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**Apr 08 2022**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Florence County

Honorable Michael G. Nettles, Circuit Court Judge  
Honorable Michael S. Holt, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

DONALD DAYQUAN SMITH,

APPELLANT.

APPELLATE CASE NO. 2021-000579

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ANDERS BRIEF OF APPELLANT

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DAVID ALEXANDER  
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ATTORNEY FOR APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Did the trial court err in refusing appellant's motion to redact the portion of his videotaped interrogation when the police asked him what his defense would be, which commented on his right to silence and shifted the burden of proof?

## **STATEMENT OF THE CASE**

On January 3, 2019, a Florence County grand jury indicted appellant for murder and criminal conspiracy. R. 451. On May 17, 2021, appellant was tried before the Honorable Michael G. Nettles and the Honorable Michael S. Holt. R. 1. Todd Tucker and Ryan White represented the State. R. 1. Karen Parrott represented appellant. R. 1. The jury convicted appellant. R. 435, l. 20 – 436, l. 5. The court sentenced appellant to concurrent terms of thirty-eight years' imprisonment for murder and five years' imprisonment for conspiracy. R. 447, l. 6 – 13. This appeal follows.

## **STANDARD OF REVIEW**

The admission of the unredacted portion of appellant's statement is reviewed under the abuse of discretion standard. State v. Brewer, 411 S.C. 401, 406, 768 S.E.2d 656, 658 (2015).

## ARGUMENT

The trial court erred in refusing appellant's motion to redact the portion of his videotaped interrogation when the police asked him what his defense would be, which commented on his right to silence and shifted the burden of proof.

Qamar Ramadan's daughter testified that she spoke with her mother on the phone multiple times a day. R. 310, l. 6 – 9. On August 3, 2018, when she did not hear from Ramadan, the daughter asked police to conduct a welfare check. R. 310, l. 15 – 21. The police found blood in the bedroom and Ramadan's dead body on the floor. R. 128, l. 23 – 130, l. 18. She died from blunt force trauma to the head. R. 213, l. 2 – 6. The pathologist testified that a lamp could have been used to cause Ramadan's injuries. R. 212, l. 14 – 213, l. 1.

Ramadan brought her troubled granddaughter, Aliyah Hill, to South Carolina from New Jersey. R. 308, l. 14 – 310, l. 5. About two months before Ramadan was killed, she called the police to come to her house. R. 104, l. 1 – 15. The police found appellant, Ramadan, and Hill. R. 104, l. 19 – 25. Hill, who was eighteen at the time, was in a romantic relationship with appellant. R. 109, l. 16 – 111, l. 3. A screen was damaged and had been removed from Hill's bedroom window. R. 106, l. 4 – 16. Ramadan had police place appellant on trespass notice and charge him with malicious injury to property. R. 106, l. 15 – 107, l. 19.

After Ramadan's body was found, the police encouraged her daughter to contact Hill. R. 313, l. 8 – 315, l. 20. The daughter ultimately contacted Hill through Facebook Messenger. R. 315, l. 13 – 330, l. 9. In these messages, Hill pretended to go into the house and find Ramadan's body. R. 315, l. 13 – 330, l. 9. Hill and Smith were arrested together in Florida on August 14. R. 254, l. 23 – 259, l. 4.

The police's videotaped interrogation of appellant was admitted and published before the jury as State's Ex. 94. R. 341, l. 1 – 343, l. 11. Appellant admitted being at the scene and helping clean up, but denied killing Ramadan. State's Ex. 94. Another man was present at the scene named Roscoe. State's Ex. 94. The police found DNA of two males under Ramadan's fingernails along with appellant's DNA. R. 234, l. 2 – 25. The solicitor used the DNA, Smith's statement to police, and his relationship with Hill to paint him as the murderer. R. 379, l. 7 – 398, l. 14. Appellant recanted his video statement in a letter to the solicitor's office and said he was being falsely accused of the murder by Hill. State's Ex. 92. R. 356, l. 7 – 357, l. 14.

At the 47 minute mark of the videotaped interrogation (11:27 on the clock visible in the video), the police officer asks appellant, "So, going forward, when you go to court for this, what's your defense going to be, I don't know nothing?" State's Ex. 94. Appellant responds that he does not know anything and says, "What can I tell y'all?" State's Ex. 94.

Defense counsel asked the Court to redact this exchange from the videotape. R. 273, l. 4 – 21. Appellant argued that the question from police "goes directly to the fact that he has a right to remain silent." R. 273, l. 4 – 21. Appellant also argued, "He has no obligation to put forward any defense whatsoever and so I think it's a direct comment on his right to remain silent and that portion could be redacted." R. 273, l. 4 – 21.

The solicitor opposed the redaction. R. 273, l. 23 – 274, l. 13. The State said appellant "waived his right to remain silent and they're trying to verify his story and get his side of it." R. 273, l. 23 – 274, l. 13. He argued appellant had not remained silent and given a two-hour statement to the police. R. 273, l. 23 – 274, l. 13. The trial judge asked the solicitor, "And your position is what's the harm?" to which he responded, "Correct, Judge." R. 274, l. 11 – 13. The court denied appellant's redaction request stating, "I don't think it's going to be prejudicial." R. 277, l. 13 –

15. The statement was played before the jury and appellant contemporaneously renewed his objections. R. 341, l. 21 – 342, l. 6. R. 343, l. 4 – 9. R. 346, l. 1 – 12.

A criminal defendant has the constitutional right to remain silent and does not have to present a defense. U.S. Const. amends. V, XIV. At all times, the State bears the burden of proof. Sandstrom v. Montana, 442 U.S. 510 (1979). “The State may not comment on a defendant’s exercise of a constitutional right.” McFadden v. State, 342 S.C. 637, 640-41, 539 S.E.2d 391, 393 (2000). “Specifically, the solicitor must not comment, either directly or indirectly, on a defendant’s silence, failure to testify, or failure to present a defense.” Id.

Statements of police officers in recorded interviews that improperly comment on a defendant’s exercise of his rights are similarly prohibited. State v. Brewer, 411 S.C. 401, 408, 768 S.E.2d 656, 659-60 (2015). In Brewer, the police repeatedly insisted that the defendant prove his innocence in the recorded interview played for the jury. Id. The Court called this a “grave constitutional error.” Id. “Law enforcement’s *ad nauseum* insistence that Brewer prove his innocence has *no* place before the jury.” Id. (emphasis in original). “It is chilling that we have to remind the State that an accused person is presumed innocent and that the State has the burden to prove guilt beyond a reasonable doubt.” Id.

Chief Justice Beatty, writing in dissent, stated that the repeated instances of the police demanding that Brewer prove he was innocent “created a due process structural defect in the trial.” Id. at 412, 768 S.E.2d at 662. As the Chief Justice pointed out, structural errors require reversal and no harmless error analysis should be done by the appellate court. Id. The Chief Justice dissented from the majority’s application of the harmless error doctrine to Brewer’s case. Id.

The trial judge erred in refusing this redaction. The trial court seemed to adopt the solicitor’s argument of “what’s the harm” when he ruled the statement was not prejudicial. The

court failed to realize that admission of this statement was a “grave constitutional error” as described by the Brewer Court. Appellant denied killing Ramadan and this error cannot be harmless.

Furthermore, this Court should adopt the rationale of Chief Justice Beatty in his dissent in Brewer and rule the improper comment on appellant’s right not to present a defense was a structural error. Appellant did not present a defense in this case. R. 373, l. 15 – 19. He exercised his right not to testify. R. 371, l. 22 – 24. Because the error is structural, the Court need not conduct a harmless error analysis and should reverse.

**CONCLUSION**

For the foregoing reasons, this Court should reverse appellant's convictions and remand for a new trial.

s/David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of April, 2022.

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THE STATE,

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PETITION TO BE RELIEVED AS COUNSEL

---

Counsel for Donald D. Smith states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judges Michael G. Nettles and Michael S. Holt, which was held on May 17-20, 2021, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

Wherefore, he asks the Court to relieve him as counsel for Donald D. Smith.

Respectfully Submitted,

s/David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of April, 2022.

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**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**  
\_\_\_\_\_

Appellant proposes the following be included in the Record on Appeal:

- (1) Trial Transcript dated May 17 – 20, 2021;
- (2) State’s Exhibit No. 92 (Letter from Defendant);
- (3) State’s Exhibit No. 94 (DVD – to be transported);
- (4) Indictments; and
- (5) Sentence sheets.

I certify that this designation contains no matter which is irrelevant to this appeal.

s/David Alexander  
Appellate Defender

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ATTORNEY FOR APPELLANT

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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."

s/David Alexander  
Appellate Defender

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ATTORNEY FOR APPELLANT

This 8th day of April, 2022.