

1

No.

21-5635

IN THE

SUPREME COURT OF THE UNITED STATES

JAMAIL D. HAIRSTON — PETITIONER
(Your Name)

vs.

COMMONWEALTH — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

MASSACHUSETTS COURT OF APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jamaill D. Hairston

(Your Name)

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(City, State, Zip Code)

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(Phone Number)

ORIGINAL

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

1. Commonwealth v. Hairston 185 CR 004437-A, 004437-B
Judgment entered 3/14/19
2. Commonwealth v. Hairston 1983 CR 00048 Judgment Entered 2/16/21
3. Commonwealth v. Hairston FAR-28124 Judgment Entered 4/15/21

QUESTION(S) PRESENTED

DID THE APPEALS COURT ERR IN HOLDING THAT NO SUBSTANTIAL RISK OF A MISCARRIAGE OF JUSTICE RESULTED FROM OFFICER PAGAN'S ERRONEOUS TESTIMONY ABOUT HAIRSTON'S POST-MIRANDA INVOCATION OF HIS RIGHT TO REMAIN SILENT BY INAPPROPRIATELY RELYING ON EVIDENCE THAT PERTAINED TO CHARGES FOR WHICH HAIRSTON WAS FOUND NOT GUILTY

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
UNITED STATES SUPREME COURT:	
Doyle v. Ohio, 426 U.S. 610 (1976)	4
Federal Cases:	
Chapman v. United States, 547 F.2d 1240 (5th Cir. 1977)	8
United States v. Edwards, 576 F.2d 1152 (5th Cir. 1978)	8
United States v. Taylor, 985 F.2d 3 (1st Cir. 1993)	5
Williams v. Zahradnick, 632 F.2d 353 (4th Cir. 1980)	8
Massachusetts Cases:	
Abraham v. Woburn, 383 Mass. 724 (1981)	7
Commonwealth v. Chase, 70 Mass. App. Ct. 826 (2007)	4, 5
Commonwealth v. Connolly, 454 Mass. 379 (2001)	7
Commonwealth v. DePace, 433 Mass. 379 (2001)	5, 7
Commonwealth v. Egardo, 426 Mass. 48 (1997)	7
Commonwealth v. Ewing, 67 Mass. App. Ct. 531 (2006)	5
Commonwealth v. Isabelle, 444 Mass. 416 (2005)	7
Commonwealth v. Mahdi, 388 Mass. 679 (1983)	4, 5, 6
Commonwealth v. Peixoto, 430 Mass. 654 (2000)	5
Commonwealth v. Steed, 95 Mass. App. Ct. 463 (2019)	8
Commonwealth v. Sugrue, 34 Mass. App. Ct. 172 (1993)	7

OTHER

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	9
CONCLUSION.....	10

INDEX TO APPENDICES

APPENDIX A : Memorandum and Order pursuant to Rule 23 - 2020-P-0512

APPENDIX B: FAR-28124: Notice of FAR Denial

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

reported at 99 Mass. App. Ct. 1110 (2021) Rule 23; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the Supreme Judicial Court court appears at Appendix B to the petition and is

reported at 487 Mass. 1104 (2021); or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was 4/15/21.

- A copy of that decision appears at Appendix B.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS:

Fifth Amendment 4

Fourteenth Amendment 4

MASSACHUSETTS DECLARATION OF RIGHTS

Article 12 4

STATEMENT OF THE CASE

Officer Pagan testified in detail about his attempt to question Hairston about the sexual assault accusation and of the defendant's exercise of his constitutional right to be silent. See Fifth and Fourteenth Amendments, United States Constitution; article 12, Massachusetts Declaration of Rights. Pagan testified that after Reyes's report, he pulled Hairston from his work assignment, placed him in handcuffs, and brought him to the interrogation room with his supervisor. Hairston asked what was going on, and Pagan informed him it was a PREA investigation and advised Hairston of this Miranda rights. Pagan twice remarked that he deemed Hairston to be a "perpetrator" (Pagan first testified that once a report is made he will "go and get the perpetrator" to "lock him up." When defense counsel referred to Hairston as having been a "suspect" in Pagan's investigation Pagan corrected him, saying "Once he is the perpetrator? Is this what you're trying to ask?"), at this time. Pagan testified that Hairston then "refused to answer any questions." (The exchange was as follows: Q. AS part of the investigation, did you speak with other patients or inmates in that particular area? A. Yes, I did. Q. And who did you speak to other than Mr. Reyes? A. I also spoke with the Defendant, which he refused to answer any questions.).

As the Commonwealth conceded and the Appeals Court agreed, Officer Pagan's testimony that Hairston "refused to answer any questions" after being informed of his Miranda rights in a custodial interrogation was an improper comment on his invocation of his constitutional right to remain silent. See Commonwealth v. Mahdi, 388 Mass. 679, 694-698 (1983). "Assertion of the right to remain silent is highly protected under Federal and State constitutional law." Commonwealth v. Chase, 70 Mass. App. Ct. 826, 830-831 (2007). A defendant may not be impeached with evidence of his post-Miranda silence, nor may it be used as evidence of his guilt, without violating the due process clauses of the Fourteenth Amendment to the United States Constitution and of article 12 of the Massachusetts Declaration of Rights. See Doyle v. Ohio, 426 U.S. 610, 619 (1976). "At the base of the jurisprudence is the due process protection that a defendant, when in the hands of the police, should be able to invoke core constitutional rights without fear of making implied or adoptive

admissions' or demonstrating consciousness of guilt." Chase, 70 Mass. App. Ct. at 831 quoting Commonwealth v. Peixoto, 430 Mass. 654, 658-659 (2000); see also United States v. Taylor, 985 F.2d 3, 7 (1st cir) Cert. denied, 508 U.S. 944 (1993). Hairston's silence was impermissibly used as evidence of his guilt through the implication that where he "refused to answer any questions" despite being provided the opportunity to explain or to deny what he had been informed was a PREA allegation indicated a consciousness of guilt. See Commonwealth v. DePace, 433 Mass 379, 382 (2001). As the Appeals Court agreed, with was error.

Where trial counsel did not object to the testimony, the Appeals Court reviewed the error to determine if a substantail risk of miscarriage of justice resulted, whether there is a serious doubt if the result of the trial might have been different had the error not been made. See Commonwealth v. Ewing, 67 Mass App Ct 531, 544 (2006).

Massachusetts' appellate courts have applied the factors set forth in Commonwealth v. Mahdi, 388 Mass. 679 (1983), to determine whether an unpreserved Doyle error created a substantial rist of a miscarriage of justice, including (1) the relationship between the evidence and the premise of the defense; (2) who introduced the issue at trial; (3) the weight or quantum of evidence of guilt; (4) the frequency of the reference; and (5) the availability or effect of curative instructions. See Ewing, 67 Mass App Ct at 544-545.

The defense at trial was that Reyes fabricated the allegations from whole cloth. Defense counsel cross-examined each witness about the numerous inconsistencies in Reyes's description of the alleged assaults and his possible motivation to use the accusations to his benefit. The video evidence offered by the Commonwealth not only failed to substantiate the allegations but often flatly contradicted them. The serious deficiencies in the Commonwealth's evidence are demonstrated by the verdicts. The court allowed a motion for required finding of not guilty on the charge of open and gross lewdness, entered acquittals on two counts of indecent assault and battery, and on the one remaining charge returned a verdict of guilty of a lesser included offense, striking the sexual component, showing that it did not credit the entirety of Reyes's testimony.

Despite the clear message in the required finding of not guilty, two acquittals, and reduced charge striking the sexual component, the Appeals Court nevertheless characterized the evidence of the defendant's guilt as "strong." To support this conclusion, the Court cited to several pieces of evidence that were irrelevant to the sole offense for which Hairston was convicted, count 2, which pertained to the allegation that Hairston reached into Reyes's room and touched or patted his buttocks. The Court cited for support the first complaint witness's testimony, although that pertained solely to the allegation that Hairston put his hands down Reyes's pants on June 18, count 4 of the indictments, for which the trial court's verdict was not guilty. It also cited to the evidence that Reyes had a bruise on his arm in support of its conclusion, despite Reyes's specific testimony that he sustained that bruise not during the touching or patting of his buttocks of count 2 but rather during the events comprising count 4 where he alleged Hairston pinned him to the ground. The court also cited favorably to Gaughan's testimony that he saw Hairston wrestling with someone in Reyes's room for its finding that the evidence on count 2 was "strong", although again Gaughan's claimed observations pertained to the allegations of count 4. Gaughan's testimony is of additionally questionable value where Officer Pagan checked the security video to corroborate his claim that he walked past and looked into the room during this event, but found no such footage of Gaughan in the vicinity at that time. None of this evidence relating to an allegation of conduct for which the court acquitted the defendant lends strength to the quantum of evidence against the defendant on count 2, the only conviction before the court on appeal.

Where the defense was innocence, the improper introduction of evidence that served no purpose other than to imply that Hairston harbored a consciousness of guilt and had something to hide by refusing to answer the questions of Officer Pagan and his supervising officer was a "strike at the jugular" of the defense. See Mahdi, 388 Mass. at 696.

The evidence was elicited by the prosecution on direct examination where the prosecutor made the broad inquiry asking which inmates

aside from Reyes Officer Pagan spoke to in his investigation. Although Officer Pagan's reference to Hairston's refusal to answer his questions was singular, it necessitated defense counsel's revisiting of the topic on cross-examination to establish the circumstances of the encounter to show that it was a custodial interrogation to which the defendant had a constitutional right to remain silent. Contrast Commonwealth v. Isabelle, 444 Mass. 416, 418-422 (2005) (one reference to defendant's request for her attorney elicited by prosecutor, which was struck from the record and jury instructed to disregard the testimony).

Defense counsel neither objected to the improper testimony nor moved to strike it. See Commonwealth v. Egardo, 426 Mass. 48, 53 (1997) (ineffective assistance of counsel to fail to object to Commonwealth's use of defendant's post-arrest silence against him).

The presumption that a judge in a jury-waive trial is presumed to have correctly instructed himself on the law is inapplicable here where defense counsel made no objection nor a request that the problematic evidence be considered in a certain manner or limit its scope. See e.g. Commonwealth v. Sugrue, 34 Mass App Ct 172, 174 (1993) (reversing conviction from jury-waived trial upon finding trial judge's assurances of limited consideration of improper fresh complaint evidence "insufficient to ameliorate the risk that his decision may have been affected by this improper evidence"). "The purpose of requiring an objection is to afford the trial judge an opportunity to act promptly to remove from the [fact finder's] consideration evidence which has not place in the trial." Abraham v. Woburn, 383 Mass. 724, 726 n.1 (1981). Without an objection, the court did not consider a curative instruction. See DePace, 433 Mass at 385 ("Because there was not curative instruction, the jury were permitted to draw an inference of guilt from the defendant's exercise of his right to counsel, which stood out as the only 'inculpatory' statement he made after the killing). Contrast Connolly, 454 Mass. at 828-829 (judge immediately and forcefully instructed the jury that they could not consider the defendant's exercise of his right to remain silent and counsel acquiesced to the instruction given). "If a timely objection is not made, the evidence is properly admitted,

and the fact finder is entitled to give it such probative effect as it deems appropriate." Commonwealth v. Steed, 95 Mass App Ct. 463, 469 (2019).

"The nature of a Doyle error is so egregious that reversal is the norm, not the exception." Mahdi, 388 Mass. at 698, citing Williams v. Zahradnick, 632 F.2d, 363 (4th Cir. 1980); United States v. Edwards, 576 F.2d 1152, 1155 (5th Cir. 1978); Chapman v. United States, 547 F.2d 1240, 1250 (5th Cir. 1977). The error created a substantial risk of a miscarriage of justice where there is a serious doubt whether the result of the trial might have been different had the error not been made.

REASONS FOR GRANTING THE PETITION

A Writ of Certiorari is appropriate where the Appeals Court agreed that Officer Pagan's Testimony that Hairston "refused to answer any questions" after being informed of his Miranda Rights was an improper comment on the defendant's invocation of his federal and state constitutional rights to remain silent, yet it failed to acknowledge that errors of this type are considered so egregious that reversal is the norm rather than the exception. The Appeals Court held that no substantial risk of miscarriage of justice resulted from the error by declarraing that "the evidence of guilt was strong" based on its reliance on evidence pertinent to indictments on which the trial judge acting as fact-finder in a bench trial returned verdicts of not guilty.

CONCLUSION

The petition for a writ of certiorari should be granted.

Jamail Hairston
Respectfully submitted,

Jamail Hairston

Date: July 7, 2021