No. _____

IN THE

Supreme Court of the United States

STATE OF MISSOURI,
Petitioner,

v.

ROBERT R. BROOKS,
Respondent.

On Petition For a Writ of Certiorari
To the Supreme Court of Missouri

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where the defendant did not invoke his right to remain silent and gave nonresponsive, evasive, and generic exculpatory answers during a lengthy post-*Miranda* interrogation—including statements that he had "nothing to hide" and that he had done "nothing" in reference to the killing of his fiancée—was it a *Doyle* violation for the State to use his post-*Miranda* statement, in its case-in-chief, to show that the defendant had not given a self-defense account or other important details during the post-*Miranda* interrogation; and, on cross-examination, to impeach the defendant's claim that he acted in self-defense?

PARTIES TO THE PROCEEDING

Petitioner, State of Missouri, was the respondent below; respondent, Robert Brooks, was the appellant.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

Blank Page

OPINIONS BELOW

The Missouri Supreme Court's opinion reversing the trial court's judgment, filed February 23, 2010, and reported at 304 S.W.3d 130 (Mo. 2010), is reprinted in the Appendix ("App.") at A1-A17.

The Missouri Court of Appeals order affirming the trial court's judgment, and the Court of Appeals unpublished memorandum in support of its order, issued March 3, 2009, is reprinted in the Appendix at A18-A27.

JURISDICTION

The Supreme Court of Missouri entered its judgment on February 23, 2010. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law . . . .

Constitution of the United States, Amendment XIV:

> ... No state shall . . . deprive any person of life, liberty or property without due process of law . . . .

STATEMENT OF THE CASE

This petition asks the Court to clarify whether a criminal defendant's nonresponsive, evasive, and generic exculpatory statements—and any pertinent facts omitted from such statements—constitute protected "silence" as that term is contemplated in *Doyle v. Ohio*, 426 U.S. 610 (1976).

In *Doyle*, the Court held that once a person has been arrested and advised of the *Miranda* warnings, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." 426 U.S. at 618. In reaching this conclusion, the Court explained that "[s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights." *Id.* at 617. "Thus," the Court stated, "every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested." *Id.*

Four years later, in *Anderson v. Charles*, 447 U.S. 404 (1980), the Court limited the scope of *Doyle* and held that the State can use voluntary, post-*Miranda* statements to impeach a defendant's trial testimony, even if the State asks about a defendant's failure to tell the police certain details. *Id.* at 408-09. The Court concluded that "[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." *Id.* at 408. The Court acknowledged that "[e]ach of two inconsistent descriptions of events may be said to involve 'silence' insofar as it omits facts included in the other version," but the Court concluded that "*Doyle* does

not require any such formalistic understanding of 'silence[.]' " *Id.* at 409.

Here, a jury found the Respondent, Mr. Brooks, guilty of second-degree murder for killing his fiancée. App. A1-A4. At trial, Mr. Brooks testified that he had shot his fiancée in self-defense. App. A3. The State, in its case-in-chief, presented evidence that Mr. Brooks had—before his arrest and before the *Miranda* warnings—made various false statements about his role in the murder. App. A3-A4. The State also presented evidence that Mr. Brooks had—after the police gave *Miranda* warnings—made a lengthy taped statement, wherein he offered numerous non-responsive, evasive, and generic exculpatory statements when questioned about the murder. App. A3-A4. Mr. Brooks's post-*Miranda* statements included assertions that Mr. Brooks and his fiancée were very close, that Mr. Brooks had "nothing to hide," and that Mr. Brooks had done "nothing" in relation to the murder of his fiancée. App. A3-A4, A31-A47. In referring to these statements during opening statement, in its case-in-chief, in cross-examining Mr. Brooks, and in closing argument, the State pointed out that Mr. Brooks had ultimately told the police nothing of value during the post-*Miranda* interrogation, and that Mr. Brooks had not told the police (as he subsequently claimed at trial) that he had shot his fiancée in self defense. *See* App. A6-A13.

On appeal, the Missouri Court of Appeals rejected Mr. Brooks's claim that the State had committed repeated *Doyle* violations by presenting evidence of Mr. Brooks's post-*Miranda* statements and by pointing out that Mr. Brooks had failed to tell the police that he had shot his fiancée in self-defense. App. A20-A25. The Court of Appeals reasoned that Mr.

Brooks had not elected to remain silent and had elected instead "to make a statement." App. A23. And, citing the Court's opinion in *Anderson v. Charles*, 447 U.S. at 408, the Court of Appeals stated, "If a defendant answers questions or makes a statement while in custody, the right to remain silent and not have the State comment on that silence is waived as to the subject matter of those statements." App. A23. The Court held:

> In this case, the defendant was informed of his constitutional rights, including his right to remain silent. He acknowledged that he understood his right to remain silent. The defendant then voluntarily elected to respond to questions asked by the interviewing officer. By answering the officer's questions, the defendant elected not to remain silent. During the course of the interview, when being questioned about the events of the day and his version of what occurred, the defendant stated, "I don't have nothing to hide. I didn't do nothing at all." We hold that the defendant waived his right to remain silent. The defendant's statement clearly refers to the alleged criminal offense. Accordingly, once the defendant waived his right to remain silent, his silence, and his failure to provide the exculpatory details he later provided at trial, was a fair subject for comment by the prosecutor.

App. A24-A25.

The Supreme Court of Missouri granted Mr. Brooks's application for transfer, and, in reversing and remanding the case for a new trial, the court held that the state had committed multiple *Doyle*

violations by presenting evidence of Mr. Brooks's post-*Miranda* statements and by repeatedly referring to the lack of specific exculpatory information in Mr. Brooks's post-*Miranda* statements. App. A4-A14. The Court held that "[a] general denial of culpability, such as 'I didn't do nothing at all," does not waive the right to remain silent." App. A5. And, citing to footnote 2 in the Court's opinion in *Anderson v. Charles*, the Missouri Supreme Court indicated that the Court had "treat[ed] similar statements as not waiving the right to silence." App. A5.[1] Thus, although he had not remained silent after the *Miranda* warnings, the Missouri Supreme Court held that the State had improperly commented on Mr. Brooks's "silence" by pointing out that Mr. Brooks, in his statements to the police, had not been forthcoming about the events surrounding the murder, and that he had not told the police that he shot his fiancée in self-defense. App. A4-A14.[2] The Court further held that the State's use of the post-*Miranda* interview was error because the police officers' questions—which sought to draw out more information—were themselves *Doyle* violations. App. A11-A12.

The Petitioner, State of Missouri, seeks review of the Missouri Supreme Court's decision because the Missouri Court has adopted a rule that fails to protect the interests that *Doyle* was designed to safeguard. Moreover, in expanding the reach of *Doyle*, the Missouri Court has created and sharpened con-

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[1] As will be discussed below, petitioner disagrees with this characterization of *Anderson v. Charles*.

[2] The substance of Mr. Brooks's post-*Miranda* interrogation, as it was presented to the jury is included in the Appendix. App. A31-A47. In stating the facts, the Missouri Supreme Court quoted only two of Mr. Brooks's post-*Miranda* statements.

flicts among the Federal Circuit Courts and state courts of last resort. Finally, the Missouri Supreme Court's new rule has placed an unwarranted and unfair burden on the state's legitimate interest of solving and prosecuting criminal offenses.

REASONS FOR GRANTING THE PETITION

I. The Missouri Supreme Court has adopted an unwarranted expansion of the rule in *Doyle*, and it has misconstrued the decision in *Anderson v. Charles* to incorrectly limit the State's use of voluntary, post-*Miranda* statements.

The Court has consistently applied the rule in *Doyle* to circumstances where the defendant actually elected to remain silent. *See Fletcher v. Weir*, 455 U.S. 603, 606 (1982) ("we have consistently explained *Doyle* as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him").

Since *Doyle* was decided in 1976, there have been various attempts to expand the scope of its rule. But the Court has consistently limited the rule of *Doyle* to those situations wherein "the defendants, after being arrested . . . received their *Miranda* warnings and chose to remain silent." *See Portuondo v. Agard*, 529 U.S. 61, 74 (2000) (reversing the lower court and declining to expand *Doyle* to prohibit a prosecutor from commenting on the defendant's presence at trial). *See also South Dakota v. Neville*, 459 U.S. 553, 564-66 (1983) (reversing the lower court and declining to expand *Doyle* to prohibit evidence of a defendant's refusing a blood-alcohol test); *Fletcher v. Weir*, 455 U.S. at 605-07 (1982) (reversing the lower court and holding that a defendant can be impeached with post-arrest, pre-*Miranda* silence); *Anderson v. Charles*, 447 U.S. at 408-09 (reversing the lower court and holding that a defendant can be impeached with inconsistent post-*Miranda* statements); *Jenkins*

v. Anderson, 447 U.S. 231, 238-40 (1980) (affirming the lower court and holding that a defendant can be impeached with pre-arrest silence); *Roberts v. United States*, 445 U.S. 552, 561 (1980) (observing that the defendant's post-conviction, presentencing silence bore "no resemblance to the 'insolubly ambiguous' postarrest silence that may be induced by the assurances contained in *Miranda* warnings").

Of particular relevance among these cases is the Court's decision in *Anderson v. Charles*, where the Court limited *Doyle* and held that the government can use voluntary, post-*Miranda* statements to impeach a defendant's trial testimony, even if the State asks about the defendant's earlier failure to include certain details. 447 U.S. at 408-409. As outlined above, the Court held that "[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." *Id.* at 408. The Court admitted that "[e]ach of two inconsistent descriptions of events may be said to involve 'silence' insofar as it omits facts included in the other version," but the Court concluded that "*Doyle* does not require any such formalistic understanding of 'silence[.]' " *Id.* at 409.

Here, as in *Anderson v. Charles*, the defendant, Mr. Brooks, did not remain silent after the police advised him of the *Miranda* warnings. Instead, he gave a lengthy, albeit evasive, statement to the police. App. A31-A47. For instance, he told the police that he and his fiancée were very close and did everything together, he said that he had "nothing to hide" about the murder, and he said that he had done "nothing" in connection with the murder. App. A31-A47. In addition, throughout the interview, Mr.

Brooks attempted to divert the officers who were questioning him by giving them non-responsive and evasive answers. App. A31-A47. Given Mr. Brooks's many responses, it cannot be said that he invoked his right to remain silent. Indeed, except as to certain details—e.g., that he shot his fiancée in self-defense—Mr. Brooks was not silent at all.[3] And as the Court stated in *Anderson*, "a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent." *Id.* at 408.

And, yet, in holding that the State committed repeated *Doyle* violations, the Missouri Supreme Court concluded that Mr. Brooks was, in effect, "silent" during his post-*Miranda* interview. In the court's estimation, Mr. Brooks only gave "[a] general denial of culpability." App. A5. But in attempting to differentiate "general" denials of culpability from all other post-*Miranda* statements, the court has adopted an artificial distinction. Whether general or specific, Mr. Brooks's voluntary statements had probative value. Moreover, there were substantial omissions in his general denials, including, for instance, that Mr. Brooks (as he later claimed at trial) shot his fiancée in self-defense. It was those omissions that the State focused on in presenting its case and in cross-examining Mr. Brooks; and, accordingly, in holding that the State could not highlight the omissions, the Missouri Supreme Court did in this case what the Court would not do in *Anderson*: it adopted a "formalistic understanding of 'silence.' "

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[3] After the interrogation had continued for some time, Mr. Brooks eventually invoked his right to remain silent and the interrogation ceased. App. A47. But, importantly, the State was not permitted to comment on Mr. Brooks's invocation, and it was not permitted to comment on his post-invocation silence. *See* App. A47.

In adopting this expansion of *Doyle*, the Missouri Supreme Court purported to rely on *Anderson*. App. A5 (citing to footnote 2 of *Anderson*). The Missouri Court stated that the Court in *Anderson* had treated statements similar to Mr. Brooks's statements "as not waiving the right to silence." App. A5. But a passing citation to footnote 2 in *Anderson* does not support the expansion of *Doyle* that the Missouri Court has adopted. In footnote 2, the Court pointed out that "*Doyle* analyzed the due process question as if both defendants had remained silent," when, in fact, one of the defendants had, "[w]hen told the reason for his arrest, . . . exclaimed 'you got to be crazy,' or 'I don't know what you are talking about.' " 447 U.S. at 407 n. 2. But this acknowledgement of the two statements that were made by one of the defendants in *Doyle* should not be viewed as an indication that the Court has already decided that such generic statements (or omissions from such statements) can never be commented on by the State.

In fact, what the footnote in *Anderson* makes plain is that the exclamations made by one of the defendants in *Doyle* have never been analyzed by the Court, i.e., they have simply been ignored in favor of treating the case as one involving actual silence. *Id.* ("Both the Court and the dissent in *Doyle* analyzed the due process question as if both defendants had remained silent."). Whether such generic statements (and any concomitant omission) would have been admissible in evidence or would have been available for cross-examination of the defendant is a question that the Court has not directly answered. And it certainly has not been considered in the wake of *Anderson* itself.

It is true that the Court, in footnote 2, also distinguished the generic statements made by one of the defendants in *Doyle* from the more explicit, contradictory statements made in *Anderson*. *Id.* But the Court gave no express indication what importance the difference had—the Court never held that a brief, generic denial, in the nature of an outburst, is equal to post-*Miranda* silence. While the Court readily distinguished the statements in *Doyle* as immaterial to the question presented by the facts in *Anderson*, the Court in *Anderson* had no opportunity to actually consider whether such generic exculpatory statements were admissible as voluntary, post-*Miranda* statements, and whether they had any probative value in the case.

Moreover, here, unlike the brief exclamations by one of the defendants in *Doyle*, Mr. Brooks gave an extensive post-*Miranda* statement, wherein he made numerous evasive and nonresponsive statements and various exculpatory statements about his conduct in killing his fiancée. As such, even if a post-*Miranda* statement must be "substantive" (and not merely the types of exclamations made by one of the defendants in *Doyle*), there is a legitimate question whether the Missouri Supreme Court should have relied on the footnote from *Anderson* to expand the reach of *Doyle* under the facts of Mr. Brooks's case.[4] Indeed, in light of Mr. Brooks's multiple false statements both before and after *Miranda* warnings, the State's comments about Mr. Brooks's omissions were not comments on protected silence; rather, they were comments on the

[4] In fact, in reaching conflicting results, both the Missouri Court of Appeals and the Missouri Supreme Court relied on this Court's opinion in *Anderson v. Charles*. App. A5, A23.

fact that he told another incomplete and false story after receiving the *Miranda* warnings.

In sum, by characterizing Mr. Brooks's omissions as "silence," and in holding that omissions from a post-*Miranda* statement cannot be remarked upon unless the post-*Miranda* statement is something more than "[a] general denial of culpability," the Missouri Supreme Court has expanded *Doyle* beyond its terms and unduly limited the State's use of voluntary post-*Miranda* statements.

II. The Missouri Supreme Court's expansion of *Doyle* is unwarranted, as it divorces *Doyle* from its dual aims of holding the State to its promises and of excluding evidence that lacks probative value.

The Missouri Supreme Court's expansion of *Doyle* is also unwarranted, as it divorces *Doyle* from the interests that the rule in *Doyle* was designed to protect. As stated above, the Court has routinely limited *Doyle* to situations where a defendant has invoked the right to remain silent after receiving the *Miranda* warnings. This limitation makes sense, for when a defendant actually remains silent, the rule of *Doyle* protects two legitimate interests: first, the notion of fair play—it violates due process to use a defendant's silence after assuring the defendant that he or she can lawfully remain silent; and second, the truth-seeking function of the court—evidence of mere silence should not be used to prove guilt or to impeach a defendant because it is, in light of the *Miranda* warnings, "insolubly ambiguous." *See Doyle v. Ohio*, 426 U.S. at 617-18.

Here, Mr. Brooks was not induced to remain silent by the *Miranda* warnings. Instead, after the police gave the warnings, Mr. Brooks talked at length with the police officers and made various incomplete and misleading statements about his role in the murder. App. A31-A47. In other words, in expanding *Doyle* to cover Mr. Brooks's situation, the Missouri Supreme Court has offered *Doyle*'s protective shield not merely to a person who remains silent due to the assurances of *Miranda*, but also to any person who speaks about the crime generally but is not truthful or forthcoming about the facts. This is completely at odds with *Doyle* and subsequent cases, which have extended *Doyle*'s protective shield only to those defendants who—in reliance on the express assurances of *Miranda*—elect to remain silent. *See Roberts v. United States*, 445 U.S. at 561 (declining to expand *Doyle* to circumstances where the defendant's conduct bore "no resemblance to the 'insolubly ambiguous' postarrest silence that may be induced by the assurances contained in *Miranda* warnings.").

As an example, in *Fletcher v. Weir*, the Court refused to expand *Doyle* to a situation involving postarrest silence where no *Miranda* warnings had been given. There, the lower court had held that "a defendant cannot be impeached by use of his postarrest silence even if no *Miranda* warnings had been given." 455 U.S. at 604. The lower court reasoned that "an arrest, by itself, is governmental action which implicitly induces a defendant to remain silent." *Id.* at 606. The Court reversed, observing first that, "as in other post-*Doyle* cases, we have consistently explained *Doyle* as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him." *Id.* The Court then held that, "In

the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." *Id.* 607. *See Jenkins v. Anderson*, 447 U.S. at 239-41 (impeachment with the defendant's pre-arrest, pre-*Miranda* silence was proper).

Similarly, in a case where the defendant receives the *Miranda* warnings, but does not elect to remain silent, there is no induced silence to protect, and the due process concern of holding the State to its promises is not implicated. Thus, here, where Mr. Brooks made statements post-*Miranda*—and where he was informed that his statements could be used against him—it cannot be said that the State violated due process by then using Mr. Brooks's post-*Miranda* statements. The rule in *Doyle* is simply not applicable to such circumstances. *See Wainwright v. Greenfield*, 474 U.S. 284, 291 (1986) ("*Doyle* rests on 'the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial.' ").

A second interest protected by the rule in *Doyle* is the truth-seeking function of the trial court. As the Court stated in *Doyle*, a defendant's silence after the *Miranda* warnings is "insolubly ambiguous." 426 U.S. at 617. This is so because a person's silence might have been caused by a desire to hide the truth, or it might have been caused by the *Miranda* warnings themselves. This "insoluble" ambiguity robs post-*Miranda* silence of any real probative value and, thus, weighs against the State in balancing whether the State's actions are permissible.

But where, as here, the defendant does not remain silent after receiving *Miranda* warnings, and where the defendant instead offers evasive, incomplete, and exculpatory responses, the "silence" that is the defendant's omissions is not insolubly ambiguous. The ambiguity is dispelled because, in answering questions posed by the police, the defendant raises the expectation that he or she will tell the truth and provide important details to the police. *See generally Roberts v. United States*, 445 U.S. at 557-58 ("This deeply rooted social obligation [to assist authorities in uncovering crimes] is not diminished when the witness to crime is involved in illicit activities himself. Unless his silence is protected by the privilege against self-incrimination, . . . the criminal defendant no less than any other citizen is obliged to assist the authorities."). *See also Jenkins v. Anderson*, 447 U.S. at 237-38 (the Fifth Amendment "privilege cannot be construed to include the right to commit perjury . . . . [] and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process") (quoting *Harris v. New York*, 401 U.S. 222, 225 (1971)).

And, indeed, once a defendant offers information to the police—and particularly where the defendant makes exculpatory statements—any "silence" or omitted fact is highly probative, for it legitimately shows that the defendant initially had no valid explanation for his conduct, that the defendant was conscious of his guilt, and that any subsequent (different) exculpatory story was fabricated in the interval between the first and later accounts. *See generally Brecht v. Abrahamson*, 507 U.S. 619, 628-29 (1993) ("It was entirely proper—and probative—for the State to impeach his testimony by pointing

out that petitioner had failed to tell anyone before the time he received his *Miranda* warnings at his arraignment about the shooting being an accident. Indeed, if the shooting was an accident, petitioner had every reason—including to clear his name and preserve evidence supporting his version of the events—to offer his account immediately following the shooting.").

The facts of the present case aptly illustrate the probative value of Mr. Brooks's so-called "silence" during the post-*Miranda* interrogation. Immediately after the murder, Mr. Brooks called 911 and told the 911 operator that he had just shot his fiancée, thinking that she was an intruder in the house. App. A3. The 911 operator transferred Mr. Brooks to the police, and Mr. Brooks repeated his false story. App. A28-A31. Mr. Brooks explained: "Yeah, she turned the f---ing light on, and I didn't know who it was. I fell asleep." App. A30. He continued: "I didn't know who she was. I told her, don't wake me up." App. A30.[5] After the police arrived, Mr. Brooks was overheard talking to his mother on the telephone; he told her that "they were sleeping and that [the victim] got up and continued the argument and then she was shot." App. A3. Mr. Brooks was also overheard talking on the telephone to a friend (who happened to be a police officer in another city); Mr. Brooks told that officer that he and the victim argued for about forty-five minutes. App. A3, A47. At no point during any of these accounts did Mr. Brooks tell anyone that he had shot his fiancée in self-defense after she pulled a gun on him. Thereafter, Mr. Brooks agreed to go to the police station for an interview. App. A3. After the

[5] The Missouri Supreme Court left this false statement out of its recitation of the facts.

Miranda warnings, Mr. Brooks was interrogated at length. In that interview, Mr. Brooks said that he had "nothing to hide," that he had done "nothing," that he did not know what had happened, and that he had a very close relationship with his fiancée. App. A31-A47.[6] Mr. Brooks also showed his consciousness of guilt, stating that he must be "a suspect," and stating his belief that the police would not let him leave if he tried to walk out. App. A34-A35, A37-A38, A41. Throughout the interrogation, Mr. Brooks also attempted to divert the police with questions of his own, particularly when the police asked him about his statement to the 911 operator. App. A31-A47. Eventually, Mr. Brooks invoked his right to remain silent, but the fact of his invocation was not presented to the jury. *See* App. A47.

In light of these facts, Mr. Brooks's post-*Miranda* statements constituted the third or fourth false account offered by Mr. Brooks in the aftermath of the murder. As such, Mr. Brooks's "silence" about certain facts while he was offering statements about his role in the murder was highly probative of his guilt. Moreover, once Mr. Brooks took the stand and offered his newly-minted account of self-defense, his previous silence in that regard became even more probative. *See Brecht v. Abrahamson*, 507 U.S. at 628-29 ("It was entirely proper—and probative—for the State to impeach his testimony by pointing out that petitioner had failed to tell anyone before the

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[6] The Missouri Supreme Court included only a brief summary of Mr. Brooks's interview: "Brooks was questioned, but repeatedly avoided answering. Brooks made the statements, 'I don't have nothing to hide' and 'I didn't do nothing at all.' Brooks did not give an account of the struggle or shooting during the interview." App. A3-A4. The full interview presented to the jury is included in the Appendix. App. A31-A47.

time he received his *Miranda* warnings at his arraignment about the shooting being an accident.").[7]

In short, silence, itself, can be probative of guilt, and it can be relevant to the defendant's credibility. Here, the "silence" that the State commented on was the absence of critical information that a person naturally would have been expected to provide in the voluntary interrogation that followed the *Miranda* warnings. Accordingly, by including such "silence" in the realm of protected silence contemplated by *Doyle*, the Missouri Supreme Court has expanded *Doyle* to preclude the use of "silence" that has legitimate probative value.[8]

III. The Missouri Supreme Court's decision is in conflict with decisions of the Federal Circuit Courts and decisions of state courts of last resort, and it sharpens a conflict over the scope of *Anderson v. Charles* in situations where the defendant's post-*Miranda* statements are less explicit than the statements at issue in *Anderson*.

There is a dearth of case law to support the Missouri Supreme Court's expansion of *Doyle* under

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[7] Although *Brecht* involved pre-*Miranda* silence, there is little reason to differentiate between the probative nature of pre-*Miranda* silence and omissions in a post-*Miranda* statement. In either instance, the defendant has not been induced to remain silent by the *Miranda* warnings.

[8] In *Wainright v. Greenfield*, the Court noted that some commentators have said that "*Doyle*'s probativeness rationale is secondary to its implied assurance rationale." 474 U.S. at 294 n. 12. The present case reveals the ongoing importance of the probativeness rationale in balancing the defendant's rights against the interests of the State.

the facts of this case. The Missouri Supreme Court did not cite to any comparable case, and petitioner knows of no case where the defendant's various evasions and critical omissions in a lengthy, post-*Miranda* interview were deemed to be protected "silence" under the rule in *Doyle*.

On the other hand, many cases have followed the Court's decision in *Anderson* and allowed the State to highlight omissions in a defendant's post-*Miranda* statements—both as affirmative evidence of the defendant's guilt and for purposes of impeachment. *See e.g. United States v. Ochoa-Sanchez*, 676 F.2d 1283, 1284-87 (9th Cir. 1982) (a prosecutor "may probe all post-arrest statements and the surrounding circumstances under which they were made, including defendant's failure to provide critical details"); *State v. Henry*, 863 P.2d 861, 871-72 (Ariz. 1993) (the defendant's failure to even mention a murder in his first post-*Miranda* statement was an omission that the state could use without violating *Doyle*); *People v. Osband*, 919 P.2d 640, 686-87 (Cal. 1996) (allowing use of the defendant's post-*Miranda* denials and failure to explain the presence of his fingerprints at the scene); *State v. Bell*, 931 A.2d 198, 207-12 (Conn. 2007) (prosecutor presented evidence of, and extensively impeached the defendant with, numerous omissions in his post-*Miranda* interrogation); *Wade v. Com.*, 724 S.W.2d 207, 208-09 (Ky. 1986) (where the defendant embellished his trial testimony with new helpful facts, it was proper for the State to impeach the defendant with the fact that he had been silent about those facts in his post-*Miranda* statement); *People v. McReavy*, 462 N.W.2d 1, 4-10 (Mich. 1990) (where the defendant answered some questions post-*Miranda* but was nonresponsive when asked about the robbery, it was proper for the state to present

evidence in its case-in-chief about the defendant's non-responsive conduct); *State v. Parker*, 585 N.W.2d 398, 402-04 (Minn. 1998) (post-*Miranda* statement "I don't know" was properly used against the defendant); *State v. Mitchell*, 346 S.E.2d 458, 460-62 (N.C. 1986) (where the defendant embellished his trial testimony with new facts, it was proper for the State to impeach the defendant with the fact that he had been silent about those facts in his post-*Miranda* statement).

In *State v. Bell*, 931 A.2d 198, the Supreme Court of Connecticut upheld the State's extensive use of omissions in it case-in-chief and in cross-examining the defendant. There, after *Miranda* warnings, the defendant talked at some length with police officers and told them that he had run from the scene of an assault. *Id.* at 205, 212. After he was interrogated, but before his trial in the state court, the defendant testified about the crimes in a federal prosecution. *Id.* at 207. In the federal case, the defendant embellished his account with numerous details that he had not previously provided to the police, including, for example, that his cousin was likely the shooter. *Id.* In the state-court trial, the State introduced a transcript from the federal case in its case in chief. *Id.* The transcript included repeated instances where the federal prosecutor asked the defendant about his failure, in the police interrogation, to mention several facts. *Id.* at 207-208, n. 14. Then, on cross-examination of the defendant, the state prosecutor repeatedly asked the defendant about the various omissions in his police interrogation. *Id.* at 208-209. In particular, much like the prosecutor in the present case, the prosecutor in *Bell* repeatedly forced the defendant to admit that he had not said "a word"

about the new facts he had testified to at his trials. *Id.* at 209, n. 16.

In *People v. McReavy*, 462 N.W.2d at 4-5—a case that was, in some respects, closely analogous to the present case—the defendant did not testify, and the State presented evidence that the defendant had been nonresponsive and silent when asked certain questions during his post-*Miranda* interrogation. One officer testified that the defendant appeared to be "dejected," and that the defendant said that "everything was going fine until 'this happened.' " *Id.* at 4. The officer also testified that the defendant "did not respond to direct questions regarding the robbery or deny his involvement, but simply put his head in his hands and looked down, [and] that he didn't respond yes or no to those questions." *Id.* The officer testified that the defendant said he was not denying that he committed the robbery, and that the defendant eventually said that he wanted time to think and "would clear up everything" about the robbery in the morning. *Id.* at 5. A second officer offered similar testimony. *Id.* In closing argument, the state summarized the officers' testimony and argued that, in the defendant's interrogation, there was "[n]ot one denial, not one suggestion that it wasn't me." *Id.* at 6. The prosecutor argued further that the defendant had made "passive admissions." *Id.* The defendant argued that the State's use of such evidence in its case-in-chief (and in closing argument) violated *Doyle*, but the Supreme Court of Michigan held that the defendant's silence was not "insolubly ambiguous" because the defendant had not invoked his right to remain silent. *Id.* at 7. And, citing *Anderson v. Charles*, the Michigan Court observed that in *Anderson* the Court "refused to endorse a formalistic view of silence" "[w]here the

defendant has not maintained 'silence,' but has chosen to speak[.]" *Id.* at 10.

In contrast to cases like *Bell* and *McReavy*—where courts have permitted the state to use omissions and actual or selective silence that occurred during a post-*Miranda* interrogation—the Missouri Supreme Court has adopted a rule that will prohibit the use of a much broader range of "silence." This conflict in applying *Doyle* should be resolved.

In addition, in holding that Mr. Brooks's "silence" was the equivalent of actual silence under *Doyle*, the Missouri Supreme Court has sharpened a conflict over the application of the rule in *Anderson v. Charles*. In support of its holding, the Missouri Supreme Court cited primarily to footnote 2 in *Anderson*, where the Court drew a distinction between the generic post-*Miranda* exclamations of one of the defendants in *Doyle* and the more explicit post-*Miranda* statements of the defendant in *Anderson* App. A5.

But, as discussed above, the Court in *Anderson* did not consider whether critical omissions in a lengthy post-*Miranda* interrogation would constitute protected silence under *Doyle*. Thus, the Missouri Court's reliance on footnote 2 of *Anderson* is a questionable proposition. Nevertheless, there is an apparent division of thought that could have grown out of the Court's language in footnote 2; for, in distinguishing the statements, the Court pointed out in footnote 2 that the more generic exclamations of one of the defendants in *Doyle* did not "contradict[] the defendant's later trial testimony." 447 U.S. at 407 n. 2. Accordingly, courts have required different

degrees of inconsistency or contradiction between post-*Miranda* statements and later trial testimony.

For example, the Tenth Circuit, in *United States v. Canterbury*, 985 F.2d 483, 484-86 (10th Cir. 1993), concluded that there was no inconsistency between a defendant's post-*Miranda* statement that he bought an illegal silencer "for protection" and the defendant's subsequent testimony that he was "entrapped" by an individual working with the police. The court seemingly found no inconsistency because the defendant denied making the post-*Miranda* statement that he bought the silencer "for protection." *Id.* at 485. *See also United States v. Massey*, 687 F.2d 1348, 1353 (10th Cir. 1982) (ignoring an arguable inconsistency because the "evidence was not inconsistent as a whole with [the defendant's] exculpatory story, had the jury chosen to believe him").

Unlike the Tenth Circuit, other courts have held that an "arguable" or implicit inconsistency is sufficient. *See Grieco v. Hall*, 641 F.2d 1029, 1034 (1st Cir. 1981) (post-*Miranda* statement must be "arguably" inconsistent with later trial testimony); *Bass v. Nix*, 909 F.2d 297, 302-04 (8th Cir. 1990) (apparently agreeing that a post-*Miranda* statement can be used if it "explicitly or implicitly contradict[s] the defendant's later trial testimony, but requiring, at least, that the statement be "fairly construed to conflict" with later testimony); *United States v. Caruto*, 532 F.3d 822, 831 (9th Cir. 2008) ("the differences between the post-arrest statement and the trial testimony must be 'arguably inconsistent' "). Some courts have held that no inconsistency is required under some circumstances, or that differences between the statements due to factual embellishment are sufficient. *See United States v. Crowder*, 719 F.2d 166,

172 (6th Cir. 1983) (requiring an inconsistent statement "relies on a reading of *Anderson v. Charles* which is too restrictive"); *State v. Gillard*, 533 N.E.2d 272, 278-79 (Ohio 1988) (the state properly used the defendant's post-*Miranda* statements in its case-in-chief despite the fact that there was no inconsistency with the defendant's trial testimony); *State v. Bell*, 931 A.2d at 207-12 (omission in the post-*Miranda* interrogation were sufficient); *Wade v. Com.*, 724 S.W.2d at 208-09 (defendant's embellishment of his trial testimony was sufficient); *State v. Mitchell*, 346 S.E.2d at 460-62 (same). *See also Squire v. Com.*, 283 S.E.2d 201, 204-05 (Va. 1981) (if a defendant adds "crucial" exculpatory facts at trial, he can be impeached with the fact that he failed to mention them in a post-*Miranda* interview).

The Missouri Supreme Court has apparently adopted a stringent rule requiring that post-*Miranda* statements be expressly contradicted by subsequent trial testimony before such statements can be used by the State in any fashion. App. A5-A6. Such a rule substantially limits the application of *Anderson v. Charles*, and it will have the detrimental effect of precluding the admission of evidence that is both probative of guilt and relevant to impeach the credibility of a testifying defendant. Accordingly, the Court should clarify whether the language in footnote 2 of *Anderson* was intended to compel such a result, and the Court should provide concrete guidance on the standard that applies when post-*Miranda* statements are less direct than the statements at issue in *Anderson*.

IV. The Missouri Supreme Court's rule places an unwarranted and unfair burden on the state's legitimate interest of solving and prosecuting criminal offenses.

In concluding that the State violated *Doyle* by using Mr. Brooks's post-*Miranda* statements in its case-in-chief, the Missouri Supreme Court has placed a heavy burden on the State's use of an interview that was carried out according to the plain dictates of *Miranda*. By transforming Mr. Brooks's omissions during a lengthy statement into protected silence, the Missouri Court has effectively held that the interrogating officer violated *Miranda*, and has expressly held that he violated *Doyle* when he did not stop questioning Mr. Brooks at the moment Mr. Brooks gave evasive and incomplete answers. Indeed, in holding that the State's use of Mr. Brooks's recorded interview in its case-in-chief was improper, the Missouri Court expressly determined that several of the interrogating officer's *questions* were themselves *Doyle* violations. App. A11-A12 ("the questions posed by Detective Pruneau were additional comments about Brooks' post-*Miranda* silence").

But this is an unworkable rule. During a post-*Miranda* interrogation, if a suspect does not invoke the right to remain silent and instead gives evasive or incomplete answers, an officer should be allowed to continue to probe as long as the suspect is willing to answer more questions. An officer should not have to guess that a suspect is remaining "silent" by being evasive and terminate the interview for fear of violating *Miranda* and *Doyle*. Indeed, it is generally impossible for an investigating officer, early in a case, to know whether a suspect is purposely making

omissions and, thus, "partially" exercising his right to remain silent. Such a rule is unfair to officers who otherwise abide by *Miranda*, and it replaces a bright-line rule with an uncertain rule that has no clear boundaries.

In its *Miranda* cases, the Court has repeatedly recognized that one of *Miranda*'s virtues is its bright-line rules. *See Arizona v. Roberson*, 486 U.S. 675, 681 (1988). Those bright-line rules provide clear guidance to all parties, and they fairly balance the competing interests of those accused of crimes and those who work to uncover and prosecute crimes. The rule in *Doyle*, likewise, should be a bright-line rule—it ought to be confined to those cases where the defendant actually invokes the right to remain silent and then remains silent. This maintains a proper balance between protecting actual *Miranda*-induced silence and allowing the state to use a defendant's relevant post-*Miranda* statements.

As the Court stated in *Jenkins v. Anderson*, "[i]n determining whether a constitutional right has been burdened impermissibly, it also is appropriate to consider the legitimacy of the challenged governmental practice." 447 U.S. at 238. Here, the governmental practice was a custodial interrogation and the State's use of Mr. Brooks's post-*Miranda* statements at trial. These were legitimate practices. The interrogation was carried out according to the plain dictates of *Miranda*, and Mr. Brooks's post-*Miranda* statements themselves were not "silence." Accordingly, the statements should have been admissible in the State's case-in-chief as part of the string of false or incomplete accounts given by Mr. Brooks in the immediate aftermath of the murder. Moreover, any silence during the interrogation about certain facts

was not protected silence because it was not *Miranda*-induced silence. And, finally, once Mr. Brooks took the stand and offered a much more detailed account (along with his new claim of self-defense), his earlier, incomplete statements gained additional probative value. *See id.* ("impeachment [with silence] follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial").

In short, in addition to conflicting with the basic principles of *Doyle*, *Anderson*, and a host of cases from other jurisdictions, the rule adopted by the Missouri Supreme Court will unduly limit the State's ability to investigate and prosecute criminal offenses.

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CONCLUSION

The Court should grant the petition for a writ of certiorari.

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