No. 18-9361

In the

Supreme Court of the United States

JORDAN ALEXANDER CLEMONS

Petitioner

v.

Commonwealth of Pennsylvania

Respondent

CERTIFICATE OF SERVICE

Undersigned counsel, a member of the bar of this Court, hereby states that as required by Supreme Court Rule 29, he has served the enclosed, Brief in Opposition to Writ of Certiorari, on counsel for the opposing party, Jordan A. Clemons, by first-class mail and email on August 19, 2019. Delivery was made to:

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On Petition for Writ of Certiorari to the

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BRIEF IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

Filed on Behalf of the Commonwealth of Pennsylvania by:

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QUESTIONS PRESENTED

1. Whether Petitioner's spontaneous statement immediately following properly administered Miranda warnings by police should be admissible at trial?

   Suggested answer: Yes. Petitioner did not expressly invoke his right to silence or to counsel prior to making this voluntary statement.

2. Whether the denial of a change of venue request was constitutionally proper where the publicity complained of occurred two and a half years before the trial of the Petitioner for murder and was not pervasive?

   Suggested answer: Yes. The pretrial publicity in this case did not rise to a level constitutionally requiring a change of venue. A fair and impartial jury was able to be selected for Petitioner's trial.

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INTRODUCTION

This is a capital case where the Petitioner raises two alleged claims of constitutional error. The first claim is that Petitioner's statement to police immediately following the recitation of his Miranda warnings should have been suppressed. Petitioner did not expressly waive his rights prior to making this statement, and there is no allegation of police misconduct in obtaining this statement. Petitioner wishes to change the bright-line rule of expressly invoking constitutional rights to a vaguer standard. To adopt this proposed change would lead to endless litigation and confusion. Petitioner's second claim is that a change of venue is required due to pre-trial publicity that occurred chiefly on social media. As the Pennsylvania Supreme Court aptly noted in affirming Petitioner's Judgment of Sentence, in today's digital age any important and newsworthy criminal matter will be attended by social media coverage. In accepting Petitioner's claim, this court will be creating a *per se* rule that any criminal case with attendant social media coverage would require a change of venue. This case does not rise to the level of previous cases that required such action. The Commonwealth respectfully requests that the Writ be denied.

STATEMENT OF THE CASE

The opinion and order of the Pennsylvania Supreme Court thoroughly outlines the factual and procedural history of this case and is incorporated herein by reference thereto as if set forth in full here.

REASONS TO DENY THE WRIT

I. THE WRIT SHOULD BE DENIED AS THE ISSUES RAISED ARE PURELY FACTUAL IN NATURE AND DO NOT PRESENT ANY UNIQUE ARGUMENTS FOR EXTENSION OF ANY FEDERAL CONSTITUTIONAL PROTECTION FOR CRIMINAL DEFENDANTS

The Commonwealth of Pennsylvania respectfully submits that the Writ only pertains to matters of factual import in this case. The alleged errors of which Petitioner complains do not raise any compelling, broader constitutional concerns which have traditionally controlled the granting of petitions for writ of certiorari. *See* ***U.S. v. Nobles***, 422 U.S. 225 (1975). U.S.Sup.Ct. Rule 10 provides a succinct listing of reasons that bear on the granting of a writ. None of the expressed reasons in the Rule would invite this court's review exist in this case. There is no conflict in lower court rulings requiring resolution by this august body. For these reasons and the reasons which follow in argument, it is submitted that there is no reason to grant a Writ of Certiorari in this case.

II. THE PENNSYLVANIA SUPREME COURT PROPERLY APPLIED FEDERAL LAW IN DETERMINING THAT PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED

Petitioner raises two issues in his Petition: an alleged violation of ***Miranda*** in the trial court's admission of a spontaneous statement made immediately following the administration of ***Miranda*** warnings and the denial of a change of venue motion based upon pretrial publicity. The Pennsylvania Supreme Court properly analyzed and applied federal law in concluding that there was no violation of Petitioner's federal constitutional rights. For the reasons which follow, it is submitted that the errors Petitioner claims are meritless and this Writ should be denied on the merits.

A. THE PENNSYLVANIA SUPREME COURT PROPERLY ANALYZED AND APPLIED *MIRANDA* AND ITS PROGENY IN HOLDING THAT PETITIONER'S VOLUNTARY STATEMENT TO POLICE WAS ADMISSIBLE AT TRIAL.

Petitioner argues that the Pennsylvania courts erred in admitting his voluntary statement given in response to orally expressed ***Miranda*** warnings. Testimony which was provided at the suppression hearing in this matter established that ***Miranda*** warnings were properly given to Petitioner. Petitioner then immediately provided a statement which placed him with the victim the evening that she disappeared. This statement was admitted at trial.

1. A SPONTANEOUS STATEMENT MADE IN RESPONSE TO PROPERLY GIVEN *MIRANDA* WARNINGS IS NOT THE CONSTITUTIONAL FUNCTIONAL EQUIVALENT OF AN EXPRESS INVOCATION OF THE RIGHT TO SILENCE AND COUNSEL

There is no argument that the state trooper administered ***Miranda***[1] warnings in proper form. The record indicates that when Petitioner arrived at the police station, he was escorted to an interview room. ***Commonwealth v. Clemons***, ___ A.3d ____, No. 738 CAP at 19 (Pa. 2019). Petitioner was advised of all of his rights under ***Miranda***. ***Id***. Petitioner neither acknowledged that he understood the warnings nor affirmatively indicated his intention to waive them. ***Id***. In response, Petitioner gave an uncoerced statement, stating "I just want you to know that you guys have it all wrong. I did not kidnap her. She hit me in the head. That is all I remember". ***Notes of Testimony*** ("N.T."), Trial, May 6, 2015, Vol III at 123. Following this statement, the police requested that Petitioner sign a written ***Miranda*** waiver form. ***Id***. At 20. Petitioner then stated that he should probably talk to an attorney. The police then stopped the interview. From this uncontroverted evidence, the following conclusions may be drawn:

1. Police properly administered the ***Miranda*** warnings to Petitioner;

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

2. Police did not receive from Petitioner an express invocation of the right to counsel or to silence; and

3. Petitioner's spontaneous statement after being read his Miranda rights was uncoerced.

The Pennsylvania Supreme Court properly held that Petitioner had knowingly and intelligently waived his right to silence and right to counsel when he made the spontaneous statement. ***Id.*** At 48. That court found that Petitioner implicitly waived his rights under ***Miranda***. ***Id.***, ***See North Carolina v. Butler***, 441 U.S. 369 (1979) (No *per se* rule that an express waiver of ***Miranda*** is required and that waiver must be determined on particular facts and circumstances of the case). In so holding, the Pennsylvania Court noted that nothing in Appellant's demeanor or actions indicated that he was incapable of understanding the rights which the police read to him. ***Id.*** The court also found that his later invocation of his right to counsel indicated that he knew how to invoke a right under ***Miranda*** ("I think I should talk to an attorney"). Since he did not expressly invoke his rights prior to giving a statement he must have consented to waiving that right with his unsolicited statement. It bears repeating that there has never been any allegation of coercion or duress which prompted Petitioner's statement immediately following the administration of the ***Miranda*** warnings.[2]

Petitioner artfully argues that it was improper for the Pennsylvania Supreme Court to rely on Petitioner's later invocation of the right to counsel as probative of his knowledge and understanding of his rights under ***Miranda***. Counsel massages various ***Miranda*** and progeny cases to create a construct of constitutional infirmity which has no foundation in this court's precedent. Despite Petitioner's best efforts, there is direct authority to the contrary which

[2] Purpose of exclusionary rule is to deter future police misconduct. ***See, e.g., United States v. Leon,*** 468 U.S. 897, 916 (1984) ("[T]he exclusionary rule is designed to deter police misconduct . . . ."); ***Davis v. United States*** 131 S. Ct. 2419, 2426 (2011) ("The rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations.").

supports the decision to admit Petitioner's statement at trial. A prior decision of this court held that where a statement is given to police without the express invocation of ***Miranda*** warnings then that statement is admissible. In ***Berguis v. Thompkins***, 560 U.S. 370 (2010), defendant Thompkins was properly advised of his ***Miranda*** rights prior to interrogation by police with respect to a shooting death. ***Berghuis***, 560 U.S. at 375. Thompkins did not indicate that he wished to remain silent. ***Id.*** Thompkins remained quiet for the three hour interview. ***Id.*** Near the end of the interview, when asked if he prayed to God for forgiveness for the shooting, Thompkins responded "yes". ***Id.*** at 376. Thompkins sought to suppress the statement arguing that his silence for three hours impliedly invoked his right to silence. This court disagreed finding that a suspect's right to silence and counsel must be invoked "unambiguously". ***Id.*** at 381. The provision of an ambiguous or equivocal statement or no statement at all does not require the police to end the interrogation. ***Id.*** This is a bright-line rule which is at once eminently practical and useful. Police must have some basis on which to determine if a suspect has invoked his rights under ***Miranda***. To hold otherwise would invite endless argument over when a suspect has impliedly invoked his constitutional guarantees of rights to counsel or to maintain his silence. In this case it is clear that Petitioner did not expressly invoke his right to counsel or silence prior to making his statement. A spontaneous statement made by a suspect in response to properly administered ***Miranda*** warnings is not the functional equivalent of an express invocation for constitutional purposes. It is respectfully submitted that based upon the facts of this case and this court's precedent that no violation of the petitioner's constitutional rights in the admission of this statement at trial.

B. THE PENNSYLVANIA SUPREME COURT PROPERLY ANALYZED AND HELD THAT A CHANGE OF VENUE WAS NOT CONSTITUTIONALLY REQUIRED BASED UPON PRETRIAL PUBLICITY

Petitioner next alleges that the trial court's denial of his motion for a change of venue based upon pretrial publicity violated his right to due process and a fair trial. Petitioner filed a pretrial motion for a change of venue based upon the following alleged instances of prejudicial pretrial publicity:

> A February 1, 2012 article from the Canon-McMillan Patch that reported that Clemons had stated, "I'm sorry, I'm sorry, I'm sorry, she's dead";
>
> A KDKA news report that aired on January 12, 2012, during which Baldwin Borough Police Chief Michael Scott stated that "[t]here had been a problem with domestic violence between the two in the past." Chief Scott also noted that Clemons had a criminal history, had previously possessed weapons, and had fought with police;
>
> A January 13, 2012 KDKA news report in which Pennsylvania State Police Trooper Joseph Christy was quoted as stating, "[t]here is a possibility that the young lady was abducted by him and or just with him; and obviously, now that she has been found deceased, you can draw your own conclusion;"
>
> The existence and public activism of "Karissa's Army," "a group dedicated to domestic violence reform in memory of Ms. Kunco";
>
> A petition to reform Pennsylvania's domestic violence laws in Kunco's memory; and
>
> A website and online forum maintained by "National Blackfoot Soldier [sic]."

Clemons, No. 738 CAP at 14-15 (Pa. 1/23/19)

This motion denied by the trial court with leave to renew the motion again at the time of jury selection[3]. The trial court examined each of the instances and determined that they did not individually or collectively create a presumption requiring a change of venue for the trial. Petitioner's trial counsel did not subsequently raise the motion at jury selection. The

[3] The motion was not renewed at time of jury selection. The Commonwealth reserves the ability to argue that this alleged error may be subject to waiver for failure to renew the motion at time of jury selection.

Pennsylvania Supreme Court also critically re-examined each of the instances of alleged prejudicial pretrial publicity. That court concluded that these instances did not rise to a level creating a presumption that a fair jury could not be selected thus requiring a change in venue. ***Id.*** at 42-44. To resolve this question of this alleged constitutional error, it is helpful to review two cases where extensive publicity occurred and this Court determined that due process required a change of venue. That this case is easily distinguishable will then become obvious as the pretrial publicity here does not even remotely approach the level in the cited authority.

The interplay between due process and jury selection where extensive pretrial publicity occurs was the issue in ***Irvin v. Dowd***, 366 U.S. 717 (1961). In this murder case, this court found that criminal defendants are constitutionally entitled under due process of law to a jury of impartial, indifferent jurors and that the failure to afford this violates the minimal requirements of due process. ***Irvin***, 366 U.S. at 721-722. In ***Irvin***, the court found:

> [a} barrage of newspaper headlines, articles, cartoons and pictures was unleashed against him during the six or seven months preceding his trial. The motion further alleged that the newspapers in which the stories appeared were delivered regularly to approximately 95% of the dwellings in Gibson County and that, in addition, the Evansville radio and TV stations, which likewise blanketed that county, also carried extensive newscasts covering the same incidents. These stories revealed the details of his background, including a reference to crimes committed when a juvenile, his convictions for arson almost 20 years previously, for burglary and by a court-martial on AWOL charges during the war. He was accused of being a parole violator. The headlines announced his police line-up identification, that he faced a lie detector test, had been placed at the scene of the crime and that the six murders were solved but petitioner refused to confess. Finally, they announced his confession to the six murders and the fact of his indictment for four of them in Indiana. They reported petitioner's offer to plead guilty if promised a *726 99-year sentence, but also the determination, on the other hand, of the prosecutor to secure the death penalty, and that petitioner had confessed to 24 burglaries (the modus operandi of these robberies was compared to that of the murders and the similarity noted). One

> story dramatically relayed the promise of a sheriff to devote his life to securing petitioner's execution by the State of Kentucky, where petitioner is alleged to have committed one of the six murders, if Indiana failed to do so. Another characterized petitioner as remorseless and without conscience but also as having been found sane by a court-appointed panel of doctors. In many of the stories petitioner was described as the 'confessed slayer of six,' a parole violator and fraudulent-check artist. Petitioner's court-appointed counsel was quoted as having received 'much criticism over being Irvin's counsel' and it was pointed out, by way of excusing the attorney, that he would be subject to disbarment should he refuse to represent Irvin. On the day before the trial the newspapers carried the story that Irvin had orally admitted the murder.
> ***Irvin,*** 366 U.S. at 725-726.

Petitioner argues that a change of venue is required due to this case's similarity to ***Rideau v. Louisiana***, 373 U.S. 723 (1963) . ***Rideau***, like ***Irvin*** before it, found that extreme pretrial publicity can create a presumption that an unbiased jury cannot be selected and that due process requires a change of venue . Even a topical review of the extreme prejudicial facts in ***Rideau*** demonstrates that it is easily distinguishable from this case. In ***Rideau***, the local sheriff permitted a local television station to record the interrogation of Rideau, who was in custody and charged with robbery and murder. That interrogation lasted 20 minutes, and during that interrogation, Rideau confessed to the crimes. This recorded confession, in its entirety, was subsequently televised on three consecutive days on the county's only television station.

> This 'interview' lasted approximately 20 minutes. It consisted of interrogation by the sheriff and admissions by Rideau that he had perpetrated the bank robbery, kidnapping, and murder. Later the same day the filmed 'interview' was broadcast over a television station in Lake Charles, and some 24,000 people in the community saw and heard it on television. The sound film was again shown on television the next day to an estimated audience of 53,000 people. The following day the film was again broadcast by the same television station, and this time approximately 20,000 people saw and heard the 'interview' on their television sets. Calcasieu Parish has a population of approximately 150,000 people.
> ***Rideau v. Louisiana***, 373 U.S. 723, 724 (1963)(emphasis supplied).

Amazing as it may be under contemporary criminal standards that this broadcast even occurred, there is more. Three of the jurors who subsequently convicted Rideau actually saw one of the broadcasts. ***Id.*** These three jurors were permitted to remain on the jury. ***Id.*** It is apparent that these two cases involved much more extensive pretrial publicity that the publicity in Petitioner's case.

Petitioner argues that the Pennsylvania Supreme Court's indication that some of the publicity was "sensational, inflammatory and slanted toward defendant's guilt" inevitably constitutionally mandates a change of venue for due process. The Commonwealth respectfully disagrees with this position and asserts that it overstates the constitutional requirements of ***Rideau. Rideau*** does not mandate venue change based solely on the existence of publicity which is unfavorable. Frequently in important criminal cases there will be emotional publicity which will be unfavorable to the accused. This is common and to be expected. The ultimate question here is whether the Pennsylvania courts committed error in deciding that a presumption was created by pretrial publicity requiring a change of venue. As this court's precedent indicates, this is an extreme remedy to be utilized only in cases where the pretrial publicity is extensive, and it can be presumed that the jury pool is saturated to such a degree that an unbiased jury cannot be selected. ***See Skilling v. United States***, 130 S.Ct. 2896, 2916 (2010) ("Pretrial publicity, even pervasive, adverse publicity –does not inevitably lead to an unfair trial").

The decision of the Pennsylvania Supreme Court that due process does not require a change of venue is supported by two factors: geography and time. As to geography, the victim, her family, classmates and friends were located in Allegheny County. The comments made by the police chief occurred in Allegheny County. Washington County was the location of the crime scene and was, at one time, the location of defendant's residence. In today's digital media age,

any homicide or serious criminal matter is likely to receive a fair amount of social media attention. It can be expected, as occurred here, that social media groups advocating both for and against a criminal defendant would exist before trial. While it is important to factor this type of publicity into a decision of whether a presumption requiring a change of venue is necessary, this should not be the sole criterion. It is submitted that the number of people who even saw the pretrial publicity in comparison to the population of Washington County (207,298 in the 2010 Census) is not significant. It is also quite possible and likely that the majority were from outside of the jury pool of Washington County.

The passage of time from the pretrial publicity until jury selection also weighs against a change in venue. As noted by the trial court and the Pennsylvania Supreme Court, almost two and one half years passed between the complained activity and the start of the trial in May of 2015. ***Clemons,*** 739 CAP at 43. In today's digital information age and 24-hour news cycle that can be likened to an eternity. It cannot be overstated that how we as a society derive our information then and now has changed greatly. It is easy to contrast and distinguish 1961 Louisiana with one lone television station with our extensive media situation today. Washington County is located just south of the media market of Allegheny County which contains the City of Pittsburgh. There are multiple television stations and print media available. Jurors are exposed to this and multiple other visual and social media opportunities. The impact of isolated postings on social media on a jury pool would not equal the impact in the ***Rideau*** case.

There is no indication in the record as Petitioner suggests that the pretrial social media pressure continued and progressed as the trial date approached. An unbiased jury was able to be selected without bother; this is evidenced by Petitioner's trial counsel's non-renewal of the

motion for change. This supports an inference that whatever pre-trial publicity had existed had mostly abated by the time of trial due to the passage of time.

Any significant criminal case will receive some level of publicity in our digital age. If this court were to find that the pretrial publicity in this case created the presumption, then it is submitted that most important criminal cases would fall within the ambit of such a presumption. This would be an unfettered expansion of the rule of ***Irvin/ Rideau.*** In practice, this would create a *per se* rule constitutionally mandating a change of venue in every case in which pre-trial social media activity exists.

The Pennsylvania Supreme Court did not commit constitutional error in holding that a change of venue was not required.

CONCLUSION

Respectfully, the Petition should be denied.

Respectfully submitted,

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Dated: August 19, 2019