

**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

**SIMULTANEOUS SUPPLEMENTAL BRIEF**

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## Supplemental Brief

### **I. Giovanni’s silence was not an “inconsistent statement.”**

If Giovanni’s refusals to tell Ovalle anything about what happened once he encountered the pastor’s son, A.G., is not protected silence under *Miranda*<sup>1</sup> and *Doyle*<sup>2</sup>, then what is it? The State proposes this Court cast Giovanni’s refusals as “prior inconsistent statements” and relies solely upon *Anderson v. Charles*, 447 U.S. 404 (1980), to advance its argument. State’s Petition for Review (“PFR”) at 8-9. Giovanni factually distinguished *Anderson*. See Defendant’s Response to State’s PFR (“Response”) at 9-12. Beyond invoking *Anderson* out-of-context, the State fails to offer either a logical or constitutional rationale for recasting Giovanni’s silence about the day’s events as inconsistent statements.

The purpose of the prosecutor’s impeachment represents an important distinction in *Anderson* that the State’s Petition avoids like the plague. Unlike Giovanni’s case, *Anderson* concluded the prosecutor’s impeachment of Charles never involved questioning “designed to draw meaning from silence.” Instead, the questioning elicited an explanation

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>2</sup> *Doyle v. Ohio*, 426 U.S. 610 (1976).

for Charles's prior inconsistent statements to police, i.e., the two separate locations from where he claimed he stole the car. *Anderson v. Charles*, 447 U.S. at 409. Conversely, every inference and argument the prosecutor advanced that Giovanni was manipulative because of his guilt, derived from Giovanni's exercise of his right to silence when Ovalle asked inculpatory questions. See TR 12/10/2019 at 94-100, 12/11/2019 at 42-44. Unlike what occurred in *Anderson*, this is precisely what the *Doyle* Court prohibited.

Here, Giovanni made no impeachable statements, he simply refused to answer questions. There was no inconsistency – there was only a constitutional exercise of his right to silence.

## **II. Federal decisions involving a defendant's selective silence heavily favor protecting selective silence under *Doyle*.**

The State oversells the strength of its position among jurisdictions when it claims, “a split of authority remains regarding whether a defendant's ‘selective silence’ in response to certain questions is protected under *Doyle*.” PFR at 9. Use of the word “split” creates a misnomer as only two federal circuit courts rendered decisions that ostensibly support

the State's position. The majority of federal circuits<sup>3</sup> that have addressed this issue extend the holding in *Doyle* to protect the selective exercise of silence. *Infra* at 7-12. The State ignores this body of law and cites cases from two federal circuits.<sup>4</sup> Both are inapposite.

**A. The State takes the two federal circuit court decisions that it relies upon out of context.**

First, the State invokes a Fifth Circuit case, [United States v. Pando Franco, 503 F.3d 389 \(5<sup>th</sup> Cir. 2007\)](#), to support its claim that once a defendant waives his right to complete silence and answers some questions, anything after that – including silence – is fair game for impeachment at trial. This is not what [Pando Franco](#) holds.

In [Pando Franco](#), Pando waived his rights and fully participated in a post-arrest, post-*Miranda* interview. *Id.* at 392. Pando never remained

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<sup>3</sup> The Fourth, Sixth, Seventh, Ninth, and Tenth Circuits hold that *Doyle* protects selective silence. The First, Second, Third, Eleventh, and D.C. Circuits have yet to squarely decide this issue. Only the Fifth and Eighth circuits disagree.

<sup>4</sup> The State's only other extra-jurisdictional cases supporting its position are from the California and Connecticut state appeals courts and the Federal District Court for Eastern Pennsylvania. For brevity, Giovanni does not distinguish these cases further. The cases upon which the State relied in its PFR are similarly inapposite, but Giovanni distinguished these in his Response to the State's Petition for Review. Response at 16-17.

silent, never exercised any form of his right to silence, and never refused to answer any questions. ¶ *U.S. v. Pando Franco*, 503 F.3d at 392. But “the officers found it unusual that not once during the course of his detention did Pando ever ask why he was being handcuffed, detained, and interviewed.” ¶ *Id.* The officers later testified that throughout the interrogation Pando never asked officers any of these questions. ¶ *Id.* at 396. This is the “silence” at issue: not silence at all but a failure to be inquisitive and ask the police for information. *Pando Franco* does not apply here.

The State also relies upon ¶ *United States v. Burns*, 276 F.3d 439 (8<sup>th</sup> Cir. 2002). This case is also inapplicable. Burns initially waived *Miranda* and answered inculpatory questions about his involvement in a check fraud scheme. *Id.* at 441. Later, in response to whether he recruited other participants to the scheme, Burns “just looked” at the officers and said nothing. Burns responded to several additional inquiries after this, but ultimately said he wanted to terminate questioning. *Id.*

The Eighth Circuit found “the admission of Mr. Burns's silence in response to one question posed to him in the midst of his interrogation” did not violate *Doyle*. *U.S. v. Burns*, 276 F.3d at 441-42. But the Eighth

Circuit’s opinion rests only on its determination that Burns never invoked his Fifth Amendment right to remain silent. The court did not address the issue presented here: whether *Doyle* protects selective silence under the Fourteenth Amendment Due Process Clause. In Giovanni’s case, there is no question as to whether he intentionally exercised his right to silence in response to inculpatory questions. *See* Appendix Item A – transcript of Giovanni’s interview with Detective Ovalle (“App. Item A”) at 4, 5, 8, 9, 12, 13-14.

**B. Most federal circuits hold that *Doyle* also protects selective silence.**

A review of the decisions finding *Doyle* protects selective silence follows.

### **The Second Circuit**

Although no Second Circuit decision directly addresses whether *Doyle* protects selective silence, its rationale in [■\*U.S. v. Casamento\*](#) bears on Giovanni’s case. [887 F.2d 1141 \(1989\)](#). In *Casamento*, the defendant (“Mazzurco”) told FBI agents that he knew co-defendant (“Alfano”) and that the previous year they talked about buying a pizzeria together. *Id.* [at 1179](#). Apparently during that post-arrest, post-*Miranda* interview,

Mazzurco never told agents he and Alfano also dealt precious stones together, but this is what he said at trial. During cross-examination, the prosecutor asked Mazzurco whether he previously told agents about dealing in precious stones with Alfano. The trial court overruled Mazzurco's subsequent objection. *Id.*

Like our case, the government in *Casamento*, relied upon *Anderson* to argue that the prosecutor's questions were proper. *Id.* The court found that the omitted details during Mazzurco's police interview (about dealing precious stones with Alfano) were not a prior inconsistent statement under *Doyle*, but rather an exercise of his right to silence. **"Here, since Mazzurco's post-arrest statement was not inconsistent with his trial testimony, we conclude that for Doyle purposes he remained silent."** *U.S. v. Casamento*, 887 F.2d at 1179 (emphasis added) Thus, the Second Circuit concluded the trial court "violated Mazzurco's due process rights by allowing the prosecutor's inquiry." *Id.*

#### **Fourth Circuit**

In *U.S. v. Ghiz*, the defendant answered questions in two post-arrest, post-*Miranda* interviews. [491 F.2d 599 \(1974\)](#). When agents asked him

questions about a stolen tractor, however, Ghiz told them he did not wish to answer questions about the tractor, so the agents terminated his interview. *Id.* at 600. The Fourth Circuit held “**if, in declining to answer certain questions, a criminal accused invokes his fifth amendment privilege or in any other manner indicates he is relying on his understanding of the Miranda warning,** evidence of his silence or of his refusal to answer specific questions is inadmissible.” *Id.* (emphasis added).

### Sixth Circuit

In [▣\*U.S. v. Williams\*](#), the government charged Williams with interstate transportation of a stolen vehicle. [665 F.2d 107, 108 \(1981\)](#). During his post-Miranda interrogation Williams, like Giovanni, “answered some questions” but then refused to answer other questions. Williams “refused to say how much and in what manner he paid for the vehicle and from whom he purchased it.” The Sixth Circuit found the prosecutor’s cross-examination of Williams about his failure to answer those questions violated his due process rights. “[T]he rationale of *Doyle* is that it is fundamentally unfair . . . to cross-examine a defendant about post-*Miranda* silence because the *Miranda* warning implicitly assures

that silence will carry no penalty and also because silence after such a warning is “insolubly ambiguous.” *Id.* at 109-110 (quoting *Doyle*, 426 U.S. at 617-18) (emphasis added).

### Seventh Circuit

In *U.S. v. Scott*, the Defendant interviewed extensively with FBI agents and provided numerous details, including admissions against his interest, but never told agents the same story he gave during his trial testimony. 47 F.3d 904 (7<sup>th</sup> Cir. 1995). The prosecutor impeached Scott with his failure to tell that story during his interview with the agents. *Id.* at 905-06. The Seventh Circuit held that the prosecutor may not impeach a defendant by showing his testimony at trial was inconsistent with his post-arrest, post-*Miranda* silence. “*Doyle* not only gives teeth to *Miranda*, but **protects against the fundamental unfairness of allowing a government agent to assure a suspect that he has the right to remain silent, and then to use that silence as evidence against the person at trial.**” *Id.* at 906 (emphasis added).

### Ninth Circuit

In [Hurd v. Terhune](#), the Defendant cooperated with a post-arrest, post-*Miranda* interview regarding his wife's homicide, but refused nine times to reenact her shooting (he claimed accidental discharge). [619 F.3d 1080, 1083-84 \(9<sup>th</sup> Cir. 2010\)](#). The Ninth Circuit concluded his refusal to reenact his wife's shooting was an exercise of his right to remain silent. **“[I]t is enough [to invoke his right to silence] if the suspect says that he wants to remain silent or that he does not want to answer that question.”** *Id.* at 1089. The court pointed out the under *Doyle*, a criminal defendant justifiably relies upon an "implicit promise" that his exercise of silence will not be "used against him in any way at trial, including impeachment." *Id.* at 1086. Once given *Miranda* warnings, an individual's silence becomes “ ‘insolubly ambiguous’ because that silence could be 'nothing more than [an] exercise of these Miranda rights.'” *Id.* at 1086 (quoting *Doyle*, 426 U.S. at 617)(emphasis added).

### **Tenth Circuit**

In [U.S. v. Canterbury](#), the defendant answered several police questions but failed to tell them he was being set up, an account to which he testified at trial. [985 F.2d 483, 484-485 \(10<sup>th</sup> Cir. 1993\)](#). The prosecutor impeached Canterbury extensively with his failure to tell the arresting

officers that he had been set up. *Id.* at 485. The court noted that when a defendant “answers some questions and refuses to answer others, this **partial silence does not preclude him from claiming a violation of his due process rights under *Doyle*.**” *Id.* at 486 (emphasis added).

### **III. *Doyle* protects Fourteenth Amendment due process rights.**

The State would define “silence” under *Miranda* in black and white terms, once a defendant speaks, he waives his right to remain silent and *Doyle*’s protection never applies. PFR at 2-3. But this view ignores the logic and rationale behind both *Miranda* and *Doyle*. Although the Fifth Amendment right against self-incrimination requires an unambiguous invocation, this is not the case with the Fourteenth Amendment protection *Doyle* promulgated. Under *Doyle*, the post-*Miranda* silence protected by the Fourteenth Amendment is best defined as an individual’s refusal to answer inculpatory questions. This “silence” is protected under the Fourteenth Amendment whether it comes as an unequivocal request, a statement declining to answer, or even if the individual simply stays silent in the face of inculpatory questions.

The Supreme Court has been clear: using an individual’s post-*Miranda* silence for impeachment violates the Due Process Clause of the

Fourteenth Amendment. *Doyle*, 426 U.S. at 619. This is because after being told they can remain silent, a defendant’s subsequent refusal to answer only certain questions may be in reliance on the *Miranda* warnings just received. The *Miranda* warnings do not tell a suspect how they must invoke their right to silence. Our courts recognize that this right might be exercised in various ways. Thus, any silence after *Miranda* is “insolubly ambiguous.” *Id.* at 617. Further, the *Miranda* warning that “anything you say may be used against you” necessarily indicates that one’s silence cannot be used against them. See *Doyle* at 618; *Miranda*, 384 U.S. at 444. Thus, when a suspect is remaining partially silent, it would be fundamentally unfair to use that silence against them at trial.

The State shades Giovanni’s partial silence as manipulative and purposeful. But intent cannot be divined, and the State does not have a magical ability to read Giovanni’s mind and know his intentions during his interrogation. Even if Giovanni’s reasons for partial silence were manipulative as the State suggests, it does not change the outcome. Our constitutional rights do not depend upon the subjective motives for the invocation.

Those federal circuits which recognize selective silence align with and support the Court of Appeals' decision. Giovanni urges that this Court apply *Doyle's* logic and protect the partial exercise of his right to silence which he invoked post-*Miranda*.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of June 2024.

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