NO. _____

IN THE
Supreme Court of the United States

DEMARCUS MCCLARIN,

Petitioner,

v.

STATE OF GEORGIA

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The states and federal circuits are in fundamental disagreement over whether a defendant's mid-interrogation invocation of his Miranda rights can be used by a prosecutor at trial. Several jurisdictions bar any mention of a defendant's invocation of the right to silence or the right to counsel, but several others, including the court below, construe an initial waiver of Miranda rights as a permanent waiver and allow prosecutors to introduce evidence of a defendant's subsequent invocation of Miranda protections.

Does the Due Process Clause permit prosecutorial comment on a defendant's post-arrest, post-Miranda, mid-interrogation invocation of the right to remain silent?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Demarcus McClarin, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Georgia.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia of April 18, 2011 is reported at 710 S.E.2d 120 (Ga. 2011), reprinted at Appendix 1. The Supreme Court of Georgia denied reconsideration in an unpublished order dated May 16, 2011, reprinted at Appendix 5.

The trial court denied Petitioner's Motion for New Trial on June 27, 2010, reprinted at Appendix 6.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review a final judgment of the highest court of each state pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This petition raises questions of interpretation regarding the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment to the United States Constitution provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor 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; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. V. Section One of the Fourteenth Amendment to the United States Constitution provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

STATEMENT OF THE CASE

Petitioner Demarcus McClarin was arrested and tried for the murder of Mac Mayer and the armed robbery of Ad Thong Kham Mayer-Lillard outside a Decatur, Georgia theater. After the arrest, a DeKalb Police detective Mirandized Mr. McClarin and conducted a custodial interrogation. Mr. McClarin initially waived his Miranda rights and answered a few questions about his whereabouts before requesting an attorney. At trial, the prosecutor's direct examination of the investigating detective elicited testimony that Mr. McClarin requested an attorney and terminated the interview. The trial court overruled Mr. McClarin's objection, allowing further comments during direct examination and closing arguments. Mr. McClarin appealed to the Supreme Court of Georgia, which found no error. This Court should grant the petition because the prosecution made improper comments about the petitioner's post-arrest, post-Miranda silence.

At trial, both sides focused on Mr. McClarin's location at the time the crime was committed. The defense presented four witnesses to corroborate Mr. McClarin's alibi that he was with his brother the night of the crime and that the two were at a local Wal-Mart.[1] The prosecution presented two eyewitnesses, as well as the police officer first at the scene of the crime, a medical examiner, and the investigating detective.

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[1] The witnesses were Petitioner's brother, Curtis McClarin, who testified he was with Petitioner at the time of the crime, their sister, who testified about when Petitioner returned home the following morning, Fekina Mobley, who testified that she saw Curtis McClarin and Petitioner leave for Wal-Mart and that the three spent the evening at Curtis McClarin's home, and a supervisor from Ms. Mobley's employment agency who explained what time Ms. Mobley left work on the night of the crime.

The prosecution questioned the detective about his interrogation of the defendant on direct examination. After asking about the time and location of the interrogation, the prosecutor asked about the Miranda warning. The Miranda form used by the detective was entered into evidence over the defense's objection. The detective read aloud the form's written waiver and pointed out Mr. McClarin's initials. The questions then turned to the substance of the interrogation:

> Q: What did the defendant tell you about this incident?
> A: Well . . . [a]t first, Mr. McClarin, we asked him if he's ever been to the Belvedere Theater, where the incident occurred . . . he denied, actually, ever having been in the area, and after . . . explaining to him that we had eyewitnesses who placed him there, he admitted that he had been to the furniture store . . . on April 7th and April 8th, but he denied having been there at all on April 9th, when the incident occurred.

(T. 472-73). The prosecutor then discussed the police interview log. After several questions about the log, the prosecutor asked:

> Q: Did Mr. McClarin tell you anything else about the incident itself?
> A: No, he did not.
> Q: Okay. And did there come a time when he requested to terminate the interview?

(App. 15). At this point, defense counsel objected and the judge and attorneys had a bench conference. Id. The defense moved for a mistrial, arguing that the detective's testimony would lead the jury to conclude Mr. McClarin had asserted his right to remain silent. (App. 16). The prosecution responded that the testimony was only being presented to show the police abided by Mr. McClarin's exercise of his Miranda rights. (App. 16-17).

The court admitted the testimony on this basis. (App. 17). At this point, the defense renewed its motion for mistrial, the court granted a continuing objection, and the jury reentered the courtroom. Id.

After the court overruled the detective's objection, the prosecution continued to refer to the defendant's termination of the interrogation. The prosecution entered the detective's interview notes as evidence and referred back to the interview log. Regarding the notes, the prosecutor asked:

> Q: Okay. Do you recall whether he told you where he was on the 9th?"
> A: He did not.
> Q: If he had told you, is that something that you would have written in your notes?
> A: It is.

(App. 20). Then the prosecutor again asked about the termination and request for an attorney:

> Q: Now, I asked you before, did there come a time when the interview was terminated?
> A: There was.
> Q: And why was the interview terminated?
> A: Mr. McClarin asked for an attorney.
> Q: Okay. Did you ask him any questions after he asked for an attorney?
> A: I did not.
> Q: Did you initiate any conversation with him after he asked for an attorney?
> A: No.

(App. 20-21).

The prosecutor again commented on the defendant's request for an attorney during her closing argument. After discussing the prosecution witnesses' testimony, the defense witnesses' testimony, and the credibility of Mr. McClarin's alibi, the

prosecutor turned to Mr. McClarin's custodial interrogation. When recounting the interrogation, the prosecutor recounted to the jury:

> Detective Schoppner testified, went through the Miranda rights, Lakeside High School, 10th grade, can read and write English, not under the influence, didn't appear to be under the influence. "I want to talk."
>
> "All right, well, let's talk."
>
> "No, I don't know where that place is."
>
> "Well, hold up. We got witnesses that put you there."
>
> "Oh. Oh, yeah, yeah, yeah, yeah, that's right. I went to the furniture store there, yeah, on the 6th or the 7th or the 8th. Yeah, that's it, to the furniture store, 7th or the 8th."
>
> "We're here about the 9th. We're here about the 9th. What did you do on the 9th?"
>
> Think at that point [the defendant] might have said "me and Curtis was at the Wal-Mart," or "we were at home"? No. At that point, when the defendant exercised his right by requesting an attorney, that interview was over.

(App. 22) (quotation marks added). The prosecutor then asked the jury to return a guilty verdict, concluding her argument. In all, the prosecution referred at three separate points throughout the trial to the defendant's request for an attorney.

The prosecution also presented two witnesses: one who made a positive identification of the defendant in a photographic lineup and one who made only a tentative identification in the same lineup. The officers involved in the investigation based Mr. McClarin's arrest on these identifications and on similarities between Mr. McClarin's name, criminal background, and tattoos, and the description given by one witness.[2] However, the prosecution was unable to provide any physical evidence

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[2] One witness who spoke to the culprit prior to the shooting said that the culprit gave the name Demarcus and had recently been released from federal prison. She also testified that the culprit showed her two arm tattoos: one of a cross and one of skulls. While Mr. McClarin has tattoos similar to those described, they are on opposite arms, not the same arm, and depict other figures in addition to a cross and skulls.

to implicate Mr. McClarin. Forensic evidence collected at the crime scene did not connect the petitioner to the scene.[3] While the only two eyewitnesses did see the assailant drive a car of the same color as Mr. McClarin's, only one reported a license plate number, and it did not match Mr. McClarin's.[4] Neither the murder weapon, its ammunition, nor the stolen money were found, and there was no evidence Mr. McClarin ever possessed any of these items.

Petitioner was convicted of all counts and sentenced to two consecutive life sentences, plus two consecutive five-year sentences for weapons charges. The trial court denied Petitioner's motion for a new trial. Petitioner appealed to the Supreme Court of Georgia, arguing that "Mr. McClarin's Fifth Amendment right to remain silent was improperly argued and placed before the jury."

The Supreme Court of Georgia upheld the trial court's ruling, explaining:

> In Rowe v. State, we held that informing the jury of a defendant's termination of a custodial interview and invocation of the right to counsel did not amount to an improper comment on the right to remain silent warranting a reversal of his conviction. That is precisely what occurred here. Accordingly, we find no error.

McClarin v. State, 710 S.E.2d 120, 123 (2011) (citing Rowe v. State, 582 S.E.2d 119 (Ga. 2003)).[5] The Court affirmed Mr. McClarin's conviction and sentence. (App. 1); McClarin, 710 S.E.2d at 124.

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[3] Police recovered fingerprints from cars in the immediate area of the shooting, and a cigarette butt from a nearby parking lot where a witness had spoken to the assailant. The fingerprints yielded no matches, and DNA recovered from the cigarette belonged to an unidentified woman.

[4] Ms. Mayer-Lillard testified she saw the letters "NBC." Mr. McClarin's license plate was "ABW-0100."

[5] Although the Georgia Supreme Court explicitly addressed the merits of the admissibility of the Miranda invocation evidence, it held that Mr. McClarin had waived his complaints about the closing argument itself, because he did not raise a contemporaneous objection. (App. 4). But Mr.

Mr. McClarin filed a timely motion for reconsideration. The Supreme Court of Georgia denied the motion on May 16, 2011. (App. 5). This Court granted Mr. McClarin an extension to file until September 14, 2011. McClarin v. Georgia, 11A173 (August 10, 2011).

REASONS FOR GRANTING THE PETITION

The decision below reflects one side of a sharp disagreement between the states and among the federal circuits over the permissibility of commenting on a late invocation of Miranda rights. This case is an ideal candidate for resolving the conflict among jurisdictions over this important question of constitutional interpretation. Even aside from the split, however, the decision below should be reversed because it reflects a longstanding and well-established practice within the State of Georgia that routinely deprives defendants of their Fifth and Fourteenth Amendment due process rights.

McClarin had been granted a continuing objection. (App. 17). How could the court find waiver in the face of that continuing objection?

The answer turns on the court's earlier ruling: that the Miranda invocation evidence was properly admissible. If that evidence was admissible, then it was proper fodder for closing argument. If Mr. McClarin wanted to object on grounds other than admissibility, such as improper use of that otherwise admissible evidence, then he had to raise that specific "improper use" objection.

But if the Miranda invocation evidence was not admissible, then the improper argument was possible only because of the trial court's erroneous admission of the improper evidence. Had the evidence been properly excluded, there could have been no closing argument at all on the topic. So if the underlying evidence was not admissible, then the continuing objection necessarily preserved every use of that inadmissible evidence at trial, and there would be no waiver.

The state court's waiver finding is essentially irrelevant to the question presented, as the waiver finding 1) necessarily turns on the state court's resolution of the very issue presented by this petition, and 2) is at most relevant to a determination of harm (how many improper comments are properly at issue), rather than a determination of whether the Miranda invocation was admissible in the first place.

I. The opinion below reiterates Georgia's blanket authorization of prosecutorial comment on a defendant's silence, despite holdings by this Court that such comments constitute error and must be analyzed for harm.

The Supreme Court of Georgia's decision to permit extensive prosecutorial comment on Mr. McClarin's invocation of the right to counsel is consistent with that court's jurisprudence, but conflicts with this Court's instructions on the same issue

The Due Process Clause of the Fourteenth Amendment prohibits the government from introducing a defendant's post-arrest, post-Miranda silence as substantive evidence of guilt in a criminal trial.[6] Wainwright v. Greenfield, 474 U.S. 284 (1986); Doyle v. Ohio, 426 U.S. 610 (1976). Silence is broadly defined as "not . . . only muteness," but also "the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted." Wainwright, 474 U.S. at 295 n.13. Thus, a defendant's request to speak with an attorney constitutes silence. Id.; Hill v. Turpin, 135 F.3d 1411, 1414 (11th Cir. 1998) (holding that silence includes post-arrest, post-Miranda request for counsel).

This Court held in Doyle that the Due Process Clause of the Fourteenth Amendment bars prosecutors from using a defendant's post-arrest, post-Miranda silence to impeach that defendant when he decides to testify. In its decision, this Court identified two key factors that helped it reach its decision. First, post-arrest, post-Miranda silence is inherently ambiguous, and, indeed, "may be nothing more than the arrestee's exercise of [his] Miranda rights." 426 U.S at 617. Second,

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[6] By contrast, the government's use of evidence of a defendant's failure to testify at trial implicates the Fifth Amendment protection against self-incrimination. See Griffin v. California, 380 U.S. 609 (1965); see generally Marcy Strauss, Silence, 35 Loy. L.A. L. Rev. 101 (2001)

because Miranda warnings implicitly assure an arrestee that his silence will not be used against him, "it would be fundamentally unfair and a deprivation of Due Process to allow [his] silence to be used to impeach" an arrestee who decided to testify at trial. Id. at 618. Of these two factors, this Court has emphasized fundamental unfairness over probative value. Wainwright, 474 U.S. at 293-94 (explaining that the Court "need not evaluate the probative value of respondent's silence" to reject the prosecution's argument that it was admissible because of its high probative value).

Wainwright expanded the prohibition on the use of post-arrest, post-Miranda silence as substantive evidence of guilt. In that case, this Court rejected the use of testimony that the defendant requested an attorney not as impeachment evidence, but as proof of the defendant's sanity. The evidence was elicited during direct examination of a detective and used during closing arguments to challenge the defendant's insanity defense. [7] 474 U.S. at 286-87. This Court reversed the defendant's conviction, equating the use of a defendant's silence to challenge an insanity defense with its use for impeachment in Doyle:

> In both situations, the State gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. The State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach, and the consequent penalty are identical in both situations.

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[7] The prosecutor told the jury: "He goes to the car and the officer reads him his Miranda rights. Does he say he doesn't understand them? Does he say, 'what's going on?' No. He says, 'I understand my rights. I do not want to speak to you. I want to speak to an attorney.' Again an occasion of a person who knows what's going on around his surroundings, and knows the consequences of his act." Wainwright, 474 U.S. at 287 n.2.

Id. at 292. Thus, the government cannot use a defendant's post-arrest, post-Miranda silence either for impeachment or as substantive evidence of guilt at trial without running afoul of due process. See Michigan v. Mosley, 423 U.S. 96, 103-04 (1975) ("Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation.").

This Court reiterated the Wainwright holding in Greer v. Miller, 483 U.S. 756 (1987), stressing that "it does not comport with due process to permit the prosecution during trial to call attention to the defendant's silence." Id. at 763 (quotations omitted) (emphasis in original). A Doyle violation likely does not occur if, after an improper reference to the defendant's silence, the trial court sustains the defendant's objection and the remark is not entered into evidence. On the other hand, where the trial court overrules the defendant's objection and allows the prosecution to inquire into and argue about the defendant's silence, a Doyle violation has occurred. See, e.g., Jenkins v. Anderson, 447 U.S. 231, 233-34 (1980) (extended questioning and closing argument reference); Fletcher v. Weir, 455 U.S. 603, 603-04 (1982) (questioning); Wainwright, 474 U.S. at 285, 287 (closing argument).

In most courts the standard for review of Doyle violations is harmless error. Brecht v. Abrahamson, 507 U.S. 619, 629-30 (1993) (collateral review); Chapman v. California, 386 U.S. 18, 22 (1967) (direct appeal). In Chapman, this court set the following controlling test: "Before a federal constitutional error can be held

harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Id. An error is harmless beyond a reasonable doubt when the prosecution demonstrates, beyond a reasonable doubt, that the improper comment did not contribute to the defendant's conviction. See id. If such a showing is made, the error will be deemed harmless. Id.; see also Brecht, 507 U.S. at 629-30 (a reviewing court must reverse unless it is "able to declare a belief that [the error] was harmless beyond a reasonable doubt.").

State and federal courts have adopted their own rules in applying Chapman's fact-driven analysis. The majority of jurisdictions interpret the Chapman standard to require reversal only after "taking into consideration [whether] the facts, the trial context of the error, and the prejudice created thereby [outweighs] the strength of the evidence of defendant's guilt." Brewer v. Hall, 603 S.E.2d 244, 246-47 (2004). In some instances, there may be no harm in cases with overwhelming evidence of the defendant's guilt. United States v. Hasting, 461 U.S. 499 (1983). See also Marsden v. Moore, 847 F.2d 1536 (11th Cir. 1988); United States v. Pallais, 921 F.2d 684 (7th Cir. 1990). The number and extent of the prosecution's comments may be balanced against the evidence of the defendant's guilt. United States v. Hernandez, 476 F.3d 791, 796-97 (9th Cir. 2007) (harmless error where defendant's silence was mentioned only twice, and other evidence of defendant's guilt was overwhelming); United States v. Jumper, 497 F.3d 699, 704-06 (7th Cir. 2007) (admission of videotape of defendant's custodial interrogation in which defendant invoked right to remain silent was harmless error where there was no other reference to defendant's

refusal to answer questions, government did not highlight those portions of tape, and there was significant evidence of defendant's guilt). But see United States v. Caruto, 532 F.3d 822, 831-32 (9th Cir. 2008) (error not harmless where credibility of defendant attacked at length on basis of post-Miranda silence, and other evidence was circumstantial). Regardless of variation, all courts analyzing Doyle violations start with a finding of error and focus on the prejudicial effect of the prosecutor's comments.

In the present case, however, the Supreme Court of Georgia explicitly found that a prosecutor's references to a defendant's termination and request for an attorney constituted no error. McClarin, 710 S.E.2d at 123. The court did not consider prejudicial effect, and instead declared that "no error" existed. Notably, the court did not make a fact-sensitive ruling on the prejudicial impact of the comments, and instead declared the comments an acceptable trial tactic.

The Georgia court's holding in this case was not an isolated decision. In its analysis, the Georgia court referenced a prior holding in Rowe v. State, 582 S.E.2d 119 (Ga. 2003). Rowe, considered a segment of a video recording showing the defendant invoking his right to counsel during a custodial interrogation. Id. at 125. The court found no error in the trial court's admission of that segment, noting that the prosecution's comments did not purport to be evidence of guilt, nor were they meant to undermine any of the defendant's defenses. Id. Therefore, the court held that the comments were not improper.

The ruling below was not a one-off mistake. Instead, it cited and further applied its previous holding in Rowe. It is now clear that informing jurors of a defendant's termination of an interrogation is perfectly permissible, regardless of the frequency, context, or content of the prosecutor's comments.[8]

Indeed, the Georgia court's holdings in McClarin and Rowe simply repeat its earlier holding in Williams v. State, 368 S.E.2d 742 (Ga. 1980). The court in Williams considered whether police testimony that the defendant requested an attorney after orally waiving his Miranda rights and answering some questions was an improper comment on the defendant's right to remain silent. Id. at 746. The court found no error: "The defendant did not remain silent. He discussed the crime, and then he invoked his right to a lawyer. Doyle v. Ohio does not apply in this situation." Id. Georgia courts continue to cite Williams,[9] and the Supreme Court of Georgia's reasoning in that case continues through the instant case.

II. There is a sharp disagreement over the scope of a defendant's right to remain silent when a defendant makes a partial or delayed invocation of his Miranda rights during a custodial interrogation.

McClarin takes one side of a broad, national conflict over the permissibility of a prosecutor's comments on a defendant's silence, and indeed on the scope of silence itself. The Supreme Court of Georgia and the trial court allowed the prosecutor's

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[8] Curiously, Georgia protects pre-Miranda silence, Mallory v. State, 409 S.E.2d 839 (Ga. 1991), more than post-Miranda silence. This effectively turns this Court's constitutional rulings on their heads.

[9] The Georgia Court of Appeals cited Williams' holding on a defendant's silence in Sanders v. State, 495 S.E.2d 653, 655 (1998). In that case, the disputed comment concerned the defendant's refusal to give a statement several days after his initial custodial interrogation. Id.

comments for narrative purposes. The comments were admitted by the trial court to show jurors that the police respected Mr. McClarin's right to remain silent.[10] (App. 17). The Supreme Court of Georgia repeated this rationale by citing Rowe, which held that the disputed segment of a recorded interrogation merely showed that the interrogation had been properly terminated. 582 S.E.2d at 125.

In Georgia, all parts of an interrogation from the defendant's initial waiver of his Miranda rights up to and including his revocation of that waiver may be presented to a jury. Following McClarin, that waiver may be presented and commented upon without error.

State and federal courts note that this Court's instructions in Doyle and its progeny do not address the constitutional protections surrounding a defendant's delayed invocation of his Miranda rights. At least two federal courts have recently recognized the conflict.

The First Circuit recently noted that "neither Miranda, nor any subsequent Supreme Court decision, draws a distinction between an immediate post-arrest Fifth Amendment assertion and a delayed mid-interrogation assertion." United States v. Andujar-Basco, 488 F.3d 549, 556 (1st Cir. 2007). The U.S. District Court for the Eastern District of California also made a comprehensive survey of recent opinions on "partial silence" in Aguirre v. Campbell, 2009 WL 3365832 (E.D. Cal. Oct. 16, 2009) (unpublished), and concluded that there was disagreement among the courts. According to the District Court, "[t]he courts that have addressed 'partial silence' have not come to consensus on whether partial post-arrest silence following

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10 A rationale no less logical than the "sanity" rationale this Court rejected in Wainright.

a Miranda waiver can be admitted as adoptive admissions." Id. at 29-30.[11] Accord People v. Aguirre, No. C047644 (Cal. App. Jan. 11, 2006) (unreported) (noting that this Court has "not resolved the specific issue").

In the absence of clear guidance, several courts have developed rules similar to Georgia's. In California, the state Supreme Court recently adopted an appeals court holding that "[o]nce a defendant elects to speak after receiving a Miranda warning, his or her refusal to answer questions may be used for impeachment purposes absent any indication that refusal is an invocation of Miranda rights." People v. Jennings, 237 P.3d 474, 510 (Cal. 2010) (quoting People v. Hurd, 73 Cal. Rptr. 2d 203, 209 (Cal. Ct. App. 1998)).[12] This rule is rooted in an interpretation of Doyle as not "preclude[ing] the prosecutor from commenting on highly relevant evidence bearing on appellant's credibility, including [a defendant's] refusal to provide critical details, when he had voluntarily waived his right to remain silent." Hurd, 73 Cal. Rptr. 2d at 209.

The Supreme Judicial Court of Massachusetts allows comment on a defendant's post-arrest silence "when it is necessary in the context of the entire

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11 The Eastern District of California did not resolve the dispute. While the petitioner in Aguirre raised the issue in his habeas petition, the national divide and lack of guiding cases from this Court prevented the District Court from addressing the question in the habeas context. Aguirre at 30-31 ("There is jurisdictional disagreement on this issue, and no clear Supreme Court direction exists. Reasonable minds have differed in interpreting the applicable Supreme Court doctrine to 'partial silence' cases. In order for the Court to grant the petition, the Court would not only have to adopt the line of cases disallowing similar silences, but also hold that the competing line of cases 'unreasonably applied' Miranda and its progeny. The Court cannot do so.").

12 The Supreme Court of California's decision in Jennings marks the entrenchment of the Hurd rule. In a case six years' prior, the court cited Hurd in its analysis of prosecutorial comment on a defendant's post-Miranda refusal to answer questions about a robbery. People v. Coffman, 96 P.3d 30 (Cal. 2004). The court noted conflicting holdings in other jurisdictions, but declined to address the matter in its opinion. Id. at 42.

conversation for the limited purpose of clarifying why a police interview ended abruptly." Commonwealth v. O'Laughlin, 843 N.E.2d 617, 632 (Mass. 2006) (citing Commonwealth v. Farley, 732 N.E.2d 893 (Mass. 2000); Commonwealth v. Martinez, 726 N.E.2d 913 (Mass. 2000); Commonwealth v. Habarek, 520 N.E.2d 1303 (Mass. 1980)). See also Commonwealth v. Waite, 665 N.E.2d 982, 987-88 (Mass. 1996) ("When the defendant has temporarily waived the right to silence, testimony regarding the cessation of questioning is appropriate . . . There is no prejudice because nothing to which the defendant is entitled is lost.")). The Massachusetts holdings demonstrate the same understanding of delayed invocations of Miranda relied upon by Georgia: a defendant's initial waiver of Miranda rights includes a waiver of protection from comment on a statement revoking that waiver. See also State v. Ruscingno, 526 A.2d 251, 254 (N.J. Super. Ct. App. Div. 1987) ("Without [the detective's] statement that defendant wished to say no more at a certain point, his description of the interrogation would have been incomplete.").

Among the federal courts of appeal, several circuits also allow prosecutorial comment on delayed or partial invocations of Miranda rights. The Eighth Circuit in United States v. Burns, 276 F.3d 439 (8th Cir. 2002), held that:

> where the accused initially waives his or her right to remain silent and agrees to questioning, but "subsequently refuses to answer further questions, the prosecution may note the refusal because it now constitutes part of an otherwise admissible conversation between the police and the accused."

Id. at 442 (quoting United States v. Harris, 956 F.2d 177, 181 (8th Cir. 1992). The court considered the defendant's silence and eventual refusal to answer questions

"part of an otherwise admissible conversation" and therefore it could be presented to a jury without error. Id. See also Babick v. Berghuis, 620 F.3d 571, 580 (6th Cir. 2010) ("Doyle thereby protects defendants who have relied on the government's assurances that they will not be punished for exercising their Miranda rights. But Babick did not rely on any such assurances here; to the contrary, he waived his Miranda rights and voluntarily gave a statement. He therefore lacks the predicate for a Doyle claim.") (citations omitted).

The Seventh Circuit in Rowan v. Owens, 752 F.2d 1186 (7th Cir. 1984), allowed a comment on a delayed invocation of a defendant's Miranda rights "so that the jury would know that the officer's testimony was complete." Id. at 1190. The court based its holding on the assumption that the comment was not made in a way that implied guilt. Id.

In direct contrast to Georgia and those jurisdictions that permit comment, several federal circuits do not allow comment on partial or delayed Miranda invocations. The Tenth Circuit bars the use of a defendant's silence as substantive evidence of guilt, United States v. Canterbury, 985 F.2d 483 (10th Cir. 1993) (citing United States v. Harrold, 796 F.2d 1275, 1279 n. 3 (10th Cir.1986) ("This court has recognized that when a defendant answers some questions and not others, or in other words is 'partially silent,' this partial silence does not preclude him from claiming a violation of his due process rights."), and uses a fact-specific inquiry focused on whether the defendant "clearly relied on a Miranda warning to remain silent." Harrold at 1279 n.3. The Eleventh Circuit in United States v. Baker, 432

F.3d 1189 (11th Cir. 2005), called a prosecutor's line of questioning about the termination of a custodial interrogation "unnecessary and inappropriate." Id. at 1222. The Fourth Circuit has held that testimony about a delayed Miranda invocation constituted reversible error. United States v. Ghiz, 491 F.2d 599, 600 (4th Cir. 1974). On review of specific habeas petitions, the Ninth Circuit has overruled the California court's allowance for prosecutorial comment on partial silence. See Hurd v. Terhune, 619 F.3d 1080 (9th Cir. 2010) (reversing the conviction at issue in Hurd, 73 Cal. Rptr.2d 203). The First Circuit finds "plain error" where prosecutors comment on a defendant's Miranda invocation. Anjudar-Basco, 488 F.3d 549 (1st Cir. 2007).

III. This case is an ideal vehicle for the Court to close the growing divide among courts over the permissibility of prosecutorial comment on defendants' partial or delayed Miranda invocations.

Certiorari should be granted in this case because Mr. McClarin's post-arrest, post-Miranda termination of a custodial interrogation typifies the factual circumstances of cases involving prosecutorial comment on a defendant's silence. Given that Mr. McClarin requested an attorney when pressed by police about his alibi, and that the prosecutor made constant references to that request, this case presents an opportunity to analyze the prejudicial impact of informing a jury of a delayed invocation of the right to remain silent. The Supreme Court of Georgia's decision to allow comments on silence for clarifying purposes begs the question whether such clarifying comments are appropriate at all. Most importantly, the

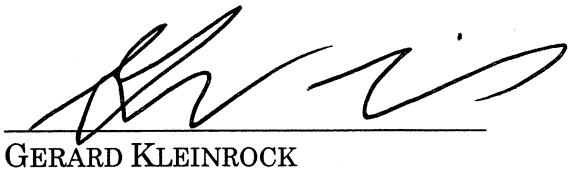
Georgia court's extension of a Miranda waiver to include the act revoking the waiver invites this Court to further define the scope of Miranda's protection of silence and provide useful guidance to lower courts.

CONCLUSION

The Supreme Court of Georgia erred in allowing Mr. McClarin's mid-interrogation invocation of the right to counsel to be brought up so frequently during trial. More importantly, however, there is a longstanding and growing divide among state and Federal circuits over the proper scope of Miranda protection in this commonly-occurring situation. This case is an ideal candidate for the Court's review of this vital constitutional question.

The petition should be granted.

Respectfully submitted,



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