AUG 20 2007

No. 07-16

IN THE

Supreme Court of the United States

NEW YORK,

Petitioner,

v.

WILLIAM P. HAVRISH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where a person is compelled, under pain of prosecution for criminal contempt of court,[1] by an order of protection issued by a local criminal court, to produce "any and all firearms,"[2] and to surrender those firearms to the police, and, in obedience to that specific order, a person surrenders an unlicensed revolver to the police, which neither the police nor the court had any knowledge of, may the revolver, which had never been involved in any other crime or offense, and which was not involved in the criminal proceeding in which the order of protection was issued, be used against him as evidence on the trial of a new criminal prosecution for unlawful possession of a weapon, a class "A" misdemeanor in violation of New York Penal Law § 265.01, based on the person's possession of the revolver surrendered to the police in compliance with the order of protection?

2. Under the same circumstances, may the government use statements made by the possessor of the revolver to the police while he was in the process of surrendering the revolver to them, pursuant to the order of protection, when the statements were made after he had been arraigned in said local criminal court on unrelated criminal charges, and his right to counsel had attached in an unrelated criminal action, and where he was not given any of the warnings required by *Miranda* prior to his statements, as evidence against him at his trial for criminal possession of a weapon?

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1. See New York Judiciary Law, Article 19, and New York Penal Law § 215.50 (3).

2. "Firearm" is defined under New York law as, *inter alia*, "... any pistol or revolver." (New York Penal Law § 265.00 [3][a].)

3. Respondent's arguments concerning the same circumstances under the Fourth and Fourteenth Amendments to the United States Constitution, and under Article I, sections 6 and 12 of the Constitution of the State of New York were not addressed by the New York Court of Appeals and are not addressed in the petition for certiorari. They are not, apparently, before this Court.

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OPINIONS BELOW

The opinion of the New York State Court of Appeals appears in the appendix to the petition filed in this court at p. 1a. The opinion is published at 8 NY3d 389, 866 N.E.2d 1009, and 834 N.Y.S.2d 681(2007). The opinion, as reproduced in the petitioner's appendix, contains several typographical errors which do not, on the whole, significantly detract from or adversely affect the sense or meaning of the opinion.

The opinion of the Intermediate Appellate Court, which was reversed by the Court of Appeals, appears in the appendix to the petition at page 11a. It is unpublished.

The opinion of the Local Criminal Court is contained in the order dated February 8, 2006 which granted respondent's motion to suppress the revolver he was accused of possessing. It dismissed the accusatory instrument filed against him. The order was not included in the petitioner's appendix. It is unpublished. It appears in the respondent's appendix attached hereto at page RA 3. This order was a part of the record on appeal in the New York Court of Appeals.

Further explanation of the decision upon which the Local Criminal Court based its order dated February 8, 2006 is found in his "Return on Appeal" dated March 24, 2006 and filed in Intermediate Appellate Court in connection with the petitioner's appeal from that order. This Return was not included in the petitioner's appendix. It is unpublished. It appears in the respondent's appendix attached hereto at page RA 7. This Return was a part of the record on appeal in the New York Court of Appeals.

COUNTERSTATEMENT OF THE CASE

1. Under "Questions Presented for Review" petitioner refers to an "illegal handgun." The handgun which respondent was accused of possessing was a Ruger© single action revolver. It was not a submachine gun or machine pistol such as might be employed by terrorists or revolutionaries, or a "sawed off" shotgun such as might be employed by gangsters. That type of weapon would certainly be illegal *per se*. The revolver which respondent was accused of possessing was primarily intended for recreational target shooting and/or hunting. Petitioner is apparently trying to put some "spin" on the facts to make respondent look like an inherently evil person because of the type of gun which he was accused of possessing. There is nothing in the record to support such a characterization.

Having said that, however, it must also be noted that, under New York Law, mere *possession* of any handgun is, in fact, unlawful *per se*. New York Penal Law, Title P, Article 265, § 265.01 provides that: "A person is guilty of criminal possession of a weapon in the fourth degree when: (1) He possesses any *firearm* . . . . (Emphasis added.).[3] The statute defining the offense makes no distinction between licensed and unlicensed, or between registered and unregistered, firearms.[4] Thus, simply by the act of obeying the order of protection and delivering the pistol to the police, the respondent was compelled to involuntarily provide testimonial evidence incriminating himself.

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3. Note again that "*Firearm*" is defined as, *inter alia*, ". . . any pistol or revolver." (NYPL § 265.00 [3][a].)

4. New York Penal Law, Title W, Article 400, §§ 400.00 – 400.10, deals with licenses which will render otherwise illegal possession legal for those who hold such licenses under certain circumstances.

2. Petitioner, under the "Facts" portion of the "Statement of the Case" section of the petition, alleges that respondent had been arrested and charged with Burglary and Kidnaping. While that is literally true, petitioner is aware and yet has failed to mention that both of those charges had been dismissed before this case was argued in the New York Court of Appeals.

3. Petitioner, under the same section of the petition, claims that respondent's ex-wife told the police that respondent did not have a license for the handgun he was accused of possessing. While this may also be literally true, examination of the record will explain why the New York Court of Appeals referred to this statement as equivocal. (See petitioner's appendix page 2a.) It is equally true that the police would have had no reason to contact respondent's ex-wife but for the involuntary admissions he was compelled to make to them. (*Id.* at 9a)

4. Petitioner, under the same section of the petition, claims that respondent made an inculpatory statement to Deputy Joseph Andreno, while Deputy Andreno was writing out a receipt for the handgun being seized. The propriety, or lack thereof, of the continued interaction between the police and the respondent, after the respondent's right to counsel had attached, and without any of the warnings required by this court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), was raised by the respondent in all of the courts below, but none of them apparently found it necessary to specifically address the issue in their determinations.

5. Petitioner, under the same section of the petition, recites that respondent moved in the Local Criminal Court, after his arraignment, ". . . to dismiss the case claiming that his fifth Amendment right against self-incrimination had been violated because he was forced to turn over the illegal handgun and that his Fourth Amendment rights had been violated."

(Petition, p. 3) The petition also states, in the portion of the section under "Statement of the Case" denominated "Procedural History," that: On January 25, 2006, the Jefferson Town Court (HAIT, J.)[5] granted the defendant's motion to dismiss on all these grounds and also suppressed the evidence consisting of the handgun and statements made to police." (Petition, p. 3)

Petitioner erred in describing the substantive and procedural issues involved. Respondent did not move to dismiss the "case" against him because his rights had been violated. He moved to suppress the handgun and the statements he made to the police pursuant to section 710.20 of the New York Criminal Procedure Law upon the grounds that such evidence had been obtained: (1) in violation of his rights under the Fourth Amendment to the United States Constitution and Article I, section 12 of the New York State Constitution, and (2) in violation of his rights under the Fifth Amendment to the United States Constitution and Article I, section 6 of the New York State Constitution. He also argued that he had been denied due process of law as required by the Fourteenth Amendment to the United States Constitution, and that, if the evidence which he challenged were suppressed, then the accusatory instrument should be dismissed because the government could produce no other evidence of his guilt.

In his order suppressing the revolver and the respondent's statements concerning it, the Local Criminal Court accepted all of these arguments. He (JUDGE HAIT) ruled that the manner in which the police obtained evidence of the respondent's guilt was in violation of his right to due process of law, and that the respondent was required to provide self-incriminatory evidence against himself in violation of his rights under the Fifth Amendment to the United States Constitution and under Article

5. Elsewhere referred to a the Local Criminal Court.

I, section 6 of the Constitution of the State of New York, and that the evidence seized from the respondent, *i.e.* the weapon which he was accused of possessing, must be suppressed, along with the statements allegedly made to the police by the respondent in connection with that weapon,

He also ruled that the weapon which the respondent was accused of possessing must be suppressed under the Fourth Amendment to the United States Constitution and under Article 1, section 6 of the New York State Constitution, and that, since the people had made no offer of proof with respect to any other evidence of the respondent's guilt, the accusatory instrument filed against him must be dismissed because, after the evidence which had been unconstitutionally obtained was properly suppressed, the prosecution could not proceed since there was no evidence of the respondent's guilt which the people could produce at trial which would result in the presentment of a *prima facie* case sufficient to go to a jury. (RA 4)

6. Petitioner, under the same section of the petition, recites that respondent was granted leave to appeal to the New York Court of Appeals which, ". . . heard oral argument on the issue of whether Havrish's surrender of the handgun was privileged under the Fifth Amendment." (Petition p. 3) Respondent did not limit his argument in the New York Court of Appeals to Fifth Amendment issues. The "Questions Presented" section of respondent's brief to that court stated that issues were presented under both the New York State and the Federal Constitutions (RA 11).

The respondent has never, therefore, waived or abandoned his claims under the Fourth and Fourteenth Amendments to the United States Constitution, or under Article I, sections 6 and 12 of the New York State Constitution, even though the New York Court of Appeals chose to base its decision only on the Fifth Amendment to the United States Constitution.

REASONS FOR DENYING THE PETITION

Procedural History:

The respondent was the subject of an order of protection, in an entirely unrelated case, issued by the a Town Court (HON. JOSEPH SKOVIRA) in Delaware County which required him to surrender all of his weapons and firearms to the police. One of the firearms which he surrendered was a revolver for which he had no license.[6] Upon surrendering this handgun, respondent was arrested for Criminal Possession of a Weapon in the Fourth Degree (New York Penal Law § 265.01 [1]).

He moved to suppress the handgun and all statements made by him to the police in connection with it on the grounds that this rights to due process, to remain silent, and to be free from unreasonable searches and seizures were violated under both the United States Constitution and the Constitution of the State of New York. The Local Criminal Court granted his motion, suppressed the revolver and all of respondent's statements concerning it, and dismissed the accusatory instrument. The people appealed, and the Intermediate Appellate Court reversed the Local Criminal Court, reinstated the accusatory instrument, and remanded the matter to the Local Criminal Court for further proceedings. Defendant appealed to the New York State Court of Appeals from that Order. The New York Court of Appeals reversed the order of the Intermediate Appellate Court, suppressed the revolver and all of respondent's statements concerning it, and dismissed the accusatory instrument for lack

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6. This unlicensed firearm was not alleged to have been used in or in any way related to the charges in Delhi at all. The Order of Protection is relevant only because it compelled the respondent to surrender "all" of his firearms, and that direction included the revolver which formed the basis for the charge of unlawful possession which is the subject of this petition.

of evidence. The people of the State of New York now seek a writ of certiorari from this Court to the New York State Court of Appeals to determine whether the respondent's act of surrendering the revolver to the police under the compulsion of a court order requiring him to do so was testimonial, and therefore in violation of his rights under the Fifth Amendment to the United States Constitution under the "act of delivery" doctrine. Respondent's arguments under the Fourth and Fourteenth Amendments to the United States Constitution, and under Article I, sections 6 and 12, of the New York State Constitution, which were accepted by the Local Criminal Court, were not addressed by the New York State Court of Appeals.

***Statement of Facts*:**

On or about August 7, 2006, respondent was arrested in connection with unrelated charges in Delaware County, all of which have since been dismissed.[7] Upon his arraignment, an order of protection was issued which required, *inter alia*, that he surrender all firearms which he "owned or possessed" to the police. After his release on bail, he permitted deputies from the Delaware County Sheriff's department to accompany him to his home in Schoharie County, where he turned over all of his long guns (rifles and shotguns) to them in obedience to the order.

When the Delaware County Deputies accompanied respondent to his Schoharie County home, respondent told them that he had given a pistol to his former wife, a woman named Linda Havrish, and that he didn't know exactly where it was then located. Since, technically, respondent still "owned" that handgun, he was required by the order of protection to tell the police about it and assist them in taking possession of it.

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7. This entire case developed from a boyfriend/girlfriend relationship which ended badly. The respondent plead guilty to a single count of Criminal Trespass in full satisfaction of all charges.

The following morning a Delaware County Deputy contacted respondent's ex-wife. She described the pistol, said she did not have it, and first told the deputy that respondent had a pistol license, then said that he did not. A short time later, this Deputy says, his dispatcher contacted him and advised him that respondent had called to say that he had found the pistol. The Deputy called respondent and respondent told him that he could come to his residence to pick it up.

The Deputy said that, when he arrived at respondent's residence, he was shown to a small room "off the living room" where he "found" the pistol in a milk crate next to a cabinet, and that, while he was writing out a receipt for the pistol, respondent asked him whether he would need a permit to get the pistol back. The Deputy did not reply, but then contacted the Schoharie County Sheriff's Department and gave them the above information which was used as the basis for the present charge.

***Argument*:**

I

The best and most compelling reason for denying the Writ sought by the petitioner is that the New York State Court of Appeals correctly decided this case. This Court is, therefore, respectfully referred to JUDGE GRAFFEO'S decision, which appears at pages 1a through 10a of the petitioner's appendix.

II

The only authority cited by the petitioner which was not discussed by the Courts below is *United States v. Patane*, 542 U.S. 630 (2007). The New York State Court of Appeals recognized this case in its opinion (5a).

In the *Patane* case, the police located and found the defendant's pistol because of his voluntary statements. In this case the police located and seized the respondent's revolver because of his involuntary and compelled statements.

MR. JUSTICE THOMAS, in the opening paragraph of the majority opinion in *Patane*, mentions the primary distinction, to wit:

> "In this case we must decide whether a failure to give a suspect the warnings prescribed by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), requires suppression of the physical fruits of the suspect's unwarned but *voluntary* statements. . . . . Because the *Miranda* rule protects against violations of the Self-Incrimination Clause, which, in turn, is not implicated by the introduction at trial of physical evidence resulting from *voluntary* statements, we answer the question presented in the negative."

(*Id.* at 542 U.S. 630, 633- 634; *Emphasis added.*)

Other parts of the *Patane*, supra, opinion reflect the same focus, *e.g.*, "The Self-Incrimination Clause . . . is not implicated by the admission into evidence of the physical fruit of a *voluntary* statement." (*Id.* at 542 U.S. 630, 637);" "The Clause cannot be violated by the introduction of nontestimonial evidence obtained as a result of *voluntary* statements." (*Id.* at 542 U.S. 630, 637); We have repeatedly explained that 'those subjected to coercive . . . interrogatories have an *automatic* protection from the use of their *involuntary* statements (or evidence derived form their statements) in any subsequent criminal trial." (*Id.* at 542 U.S. 630, 640); ". . . the Court requires the exclusion of the physical fruit of actually *coerced* statements . . . ." (*Id.* at 542 U.S. 630, 644; *Emphasis added in all quotes*).

Here there is no question that the respondents statements to the police in this case were not voluntary. The New York Court of Appeals specifically held that ". . . the element of state compulsion was unquestionably met. Defendant was ordered by a court to surrender his weapons, Had he failed to do so, he could have been prosecuted for criminal contempt." (4a) Obviously, the respondent was coerced into making statements to the police concerning the revolver, and as a result of those statements the police were led to and able to seize it.

Patane should be distinguished from this case on other grounds as well. The police in *Patane* already knew that the defendant had a pistol when they went to his home. The police in this case had no idea that the revolver even existed until the respondent was compelled to tell them about it.

The police in *Patane* went to the defendant's home to arrest him for violating an order of protection. The police in this case went to the respondent's home to seize his firearms pursuant to an order of protection, but then went back to seize the revolver only because respondent was compelled to tell them he had found it.

The statements taken from the defendant in *Patane* were taken after the police had attempted to give the defendant his *Miranda* warnings and he had refused to listen to them. In this case there was no attempt made to warn the respondent that he had the right to remain silent and the right to refrain from making any statements to the police about the unlicensed revolver.

III

The only evidence in the record concerning how the police learned about respondent's revolver came from Delaware County Deputy Sheriff Joseph Andreno's supporting deposition provided to the Schoharie County Sheriff's Department.

Accepting his account as completely accurate for the purposes of this petition, there are several remarkable aspects to it. First, he says that he was investigating respondent's possible possession of a hand gun: ". . . in reference to an ongoing investigation where Havrish ha[d] been charged with Domestic Assault third degree, Burglary in the second degree and Kidnaping in the second degree."

Deputy Andreno indicated that respondent had been arraigned on those charges and released on bail. It is clear, therefore, that Deputy Andreno knew full well that respondent had already been arrested and arraigned, and that his right to counsel had already attached (see, e.g., *People v. Mitchell*, 61 NY2d 580 [1984].) Deputy Andreno's continued interaction with the respondent under these circumstances should therefore be deemed questionable, at best, under both state and Federal law.

Second, Deputy Andreno's supporting deposition conclusively refuted the Intermediate Appellate Court's finding that, ". . . since both [respondent] and his wife both independently and voluntarily advised the police of the handgun's existence and its location, the police would have inevitable discovered it anyway." (12a) Deputy Andreno's deposition proves that the police has no knowledge that the revolver even existed until the respondent was forced to tell them about it by the order of protection. Deputy Andreno's deposition also proves that he only contacted respondent's ex-wife because respondent had been forced to tell the police, after he had been arraigned and served with the order of protection, that he thought she had the revolver. The record suggests no other reason for Deputy Andreno to contact her at all.[8] It is illogical and contrary to the facts in the record to

8. Respondent's ex-wife was in no way involved in the alleged domestic violence incident referred to in Deputy Andreno's deposition.

speculate that the police would have inevitably discovered the pistol even without the respondent's uncounseled statements.[9]

JUDGE BARTLETT, of the Intermediate Appellate Court, reasoned that: ". . . to the extent, if any, that defendant was compelled to turn over his handgun, it is now well settled that 'a person can be forced to produce real or physical evidence' without violating his or her 5th amendment rights." (12a) He relied on *People v. Berg*, 92 NY2d 701, 704 (1999), which relied, in turn on *Schmerber v. California*, 384 U.S. 757, 764 (1966). He also relied upon *People v. Slavin*, 1 NY3d 392 (2004), cert. denied 543 US 818. He further reasoned, citing *Hubbell*, supra,, 530 U.S. 27, 34-35 (2000), that: ". . . there is a significant difference between the use of compulsion to extort communications from a defendant and compelling a person to engage in conduct that may be incriminating." (12a-13a)

All of those cases are simply inapposite as support for the points JUDGE BARTLETT decided. None deal with the present situation where the government orders a person to deliver something to the police, the possession of which will, in and of itself, subject him or her to arrest and prosecution. The New York Court of Appeals properly rejected JUDGE BARTLETT'S arguments. It held that the *delivery* of the revolver, compelled as it was by a court order, was testimonial, even if the revolver, itself, was not.

The order of protection made no exception or allowance for, and drew no distinction between, lawfully and unlawfully possessed weapons. As the New York Court of Appeals held, "Here, the element of state compulsion was unquestionably met. Defendant was ordered by a court to surrender his weapons.

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9. The people did not make this argument either to the Local Criminal Court or to the Intermediate Appellate Court. JUDGE BARTLETT, of the Intermediate Appellate Court, interjected it himself.

Had he failed to do so, he could have been prosecuted for criminal contempt." (4a) "The order compelling defendant to turn over his weapons was issued in the course of a felony prosecution without a grant of immunity or amnesty." (9a)

If the presence of firearms may escalate or complicate a domestic disturbance, so might the presence of recreational drugs. In another case one might then imagine that a Judge could order someone to turn all of his or her narcotic and hallucinogenic drugs over to the police, without limiting the scope of the order to those drugs for which he or she had a valid prescription. Under that scenario the possessor of the recreational drugs would face the same conundrum as did the respondent in this case. Obey the order and be prosecuted for criminal possession of narcotics, or disobey it and be prosecuted for criminal contempt of court. It is irrational to require a person to commit a crime to avoid prosecution for a crime. The law should discourage, not encourage, criminal behavior.[10]

Nevertheless, under circumstances such as these, the mere delivery of the thing which the order requires the delivery of is obviously testimonial. To paraphrase this court, "Compliance with the order tacitly concedes the existence of the thing demanded and its possession and control by the person to whom

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10. As observed by several members of the New York Court of Appeals during oral argument, although not mentioned in their opinion, public policy might be better served if the objects of protection orders knew that they would not be prosecuted if they obeyed those orders, rather than having guns hidden or secreted away in order to avoid such prosecution. The first alternative takes the guns out of circulation and neutralizes any threat which they might have posed to the person(s) in whose favor the order of protection was issued. The second alternative defeats the whole purpose for which the order of protection was issued in the first place. It leaves the guns in the possession of the persons whom the issuing court believed might utilize them harmfully.

the order is directed. The elements of compulsion are clearly present." (*United States v. Doe*, 465 U.S. 605, 613 [1984].)[11]

In one of the very cases cited by, the Intermediate Appellate Court, *Hubbell*, supra, 530 U.S. 27 (2000), MR. JUSTICE STEVENS echoed the Court's decision in *Doe*, supra, by pointing out that it was clear that the very act of producing the thing which a court order requires be produced may have a ". . . compelled testimonial aspect. . . . We have held that "the act of production' itself may implicitly communicate 'statement of fact.'" (*Hubbell*, supra, 530 U.S. 27, 36 [2000].)" The New York Court of Appeals adopted this rational. (6a-7a)

MR. JUSTICE STEVENS also wrote that, ". . . It as only through respondent's truthful reply to the subpoena that the Government received the incriminating documents of which it made 'substantial use' . . . in the investigation that led to the indictment." (*Hubbell*, supra, at 42-43.) Likewise, in this case, it was only by respondent's truthful and earnest effort to comply with the order of protection that the police received the incriminating information and evidence which they used to charge him. By producing a handgun in compliance with the order of protection, therefore, the respondent was compelled to admit that the handgun existed, was in his possession or control, and was authentic (i.e., not a toy or non-firing replica).

The New York court of Appeals specifically held that, "Before [respondent] revealed that he has possessed a revolver, neither the court nor the police were aware that defendant owned a handgun. Furthermore, [respondent's] statements about the

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11. This case, and many of the other cases cited below, are addressed to the validity of subpoenas. There is no demonstrable difference between a subpoena and a court order under these circumstances. Both are processes by which a court compels people to produce things.

gun were integral to compliance with the directive in the order of protection." (8a)

In *Baltimore City Department of Social Services v. Bouknight*, 493 U.S. 549 (1990), Ms. JUSTICE O'CONNOR also recognized the principle at play in this situation, to wit: ". . . The Fifth Amendment's protection may nonetheless be implicated because the act of complying with the government's demand testifies to the existence, possession, or authenticity of the things produced." (*Baltimore City Department of Social Services*, supra, at p. 555.)

Justice O'Connor did state that the Amendment would not shield against the incrimination that may result from the contents or nature of the thing demanded (*Baltimore City Department of Social Services*, supra), but that statement was not made in connection with, and would not apply under, these facts and circumstances.

In *Baltimore City Department of Social Services*, supra, a woman, Ms. Bouknight, who had been granted custody of her daughter under specific conditions designed to protect the child was charged with contempt of court for refusing to produce the child in court as ordered. She claimed that compelling her to do so would violate her rights under the Fifth Amendment. There is no parallel between that case and this one. Having one's own daughter in one's custody, pursuant to an order issued by a court of competent jurisdiction, is not, in and of itself, evidence of any criminality.

Note, however, that the Court in *Baltimore City Department of Social Service* did say that: ". . . Bouknight cannot invoke the [Fifth Amendment] privilege to resist the order to produce [her child]." But " . . . The same custodial role that limited the ability to resist the production order may give rise to

corresponding limitations upon the direct and indirect use of that testimony." Because, ". . . In a broad range of contexts, the Fifth Amendment limits prosecutors' ability to use testimony that has been compelled." (*Baltimore City Department of Social Services*, supra, at p. 560.)

The issue in that case was, therefore, whether the mother could use the Fifth Amendment as a shield to block the court's power to compel her to produce her child, and this Court ruled that she could not. It did not reach the question of whether any information which the government might obtain as a result of her obedience to the court order could be used against her in a subsequent criminal prosecution, but it suggested the possibility that such use might be precluded by the Fifth Amendment.

The issue in this case in not whether the respondent could use the Fifth Amendment as a shield to block the court's power to compel him to surrender his revolver. He concedes that he could not. The issue in this case is the one which this court left unanswered in the *Bouknight* case. Once the respondent has surrendered his revolver to the police under compulsion of a court order, may the government use his production of that revolver as evidence against him in a prosecution for criminally possessing that same revolver?

The New York Court of Appeals noted that this Court had determined that the "act of production" doctrine did not apply to Ms. Bouknight's circumstances ". . . because it could not be used to resist compliance with a civil regulatory regime constructed to effectuate governmental purposes unrelated to law enforcement." (6a) The New York Court of Appeals held that "regulatory regime" exception to the act of production doctrine was unpreserved for its review in this case because petitioner had waived it. (7a)

Nevertheless, the accusation laid against respondent was founded under the New York State Penal Law, not part of any civil regulatory scheme. It was directly related to law enforcement purposes, and even so, the New York Court of Appeals noted that this Court had indicated, in *dicta* that the Fifth Amendment protections are not ". . . necessarily unavailable to a person who complies with the regularity requirements . . . ." (7a)

Possession of one's own blood is not, in and of itself, criminal, and the government may require a sample of one's blood under appropriate circumstances. (*Schmerber*, supra, 384 U.S. 757 [1966].) Displaying tattoos on one's body is not, in and of itself, criminal, and the government may require that one allow the tattoos to be photographed for display to a jury (*People v. Slavin*, supra.)

Possessing a distinctive voice, personal appearance, or style of handwriting is not criminal, and the government may require one to speak nonincriminatory words, to display one's physical appearance, or to provide a writing sample. (*United States v. Wade*, 388 U.S. 218 [1967]; *Holt v. United States*, 218 U.S. 245 [1910]; *Gilbert v. California*, 388 U.S. 266 [1967].)

Possessing a handgun is, in and of itself, criminal in the State of New York. New York State Penal Law § 265.01 provides that a person is guilty of criminal possession of a weapon in the fourth degree when he possesses any firearm (*i.e.*, any pistol or revolver). The statute defining the offense makes no distinction between licensed and unlicensed, or between registered and unregistered, firearms. Thus, simply by the act of obeying the order of protection and delivering the pistol to the police, the respondent was compelled to offer testimonial evidence incriminating himself.

As the New York Court of Appeals observed,

> "Indeed, by the time defendant produced the weapon, he had provided the police with proof of virtually every element of the offense of criminal possession of a weapon. Given that the act of production involved the commission of a crime in the presence of the police, it can hardly be argued that the conduct was unlikely to result in criminal prosecution."

(10a)

Clearly then, the mere act of producing the handgun pursuant to the order of protection had a communicative aspect of its own, completely separate from the nature of the thing produced. Respondent's compliance with the order tacitly conceded that the gun existed and that it was within his possession and control. (*Fisher v. United States*, 425 U.S. 391, 410 [1976]; *United States v. Fox*, 721 F.3d 32, 36 [Second Cir. 1983].)

In support of his motion to suppress, respondent alleged that his actions in disclosing the existence and location of the revolver of which he was accused of unlawfully possessing, and the statements he made to the police with respect to that revolver, were not voluntary, but were compelled, under penalty of punishment for criminal contempt of court, by the order of protection with which he had been served. (RA 1)

In his order suppressing the weapon and respondent's statements, JUDGE HAIT specifically found that,

> ". . . the manner in which the police obtained evidence of the defendant's guilt was in violation of his right to due process of law, and that the defendant was required to provide self-incriminating evidence against himself

> in violation of his rights under the Fifth Amendment to the United States Constitution and under Article I, section 6 of the Constitution of the State of New York, and that the evidence seized from the defendant, i.e. the weapon which he is accused of possessing, must be suppressed, along with the statements allegedly made to the police by the defendant in connection with that weapon"

and that the people had ". . . made no offer of proof with respect to any other evidence of the defendant's guilt not obtained in violation of his rights or tainted on account of such violation . . . ." (RA 5)

IV

It is unconstitutional for the government to place an individual in a position where he has no choice but to commit a criminal offense or to admit to a different criminal offense, and to then prosecute him for committing one or the other of such offenses. That is just what happened in this case. Respondent was offered a "Hobson's Choice" in which every option amounted to "go straight to jail, do not pass go."

This Court recognized the intolerable nature of such a situation long ago in the case of *Marchetti v. United States*, 390 U.S. 39 (1968).[12] Under the Federal Law, at that time, an excise tax was imposed on all persons engaged in the business of accepting wagers. Such persons were required pay an "occupational tax," and to register each year, and to obtain "revenue stamps" denoting his or her registration and the payment of his or her "occupational tax."

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12. See also, *United States v. Grosso*, 390 U.S. 62 (1968) which held, *inter alia*, that reversal of any conviction obtained in violation of the Fifth Amendment principles enunciated in *Marchetti* would be "inevitable." (*Id.* at 71.)

The taxing authority would not accept payment of either the "occupational tax" or the excise tax unless the gambler had submitted an Internal Revenue Service form disclosing his or her residence and business addresses, acknowledging that he or she was engaged in the business of accepting wagers, and listing the names and addresses of all of his or her employees. The law also included specific record keeping requirements and permitted inspection of those records.

Each Internal Revenue office was required to maintain a list of all persons who had paid the "occupational tax" for public inspection, and to provide certified copies of the list to any state or local prosecutor upon request. Registration or payment of the wagering taxes specifically did not exempt any person from prosecution under any Federal, State, or Local law regulating or prohibiting any taxable activity.

It became common for State and Local law enforcement and prosecutorial officials to use the Federal records compiled under the law to locate and identify persons engaged in gambling activities which were criminal under their laws, and even to use defendants' registration and tax payments as proof that they were engaged in the business of unlawful gambling.

Even though the petitioner in *Marchetti*, supra, was actually a criminal under the Laws of the State in which he conducted his business of accepting wagers, and even though he knew that his activities were criminal under those laws, the Supreme Court held that because he ". . . was required, on pain of criminal prosecution, to provide information which he might reasonably suppose would by available to prosecuting authorities, and which would surely prove a significant 'link in a chain' of evidence tending to establish his guilt" (*Marchetti v. United States*, supra, at p. 48), his assertion of his privilege against self-incrimination under the Fifth Amendment to the United States Constitution

was a proper defense which ". . . should have sufficed to prevent his conviction" (*Marchetti*, supra, at p.49).[13]

In *Kastigar v. United States*, 406 U.S. 441 (1972), this Court ruled that:

> "The privilege [against compulsory self-incrimination] reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty. It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the [defendant] reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used. This Court has been zealous to safeguard the values which underlie the privilege."

(*Kastigar*, supra, at 445, 446; footnotes omitted.)

The *Kastigar* Court reaffirmed the constitutional principal that once a defendant has been compelled by the government to give testimony or to produce evidence which could either incriminate himself or herself, or lead to other evidence which might do so, the authorities must prove that their evidence is not tainted by establishing that they had a legitimate, independent source from which they obtained it. (*Kastigar*, supra, at 461.)

It would be impossible for the prosecution to have met this burden in this case. The only evidence they had came from statements made to law enforcement officers and evidence

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13. See *United States v. United States Coin and Currency*, 401 US 715 (1971) in which the Court held that the Fifth Amendment principles laid down in *Marchetti*, supra, were applicable to forfeiture proceedings commenced by the government as well as to actual criminal proceedings.

delivered to them under the compulsion of a criminal court order of protection. There can be no independent or legitimate source from which this evidence was obtained, and the New York Court of Appeals so held.

The people have cited *United States v. Kordel*, 397 U.S. 1 (1970) in the courts below, as a "similar case" to this one in which this Court had ruled that, ". . . without question [the defendant] could have invoked his Fifth Amendment privilege against self-incrimination" (*Kordel*, supra, at 9.), arguing that respondent had the same opportunity in this case, but failed to invoke it. Interestingly, the people did not then dispute the fact that Mr. Havrish did have a Fifth Amendment right. They would have it seem, apparently, that he waived his right by failing to assert it. JUDGE HAIT, of the Local Criminal Court, rejected this argument. JUDGE BARTLETT, of the Intermediate Appellate Court, did not address it, and the New York Court of Appeals held that the question had not been preserved for its review. (3a)

The defense argued then, and argues now, however, that *Kordel,* supra, simply does not apply in this case, either on the law or on its facts, because the respondent in that case was not actually required to respond to the government's interrogatories at all. They were addressed to a corporation with which the respondent was associated. As this Court said, the ". . . interrogatories obligated the corporation to 'appoint an agent who could, without fear of self-incrimination, furnish such requested information as was available to the corporation.'" (*Kordel*, supra, at p. 8.)

In this case, the respondent had no such opportunity to avoid incriminating himself by appointing an agent to perform the task which he had been ordered to perform. He was the only person who had been ordered to turn over any and all firearms in his possession or under his control to the police. He was the only person who could comply with that order.

In *Kordel*, supra, the respondent had a fair opportunity to assert his privilege. If the government were dissatisfied with the answers the corporation provided, they could then have insisted on answers from the respondent, himself. That was the time for him to assert the privilege (the corporation, of course, had none). If the government still insisted on answers from the respondent, in person, they would have had to take him before a judge or magistrate, where he could continue to claim his privilege. If that judge or magistrate then ordered the respondent to respond to the government's questions, despite his Fifth Amendment right to be free from compulsory self-incrimination, the respondent would have, upon complying with the court's or magistrate's instructions, received immunity from prosecution as a matter of law.

Contrast and compare the respondent's position in *Kordel*, supra, with respondent's position in this case. Mr. Havrish would have been arrested for contempt of court had he been found to have violated the order of protection by withholding the unlicensed gun from the police. He would have been taken to a judge or magistrate all right, but not for an opportunity to assert his privilege. He would have been arraigned on the new charge. Whether or not he could have successfully raised his Fifth Amendment privilege as a defense to the charge of criminal contempt is problematic.

The rule that: ". . . unless some attempt is made to secure a communication – written, oral or otherwise – upon which reliance is to be placed as involving [the accused's] consciousness of the facts and the operations of his mind in expressing it, the demand is not a testimonial one," clearly does apply to the communications which the respondent was compelled to make to the police in this case. The Fifth Amendment privilege extends to not only answers that would, in and of themselves, support a criminal conviction, but also

includes those which would furnish a link in the chain of evidence needed to prosecute the claimant for a crime, and "[c]ompelled testimony that communicates information that may 'lead to incriminating evidence' is privileged even if the information itself is not inculpatory." (*Hubbell*, supra, 530 U.S. 27, 38 [2000].) For this reason alone, the statements made by respondent to the police, after his arraignment on other charges, were properly suppressed.

This is not a case where the police observed the respondent's pistol from any place where they had a right to be, or where they saw it on his person, or on the seat of his car, or even where they discovered it during a lawful "stop and frisk." Even the respondent didn't know where the pistol was located. He thought his former wife had it. When she said she did not, he searched for and found it. But for his cooperation and the communication of the operation of his mind to the police, they would not have known about the pistol, they would not have found it, they would not have known that it was unlicenced or unregistered, and they could not have arrested him.

Respondent was conscious of the fact that there was a pistol which he had not given to the police. He was conscious that the order of protection required that he give it to them. The police had no reason to know that the pistol existed, much less where it was located, until the respondent told them about it. The operations of respondent's mind, clearly understanding and intending to comply with the terms of the order of protection, caused him to express the knowledge which he, and he alone, had at that moment, and required him to both inform the police as to the existence of the pistol, and, later, to deliver it to them. He was, in law and in fact, compelled to "speak his guilt" in the loudest and clearest way possible.

Furthermore, the idea that a person dealing with police officers in the context of a situation where a criminal prosecution is possible is expected to know his or her constitutional rights, and to be able to act in his or her best interest with respect to those rights, has long since been rejected. In 1966 this Court said, ". . . there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settlings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." (*Miranda*, supra, 384 U.S. 436, 467.)

Obviously, respondent's freedom of action was curtailed. He was ordered by a Court of competent jurisdiction to do something which he would not otherwise have had to do. He was compelled to allow police officers to come to his home and take away his personal property.

> "The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut [sic] fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time. . . . . The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used

> against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege."

(*Miranda*, supra, at 468-469.)

The people do not even pretend that respondent was given any such warnings, at all, by anyone, ever, concerning any right he might have had (if, indeed, he ever did have one) to refuse to obey the order of protection by not turning over one of his guns to the police.

The people have relied heavily upon *Schmerber*, supra, 384 U.S. 757 (1966), which dealt with whether the seizure of a sample of an arrested person's blood, without his consent and over his clearly stated objections, in order to determine the alcohol level of that blood for use in a criminal prosecution for the equivalent of Driving While Intoxicated, was a violation of the person's rights under the Fourteenth Amendment (due process), the Fourth Amendment (searches and seizures), the Fifth Amendment (self-incrimination), or the Sixth Amendment (counsel). (*Schmerber*, supra, at 759.) The Supreme Court ruled that it was not.

The Court also noted, however, that while the Fifth Amendment privilege against compulsory self-incrimination was applicable to state law prosecutions against defendants in state courts by virtue of the Fourteenth Amendment (*Schmerber*, supra, at pp.760-761), ". . . the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and . . . the withdrawal of blood and

use of the analysis in question [did] not violate involve compulsion to these ends." (*Schmerber*, supra, at p. 761.)

In explaining this result, the Supreme Court drew an important distinction, stating that, "It is clear that the protection of the privilege reached an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. . . . On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture" (*Schmerber*, supra, at pp. 763-764).

This distinction is simple enough to understand. The accused's body need not be found. It is there for all to see. So too, the characteristics and physiological components of the accused's body involve no testimonial facet. It is not as though the police had to ask the accused, "Where are your fingers?" before they could take his fingerprints, or "Where is your face?" before they could take his photograph, or "Where is your blood" before they could take a sample of it.

Any rule which prevented the police from requiring an accused to assume a stance, to walk, or to make a particular gesture to aid in a witness's ability to identify him or her would logically require that the witness not be allowed to look at the accused at all. Requiring the accused to write or speak for purposes of identification, so long as the words written or spoken were not inculpatory in and of themselves, merely require him

or her to demonstrate additional physiological characteristics of his or her body.[14] These things do not involve communication.

No imparting of thoughts, ideas, or personal knowledge is involved. The same is true for requiring the defendant to stand in a lineup (*Wade*, supra, 388 U.S. 218 [1967].), to wear particular clothing (*Holt*, supra, 218 U.S. 245 [1910].), or to provide a handwriting exemplar (*Gilbert*, supra, 388 U.S. 266 [1951].).

This case is different. In this case the respondent was required to give testimonial evidence as to the existence and location of an unlawfully possessed handgun. This case is akin to compelling an accused to produce his or her personal papers, which the Schmerber court condemned (*Schmerber*, supra, at p. 763).

In this case the police would not have known that the respondent owned or possessed any firearms at all, unless he told them so. They would not have known where those firearms were located unless he told them so. Specifically, they would have known nothing at all about the particular pistol which

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14. See, *U.S. v. Wade*, *supra,* 388 U.S. 218 (1967), where the Supreme Court said, at pages 222-223, that

> ". . . compelling the accused merely to exhibit his person for observation by a prosecution witness . . . involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have. . . . Similarly, compelling [the accused] to speak within hearing distance of the witnesses . . . was not compulsion to utter statements of a 'testimonial' nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt."

brought about respondent's arrest unless he told them about it.[15]

All of this involves testimonial communication which the respondent would not have made had he not been ordered, under pain of prosecution for contempt of court, to do so. In this case the police did have to ask the respondent, "Where are your guns?" before they could seize them or arrest him on this charge.

The Supreme Court also made it clear that, in *Schmerber*, supra, it was not dealing with Fourth Amendment issues such as government interference with property relationships or private papers, i.e., "houses, papers and effects" (*Schmerber*, supra, at 768-769),[16] and that authorities considering limitations on the kinds or property which might be seized under a warrant as distinct from procedures for searching and the permissible scope of searches did not apply (*Schmerber*, supra, at p. 769). They do apply here.

The people may argue that the order of protection was the equivalent of a warrant to search the respondent's home. Even if that argument were valid, which respondent disputes, there remains the issue of whether or not the court which issued the order of protection would have had sufficient probable cause to issue a search warrant for respondent's home. The most

15. Examination of the Local Criminal Court Return will establish that the person who complained against the respondent in Delaware County, and in whose favor the order of protection was issued, did not know anything about that gun, and that the respondent, himself, had forgotten that he even had it or where it was. He had to search for it, find it, and then turn it over to the police after they had taken the rest of his guns.

16. It is ". . . a 'basic principal of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." (*Payton v. New York*, 455 U.S. 573, 586 [1980].)

important aspect of this issue, however, is that the order was made in a different case by a different court, and respondent has been deprived of the ususal tools which the law affords him to test the validity of the "warrant" and the constitutionality of the search and seizure of his property.

CONCLUSION

This case is one in which this Court should deny certiorari.

Respectfully submitted,

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