ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. GIOVANI FUSTER MELENDEZ, Appellant.	CR– Court of Appeals No. 1 CA–CR 20–0066 Maricopa County Superior Court No. CR2019–104831–001

STATE OF ARIZONA'S PETITION FOR REVIEW

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I. ISSUE PRESENTED FOR REVIEW.

Where Melendez waived his right to remain silent, but deferred responding to some questions during a post-*Miranda*[1] police interview, was it a due process violation for the State to use the interview to impeach his testimony at trial that he acted in self-defense?

II. INTRODUCTION.

This petition asks this Court to clarify whether a criminal defendant's decision to defer answering specific questions during a post-*Miranda* police interview—where he freely answered other questions and never invoked his right to remain silent—constitutes a due process violation under *Doyle v. Ohio*, 426 U.S. 610, 611 (1976).

It is clear under *Doyle* that a defendant's decision to remain entirely silent after being given a *Miranda* warning cannot be used to impeach him at trial. But there is a conflict among state and federal courts concerning whether *Doyle* applies when a defendant has answered some questions but declined to answer others. In this case, the court of appeals found that a defendant's right to silence is not an all-or-nothing proposition and that he need not "affirmatively invoke" the right before seeking protection under *Doyle*. There is some support for the court's holding, but

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

it is contrary to precedent from this Court holding that *Doyle* is not implicated where a defendant chooses to answer some questions, but declines to respond to others. *See, e.g., State v. Maturana*, 180 Ariz. 126, 130 (1994). Accordingly, this Court should grant review and clarify that the due process protection in *Doyle* is not implicated if a defendant selectively answers questions without unambiguously invoking his right to remain silent.

III. MATERIAL FACTS.

Appellant, Giovani Fuster Melendez, was convicted of one count of aggravated assault and five counts of endangerment after he shot at A.G., missing him but striking an apartment building. R.O.A. 90, 97–101.

Melendez had previously met A.G., whose parents were pastors at his mother's church. R.T. 12/9/19, at 10–11; R.T. 12/10/19, at 70, 73, 85. Melendez drove to A.G.'s apartment complex and, upon seeing A.G. outside the building, exited the car and asked if A.G. "was the pastor's son." R.T. 12/4/19, at 66–67, R.T. 12/9/19, at 12, 20–21, 25–28, 37. When A.G. responded, "Yes," and walked towards Melendez to greet him, Melendez began shooting at him. R.T. 12/4/19, at 67; R.T. 12/9/19, at 13, 20–21.

After Melendez was arrested, Detective Ovalle entered the room to interview him, and Melendez stated that he had never been in this situation before and wanted "to hear what's going on." Trial Exhibit ("Exh.") 174, at 1:30–2:20.

Detective Ovalle informed Melendez that she wanted to hear "what was going on" as well and then read Melendez his *Miranda* rights. *Id.* at 2:30–3:15. Melendez said he understood his rights, and then began freely answering Detective Ovalle's questions of a variety of topics, providing information about his relationship with A.G. and A.G.'s family, detailing where the gun was located in his apartment, and stating that he always carried the gun for his protection. *Id.* at 3:15–14:53.

Interspersed through these answers, Melendez evaded Detective Ovalle's questions about his motive for shooting at A.G., claiming he wanted to "hold" onto that information for the present because he felt "blindsided." *Id.* at 5:10 ("I want to hold . . . some stuff I want to say, just because . . . I feel a little bit blindsided"), 11:05 ("I still want to hold up on some information"), 12:55 ("I still want to hold myself on some things"), 13:05 ("I would hold [that] information"). Nevertheless, Melendez did not cut off questioning and continued to answer most of Detective Ovalle's questions. *Id.* at 3:15–15:00. Moreover, when Detective Ovalle paused the questioning to clarify whether Melendez was "comfortable talking to [her]" about what happened, Melendez informed her that "he did not mind talking to [her]." *Id.* at 14:55–15:29.

Detective Ovalle then informed Melendez that he would be going to jail and sought to clarify why he felt "blindsided," offering to clarify any of his confusion. *Id.* at 15:30–16:15. Melendez said that he was curious "what [was] the pastor

saying and stuff." *Id.* at 16:16–26. Detective Ovalle then explained that A.G. and the other witnesses saw Melendez drive up and ask A.G. if he was "the pastor's son." *Id.* at 16:26–45. When Detective Ovalle asked again if Melendez had a problem with A.G., Melendez said he had barely talked to him and that he did not really know him. *Id.* at 16:45–58. Nevertheless, he stated that he would "pass" on the question of why he asked about what the other witnesses were stating. *Id.* at 16:59–17:10.

Detective Ovalle again offered to explain anything that made Melendez feel "blindsided." *Id.* at 17:10–18. Melendez then stated that he wanted to "clarify everything with the pastor" and that he never had a problem with the pastor or his family. *Id.* at 17:20–50. When the detective then asked him if he was upset or who he was after, Melendez again evaded those questions, stating that he "pass[ed]" and wanted to hold "[t]hat information." *Id.* at 18:13 ("Sorry, I apologize. I don't mean to . . . ignore you. I'm going to pass."), 18:45 ("I'll pass again."), 19:10 ("I'll pass these questions. Sorry."), 19:37 ("I'll pass that question . . . . I just want to hold what I did today. That information and any information that you are trying to figure out. I just want to hold everything for now."). Detective Ovalle then told him "that was his right," but that they already had the whole story, including witnesses who saw him in the car and saw him shooting. *Id.* at 20:00–30.

At that point, Detective Ovalle left to get Melendez water and speak with her supervisor. *Id.* at 21:00–23:00. When she returned and informed Melendez that he was going to jail, Melendez indicated that he wanted to tell her something, explaining that he waited to do so because he "[did]n't know what people on the other side were trying to do or trying to say," and that he was just being cautious. *Id.* at 23:00–24:50. He then told her that he shot at A.G. because he felt A.G. was being hostile and aggressive walking towards him when he approached his car. *Id.* at 25:00–28:00.

At trial, Melendez claimed he shot at A.G. because he thought A.G. was going to grab a gun and shoot him. R.T. 12/10/19, at 74–78. Without objection, the prosecutor cross-examined Melendez about how he had declined to answer questions during his police interview, pointing out that he had made no claim of self-defense to the detective until she advised him that he would be going to jail. *Id.* at 94–99. The State highlighted Melendez's statements to the jury during closing argument. R.T. 12/11/19, at 42–44. Again, Melendez did not object. *Id.* Melendez was convicted on all charged counts and sentenced to a total of 7.5 - years in prison. R.O.A. 114.

After Melendez's counsel filed an *Anders* brief, the court of appeals ordered briefing on "[w]hether the prosecutor's cross-examination and/or closing argument comments pointing to Melendez's post-arrest, post-*Miranda* 'selective silence'

violated Melendez's right against self-incrimination under the Fifth Amendment or the Fourteenth Amendment to the United States Constitution." No. 1 CA–CR 20–0066, Order for *Penson* Briefing.

After the matter was fully briefed, the court of appeals published the attached opinion reversing Melendez's convictions and sentences and remanding for a new trial. *State v. Melendez*, No. 1 CA–CR 20–0066 (Ariz. App. July 25, 2023) ("Opinion") at ¶ 64. Acknowledging that a defendant must "unequivocally and unambiguously communicate his desire" to invoke his constitutional right to terminate police questioning, the court stated that the "privilege related to the due process right recognized in *Doyle*" is not an "all or nothing proposition," "requires no affirmative communication," and is "self-executing." *Id.* at ¶¶ 44–45.

In coming to this conclusion, the court relied on inapposite precedent from this Court. *Id.* at ¶¶ 17–42 (citing, *inter alia*, *State v. Shing*, 109 Ariz. 361 (1973), *State v. Anderson*, 110 Ariz. 238 (1973), and *State v. Ward*, 112 Ariz. 3 (1975)). Meanwhile, the court acknowledged but quickly dismissed the cases from this Court that were more directly on point, including *State v. Maturana*, 180 Ariz. 126 (1994), and *State v. Reinhold*, 123 Ariz. 50 (1979). Opinion, at ¶ 49. The court concluded that fundamental, prejudicial error occurred when the State impeached Melendez with his deferrals on certain topics during the police interview and then emphasized those deferrals during closing arguments. *Id.* at ¶¶ 53–63.

IV. THIS COURT SHOULD GRANT REVIEW TO CLARIFY WHETHER THE STATE MAY IMPEACH A DEFENDANT WHO AGREES TO SPEAK WITH POLICE, BUT SELECTIVELY DECLINES TO ANSWER SOME QUESTIONS.

In *Doyle*, the United States Supreme Court held that the State could not use a defendant's post-arrest, post-*Miranda* silence "to impeach an explanation subsequently offered at trial" because "[s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights." 426 U.S. at 617–18. The Supreme Court later clarified that *Doyle* does not extend to cross-examination with prior inconsistent statements—even if the State asks about a defendant's failure to tell police certain details—since "[s]uch questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent." *Anderson v. Charles*, 447 U.S. 404, 408–09 (1980). In other words, "[a]s to the subject matter of his statements, the defendant has not remained silent at all." *Id.* at 408.

Here, the court of appeals' opinion incorrectly finds that Melendez did not waive his *Miranda* rights and instead "exercised his right to silence at several points" of the police interview. Opinion, at ¶¶ 31–48. But like the defendant in *Anderson*, Melendez decided to voluntarily speak with police after receiving *Miranda* warnings that he had the right to remain silent. He then answered several of the detective's questions, providing police with his prior relationship with the victim and his family, stating that he had no problem with the victim, and

indicating that the victim's family had helped his family resolve a dispute. Exh. 174, at 4:10–4:45, 5:50–7:20. His statements that he wanted to "hold" information or "pass" on certain questions for now were not silence but instead conditional and temporary deferrals—as he ultimately explained during the interview—until he heard what other witnesses were saying about the shooting. Exh. 174, at 5:10, 16:00–16:22 (explaining that his decision to hold information due to feeling "blindsided" was because he wanted to hear what the "pastor [was] saying and stuff"). These statements were fair game for the State to use at trial to impeach his self-defense testimony by pointing out that he provided detectives with extensive information on his relationship with the victim but did not tell officers the self-defense story until he heard what the other witnesses were saying. Thus, the court of appeals failed to recognize that Melendez was not being impeached with his silence, but rather with the fact that he did not tell the "same story he told the jury" until he was informed he was going to be arrested. *Anderson*, 447 U.S. at 408.

Nevertheless, even if Melendez's statements constituted "selective silence," there was nothing wrong with the State using that selective silence to impeach his testimony at trial. And this Court should grant review because a split of authority remains regarding whether a defendant's "selective silence" in response to certain questions is protected under *Doyle*. Some courts have found that the prosecutor's use of a defendant's selective silence is permissible, concluding that the

fundamental unfairness in *Doyle* does not exist when a defendant waives his rights and begins answering a detective's questions. *See United States v. Pando Franco*, 503 F.3d 389, 397 (5th Cir. 2007) (finding no *Doyle* violation where the defendant's post-*Miranda* statements about his own prior silence were admitted); *United States v. Burns*, 276 F.3d 439, 441–42 (8th Cir. 2002) (determining no *Doyle* violation occurred where the defendant waived his *Miranda* rights and answered many questions, but "did not respond and 'just looked' at those questioning him" in response to one question); *United States v. Hampton*, 843 F. Supp. 2d 571, 577 (E.D. Pa. 2012) (concluding evidence of "selective silence" was constitutionally permissible "since a reasonable jury could find on the facts here that he waived his *Miranda* rights, did not remain silent, and did not unequivocally re-invoke his right to remain silent"); *People v. Bowman*, 202 Cal. App. 4th 353, 361 (Cal. 2011) (finding that the harm the *Doyle* rule sought to prevent did not occur in that case because "there is no evidence [defendant] told the detective he wanted to cease all further questioning, asked for an attorney, or otherwise unambiguously indicated he wanted to invoke his right of silence"); *State v. Fluker*, 1 A.3d 1216, 1223 (Conn. App. 2010) ("[T]he refusal of a defendant to answer a particular question during custodial interrogation is not an invocation of the right to remain silent.") (citation and internal quotation marks omitted).

Other courts have found that *Doyle* does not permit a prosecutor to use selective silence. *See, e.g.*, *Hurd v. Terhune*, 619 F.3d 1080, 1087–88 (9th Cir. 2010) (holding that "[a] suspect may remain selectively silent by answering some questions and then refusing to answer others without taking the risk that his silence may be used against him at trial"); *United States v. Canterbury*, 985 F.2d 483, 486 (10th Cir. 1993); *Booton v. Hanauer*, 541 F.2d 296, 298 (1st Cir. 1976) ("[E]vidence of refusal to answer specific questions in the course of an interview has been held inadmissible."); *United States v. Williams*, 665 F.2d 107, 109 (6th Cir. 1981) ("*Miranda* protects refusal to answer specific questions."); *Bartley v. Com*, 445 S.W.3d 1, 12 (Ky. 2014) ("[D]ue process ordinarily bars the use of an accused's post-*Miranda*-warning selective silence."); *State v. Fuller*, 282 P.3d 126, 136, ¶¶ 36–39 (Wash. App. 2012) (following the Ninth Circuit's decision in *Hurd*).

This Court has also held—albeit without extensive analysis of the question presented here—that *Doyle* is not violated when the prosecution points out that a defendant answered some questions but not others. *See Maturana*, 180 Ariz. at 130 (holding no *Doyle* violation occurred where the defendant "never invoked his right to remain silent—he merely chose to answer some questions and remain silent as to others" after "being read his rights and stating that he understood them"); *Reinhold*, 123 Ariz. at 53 (finding *Doyle* not implicated where the defendant "did not invoke his right to remain silent," but instead "answered all

questions posed by the police officer except one"); *see also State v. Corrales*, 161 Ariz. 171, 172 (App. 1989) (holding that where the defendant "did not remain silent but chose to answer select questions," a comment that he refused to answer some questions was not impermissible under *Doyle*).

In finding a *Doyle* violation here, the court of appeals dismissed this Court's decisions in *Maturana* and *Reinhold*, relying instead on *Shing*, *Anderson*, and *Ward*. Opinion, ¶¶ 17–21, 29, 49. The court stated that "[c]onsistent with Arizona case law showing that a defendant's silence 'cannot be used against him,' our supreme court held that the prosecutor improperly asked 'questions on matters about which the [defendant] had not made any comment *or given any information*.'" *Id.* at 29 (emphasis in original). But *Shing*, *Anderson*, and *Ward* did not involve "selective silence." For example, although the defendant in *Shing* initially agreed to speak with police, he did not answer any substantive questions. 109 Ariz. at 363–64. *Anderson* and *Ward* also do not involve "selective silence" as there is no indication that the defendants in those cases ever spoke to the police after their arrest. *Anderson*, 110 Ariz. at 240–41; *Ward*, 112 Ariz. at 391–92.

Thus, Melendez's case is more closely aligned with *Maturana* and *Reinhold*, where the defendant had been advised that he had the right to silence but nevertheless chose to answer police questions. Here, Melendez answered most of the detective's questions and provided extensive information on his relationship

with the victim and the victim's family. *See* Exh. 174, at 4:25–4:59, 5:45–7:45, 16:52–17:50, 18:30. In this scenario, a defendant has "not been induced to remain silent."[2] *Anderson*, 447 U.S. at 408–09; *see also State v. Talton*, 497 A.2d 35, 44 (Conn. 1985) (stating that the "*Doyle* rationale is not operative" when a defendant has waived the right to remain silent because "[b]y speaking, the defendant has chosen unambiguously not to assert the right to remain silent [and] knows that anything he says can and will be used against him").

The court of appeals held that the *Doyle*–related right "requires no affirmative communication" because it is "self-executing." Opinion, at ¶¶ 44–45. Unlike the clear standard for cutting off questioning, such a rule would only create confusion for detectives, prosecutors, and courts in Arizona. *See Berghuis v. Thompkins*, 560 U.S. 370, 381–82 (2010) ("A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that avoids difficulties of proof and . . . provides guidance to officers on how to proceed in the face of ambiguity.") (citation and internal quotation marks omitted).

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[2] Such conduct is more akin to a defendant who decides to take the stand and testify. Although a prosecutor certainly cannot use a defendant's refusal to testify against him at trial, when the defendant does take the stand, he waives his right to self-incrimination and may not chose which questions he wants to answer. *See Brown v. United States*, 356 U.S. 148, 155–56 (1958).

Here, Melendez's statements were not unambiguous invocations of his right to remain silent as he continually stated he wanted to "hold" and "pass" certain questions "*for now*" because he felt blindsided, indicating to Detective Ovalle that he first wanted to know what the other witnesses were telling police before he would answer those questions. *See, e.g.,* Exh. 174, at 1:30–2:20, 5:10, 11:05, 13:00, 13:06, 15:30–16:45, 18:13, 18:45, 19:10, 19:37. Thus, concluding Melendez's statements were inadmissible "selective silence" under the court of appeals' definition would create a confusing, untenable standard when admitting a defendant's police interview, effectively requiring the trial court to insert itself into trial to determine, statement by statement, which portions of a police interview are admissible for impeachment even if a defendant does not object.

Finally, even if this Court agrees that fundamental and prejudicial error occurred in this case, the court of appeals' opinion should be depublished because its opinion creating a "self-executing" due process right to silence goes too far. Moreover, without depublication, a trial court that relied on this Court's prior decisions, such as *Maturana*, to conclude that it is permissible to comment on a defendant's selective silence during a police interview could be reversed on appeal under the instant opinion, resulting in needless expenditure of judicial resources to retry the case.

V. CONCLUSION.

For these reasons, this Court should grant review. Should this Court decide not to grant review, the State respectfully requests that this Court depublish the court of appeal's opinion.

RESPECTFULLY SUBMITTED this 24th day of August, 2023.

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