did not mention his alibi defense to the police in the hour he spent traveling with the detective following his arrest.

In McIntosh, this Court noted that the defendant returned to South Carolina, and denied knowledge of the crimes and did not speak further with the police. Yet, McIntosh's failure to tell the police, consistent with his trial defense, his exculpatory story, was used against him.

Here, similarly, petitioner told the police essentially that he was not going to talk to them about the crime. "It might be me [in the photograph], and it might not be me [in the photograph]." Petitioner's failure to make a definitive statement to the police denying it was him

in the Savannah photograph following his arrest and his Miranda warnings was definitely used against him. This was a Doyle error.

Further, the error would not have been found harmless on direct appeal if defense counsel had lodged a contemporaneous objection. Defense counsel correctly testified at PCR that he considered making a contemporaneous objection during the solicitor's closing argument but instead he waited until after the argument to make an objection. App. 831, l. 12 – 836, l. 23. Defense counsel admitted he should have objected immediately to the solicitor's closing argument Doyle violation to preserve the issue for appeal. App. 836, ll. 9-14.

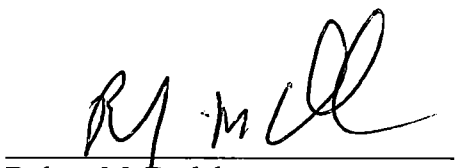
Petitioner was prejudiced in this case. In Edmond v. State,341 S.C. 340, 534 S.E.2d 682 (2000), the petitioner asserted the PCR judge erred in denying his claim that the detective's testimony and prosecutor's closing argument violated his rights under Doyle v. Ohio, 426 U.S. 10 (1976). The Court noted such comments on a defendant's exercise of a constitutional right may be made either directly or indirectly. State v. Rause, 262 S.C. 581, 206 S.E.2d 873 (1974). The Court in Edmond noted that courts must use the Strickland v. Washington, 466 U.S. 668 (1984) standard when making a determination whether the petitioner was prejudiced by defense counsel's deficient handling of a Doyle violation. Here the judge used a direct appeal standard.

Here, defense counsel acknowledged the evidence was not overwhelming against petitioner. App. 838. Petitioner's ex-girlfriend, and her mother, both had extensive criminal records, and a motive to misrepresent the truth to gain favor with the prosecution for themselves where they both were going to be indicted on counterfeit paycheck grounds. The remainder of the case against petitioner was slim. The state's use of petitioner's failure to cooperate -- or deny he was the man in the Savannah photograph -- was tantamount to guilt argument was extraordinarily prejudicial. Under the highly unusual facts of this case, petitioner submits that a

Doyle violation did occur, it was prejudicial within the meaning of Strickland, and this Court should reverse the PCR judge, and grant him a new trial.

CONCLUSION

By reason of the foregoing arguments, this Court should grant certiorari, and allow full briefing on this issue.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of May, 2018.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jerry L. Scantling states:

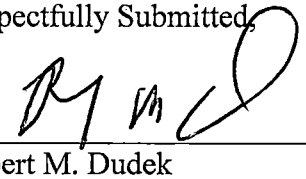
1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge R. Scott Sprouse, which was held on February 15, 2017, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Jerry L. Scantling.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 29th day of May, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Robert M. Dudek
Chief Appellate Defender

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Christian Saville, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Jerry L. Scantling, #259057, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 29th day of May, 2018.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 29th day of May, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.