ARIZONA SUPREME COURT

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

STATE OF ARIZONA'S SUPPLEMENTAL BRIEF

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QUESTION PRESENTED FOR REVIEW

Where Melendez waived his right to remain silent, but deferred responding to some questions during a post-*Miranda* 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?

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ARGUMENT

The Constitution prohibits the government from compelling a person to incriminate himself. But once a person voluntarily speaks, there is no compulsion, and his statements may be used against him.

It follows from these principles that a defendant who voluntarily answers substantive questions in a police interview but leaves out or refuses to provide part of his self-defense story, and later testifies to it, can fairly be cross-examined as to the late-breaking nature of his defense. Such cross-examination does not threaten the right against self-incrimination that *Doyle* is designed to protect. After all, it is well-established that when a defendant takes the stand, the Fifth Amendment does not give him "an immunity from cross-examination on the matters he has himself put in dispute." *Brown v. United States*, 356 U.S. 148, 156 (1958). Likewise, no constitutional text or rule entitles a defendant who voluntarily tells the police only part of his story to an immunity from cross-examination about his omissions if he later testifies at trial.

The court of appeals therefore erred in reversing Melendez's convictions. Its decision should be vacated and the convictions affirmed.

I. If a defendant waives his right to remain silent by answering substantive questions, but fails to provide certain information, the right against self-incrimination does not immunize him from cross-examination if he testifies at trial.

A. *Doyle* is not implicated where a defendant waives his right to remain silent by speaking or through his conduct.

The Fifth Amendment instructs that "[n]o person … shall be compelled in any criminal case to be a witness against himself." To secure this privilege in the police interrogation setting, the United States Supreme Court established a procedural safeguard where the person is "warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney." *Miranda v. Arizona*, 384 U.S. 436, 444, 460–61 (1966). *Miranda* warnings carry an implicit promise that a person who remains silent will not have that fact used against them. *Doyle v. Ohio*, 426 U.S. 610, 618 (1976). Under *Doyle*, when a person receives a *Miranda* warning and chooses to remain silent, the government cannot use their silence "to impeach an explanation subsequently offered at trial." *Id.* *Doyle* therefore creates an immunity against certain cross-examination for a defendant who chooses to remain silent in an interview pursuant to *Miranda*.

After receiving a *Miranda* warning, a person may waive the right to remain silent either expressly or through a course of conduct, which includes answering police questions. *See, e.g.*, *Berghuis v. Thompkins*, 560 U.S. 370, 382–87 (2010).

When a person waives his right to remain silent, he is freely choosing to set aside its protection. Thus, "*Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such 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 (1980); *accord State v. Henry*, 176 Ariz. 569, 580 (1993) (finding no *Doyle* violation when a defendant "waives his rights by answering questions").

Although *Anderson* was about inconsistent statements, its rule can apply to omissions, based on the common law rule that, in certain circumstances, an omission is an inconsistent statement and can be used to impeach a witness accordingly. "Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted." *Jenkins v. Anderson*, 447 U.S. 231, 239 (1980). In such circumstances, "[a] prior omission will constitute an inconsistency." *State v. Hines*, 130 Ariz. 68, 70 (1981); *see also Ball v. State*, 43 Ariz. 556, 559 (1934) ("It is always competent to show that a witness has upon a former occasion omitted to state material and relevant facts which he now states, providing it was under the circumstances his duty to speak the whole truth."). Thus, *Doyle* does not apply to cross-examinations that merely inquire into post-waiver omissions, such as those at

issue here, that under the common law rule would constitute inconsistent statements.

B. Once a defendant waives the right to remain silent, no constitutional text or rule immunizes him from cross-examination about information he failed to provide to law enforcement, unless and until he unambiguously invokes his right to remain silent.

The *Miranda* warning is "a prophylactic means of safeguarding Fifth Amendment rights." *Doyle*, 426 U.S. at 617. *Doyle* adds a second layer of prophylaxis, ensuring that a person who acts based on *Miranda*'s assurances suffers no penalty. *Id.* at 618. But once a person waives *Miranda* and begins answering substantive questions, the reasons for *Doyle's* prophylaxis evaporate, and there is no constitutional basis to immunize a defendant from cross-examination as to information they failed to provide to law enforcement.[1] *See, e.g.*, *State v. Tuzon*, 118 Ariz. 205, 207 (1978) ("When one who has voluntarily made statements to police officers after his arrest makes new exculpatory

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[1] *Doyle* may offer some protection in cases where a defendant answers questions in certain areas and unambiguously invokes as to other areas. This Court need not resolve any such question here, however, because Melendez did not unambiguously invoke at all in his interview with Detective Ovalle. *See, e.g.,* *State v. Talton*, 497 A.2d 35, 44 (Conn. 1985) (declining to decide "the boundaries of intermittent assertion of the right to remain silent because" the defendant's declining to answer "one question was not tantamount to any assertion of his fifth amendment right").

statements at trial, the fact that he failed to make these statements earlier may be used for impeachment.")

That conclusion is consistent with the weight of authority from this Court, which has repeatedly found no *Doyle* violation when a suspect freely answers some questions after receiving *Miranda* warnings but does not answer or provide certain information in response to questions. *See State v. Maturana*, 180 Ariz. 126, 130 (1994); *Henry*, 176 Ariz. at 580; *State v. Reinhold*, 123 Ariz. 50, 53 (1979); *Tuzon*, 118 Ariz. at 207; *State v. Raffaele*, 113 Ariz. 259, 262 (1976); *see also State v. Anaya*, 170 Ariz. 436, 442 (App. 1991); *State v. Corrales*, 161 Ariz. 171, 172 (App. 1989).

In *Maturana*, the defendant "remained silent [as] to many of [the officer's] questions" and when he "failed to answer specific questions, the detective went on to other questions." 180 Ariz. at 129. Nevertheless, this Court found no *Doyle* violation when the State later commented on that silence at trial because *Maturana* "never invoked his right to remain silent—he merely chose to answer some questions and remain silent as to others." *Id.* In other words, the defendant waived his right to self-incrimination, and without any specific invocation of that right following his waiver, the full circumstances of his interview, including any moments of silence or omissions, could be used against him.

In *State v. Henry*, the defendant "was 'silent' about the murder during the early versions he gave the police" until he was confronted with his true identity and "gave a totally different version of the facts." 176 Ariz. at 580 (original emphasis omitted). This Court found no *Doyle* violation because the defendant "talked freely" without remaining silent or invoking his constitutional right to do so. *Id.* As this Court described, "'each of two inconsistent descriptions of events may be said to involve silence insofar as it omits facts included in the other version. But *Doyle* does not require any such formalistic understanding of silence.'" *Id.* (cleaned up; quoting *Anderson*, 447 U.S. at 409).

And in *Reinhold*, after receiving *Miranda* warnings, the defendant "answered all questions posed by the police officer except one; he refused to tell the officers the victim's name." 123 Ariz. at 52–53. This Court again found no *Doyle* violation because *Reinhold* "did not invoke his right to remain silent." *Id.* at 53.

The Arizona cases relied upon by the court of appeals and Melendez in his response to the petition for review are unavailing because in those cases, the prosecutor commented on silence when the suspect had not waived, or had specifically invoked, the right to remain silent. In *State v. Shing*, although the facts are not completely clear, the defendant seems to have initially agreed to speak with police post-*Miranda* warnings but ultimately refused to answer any police

questions or identify a suspect. 109 Ariz. 361, 364–65 (1973). In *State v. Anderson*, the prosecutor commented on the defendant's silence at the time of arrest, stating that "[t]his is the first time he told this story" when there was no evidence that defendant had made any statements to police. 110 Ariz. 238, 239 (1973).

In *State v. Sorrell*, the defendant initially invoked his right to counsel and cut off questioning. 132 Ariz. 328, 329 (1982). Later that day, the defendant called police to his cell and asked to make a statement. *Id.* The prosecutor violated *Doyle* by commenting on the time that passed between Sorrell's invocation and subsequent statements. *Id.*

Finally, in *State v. Routhier*, the defendant initially waived his rights post-*Miranda* warning but after answering certain questions, he informed police "that he wanted to speak with an attorney" and "the questioning ceased." 137 Ariz. 90, 93–94 (1983). This Court distinguished the case from its decisions in *Reinhold, Tuzon*, and *Raffaele* because of the defendant's "express invocation of his rights, as well as his failure to make a complete statement or to answer particular questions." *Routhier*, 137 Ariz. at 96.

Thus, Arizona courts, like the Supreme Court, have long permitted a defendant to be impeached with, and the State to comment on, a defendant's delay in providing his or her version of events that occurs after the defendant has waived

his right to remain silent and before any unambiguous re-invocation of that right. *See, e.g.*, *State v. Parker*, 231 Ariz. 391, 406, ¶ 65 (2013) (prosecutor's arguments about defendant's failure to answer questions or deny involvement in murder during police interview "were permissible comments on [defendant]'s statements, not comments on his invocation of his Fifth Amendment rights"); *State v. Guerra*, 161 Ariz. 289, 296 (1989) ("[T]he prosecutor could properly comment on the inconsistency of the statements [defendant made during 45-minute interview] under *Anderson v. Charles*, but could not comment on [defendant]'s invocation of his *Miranda* rights under *Doyle v. Ohio*.").

C. This conclusion is supported by case law regarding the right against self-incrimination when a defendant testifies at trial.

The Supreme Court has long held that when a defendant "waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution has the right to cross-examine upon such statement with the same latitude as would be exercised in the case of an ordinary witness." *Fitzpatrick v. United States*, 178 U.S. 304, 315 (1900). A defendant has "no right to set forth to the jury all the facts which tend in his favor without laying himself open to cross-examination upon those facts." *Id.*; *see also* *Brown*, 356 U.S. at 154–55 ("If [a criminal defendant] takes the stand and testifies in his own defense his credibility may be impeached and his testimony assailed

like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination.”).

Providing juries with all of the facts surrounding a defendant’s statements is imperative to the truth-seeking function of trials. For this very reason, the Supreme Court permits the State to impeach a defendant with *Miranda*-violative statements if he testifies inconsistent with those statements because “[h]aving voluntarily taken the stand, petitioner was under obligation to speak truthfully and accurately, and the prosecution [could] utilize the traditional truth-testing devices of the adversary process.” *Harris v. New York*, 401 U.S. 222, 224–26 (1971); *see also State v. Joe*, 234 Ariz. 26, 29, ¶ 12 (App. 2014) (“[T]he jury should be allowed to hear the conflicting statements and decide which story represents the truth in light of all the facts[.]”) (cleaned up). *Doyle* itself recognizes that a defendant’s invocation of silence can be used for impeachment under certain circumstances. 426 U.S. at 620 n.11 (“It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest.”).

Here, the cross-examination was aimed at highlighting that Melendez delayed telling police officers his self-defense story, in response to questions naturally calling for such information, so that he could first hear what other

witnesses were saying. R.T. 12/10/19, at 94 (prosecutor framing questions about interview that Melendez delayed in claiming self-defense until he was told he was going to jail); *id.* at 98 ("[Y]ou wanted her to tell you what she knew before you make a claim of self-defense; is that what you're saying?"); *see also* R.T. 12/11/19, at 42–43 (discussing Melendez's answers of wanting to "hold that information" and "pass" as delay). That is a form of impeaching with inconsistent statements. *See Jenkins*, 447 U.S. at 239 ("Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted."); *Hines*, 130 Ariz. at 70 ("A prior omission will constitute an inconsistency" if, under the circumstances, it would "have been natural for the person to make the assertion in question[.]"). As in *Anderson*, this cross-examination was proper. *See People v. Collins*, 232 P.3d 32, 59 (Cal. 2010) (relying on *Anderson* to conclude "prosecutor's questions regarding defendant's failure to come forward earlier with his alibi" were "a legitimate effort to elicit an explanation as to why, if the alibi were true, defendant did not provide it earlier").

To be clear, not all references to a defendant's silence during an interrogation after the proper waiver of *Miranda* rights would be admissible to impeach a defendant. The trial court still has a duty to preclude objectionable evidence that is not relevant or is unduly prejudicial. *See* Ariz. R. Evid. 402; Ariz.

R. Evid. 403. But here, Melendez's delay in answering Detective Ovalle's questions about why he shot at the victim was highly relevant and probative because it placed his self-defense testimony in context for the jury. And neither Melendez's trial counsel nor his appellate counsel found the State's use of his silence to impeach his credibility objectionable.

II. Melendez voluntarily, knowingly, and intelligently waived his right to remain silent.

The question of whether a defendant has waived his right to remain silent has been divided into "two distinct" requirements that the invocation be made (1) voluntarily, and (2) knowingly and intelligently. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). In the first prong, "the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception." *Id.* And in the second prong, the waiver must be made "'with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *Id.*

First, the record confirms that Melendez's waiver was voluntary because—after receiving his *Miranda* warnings—he began freely answering substantive questions about the events surrounding the shooting. Exh. 174; *see also State v. Melendez*, 256 Ariz. 14, 535 P.3d 16, 27, ¶ 32 (App. 2023) (concluding that Melendez "voluntarily spoke with the detective and nothing suggests he was intimidated, coerced, or deceived"). Indeed, the Supreme Court has found a single

answer to police questioning to be "a course of conduct indicating waiver" because if the defendant "wanted to remain silent, he could have said nothing in response to [officer]'s questions, or he could have unambiguously invoked his *Miranda* rights and ended the interrogation." *Berghuis*, 560 U.S. at 386.

Second, the record shows that Melendez "knowingly and intelligently" waived his right to remain silent. Specifically, Melendez twice received his *Miranda* warnings. *See* Exh. 174, at 2:40–3:15. After the first warning and, after a couple questions were asked, Melendez unequivocally invoked his right to remain silent by stating he had "decided to not talk," and the officer immediately stopped questioning. Docket 6. That officer told Melendez that he could always invoke and say he did not "want to talk anymore." *Id.* After receiving a second *Miranda* advisement five hours later, Melendez indicated that he understood his rights and subsequently chose to answer many of the detective's questions, while deferring others. Exh. 174, at 3:15–4:27. Thus, Melendez was fully aware of his right to silence and chose to waive it by answering questions in the second interview, which is the interview at issue here.

In its opinion, the court of appeals found that Melendez had not "knowingly" waived his right to silence under the second prong, finding that he "repeatedly told the detective he did not want to talk about the shooting, and the detective affirmed that was his right." *Melendez*, 535 P.3d at 27, ¶ 32. The court further found that

"[n]othing in the *Miranda* warnings informs a suspect that if he relies on his Fifth Amendment right to be silent, completely or partially, his exercise of that right can be used against him at trial." *Id.* at ¶ 33. But this conclusion is wrong for several reasons.

First, the court of appeals ignored the plain language of the advisement. *See Miranda*, 384 U.S. at 444. When given *Miranda* warnings, a defendant is necessarily advised that his right is to "*remain* silent" or have "any statement he does make … used as evidence against him." *Id.* (emphasis added). This warning conveyed to Melendez "not only … the privilege, but also the real consequences of foregoing it." *Id.* at 469.

Second, the court of appeals' decision contradicts the Supreme Court's decision in *Anderson*. After receiving *Miranda* warnings, the defendant in *Anderson* waived his rights by speaking to police and admitting he stole a vehicle belonging to a man who had been strangled to death. 447 U.S. at 404–05. At trial, the defendant mentioned for the first time that he stole the vehicle from an unattended parking lot. *Id.* at 405. On cross-examination, the prosecutor repeatedly asked the defendant about his failure to tell police where he got the car. *Id.* at 405–06. The Supreme Court held this was valid "because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent." *Id.* at 408. Thus, *Anderson* stands for the proposition that a

defendant's inconsistent statements in an interview may be used against him. Contrary to the court of appeals' decision, such usage is not inconsistent with the *Miranda* warning.

Third, the court of appeals erroneously characterized the record in finding that any waiver was not "knowing." Here, Melendez did not "repeatedly [tell] the detective he did not want to talk about the shooting." *Melendez*, 535 P.3d at 27, ¶ 32. Instead, Melendez answered several questions surrounding the circumstances of the shooting, including his relationship with the victim and the victim's family, where the gun was located in his apartment, and that he always carried the gun for protection. Exh. 174, at 3:15–14:53. He then stated that he wanted to "hold" or "pass" on certain questions. *Id.* at 5:10, 11:05, 12:55, 13:05, 16:59–17:10, 18:13, 18:45, 19:10, 19:37. Melendez never stated that he did not want to talk about the shooting. And Melendez knew how to invoke his *Miranda* rights, as he promptly did in his first interview.

III. After a defendant waives his right, *Doyle* is not implicated unless and until he unambiguously invokes his right to remain silent, which Melendez did not do in the interview at issue.

A person who waives his right to remain silent may subsequently invoke that right and "the interrogation must cease" at that point because "he has shown that he intends to exercise his Fifth Amendment privilege." *Miranda*, 384 U.S. at

473–74. That invocation, and any subsequent silence that occurs before a new waiver, are protected and cannot be the subject of cross-examination.

The invocation of the right to remain silent during a police interview, like the invocation of the right to counsel, must be unambiguous. *Berghuis*, 560 U.S. at 381. Melendez did not unambiguously invoke the right to remain silent in the interview at issue. Instead, he talked freely with the detective and indicated he had no problem speaking with her. *See generally* Exh. 174. In response to questions about why he shot at the victim, he did not unambiguously invoke his right to remain silent, but instead informed the detective that he wanted to "pass" or "hold" those answers "*for now*" because he felt "blindsided" and wanted to wait until he received information on what other witnesses had said. *See id.* 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 (emphasis added). These statements were not unambiguous invocations, but instead were an indication that he would prefer to answer certain questions only after hearing more information about what other witnesses stated.

CONCLUSION

A suspect who waives his right to silence and speaks to law enforcement, and who omits or refuses to provide information about part of his defense (without unambiguously invoking his right to remain silent), may be impeached with those omissions or refusals if he subsequently testifies at trial and includes in his

testimony new information in support of his defense. Melendez knowingly waived his right to remain silent by answering substantive questions from Detective Ovalle, and subsequent to that waiver, never unambiguously invoked his right to remain silent. Accordingly, the State permissibly used his prior omissions to impeach his trial testimony. Melendez's convictions and sentences should be affirmed.

Respectfully submitted,

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