

07-16 JUL 02 2007

No. _____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NEW YORK,

Petitioner,

vs.

WILLIAM P. HAVRISH,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Through an order of protection, Havrish was ordered to surrender all firearms owned or in his possession. Havrish then turned in an illegal handgun. The Fifth Amendment guarantees that individuals cannot be compelled to be a witness against themselves. But this principle only extends to matters of a testimonial or communicative nature – not non-testimonial tangible physical evidence which is incriminating. Since Havrish was not compelled to produce anything testimonial or communicative, did the New York Court of Appeals incorrectly determine that a violation of the Fifth Amendment occurred?

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OPINIONS BELOW

The opinion of the New York State Court of Appeals – the highest state court to review the merits of this case – appears in the Appendix to the petition, at 1a, and is unpublished. The Decision and Order of the Schoharie County Court appears in the Appendix at 11a.

JURISDICTION

The date when the Court of Appeals decided this case was April 3, 2007. This petition for certiorari is filed within ninety days of that decision, and is therefore timely. Sup. Ct. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself*, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public

use, without just compensation (*emphasis supplied*).

STATEMENT OF THE CASE

Facts

On April 8, 2005, the appellant, William Havrish, was arrested and issued an Order of Protection out of the Delhi Town Court (Delaware County, New York) for charges that included Burglary and Kidnapping. Under the terms of that Order of Protection, Havrish was ordered to "Surrender any and all firearms owned or possessed. . ."

Subsequently, Havrish posted bail the same morning and then allowed deputies to come to his home in Jefferson, (Schoharie County) New York to surrender his long guns. Havrish also told deputies that he had given a pistol to his former wife, Linda Havrish who was not the subject of the Town Court's Order of Protection. Based on that information, Deputy Joseph A. Andreno interviewed Linda Havrish later that day. Linda explained that she did not have the pistol and added that her husband did not have a license for it.

Eventually, Deputy Andreno received a telephone message that William Havrish had called, and claimed that he had found the pistol. Deputy Andreno then responded to Havrish's residence in Jefferson and secured the pistol – a Ruger .44 Magnum Blackhawk revolver. While Andreno was writing out a receipt for the handgun, Havrish inquired whether or not he would need a permit to get the pistol back. Andreno did not reply.

Ultimately, Havrish was charged in the Jefferson Town Court with Criminal Possession of a Weapon in the Fourth Degree (New York Penal Law §265.01[1] – a class A misdemeanor) for possessing the handgun without a valid license. After arraignment, Havrish moved 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.

Procedural History

On January 25, 2006, the Jefferson Town Court (Hait, J.) granted the defendant's motion to dismiss on these grounds and also suppressed the evidence consisting of the handgun and statements made to police.

The People took an appeal to the Schoharie County Court (Bartlett, J.). By decision and order dated June 8, 2006, County Court reversed Town Court's order finding that no Fourth or Fifth Amendment violation occurred and reinstated the accusatory instrument (11a).

Havrish was granted leave to appeal to the New York State Court of Appeals on September 14, 2006. On February 8, 2007, the New York State Court of Appeals heard oral argument on the issue of whether Havrish's surrender of the handgun was privileged under the Fifth Amendment. By Decision and Order dated April 3, 2007, it found that it was privileged and, accordingly, reversed County Court's order and granted Havrish's motion to suppress and dismiss the accusatory instrument (1a).

REASONS FOR GRANTING THE WRIT

This case presents a single compelling issue for this Court's consideration – one that goes to the heart of the Fifth Amendment. Indeed, this case represents an opportunity for this Court to review a case when physical evidence – which is not documentary in nature – has been held to rise to the level of being testimonial or communicative, thus triggering Fifth Amendment Protection based on the act of production doctrine.

This Court has held as constitutional, a defendant's compelled production of the following physical evidence even though that evidence led to prosecution and conviction: to give a blood sample (*Schmerber v. California*, 384 U.S. 757, 765 (1966)); to stand in a lineup (*United States v. Wade*, 388 U.S. 218, 221(1967)); to wear particular clothing (*Holt v. United States*, 218 U.S. 245, 252 (1910)); and to provide a handwriting exemplar, (*Gilbert v. California* 388 U.S. 266, 266 (1951)). In the case below, the Court of Appeals relied upon to the act of production doctrine when it determined that Havrish's surrender of the handgun was "sufficiently incriminating to give rise to Fifth Amendment protection." In *Baltimore City Dept. of Social Services v. Bouknight*, 493 U.S. 549 (1990), this Court held that when the government demands the production of an item, "the only thing compelled is the act of producing the item." *Id.* at 554-555.

Historically, the act of production doctrine has only been applied to the surrender of subpoenaed documents. But in *Bouknight*, this Court suggested that it can also apply to the compelled production of other types of evidence. Even more recently in *United States v. Patane*, 542 U.S. 630, 644 n7 (2004), this Court touched on the scope of the self-incrimination clause and proposed that it *was* possible to use

legal process to compel a defendant to produce physical evidence [a handgun].

The facts of this case are well-suited to serve as a vehicle for this Court to clarify not only the scope of the self incrimination clause, but also the act of production doctrine.

CONCLUSION

This Court should grant certiorari to determine whether the act of surrendering a handgun has certain testimonial or communicative aspects that is privileged under the Fifth Amendment.

Respectfully submitted,

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July 2, 2007

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