IN THE SUPREME COURT
STATE OF ARIZONA

STATE OF ARIZONA, Appellee, v. GIOVANI FUSTER MELENDEZ, Appellant.	No. CR-23-0215-PR Court of Appeals No. 1 CA-CR 20-0066 Maricopa County Superior Court No. CR2019-104831-001

APPELLANT'S RESPONSE TO STATE'S PETITION FOR REVIEW

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I. ISSUE PRESENTED FOR REVIEW

Doyle v. Ohio,[1] prohibits the government from impeaching a defendant with their post-*Miranda*[2] silence, but no authority controls whether *Doyle* applies when a defendant selectively invokes their right to silence. The State's comments on Giovani's post-*Miranda* selective silence bolstered its otherwise tenuous case and likely procured the conviction. Did the Court of Appeals correctly find that the prosecutor's repeated comments violated due process and caused fundamental error?

II. FACTS

If the State had not invoked Giovani's post-*Miranda* selective silence, the jury may not have convicted him of aggravated assault on A.G. The jury nearly hung on Count 1. *See State v. Melendez*, 1 CA-CR 20-0066 (Ariz. App. July 25, 2023) ("Opinion") at 63. Had the State played by the rules, it would have lost. TR 12/12/2019 (A.M.) at 3-4.

[1] 426 U.S. 610 (1976).
[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Shortly into deliberations the jury submitted a question. "We have come to a conclusion on five counts.[3] We are unable to come to a unanimous decision on one count. We do not believe we can come to a unanimous decision on the final count. What should we do?" *Id*. The trial court gave an impasse instruction. TR 12/12/2019 (A.M.) at 3-4; TR 12/12/2019 (P.M.) at 3-6. The jury later returned a guilty verdict on all six counts. Record on Appeal ("ROA") at 90, 97-101.

Giovani Melendez moved from Puerto Rico to live with his mother in the United States approximately 18 months before his arrest in this case. Ex. 174 at 13:35-13:44. Giovani's mother attended a church pastored by A.G.'s parents, who lived in the same complex and held services in their home. TR 12/10/2019 at 70-73. Giovani became acquainted with A.G. through this connection. *Id*. at 70-71.

Giovani and his mother later moved out of that apartment complex. *Id.* at 69-70. Several months later, while driving through the parking lot of his earlier residence, Giovani saw A.G. *Id*. at 70, 73. Giovani got out of

[3] The five counts at issue were likely the five endangerment counts arising from bullet strikes to a wall of an apartment housing a family of five. ROA at 2, 8. Logically this means the jury reached a verdict on these five counts and was still struggling with the aggravated assault charge.

his car to greet A.G. TR 12/10/2019 at 74-75. As Giovani walked toward A.G., he called out to him and asked him if he was the pastor's son. *Id*. A.G. began to walk toward Giovani, who pulled out a gun and fired at A.G. but did not hit him. *Id*.

Phoenix Police took Giovani into custody shortly afterward. TR 12/5/2019 at 73. Officer Jansma read Giovani the *Miranda*[4] advisement in the field. Jansma IV at 1:08-1:27.[5] Giovani invoked his right to remain silent fifteen seconds later. *Id*. at 1:42-2:08. Questioning ceased. *Id*. at 2:08-2:20.

Detective Ovalle subsequently *Mirandized* and interviewed Giovani. Exh. 174 at 2:55-3:20. Giovani answered Ovalle's non-incriminating questions but continually exercised his earlier-invoked right to remain silent. *See* Exh. 174. As described below, 10 times Giovani told Ovalle he wanted to remain silent, twice he did not respond, and once he changed the subject. *Id*. at 4:59-5:25, 6:29-6:42, 10:58-11:08, 12:48-

[4] 384 U.S. 436 (1966).

[5] On August 4, 2022, the Court of Appeals expanded the record to include the two-minute and twenty-second interview between Officer Jansma and Giovani (hereafter "Jansma IV").

12:56, 12:57-13:09, 16:49-17:08, 18:04-18:24, 18:40-18:49, 19:02-19:13, 19:14-19:20, 19:34-20:01, 20:04-20:36, 20:44-21:00.

Giovani exercised his right to remain silent with the first inculpatory question.

> Ovalle: So what made you go over there today and shoot, um, the pastor's son?
>
> Giovani: Um . . . I want to hold some stuff. Um, I want to, uh, hold some stuff I want to say. Just because I feel a little blindsided.
>
> Ovalle: That's okay. I just want your side of the story – get down to the bottom of the problem.

Exh. 174 at 5:03-5:35.

The interview continued along non-incriminating lines. Minutes later, Ovalle asked about self-defense.

> Ovalle: Did you feel like you had to protect yourself from the pastor's son?
>
> Giovani: I still want to hold up on some information.

Id. at 11:03-11:07. Giovanni again exercised his right to remain silent.

Giovani continued to "hold" information in response to Ovalle's incriminating questions. *See* Exh. 174. Conversely, Giovani willingly answered all Ovalle's non-incriminating questions. *Id.*

III. REASONS THIS COURT SHOULD DENY REVIEW

a. Arizona aligns with cases prohibiting the government from impeaching defendants with their silence when they decline to answer police questions.

The State claims the Court of Appeals erred concluding the due process right recognized in *Doyle* protects a defendant's selective exercise of his right to remain silent. The State argues that the Court of Appeals reached this conclusion by erroneously relying on inapposite cases. But the State's argument is superficial, supported with only conclusory quotations. The State fails to explain why these cases are inapposite. The State instead cites inapposite cases again offering mere conclusory quotations to support its position.

State and federal jurisdictions are split concerning whether the Fifth Amendment protects a defendant's selective silence, and the Supreme Court has not spoken directly to this point. But as the Court of Appeals explains in detail, the principles of *Miranda*, *Doyle*, and their progeny weigh in favor of protected selective silence—as does Arizona jurisprudence. Opinion at 11-16.

"The principles announced in *Doyle* were not surprising, at least for Arizona courts (citation omitted). And for the most part, our appellate

courts have continued to reinforce the principle that prosecutors cannot penalize a defendant at trial by bringing to the jury's attention that he exercised his right to decline to answer police questions." Opinion at ¶25.

The Court of Appeals' opinion seamlessly and logically connects the dots between *Doyle*, its progeny, and Arizona jurisprudence to conclude that due process protects selective silence. This Court should deny the State's Petition for Review because the Court of Appeals spoke decisively and correctly.

b. The State mischaracterized selective silence as a "prior inconsistent statement."

Giovani continually and insistently exercised his right to silence. Giovani "held" his answers or "passed" on every incriminating question Ovalle asked. Giovani clearly wished to remain silent. His wish to "hold that information" or "pass" was a request to remain silent on those questions. *See* Exh. 174.

The State argues that Giovani's requests to "hold" or "pass" were not exercises of his right to remain silent, but "temporary deferrals" amounting to prior inconsistent statements. The State would color Giovani's silence as a manipulative attempt to wait until he knew what

other witnesses had said. But Giovani never asked about what other witnesses said until the fifth time he rejected answering one of Ovalle's incriminating questions, which occurred over half-way through the interview.

Ovalle pretended she was wrapping up the interview and again asked Giovani about the shooting. At that point Ovalle elicited the issue of what others said.

> Giovani: It's just, um, like, um, I kind of feel blindsided because I want to hear-
>
> Ovalle: Wha-What makes you feel blindsided? Is there anything I can explain to you that you aren't sure about?
>
> Giovani: Um . . . you just (unintelligible) um, what, uh you know, the pastor is saying and stuff.

Exh. 174 at 16:00-16:49.

Giovani raised others' statements only once, after Ovalle tells him he is going to jail. Giovani explained to Ovalle that he was trying to be cautious because he doesn't know what other people are saying and he's never been in this situation before. Giovani then asked Ovalle why he was going to jail. "What do you guys, um, wha-what's the reason that they're putting me to jail? What, you know, whi-which, uh, in order to put

me to jail um, okay I'm going to say it." At this point Giovani tells Ovalle his version of events. Exh. 174 at 24:49-25:07.

Giovani's incessant iteration that he would "hold onto information" was a continual exercise of his right to remain silent. Ovalle understood this, she acknowledged that Giovani was exercising his right to remain silent.

> Ovalle: Do you remember what happened?
>
> Giovani: Um, I'll pass that question.
>
> Ovalle: You'll pass that question, okay.
>
> Giovani: Sorry. Um. But yeah, I'm just holding, ah, I-I just want to hold, you know what I, what I did today. You know the information that you, uh, and that- and any information that you are trying to figure out, or trying to, you know, I just want to hold everything for now. Because I just, uh—
>
> Ovalle: And that's fine, ***that's your right.***

Exh. 174 at 19:34-20:01.

But Ovalle didn't believe Giovani's rights mattered, because with the *very next breath* she changes tactics and *continues to interrogate* him about the subjects he kept telling her he didn't want to talk about! *Id*. at 20:29-21:00.

The State complains the Court of Appeals failed to recognize that the prosecutor did not comment on Giovani's silence, but on the "fact that he did not tell the 'same story he told the jury' until he was informed he was going to be arrested." State's Pet. Rev. at 9 ("PR") (quoting *Anderson v. Charles*, 447 U.S. 404, 408 (1980)). This mischaracterizes Giovani's statements and requires a tortured reading of *Charles*.

Police arrested Glenn Charles, who was driving a car stolen from a man murdered earlier that week. *Anderson* at 404. Detective LeVanseler *Mirandized* and interviewed Charles. Charles neither remained silent nor exercised selective silence. *Id*. at 404-407. Charles told LeVanseler he stole the car from "the vicinity of Washtenaw and Hill Streets, about two miles from the local bus station." *Id*. At trial, Charles testified he stole the car from the parking lot of Kelly's Tire Co., located "right next to the bus station." *Id*. The prosecutor impeached Charles, implying that he recently fabricated the story about stealing the car from Kelly's Tire Co.

> Q. Don't you think it's rather odd that if it were the truth that you didn't come forward and tell anybody at the time you were arrested, where you got that car?
>
> A. No, I don't.

* * *

Q. Well, you told Detective LeVanseler back when you were first arrested, you stole the car back on Washtenaw and Hill Street?

A. Never spoke with Detective LeVanseler.

Q. Never did?

A. Right, except when Detective Hall and Price were there and then it was on tape.

Id. at 406.

The jury convicted Charles of first-degree murder. The Sixth Circuit reversed, holding "'the prosecutor's questions about [respondent's] post-arrest failure to tell officers the same story he told the jury violated due process' under the rule of *Doyle v. Ohio*." *Id*. at 406-407 (quoting *Doyle*) (alterations in original). The United States Supreme Court reinstated the verdict, finding the prosecutor's questions did not invade Charles's right to remain silent because he never exercised that right. "The [prosecutor's] questions were not designed to draw meaning from silence," which would have been a due process violation, "but to elicit an explanation for a prior inconsistent statement." *Id*. at 408-409. (Emphasis added).

Here, Giovani made no inconsistent statements. The prosecutor impeached Giovani with only his silence. Unlike *Charles*, the impeachment encouraged the jury to draw meaning from the silence. *See* Exh. 174.

c. Arizona aligns with jurisdictions holding that *Miranda* impliedly protects selective silence.

The State erroneously insists the Opinion rests on inapposite cases. The three it addresses—*State v. Shing*, 109 Ariz. 361 (1973), *State v. Anderson*, 110 Ariz. 238 (1973), and *State v. Ward*, 112 Ariz. 391 (1975)—are not inapposite, but rather logical steps in the Opinion's deductive reasoning. PR at 7, 11. The State ignores *State v. Sorrell*, 132 Ariz. 328 (1982), and *State v. Routhier*, 137 Ariz. 90 (1983), which most closely align with the issue presented here. *See* PR.

1. State v. Shing.

Shing spoke to police post-*Miranda* but refused to answer questions about his co-conspirators. 109 Ariz. at 363-364. He did the same at trial. *Id.* at 362, 364. The prosecutor's closing stated, "'[p]erhaps the most significant thing about * * * Mr. Shing's behavior was his silence. He had the opportunity to explain his presence [at the crime scene . . . or] to

identify someone else who might . . . be involved . . . but Mr. Shing did not avail himself of that opportunity.'" *Id.* at 364.

Our Supreme Court held that the prosecutor's comments constituted fundamental error. Using silence against a defendant, after warning him only that what he *says* can be used against him, "would nullify the warning required by *Miranda*, . . . the warning would have to be amended to inform [him that] what he doesn't say will be used against him." *Id.* at 365.

Like *Shing*, Giovani agreed to speak with the police but limited the subjects he would speak about. And Giovani's prosecutor not only commented on his silence in closing, but also extensively impeached him with it. Opinion at 6-10.

2. *State v. Anderson* and *State v. Ward*.

In *Anderson* and *Ward*, our Supreme Court considered the question of whether the prosecutor may properly impeach a defendant who tells his story for the first time at trial. The *Anderson* Court noted a split forming among jurisdictions on this issue. 110 Ariz. at 240. The Court looked to the 10th Circuit case and held that silence at the time of arrest is not a prior inconsistent statement. *Id.* at 240-41.

> Silence at the time of arrest is simply the exercise of a constitutional right that all persons must enjoy without qualification. (Citations omitted) It would indeed be irregular and anomalous to warn an accused that he has the right to remain silent, that if he says anything it may be used against him, however, if he does remain silent that too may be used against him. (Citations omitted) This would be the practical effect of allowing the prosecution to use at trial the fact that an accused remained silent, clearly making the assertion of the constitutional right costly.

Id. at 241 (quoting *Johnson v. Patterson*, 475 F.2d 1066, 1068 (10th Cir. 1973)).

3. *State v. Sorrell*.

The State charged Sorrell with aggravated assault. Like Giovani, Sorrell invoked his right to remain silent the first time police *Mirandized* him. 132 Ariz. at 329. Ninety minutes later Sorrell asked to make a statement and told police he had acted in self-defense. *Id*.

The prosecutor elicited this information at trial and commented on Sorrell's silence during opening and closing arguments. Like Giovani's case the prosecutor in *Sorrell* argued that the defendant waited to tell his story until he had time to think about what to say. *Id*.

Our Supreme Court found the prosecutor's comments on Sorrell's post-arrest silence created fundamental error. 132 Ariz. at 329. The opinion flowed from earlier Arizona decisions and was rooted in *Doyle v. Ohio*, 426 U.S. 610 (1976) and *Charles*.

Our Court also noted that *Miranda* warnings "inform a person of his right to remain silent and to assure him, at least implicitly, that his silence will not be used against him." *Sorrell* at 330 (quoting *Charles*, 447 U.S. at 407-08).

4. *State v. Routhier.*

Routhier implicated himself during a post-*Miranda* interview but made no statements about self-defense. 137 Ariz. at 93-94. At trial, the prosecutor cross-examined Routhier about whether he told police he acted in self-defense. A detective also testified about Routhier's failure to claim self-defense.

Our Supreme Court again affirmed that *Anderson*, *Shing*, and *Ward* are "grounded on the principle that the *Miranda* warnings implicitly assure a person that the exercise of his rights carries no penalty and cannot be used against him." *Id.* at 95-95 (citing *State v.*

Anderson, 110 Ariz. 238 (1973); *State v. Shing*, 109 Ariz. 361 (1973); and *State v. Ward*, 112 Ariz. 391 (1975)). (Emphasis added).

5. The State's argument rests upon two irrelevant cases: *State v. Maturana* and *State v. Reinhold*.

State v. Maturana, 180 Ariz. 126 (1994), involves voluntariness, not *Miranda*. Our Supreme Court framed the issue as "[w]hether the trial court erred in finding the defendant's statements to the police were voluntary and admissible pursuant to Rule 801(d)(2), Ariz.R.Evid." *Id*. at 129. Maturana's silence is tangential and discussed in only one paragraph. *Id*. at 130. The Court held that Maturana's silence "in response to some of [the police's] questions," was not an exercise of his right to remain silent, *Id.*, but the decision gives no context for Maturana's silence and no analysis relevant here.

State v. Reinhold, 123 Ariz. 50 (1970), involves silence rooted in a lack of knowledge. Reinhold sexually assaulted the victim then fell asleep in her bed. The police arrived and woke him up. Reinhold willingly answered the police's questions, telling them his name and that he knew the girl who lived in the apartment. When the police asked him what her name was, Reinhold didn't respond. Police *Mirandized* him and Reinhold

again said he knew the girl that lived there but didn't respond when asked her name. *Id*. at 52. Our Supreme Court found that "it is clear here from the quoted testimony that appellant did not invoke his right to remain silent." *Id*. at 53.

Neither case supports the State's argument.

IV. CONCLUSION

The State's case relied heavily on impeaching Giovani with his selective silence during Ovalle's interview. TR 12/10/2019 at 94-99. The State's arguments encouraged the jury to equate his silence with dishonesty and guilt. Using Giovani's selective silence was impermissible and a violation under *Doyle v. Ohio*. The Court of Appeals cured this error by vacating and remanding his case. This Court should decline jurisdiction.

RESPECTFULLY SUBMITTED September 25, 2023.

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