SUPREME COURT OF ARIZONA

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

BRIEF OF AMICUS CURIAE ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE ("AACJ")

Molly Brizgys (#029216)
Mitchell | Stein | Carey | Chapman, PC
2600 N. Central Ave., Suite 1000
Phoenix, AZ 85004
Phone: 602-358-0290
Fax: 602-358-0291
molly@mscclaw.com

Attorney for Amicus Curiae
Arizona Attorneys for Criminal Justice

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

INTEREST OF AMICUS CURIAE

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend them. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ offers this brief because the right to silence is a core constitutional principle that affects criminal defendants. The right is important to all criminal defendants including innocent ones. "A right to silence benefits innocent suspects by providing them with a safer alternative to speech, as well as by reducing the probability of wrongful conviction for suspects who remain silent with and without a right to silence." Leshem, Shmuel, *The Benefits of a Right to Silence for the Innocent* (November 18, 2011) RAND Journal of Economics, Vol. 41, No. 2, pp. 398-416, 2010[1] This Court should affirm that post-*Miranda* silence should never serve as the basis of evidence against a defendant.

[1] Available at: https://ssrn.com/abstract=1935063

AACJ previously received permission from the parties to file an amicus brief in this case.

INTRODUCTION

The right to silence has come to occupy an important cornerstone in our system of jurisprudence. "There can be little doubt that the rule prohibiting an inference of guilt from a defendant's rightful silence has become an essential feature of our legal tradition." *Mitchell v. United States*, 526 U.S. 314, 330 (1999). The principle recognizes the longstanding implicit assurance contained in the *Miranda* warnings "that silence will carry no penalty." *Wainwright v. Greenfield*, 474 U.S. 284, 290 (1986). And the cases embrace the affirmation of the principle rooted in the due process clause of the Fourteenth Amendment that it is "fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony." *Id*. at 292. The Supreme Court has recognized that the critical point is after *Miranda* warnings because after those warning are given, it is the "governmental action [that] induced petitioner to remain silent." *Jenkins v. Anderson*, 447 U.S. 231, 240, 100 S. Ct. 2124, 2130, 65 L. Ed. 2d 86 (1980) (holding that use of prearrest silence does not violate the Fourteenth Amendment); *see also Salinas v. Texas*, 570 U.S. 178, 185 (2013) (also drawing the constitutional line at pre and post *Miranda*). That is why it is a basic precept that "[u]nder our adversary system of criminal justice, a defendant

may not be made to suffer for his silence." *United States v. Harrison*, 34 F.3d 886, 891 (9th Cir. 1994).

Melendez was given *Miranda* warnings and even after those warnings, the State seeks to make him "suffer for his silence." The State's arguments propose substantial ways of chipping away at a defendant's fundamental right to silence and non-incrimination by suggesting that Arizona courts take an all-or-nothing approach to the right. This ignores how the Fifth Amendment works in other contexts—which is on a question-by-question basis. The State's approach also encourages law enforcement overreach, which was the case here; in one breath the detective recognized "[silence] is your right" and in the next continued to ask the same questions of Melendez, wearing down his will to resist. This was all in the name of obtaining a conviction based on what a criminal defendant did not say in response to certain questions by the detective.

By characterizing silence as an "inconsistent statement," the State also runs roughshod over several evidentiary first principles. At a bare minimum, statements should be analyzed by the trial court under Ariz. R. Evid. 403 and juries should be instructed on the limited way that they are allowed to consider those statements pursuant to Ariz. R. Evid. 105.

This Court should reject the State's efforts to eviscerate a defendant's long-standing right and affirm that in Arizona, whenever a criminal defendant invokes his

right to silence, even when that silence is partial, the State cannot use that silence against him.

ARGUMENT

I. The State's argument ignores basic evidentiary rules.

a. Silence is not an inconsistent statement.

The State jumps to the conclusion that Melendez's exchanges with the detective are (1) statements at all and (2) inconsistent statements.

Silence, or the absence of speaking, is not a statement. Ariz. R. Evid. 801 (a) defines "Statement" as "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." Melendez was not making a statement when he refrained from telling the detective about how the shooting occurred or stated that he wanted to "pass," or "hold that information." It was his failure to respond, the failure to offer an explanation—or, in other words, the exercise of the right to remain silent-— that the State used against him in its closing argument ("why not tell the police that?') ("just what would a reasonable person respond if you really just shot in self-defense? Would a reasonable person say: I would not like to answer that question, or would the answer be: Absolutely not. I was not after anyone.")

Neither could these assertions of silence qualify as tacit admissions, which have very strict admission criteria. "When a statement adverse to a defendant's

interests is made in his presence and he fails to respond, evidence of the statement and the defendant's subsequent silence may be admissible as a "tacit admission of the facts stated" but only if "the defendant [could] clearly hear the statement and the circumstances must have been such as naturally call for a reply if [the defendant] did not intend to admit such facts." *State v. Saiz*, 103 Ariz. 567, 569 (1968) (cleaned up). That was not remotely the case here—the detective did not squarely place a fact at issue that Melendez heard and remained silent such that it would be considered a tacit admission. For instance Melendez's statements ("I want to pass" and "I want to hold that information" are markedly different than the circumstances in *State v. Reinhold*, 123 Ariz. 50, 53 (1979). There, "the [defendant] did not invoke his right to remain silent. He answered all questions posed by the police officer except one; he refused to tell the officers the victim's name." This Court held the defendant's silence in the face of a specific question about the victim's name could be used against the defendant at trial. Here, Melendez invoked his right to silence on specific questions ("I want to pass"); he did not stay silent or make a tacit admission like the defendant in *Reinhold* did.

This Court has applied this evidentiary framework and already held that silence is not an inconsistent statement. "Silence at the time of arrest is not an inconsistent or contradictory statement. Silence at the time of arrest is simply the

exercise of a constitutional right that all persons must enjoy without qualification." *State v. Anderson*, 110 Ariz. 238, 241, 517 P.2d 508, 511 (1973).

Putting aside that these were not statements at all, if the statement that the State seeks to admit is "I want to pass" or the number of times that Melendez refused to answer a question ("I want to hold that information"), they were not inconsistent statements to something he testified to at trial. The State ignores that "inconsistent statement" is an evidentiary term of art that permits admission of an otherwise hearsay statement only when it is truly an "inconsistent statement." *See* Ariz. R. Evid. 801(d)(1)(A) (A prior statement by a witness is not hearsay and may be admissible if "[t]he declarant testifies and is subject to cross-examination about [the] prior statement, and the statement ... is inconsistent with the declarant's testimony.") The trial court should have considered whether Melendez's statements were indeed inconsistent. *See United States v. Hale*, 422 U.S. 171, 176 (1975) *citing* 3A J. Wigmore, Evidence s 1040 (J. Chadbourn rev. 1970) ("As a preliminary matter, however, the court must be persuaded that the statements are indeed inconsistent.") Other than summarily declaring that the statements are inconsistent and therefore fall squarely under *Anderson v. Charles,* 447 U.S. 404 (1980), the State's argument bypasses the evidentiary requirements and fails to match up which statement made by Melendez at trial is inconsistent with which direct statement he made in his interview.

b. The trial court did not apply any of the traditional limiting protections before admitting the exchanges.

If Melendez's assertions were truly inconsistent statements, the trial court failed to apply any of the traditional protections attendant to the admission of an inconsistent statement. At a very minimum, the trial court should have weighed the admissibility of each statement under Ariz. R. Evid. 403.

The United States Supreme Court has recognized that silence has very little probative value, and significant potential for prejudice. *Hale*, 422 U.S. at 180 ("The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest.") That is because an arrestee's silence can "as easily be taken to indicate reliance on the right to remain silent as to support an inference that the explanatory testimony [offered at trial] was a later fabrication, which give silence "little probative force." *Id*.

Concerns over the ambiguity of a speaker's silence or failure to respond are even more present when English is the speaker's second language, as it was here. *See United States v. Osuna-Zepeda*, 416 F.3d 838, 846 (8th Cit. 2005) (Lay, J., concurring) ("The fact that [defendant] did not speak English only added to the ambiguity [of his silence]. Even if he understood the arresting officer, he may have

stood mute because he lacked sufficient ability to articulate a protest of his innocence in English. Under these facts, it is rank speculation to conclude that his silence demonstrated guilt.").

Social science research has also shown that silence can mean many things depending on the speaker. *See generally* Mikah Thompson, *Methinks the Lady Doth Protest Too Little: Reassessing the Probative Value of Silence* (August 1, 2008). 47 U. LOUISVILLE L. REV. 21 (2008). Thompson collects studies illuminating what a speaker's silence means. "In some cultures and contexts, silence may actually constitute disagreement or dissent with an adverse statement or condition." Stefan H. Krieger, *A Time to Keep Silent and a Time to Speak: The Functions of Silence in the Lawyering Process*, 80 OR. L. REV. 199, 220-21 (2001). Arrestees may remain silent to avoid being tricked into giving a false confession, which remain a reality for innocent and guilty individuals. Stephen Moston, *From Denial to Admission in Police Questioning of Suspects*, PSYCHOLOGY, LAW, AND CRIMINAL JUSTICE: INTERNATIONAL DEVELOPMENTS IN RESEARCH AND PRACTICE 91, 92-93 (Graham Davies et al. eds., 1996). "Arrestees may also remain silent because they are simply afraid. Innocent and guilty suspects alike may be fearful and nervous during police questioning," resulting in clamming up. Gisli H. Gudjonsson, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS 25 (2003). Sometimes silence simply means the person does not

know how to express themselves. "Studies show that children of different cultures learn different norms regarding the use of silence which tell them when, where, and how they should be silent." Sibel Tatar, *Why Keep Silent? The Classroom Participation Experiences of Non-Native English-Speaking Students*, 5 LANGUAGE & INTERCULTURAL COMM. 284, 286 (2005).

This bears out in this case—both parties are reasonably arguing as to what the defendant's silence must mean based on their advocacy position.

And even if the statements were admitted as inconsistent statements, it does not follow that they should have been admitted as substantive evidence of the defendant's guilt. The point of the rule admitting prior inconsistent statements is "based upon a belief that a jury ordinarily should be permitted to consider a prior inconsistent statement in determining credibility." *State v. Carr*, 154 Ariz. 468, 471, 743 P.2d 1386, 1389 (1987); *see also United States v. Gomez*, 725 F.3d 1121, 1127 (9th Cir. 2013) ("when Defendant testified in a manner arguably inconsistent with his earlier explanation, the Constitution does not prohibit the use of his explanation during rebuttal only, as impeachment evidence.")

The line of cases contending with the permissibility of admission of a defendant's silence have drawn the line between admission solely for impeachment purposes as to a testifying defendant and admission as substantive evidence of the state's case-in-chief. In *Doyle v. Ohio*, 426 U.S. 610 (1976), before holding that

silence was not admissible, the Court preliminarily acknowledged that the State was not arguing the silence could be as evidence of guilt, but merely as impeachment evidence. *See id.* at 617 ("the State does not suggest petitioner's silence could be used as evidence of guilt"). The question presented in *Jenkins v. Anderson*, 447 U.S. 231, 232 (1980) was "whether the use of prearrest silence to *impeach a defendant's credibility* violates either the Fifth or the Fourteenth Amendment to the Constitution." (emphasis added) In *Wainwright v. Greenfield*, 474 U.S. 284, 285 (1986) the Supreme Court held that it was a Due Process violation to use respondent's silence after receiving *Miranda* warnings as "substantive evidence of his sanity."

Against Melendez, the State used the assertions of silence both to impeach his credibility as a witness and as evidence that he was guilty of the crime, arguing that an innocent man who truly acted in self-defense would have immediately told that story to the detective in the interview, which meant that he was guilty and was not justified to act in self-defense. This was impermissible and at the very least, the jury should have been instructed that it could only consider any inconsistent statements when assessing the credibility of the defendant turned witness, and not as substantive evidence of his guilt. *See* Ariz. R. Evid. 105; Ariz. RAJI 23.

II. The State's all or nothing approach is not how the Fifth Amendment works.

The State treats an individual's rights under the Fifth Amendment as an all or nothing proposition), which is not how the right operates in other contexts. "*Miranda* does not apply only to specific subjects or crimes. It applies to every question investigators pose." *Hurd v. Terhune*, 619 F. 3d 1080, 1087 (9th Cir. 2010).

For instance, when a testifying witness seeks to invoke their Fifth Amendment on the stand, they cannot invoke their rights wholesale or stand on generalities, they must invoke the right, and show they actually have a valid right as to every question posed. *See United States v. Bodwell*, 66 F.3d 1000, 1002 (9th Cir. 1995) (trial court erred by denying defendant's Fifth Amendment rights and on remand, the defendant "shall be asked the questions in the summons *on a question-by-question basis*, and for a determination as to the merit of Bodwell's Fifth Amendment claim.") (emphasis added). In other words, "[t]he only way the Fifth Amendment can be asserted as to testimony is on a question-by-question basis." *Id*. This is also the case in Arizona. Only "[i]f upon conducting an in camera hearing the trial judge determines that a witness could legitimately refuse to answer essentially all relevant questions, then that witness may be totally excused without violating an individual's Sixth Amendment right to compulsory process." *State v. McDaniel*, 136 Ariz. 188, 194, 665 P.2d 70, 76 (1983), abrogated on other grounds by *State v. Walton*, 159

Ariz. 571, 769 P.2d 1017 (1989). Otherwise, they must invoke on a question-by-question basis.

The Ninth Circuit's question-by-question approach to "selective silence" (*Miranda* "applies to every question investigators pose") is the other side of this coin. It would be illogical and inconsistent to hold that in this context, when it is being used against a defendant to convict him, the Fifth Amendment is all or nothing, but when a defendant seeks to compel a witness to testify on his behalf, it attaches to each specific question and must be accordingly invoked as to every question.

III. If a defendant's selective silence is fair game, it will encourage law enforcement to abandon its imperative to scrupulously honor a speaker's right to cut off questioning.

It is unworkable in practice to allow any invocation of silence to be used against a defendant. As argued above, silence is ambiguous. It can mean many different things based on the complicated dynamics between law enforcement and the interviewee. It can vary in length. It is particular to each person—some speakers talk rapidly, filling silence, while others are quiet and have trouble getting their words out. Depending on the education level, age, sophistication, mental state, mental ability, cultural context, stress-level and a myriad of other human characteristics, the cadence and flow of an interview with law enforcement will vary. Under the State's theory if a speaker pauses or hesitates before answering a question,

would that be considered "silence" and therefore admissible against him under a selective silence theory? If a defendant fails to expound a detail or explain something in enough detail, under the State's selective silence theory is that fair game to argue a defendant had a chance to explain and did not? A trial court is ill-equipped to play umpire to the meaning and admissibility of these various hesitations, pauses, gaps, omissions, and silences. There are good practical reasons why post-*Miranda* silence is inadmissible.

A rule prohibiting the use of any invocation of silence would have a deterrent effect on law enforcement overreach. A person in custody "may selectively waive his right to remain silent by indicating he will respond to some questions, but not to others." *United States v. Thierman*, 678 F.2d 1331, 1335 (9th Cir. 1982). If a defendant selectively chooses to answer some questions and not others, law enforcement must "scrupulously honor his "right to cut off questioning." *Michigan v. Mosley*, 423 U.S. 96, 104 (1975); *see also State v. Finehout*, 136 Ariz. 226, 230, 665 P.2d 570, 574 (1983) ("limited additional questioning for clarification is consistent with the United States Supreme Court's mandate that the person in custody's "right to cut off questioning" must be "scrupulously honored.") Melendez's statements to cut off questioning may not have been delivered with the clarity of an "Oxford don" *Davis v. United States*, 512 U.S. 452, 476 (1994), but the constitution does not require as much. "Even if the defendant's assertion is

susceptible to more than one interpretation, the limit of permissible continuing interrogation immediately after the assertion would be for the sole purpose of ascertaining whether the defendant intended to invoke his right to silence." *Finehout*, 136 Ariz. at 229. In other words, if the detective believed Melendez's statements "I want to pass" or "hold that information" were ambiguous, clarifying questions should have been asked by the detective about what he meant and whether he intended to cut off questioning.

If selective silence is admissible, there is a built-in incentive for law enforcement to not scrupulously honor the right to cut off questioning but to charge ahead, continue questioning, and then argue later the defendant had a chance to answer, deny, explain, and did not. That's exactly what happened here. Law enforcement did not scrupulously honor Melendez's right to cut off questioning or clarify whether he was invoking his right to silence. Instead, after repeated statements about "passing," "holding that information" and not wanting to answer, the detective acknowledged "that's your right" only to forge ahead with more questioning on the same topics Melendez had refused to answer. The State then exploited that silence, which it argued was ill-timed and had a manipulative purpose, as evidence of Melendez's guilt.

This Court should not countenance an approach that incentivizes law enforcement to ignore an interviewee's Fifth Amendment rights even in the face of ambiguity.

***

This Court should hold that when a defendant remains silent or refuses to answer a question posed by law enforcement, that silence or refusal is inadmissible. The State's position, suggesting that Melendez's exchanges with the detective should be admissible as substantive evidence of his guilt, is extreme on many fronts. It asks this Court to chip away at a defendant's Fifth Amendment right, which is an essential feature of our legal tradition. It is also fundamentally unfair in that it promises one thing—that an interviewee has the right to remain silent—and then turns around and uses that silence against him at trial, in violation of Due Process. The State should not be in the business of this kind of bait and switch or convict-at all costs type of prosecutions.

The State's arguments also ignore many longstanding evidentiary principles, including whether the verbal exchange included a statement at all let alone an inconsistent one, and suggesting that the exchanges and silence were both properly admitted without any limiting instructions on their use.

Human experience backed by social science and case law shows that the meaning of silence is ambiguous. Depending on the dynamics of the exchange between speaker and law enforcement, silence can signal a myriad of things. Given its low probative value and the constitutional principles at stake, this Court should affirm that post-*Miranda* silence should never serve as the basis of evidence against a defendant.

RESPECTFULLY SUBMITTED June 21, 2024.

MITCHELL | STEIN | CAREY | CHAPMAN, PC

By _____
Molly Brizgys
2600 North Central, Suite 1000
Phoenix, AZ 85004

Attorney for Amicus Curiae
Arizona Attorneys for Criminal Justice