No. _____

In The
Supreme Court of the United States

CLEMENT REYNOLDS,

Petitioner,

v.

MARYLAND,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Maryland

PETITION FOR WRIT OF CERTIORARI

ROBERT C. BONSIB
Counsel of Record
MARCUSBONSIB, LLC
6411 Ivy Lane, Suite 116
Greenbelt, Maryland 20770
(301) 441-3000
robertbonsib@
marcusbonsib.com

MEGAN E. COLEMAN
MARCUSBONSIB, LLC
6411 Ivy Lane, Suite 116
Greenbelt, Maryland 20770
(301) 441-3000
megancoleman@
marcusbonsib.com

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

I. Was Petitioner denied Due Process of Law under the Fourteenth Amendment and the protections against self-incrimination under the Fifth Amendment and *Miranda* by the admission of his custodial statement taken by a police officer who intentionally and repeatedly ignored Petitioner's invocation of his right to remain silent under *Miranda* where the record demonstrates that the impermissible police conduct was a deliberate and a routine interrogation tactic employed by police officers who were "encouraged" by this Court's holding in *Harris v. New York* permitting the use of *Miranda* violative statements for impeachment and where the police officer knew that any post-invocation statements would be able to be used to chill Petitioner's decision as to whether to testify at his trial, thus calling into question this Court's belief in *Harris* that it was only a "speculative possibility that impermissible police conduct will be encouraged" if *Miranda* violative statements were permitted to be used for impeachment?

II. Was Petitioner denied Due Process of Law when the trial court permitted the prosecutor to question Petitioner about "what he did *not* tell the police" about his alibi defense, even though the omissions were a result of Petitioner's post-arrest, post-*Miranda* invocation of silence and were not inconsistent with his trial testimony?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Clement Reynolds respectfully petitions for a writ of certiorari to review the judgment of the Maryland Court of Appeals.

OPINIONS BELOW

The opinion of the Maryland Court of Appeals issued on August 27, 2018, is reported at 461 Md. 159, 192 A.3d 617 (2018) and is found at Appendix, App. 1. The Maryland Court of Appeals' order granting a limited issue in Clement Reynolds' timely petition for writ of certiorari was entered February 5, 2018 and is found at App. 125. The opinion of the Maryland Court of Special Appeals issued on November 8, 2017 is unreported and is found at Appendix, App. 35. The ruling of the Circuit Court for Montgomery County, Maryland overruling Reynolds' objections to the use of statements for impeachment at trial is unreported and is found at App. 92-106. The ruling of the Circuit Court for Montgomery County, Maryland granting in part, and denying in part, Reynolds' Motion to Suppress Statements is unreported and is found at App. 108-12.

JURISDICTION

Petitioner seeks review of the decision of the Court of Appeals of Maryland entered on August 27, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> 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 offense 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.

United States Constitution, Amendment XIV:

Section 1.

> 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.

STATEMENT OF THE CASE

On November 18, 2002, around 11:00 p.m., Wesley King ("King") was shot and killed outside of his apartment in Silver Spring, Montgomery County, Maryland, in front of his 11-year-old daughter. A warrant was obtained for "Kevin Reynolds[,]" also known as "Clement Reynolds[,]" ("Petitioner") and remained unserved from March 25, 2003, until April 14, 2014 when it was discovered that Petitioner was using the alias "Dennis Graham."

On April 14, 2014, Petitioner was arrested at John F. Kennedy International Airport in New York City on the outstanding warrant for King's murder.

Upon his arrest, Petitioner was taken to a New York City precinct where he was held for hours waiting for detectives from the Montgomery County Police Department to travel from Maryland up to New York City to interview him.

April 14, 2014 Custodial Interview

Detective Frank Colbert was the lead detective assigned to interview Petitioner. He was informed that the man who was arrested on the warrant for Clement Reynolds, also known as, Kevin Reynolds, was using the name Dennis Graham. Detective Colbert strongly believed that this man was in fact, Kevin Reynolds.

Pre-*Miranda* Questions

Prior to reading Petitioner his *Miranda* rights, Detective Colbert asked Petitioner for his name and asked Petitioner whether he had any ties to Maryland.

***Miranda* Advisement**

Detective Colbert then read Petitioner his *Miranda* rights. Petitioner refused to sign the Advice of Rights form.

Detective Colbert asked Petitioner a series of questions and told Petitioner that "[t]here's overwhelming evidence that you murdered somebody back in November of 2002 . . . this is your opportunity to talk. . . ."

1st Invocation of Silence

Petitioner responded by clearly and unambiguously invoking his right to silence, ***"There's nothing I have to say."***

Detective Colbert ignored this invocation asking Petitioner to identify individuals in photographs, and asking Petitioner facts relating to the murder. Detective Colbert told Petitioner that he had a "list of evidence . . . [a]nd it's overwhelming . . . [i]t's your time to speak up about this."

2nd Invocation of Silence

Petitioner invoked his right to silence a second time saying, ***"There's nothing I have to say. You're trying to solve a homicide and – ."***

Detective Colbert cut off Petitioner's invocation retorting, "our homicide is solved . . . I'd rather you just tell me to go to hell and get out of here."

Detective Colbert continued to interrogate Petitioner asking him whether he had any idea what country he was in in November of 2002. Petitioner responded, "November of 2002? I was probably in the Virgin Islands." Detective Colbert again asked Petitioner, "November of 2002 – " and Petitioner replied, "I was not in Maryland."

Detective Colbert continued to ask questions for an entire page in the transcript, telling Petitioner about evidence and witnesses in the case. Detective Colbert told Petitioner that he was facing the death penalty, even though Maryland had abolished the death penalty years prior to Petitioner's arrest.

Detective Colbert posed a hypothetical question to Petitioner that spanned another page of the transcripts, relaying the facts of the murder, and asking Petitioner if he thought that would be enough to convict somebody.

3rd Invocation of Silence

Detective Colbert said, "Clement leaves the country," and Petitioner invoked a third time: "I don't know. ***Nothing else to say***."

Detective Colbert pressed on, "Have you ever killed a man?"

Detective Colbert asked Petitioner when he moved permanently to the United States. Petitioner responded that it was in 2000, and that he moved to Morris Plains, New Jersey. Petitioner told Detective Colbert that he was helping a man named Byron Matamora at his garage selling cars. After Morris Plains, Petitioner moved to Hackensack, then Patterson where he lived with a woman named Rose Lopez.

Detective Colbert then went through a litany of questions all pertaining to the murder that he was investigating. Detective Colbert then spoke the remainder of the interview, another two pages, telling Petitioner how "horrible" this person is and how strong his case his.

4th Invocation of Silence

Petitioner said, **"*I have nothing to say*."** The interview subsequently ended and Petitioner was transported from New York to Montgomery County, Maryland where he was detained.

April 30, 2014 Interview

On April 30, 2014, in Maryland, Detective Colbert again attempted to interview Petitioner about the murder, after Petitioner had previously invoked silence, and without Petitioner re-initiating the conversation. Detective Colbert began asking Petitioner questions, without re-advising him of *Miranda*.

A Dozen Invocations of Counsel and Various Invocations of Silence

Petitioner immediately said, ***"I would like to talk to counsel first."***

Detective Colbert said, "You have that right, but I want to ask basic information."

Petitioner responded, ***"I want counsel."***

A second detective said, "No one is trying to trick you, basic biographical information, not a trick or game, you know what's up and we do too, spell your name."

Petitioner again said, ***"I want to request counsel."***

Detective Colbert persisted and Petitioner clearly stated, ***"We can do this after counsel."***

Detective Colbert went so far as to say, ***"[o]nce you have an attorney, the likelihood of me talking to you is zero."***

Petitioner responded, ***"I would like to exercise my right to counsel, you just threw a lot of info at me, I would like to exercise my right to counsel."***

The detectives agreed to get a lawyer's phone number, but before allowing Petitioner to call the lawyer, the detectives brought in documents and photos to Petitioner asking him to "peruse" them. The documents contained information about what people said in the news about the case, immigration documents, and photographs of various people.

The detectives come back in the room with a kit for fingerprints. The detectives took Petitioner's fingerprints, and then brought in a latent fingerprint examiner to put pressure on Petitioner.

Detective Colbert continued, "so again, this is way too serious to play games, you saw what we were looking at, so Reynolds last name, what is your middle name cuz [*sic*] I've seen it a few different ways, Oswald?"

Petitioner remained quiet.

Detective Colbert said, "seriously come on man."

Petitioner said, ***"I will talk to you as soon as I talk to counsel."***

The other detective said, "Nobody is trying to trick you man."

The detectives attempted to call Petitioner's lawyer but there was no answer. Detective Colbert said, "we can run through this ***just like we did in New***

York and if there's anything you don't feel comfortable answering, you can tell me you are not gonna answer, there is nothing that is forcing you to answer."

Petitioner asked, **"*Well why can't I wait . . . why can't I wait to talk to an attorney?*"**

Petitioner eventually was able to speak with one of his attorneys by phone. Detective Colbert told Petitioner to tell the attorney that they just want to talk about name, place of birth, and background information.

After the call, Petitioner gave his real name to the detectives, along with his date of birth, and where he was born.

Detective Colbert reviewed a *Miranda* waiver of rights form which Petitioner read and signed. The detectives again started to ask about the offense, asking, "let's back up to 2000, when did you first come in the country, do you remember?"

Petitioner replied, **"*I don't want to talk about that*."**

Detective Colbert asked, "when did you and Wes meet, back in Jamaica or here?"

Petitioner responded, **"*I don't want to talk about that*."**

Detective Colbert asked, "is there anything you want to talk about, clear up rumors?"

Petitioner answered, ***"not until I'm sitting with counsel."***

The detectives continued to ask Petitioner if there is anything he disagrees with, if he wants to have a discussion.

Petitioner indicated, ***"I should have counsel and we can have a discussion."***

The detectives continued to ask about the instant offense and Petitioner said, ***"I don't want to talk about that, that is why I am here, I don't want to talk about that til I talk to counsel."***

Detective Colbert even asked Petitioner what he can tell them to point them in a different direction, other than him, and Petitioner responded,

> ***I will discuss that with counsel, I am aware that you guys think you have your man, and whatever I say will be used against me, you are very smart guys, not going to say something open to misinterpretation and be used against me, wait for counsel, what I can say is I had nothing to do with it.***

Detective Colbert said, ***"You can't give me information to say you weren't there."***

Petitioner replied, ***"I want to discuss in front of counsel."***

Detective Colbert said, "Since you are taking yourself out of it, what have you heard about what happened to Wes?"

Petitioner replied, ***"I don't want to discuss that."***

Detective Colbert asked, "Have you heard he was killed in front of his child?"

Petitioner said, ***"I don't want to discuss that."***

Detective Colbert asked, "So the phone that was left on the scene, we get your DNA . . . "

Petitioner replied, ***"I don't know what you are talking about I don't want to talk about that."***

Detective Colbert said:

> ***[A]in't no way your attorney will let you sit down with us, that isn't going to happen, come on, you know that as well as I do,*** I can't tell you what to do, ***I can suggest it might be in your best interest, that while you have the chance . . . once your attorney meets you he is not going to let you talk . . . that's just in an attorney's book, even if you think you have something beneficial, very rare they would let you talk to us. . . .***

Petitioner responded, ***"it wasn't me and at this point I have nothing to offer."***

The detective said, "I'm an evidence man, looks pretty strong, if there is an alternate story, that is what I want to hear. . . ."

Petitioner replied, ***"There is nothing I have to offer when it comes to that right now."***

The detectives still questioned Petitioner showing him photographs until they ultimately ended the interview.

The Suppression Hearing

Detective Colbert's Testimony

At the suppression hearing Detective Colbert testified that he has been a Montgomery County police officer for 20 years. Detective Colbert was assigned to investigate a cold case that had an outstanding warrant for Petitioner. Detective Colbert was notified on April 14, 2014, that Petitioner would be in custody that night in New York. Detective Colbert and Detective Sean Reilly traveled there together.

Detective Colbert testified that he did not believe that the man in custody was actually named Dennis Graham, rather, he "had a pretty strong suspicion it was Kevin Reynolds" whom the police had in custody.

Detective Colbert conceded that his processing of Petitioner would not occur until Petitioner was brought to Maryland, and Detective Colbert's questioning of Petitioner's name was for investigative purposes. Detective Colbert admitted that asking Petitioner about

whether he has ever been through Maryland is not a booking question. Detective Colbert further admitted that the interrogation of Petitioner began while Petitioner was in custody and before he had been given any rights.

Right after giving Petitioner his advice of rights, Detective Colbert acknowledged that Petitioner said "there's nothing I have to say." Detective Colbert tried to explain that at the April 14th interview, "we didn't know 100 percent who he was at the time." However, Detective Colbert then testified that after Petitioner invoked, Detective Colbert tried "to get the basic information and give him an opportunity to speak about the case."

Detective Colbert recalled a second instance in the interview when he heard Petitioner say he didn't have anything to say. Detective Colbert testified that he believed Petitioner "was trying to steer me in a different direction" not that he was trying to say "I don't want to talk to you." Detective Colbert testified that "it was my job to try to get the facts out to talk."

Detective Colbert confirmed that he had shown Petitioner photos of Petitioner from a prior arrest and one of the victim.

Detective Colbert testified that Petitioner never indicated that he wanted to talk.

Detective Colbert was then asked about the April 30, 2014 interview. Detective Colbert testified that he and Detective Drewry again took the opportunity to

talk to Petitioner when he was extradited from New York and brought down to Montgomery County.

Detective Colbert testified that he was trying to obtain biographical information from Petitioner and Petitioner kept requesting to speak with counsel.

Detective Colbert admitted that as of April 30th, he already had confirmation that the person in custody was in fact Kevin Reynolds, and that Petitioner would not have been extradited if it had not been confirmed that he was in fact the person wanted in the warrant.

Detective Colbert testified that with respect to the April 30th statement, it was clear from the very beginning that Petitioner wanted a lawyer, yet Detective Colbert did not stop the interview. Detective Colbert admitted that a strict honoring of Petitioner's *Miranda* rights would have resulted in Detective Colbert saying "Okay. That's it. We're done." Detective Colbert admitted that despite the clear invocation, he and Detective Drewry continued on for 30-40 minutes asking questions. Detective Colbert admitted to asking questions in the face of Petitioner asking for a lawyer multiple times. Detective Colbert acknowledged that "with the conscious knowledge that [Petitioner] didn't want to speak" to detectives, both he and Detective Drewry "continued to try to interrogate him for the investigative purpose and for the impeachment purpose value of subsequent statements."

When asked why Detective Colbert told Petitioner that once an attorney is involved the likelihood of the detective being able to speak to Petitioner "is pretty

much zero," Detective Colbert explained that he was just "[s]tating the obvious."

Detective Colbert admitted to being familiar with the requirements of *Miranda*. Detective Colbert testified that when a person in custody does not have their *Miranda* rights provided, or if the defendant indicates he wants to speak to a lawyer or does not want to speak at all, that the statement can be used for impeachment purposes. Detective Colbert testified that his understanding of "impeachment purposes" means if the defendant "takes the stand and says something that contradicts what he told us." Detective Colbert testified that he has in fact heard in his experience that officers will still get statements from suspects even if they invoke their *Miranda* rights, in order to preserve their use of those statements for impeachment purposes. Detective Colbert conceded that is part of an interrogation approach in certain cases. Detective Colbert acknowledged that even with the knowledge that somebody may invoke, there is still an investigative value to getting statements after the person has either asked for a lawyer or said they do not want to speak. The investigative value is that it may provide the detectives with leads. Detective Colbert also confirmed the value of locking in one's statement, even though it may not be used in the affirmative, so that the prosecutor can use it to cross-examine the defendant. That would be a reason why an investigator would continue to interrogate an individual after he has invoked his rights.

The Suppression Court's Rulings

April 14, 2014 Statement

The suppression court found that Petitioner "in no uncertain terms, clearly and unequivocally . . . unambiguously and clearly invokes his right to remain silent by saying and I quote 'There's nothing I have to say.'" (App. 108). The suppression court found that Detective Colbert ignored that invocation. (App. 109). The suppression court found that Petitioner invoked a second time at which time Detective Colbert cut off Petitioner. (App. 109-10).

The suppression court did not find any bad faith inducement or promise to make a statement, nor any bad faith on behalf of the detective. (App. 110-12). The suppression court found that the detective's "attempts to continue to question [Petitioner] about this are legitimate attempts to see if he can bring something out of him." (App. 111). Therefore, the suppression court ruled that the April 14, 2014 statement could be used for impeachment purposes. (App. 112).

April 30, 2014 Statement

The suppression court found that the detective knew that Petitioner did not wish to speak to him before about the facts of the murder. (App. 112). The suppression court recognized that the State conceded that there is a *Miranda* violation. (App. 113).

The suppression court found that Petitioner requested counsel about 14 times and the detectives "were not going to stop until they got [Petitioner] to answer some questions." (App. 121). The suppression court said "I don't know that there's a single case anywhere that's remotely close to this with respect to the number of times he's asserted his right to counsel. I've never read one that's anything anywhere remotely close to that and I've never seen anything remotely close to that." (App. 121). The suppression court credited the detective with being "honest" about his intent at that point in time which was to try to get some statement, and the suppression court believed that "may be a new training tool the police use, I don't know, but clearly they are taught what the case law says." (App. 121).

The suppression court found that "the violation of [Petitioner's] right to counsel in this case is so egregious, that I have no doubt in my mind that neither the Court of Special Appeals, nor the Court of Appeals would condone it and find voluntariness in this case." (App. 123). The suppression court found that the entire statement on April 30th is *Miranda* violated and involuntary and thus could not be used by the State for any purpose. (App. 123).

The Trial

At trial, Petitioner asserted an alibi defense that he was in New York during the time of King's murder. Petitioner presented three witnesses: Simone Smith

("Smith"), Karlene Gill ("Gill"), and Carolene George ("George"). These witnesses placed Petitioner in New York between 6:00 p.m. and midnight on November 18, 2002.

Direct Examination of Petitioner

Petitioner testified in his defense. On direct examination, Petitioner testified that in 2000, he and Smith moved to Brooklyn, New York, where he lived until the events in this case occurred. Petitioner went out to Los Angeles in January 2002 for a brief period of time. In September of 2002, Petitioner helped King get an apartment in Maryland.

Petitioner testified that on November 15, 2002, he was in Maryland and was carjacked. Petitioner testified that he then went back to New York, and never returned to Maryland again.

Petitioner testified that on November 18, 2002, the day that King was shot, "I was in New York in my apartment." Petitioner testified that when he learned he was a suspect in the murder, he changed his name from "Clement Reynolds" to "Dennis Graham" and left the area. On November 22, 2002, he went to Connecticut to get an identification card.

Cross-Examination of Petitioner

On cross-examination, over defense objection, the State used portions of Petitioner's April 14th interview to impeach Petitioner on his alibi defense, an area that

he never discussed with the police during the April 14th interview. The State asked Petitioner:

1) "So, instead of telling the police about Caroline [sic] George, or Karlene Gill, who could truly alibi you, you started naming Rose Lopez and Byron Matamora, who isn't even a real person?" (App. 104).

2) "And just so we're clear, you never said anything about Caroline [sic] George or Karlene Gill?" (App. 104).

3) "But you agree, you've never mentioned the alibi to the police?" (App. 105).

Objections and the Trial Court's Rulings

Defense counsel objected to all of these questions and moved for a mistrial because the State was asking Petitioner "why he didn't say things," even though Petitioner had asserted his right to silence during the interview. (App. 104-05). The trial court told the State "to get away from this area," but denied the motion for mistrial. (App. 105). The trial court also told the State it might be a fair argument to make to the jury. (App. 105). The trial court did not give a limiting instruction to the jury as to how the *Miranda* violative questions were to be considered.

Defense counsel asserted that the questions were prejudicial because Petitioner did not tell the police something at a time, where the court had already ruled that he had invoked his right to remain silent. (App.

106). Again, the trial court denied Petitioner's motion for mistrial. (App. 106).

The Court of Special Appeals

Petitioner challenged the suppression court's rulings on appeal relating to the voluntariness of the April 14, 2014 custodial statement based on the "bad faith" of Detective Colbert. The Court of Special Appeals found that the statement was voluntary under Federal and State law, App. 58, as well as voluntary under Maryland common law. (App. 60).

Petitioner also challenged on appeal the trial court's rulings allowing Petitioner to be impeached by what he failed to tell the police after invoking *Miranda*. The Court of Special Appeals found that the State's questions "were classic impeachment, relating to what [Petitioner] *said* during the April 14 interview and how it differed from his trial testimony." (App. 68). However, the Court of Special Appeals acknowledged that "the questions relating to [Petitioner's] alibi witnesses touched on what [Petitioner] *did not say* to the detectives." (App. 68-69). The Court of Special Appeals found no error.

The Court of Appeals' Rulings

Petitioner petitioned Maryland's Court of Appeals to consider two issues:

> I. Was [Petitioner] denied due process when the trial court determined that [Petitioner's] April 14, 2014 statements were made voluntarily despite the detective's undeviating intent to extract a confession in the face of [Petitioner's] multiple invocations of his *Miranda* right to silence?
>
> II. Was [Petitioner] denied due process when the trial court permitted the prosecutor to question [Petitioner] about "what he did *not* tell the police" about his alibi defense, even though the omissions were a result of [Petitioner's] post-arrest, post-*Miranda* invocation of silence and were not inconsistencies with his trial testimony?

The Court of Appeals denied certiorari as to the first issue and granted certiorari as to the second issue. (App. 125).

As to the second issue, the Court of Appeals concluded that:

> [I]t was not error for the trial court to permit the State to inquire about prior inconsistent statements made to detectives after [Petitioner] invoked *Miranda*. The State's use of [Petitioner's] prior inconsistent statements about what he did not tell the State were not post-arrest silence, but rather affirmative statements about his alibi. In accordance with *Miranda* and its progeny, it was appropriate for the State to impeach [Petitioner] about his testimony on cross-examination.

(App. 34).

REASONS FOR GRANTING THE WRIT

I. This Court should grant review of the decision below because it is inconsistent with the protections of the Fifth and Fourteenth Amendments, and *Miranda*, and it is an area not yet decided by the Supreme Court, that is, whether to permit the use of a statement for impeachment purposes when it was obtained by an officer who intentionally and repeatedly ignored Petitioner's invocation of his right to remain silent under *Miranda* where the record demonstrates that the impermissible police conduct was a deliberate and a routine interrogation tactic employed by police officers who were "encouraged" by this Court's holding in *Harris v. New York* permitting the use of *Miranda* violative statements for impeachment and where the police officer knew that any post-invocation statements would be able to be used to chill Petitioner's decision as to whether to testify at his trial, thus calling into question this Court's belief in *Harris* that it was only a "speculative possibility that impermissible police conduct will be encouraged" if *Miranda* violative statements were permitted to be used for impeachment.

A. This Court has never condoned police conduct designed to deliberately violate a suspect's constitutional rights.

In *Brewer v. Williams*, 430 U.S. 387, 405, 97 S.Ct. 1232, 1242 (1977), this Court upheld the lower court's

finding that the Government did not prove that Williams waived his right to counsel prior to making a statement when Williams sought out legal advice before turning himself in, consulted with his attorney after being booked, obtained legal advice, and was assured that the police had agreed not to question him during his transport in the police car.

In concurring with the opinion, Justice Marshall said that "good police work is something far different from catching the criminal at any price. It is equally important that the police, as guardians of the law, fulfill their responsibility to obey its commands scrupulously." *Id*. at 406-07, 97 S.Ct. at 1244. Justice Marshall further said that "[i]t is this intentional police misconduct not good police practice that the Court rightly condemns. The heinous nature of the crime is no excuse . . . for condoning knowing and intentional police transgression of the constitutional rights of a defendant." *Id*. at 408, 97 S.Ct. at 1244.

Justice Powell also concurred with the opinion noting that he had previously indicated, "with respect to Fourth Amendment violations, that a distinction should be made between flagrant violations by the police, on the one hand, and technical, trivial, or inadvertent violations, on the other." *Id*. at 413, n.2, 97 S.Ct. at 1247 (citing *Brown v. Illinois*, 422 U.S. 590, 610-12, 95 S.Ct. 2254, 2265-66 (1975)). Justice Powell continued that "[h]ere, we have a Sixth Amendment case and also one in which the police deliberately took advantage of an inherently coercive setting in the absence of

counsel, contrary to their express agreement." *Brewer*, 430 U.S. at 413, n.2, 97 S.Ct. at 1247.

In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), this Court held that statements obtained from defendants during incommunicado interrogation in police-dominated atmospheres, without the full warning of constitutional rights, were inadmissible as having been obtained in violation of the Fifth Amendment privilege against self-incrimination. *Miranda* was decided to combat the psychologically coercive training exercises that officers were receiving about what to do when the suspect refuses to discuss the matter. *Miranda*, 384 U.S. at 455-56, 86 S.Ct. 1602.

The *Miranda* Court further stated that "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Id*. at 473-74, 86 S.Ct. at 1627. The exercise of the right must be "scrupulously honored." *Id*. at 479, 86 S.Ct. at 1630.

In *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321 (1975), this Court said that in order for *Miranda* to be effectively applied, the exercise of the defendant's invocation must be "scrupulously honored" meaning the defendant must have the "right to cut off questioning." *Id*. at 103, 96 S.Ct. at 326. "

Years after *Miranda*, this Court decided *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643 (1971) in which the *Harris* majority believed that with *Miranda*

warnings now being a requirement for the admission of custodial statements, officers would no longer be incentivized to violate a suspect's rights. *Id.* at 225, 91 S.Ct. 643.

The *Harris* majority believed that there was only a "speculative possibility that impermissible police conduct will be encouraged" by the use of a *Miranda* violative statement for impeachment, and that any "deterrent effect on proscribed police conduct" would sufficiently flow "when the evidence in question is made unavailable to the prosecution in its case in chief." 401 U.S. at 225, 91 S.Ct. 643. Therefore, this Court found that a statement taken in violation of *Miranda*, that otherwise satisfies legal standards of trustworthiness, was properly usable for impeachment purposes to attack credibility of the defendant's trial testimony. *Id*. at 224, 91 S.Ct. at 645. The *Harris* Court reasoned that "[t]he shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Id*. at 226, 91 S.Ct. at 646.

In dissent, Justice Brennan, joined by Justices Douglas and Marshall observed:

> The Court today tells the police that they may freely interrogate an accused incommunicado and without counsel and know that although any statement they obtain in violation of Miranda cannot be used on the State's direct case, it may be introduced if the defendant has the temerity to testify in his own defense. This goes far toward undoing much of the progress

> made in conforming police methods to the Constitution.

Id. at 232, 91 S.Ct. 643.

Several years after *Harris*, in *Oregon v. Hass*, 420 U.S. 714, 95 S.Ct. 1215 (1975), this Court adopted the rationale of the *Harris* majority, noting that "[i]f, in a given case, the officer's conduct amounts to an abuse, that case, like those involving coercion or duress, may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness." *Id*. at 723, 95 S.Ct. 1215.

Justices Brennan and Marshall dissented adhering to their dissent in *Harris* and cautioned that once warnings are given, police have almost no incentive to follow *Miranda*'s requirements, and "police interrogation will doubtless be vigorously pressed to obtain statements before the attorney arrives." *Id*. at 725, 95 S.Ct. 1215.

B. The conduct by Detective Colbert in Petitioner's Case is a flagrant disregard of Petitioner's constitutional rights and does exactly what the Majority in *Harris* and *Hass* thought was but a "speculative possibility."

There is absolutely *no* "speculation" about the "impermissible police conduct" engaged in by Detective Colbert to violate *Miranda* in order to obtain a statement from Petitioner.

The suppression court found that Petitioner clearly and unambiguously invoked his right to silence when Petitioner said: "There's nothing I have to say." (App. 108).

Rather than "scrupulously honor" Petitioner's invocation and cease the interrogation, as *Miranda* instructed, and as occurred in *Mosley*, Detective Colbert purposely ignored the invocation and continued seeking answers to his questions.

With respect to the April 14th statement, Detective Colbert conceded that the continued questioning of Petitioner was for investigative purposes, and that he was trying "to get the basic information and give him an opportunity to speak about the case."

Detective Colbert testified to his understanding of the *Miranda* requirements, as well as his understanding of the usefulness of violating the *Miranda* requirements so to obtain a statement that can be used for impeachment purposes, which Detective Colbert explained meant to counter a defendant who "takes the stand and says something that contradicts what he told us." Detective Colbert testified to his knowledge of the benefit of trying to obtain a statement from a suspect even if they invoke *Miranda*, because he may be able to obtain leads or allow the prosecutor to use the statement on cross-examination of the defendant.

Detective Colbert's practice of purposely violating *Miranda* invocations in order to obtain statements for impeachment purposes was not a one-time, isolated event. Rather, 16 days later, Detective Colbert again

exercised such learned practices during the April 30, 2014 custodial interview of Petitioner. Detective Colbert admitted to understanding that Petitioner wanted a lawyer from the very beginning, and despite that clear invocation, an invocation which was repeated a dozen times, Detective Colbert continued to interrogate Petitioner for an additional 30-40 minutes. Detective Colbert acknowledged doing this both for investigative purposes as well as for impeachment purposes.

In *Harris v. New York*, the defendant had never been advised of *Miranda* before making a custodial statement, but the defendant made "no claim that the statements made to the police were coerced or involuntary." 401 U.S. at 224, 91 S.Ct. at 645.

In *Oregon v. Hass*, the defendant was advised of *Miranda* and provided statements to the police, *prior* to invoking *Miranda*. 420 U.S. at 715, 95 S.Ct. at 1217. The defendant eventually invoked his right to counsel, but thereafter pointed out a place in the brush where evidence was found. *Id*. at 716, 95 S.Ct. at 1217. The identification of the location of the evidence was permitted as rebuttal after Hass testified inconsistently. In *Hass*, like in *Harris*, there was no evidence or suggestion that Hass' statements were involuntary or coerced. *Id*. at 723, 95 S.Ct. at 1221.

Hass left open the possibility that "[i]f, in a given case, the officer's conduct amounts to an abuse, that case, like those involving coercion or duress, may be taken care of when it arises measured by the

traditional standards for evaluating voluntariness and trustworthiness." *Id*. at 723, 95 S.Ct. at 1221.

Unlike in *Harris* and *Hass*, Petitioner in this case challenged the voluntariness of the April 14, 2014 statement both in the sense of traditional standards for evaluating voluntariness such as making promises or inducements, as well as based upon Detective Colbert's "bad faith" in violating *Miranda* and his undeviating intent to extract a confession.

C. This Court must reassess the risk of perjury by a defendant if a *Miranda* violative statement is excluded for impeachment against the now-realized, non-speculative risk that police misconduct will be encouraged by the holdings of *Harris* and *Hass* which allow the use of *Miranda* violative statements for impeachment.

Detective Colbert's interrogation of Petitioner occurred decades after *Miranda*, *Harris*, and *Hass*. What has developed in that time is that officers are actually being trained to violate a suspect's invocation of *Miranda*, knowing that the statement will not be admissible in the State's case-in-chief, but can be used to try to prevent the suspect from testifying at trial, to give the State information about the suspect's position, or to secure impeachment evidence against the suspect should he testify. It can no longer be said that there is a speculative possibility that impermissible police conduct would be encouraged by the *Harris-Hass* rulings.

Unfortunately, what occurred in Petitioner's case is exactly what the majority hoped would never come to fruition, but what the dissenters forecasted as a sure thing: once the warnings are given the police have almost no incentive for following *Miranda*.

Petitioner understands the Court's need to prevent a criminal defendant from being granted "the right to commit perjury." *Harris*, 401 U.S. at 225, 91 S.Ct. at 645. However, Petitioner also believes the Court has an interest in preventing a police officer from being granted the right to pervert the *Harris-Hass* exception to the exclusionary rule into a license to compel statements in violation of Petitioner's constitutional rights under the Fifth and Fourteenth Amendments and the protections of *Miranda*.

In Petitioner's case, where the record establishes that the *Miranda* violation was purposeful and intentional, and not just a "speculative possibility that impermissible police conduct [was] encouraged," the statement should not be permitted, even for impeachment purposes, as Petitioner was not in control of his "right to cut off questioning" and his invocations were not "scrupulously honored." Rather, Detective Colbert "perverted" *Harris* "into a license to use" compulsion and coercion to circumvent exactly what *Miranda* intended to safeguard against: a custodial atmosphere that undermines the defendant's will to resist.

This Court has previously suggested that "a distinction should be made between flagrant violations by the police, on the one hand, and technical, trivial, or

inadvertent violations, on the other." *Brown*, 422 U.S. at 610-12, 95 S.Ct. at 2265-66 (J. Powell, concurring); *Brewer*, 430 U.S. at 413, n.2, 97 S.Ct. at 1247 (J. Powell, concurring).

By permitting the April 14th statement to be used in this case, the Montgomery County Police Department is essentially being told that it is okay to ignore a suspect's invocation to silence three times, so long as it is not ignored a dozen times as was done in the April 30th interview.

Petitioner is asking this Court to decide an issue that was not developed in the *Harris-Hass* decisions. What happens when the police act with the purpose to intentionally subvert *Miranda*? *Harris* and *Hass* were not authored to protect, let alone encourage, the flagrant disregard of *Miranda*, nor subvert its protections.

This question is of high importance to the public interest because the purposeful misuse of *Harris* and *Hass* by law enforcement to erode a suspect's constitutional rights will continue if this Court does not place limits on this type of police misconduct.

II. This Court should grant review of the decision below as this Court has not yet decided whether *Doyle v. Ohio* extends to cases in which the defendant invokes *Miranda*, answers some questions, but is silent as to other topics, only to later have his silence used against him, rather than previous inconsistent utterances.

The State did not seek to impeach Petitioner by what he said, but by what he did *not* say. Petitioner submits that the Maryland Court of Appeals erred in finding that Petitioner was not questioned about post-arrest silence, but rather about affirmative statements about his alibi. (App. 34). Petitioner never gave statements about his alibi to Detective Colbert, therefore it was improper for Petitioner to be asked questions relating to what he failed to tell the police regarding his alibi defense.

A. It is constitutionally infirm to allow a defendant to be impeached by his *Miranda* invoked silence.

In *United States v. Hale*, 422 U.S. 171, 95 S.Ct. 2133 (1975), this Court held that the accused's silence during police interrogation lacked significant probative value so that any reference to his silence in cross-examination of the defendant at trial, in an attempt to impeach his alibi, carried with it an intolerably prejudicial impact entitling him to a new trial. This Court said that "[a]s a preliminary matter . . . the court must be persuaded that the statements are indeed

inconsistent." *Id*. at 176, 95 S.Ct. 2133. (Internal citations omitted). "If the Government fails to establish a threshold inconsistency between silence at the police station and later exculpatory testimony at trial, proof of silence lacks any significant probative value and must therefore be excluded." *Id*., 95 S.Ct. 2133.

Justice White concurred in the judgment, finding:

> But when a person under arrest is informed, as Miranda requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insistent that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony.

Id. at 182-83, 95 S.Ct. 2133.

In *Doyle v. Ohio*, 426 U.S. 610, 611, 96 S.Ct. 2240 (1976), the *Doyle* majority adopted Justice White's concurrence from *Hale* when considering the issue of "whether a state prosecutor may seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving Miranda warnings at the time of his arrest." The majority held "that use of the defendant's post-arrest silence in this manner violates due process." *Id*., 96 S.Ct. 2240.

Relying on Justice White's summation from *Hale*, the *Doyle* Court held that "the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment." *Id*. at 619, 96 S.Ct. 2240.

In *Anderson v. Charles*, 447 U.S. 404, 100 S.Ct. 2180 (1980) (per curiam), this Court considered the prosecutor's impeachment with "silence" in a case in which the defendant, when arrested was advised of *Miranda*, waived *Miranda*, gave a statement, but *never* subsequently invoked *Miranda*. In *Anderson v. Charles*, the defendant was arrested while driving a stolen car and charged with murder of the owner of the stolen car. *Id*. at 404, 100 S.Ct. 2180. Charles was given his *Miranda* warnings and was asked about the stolen vehicle. *Id*. at 405, 100 S.Ct. 2180. Charles told the police that he stole the car in Ann Arbor, two miles from a bus station. *Id*., 100 S.Ct. 2180. At trial, the arresting officer presented this information to the jury. Charles then took the stand and testified that he took the vehicle from the parking lot of Kelly's Tire Co. which is right next to the bus station, not that he took it from two miles away from the bus station. *Id*., 100 S.Ct. 2180. On cross-examination, the prosecutor asked Charles "Don't you think it's rather odd that if it were the truth that you didn't come forward and tell anybody at the time you were arrested, where you got that car?" *Id*. at 406, 100 S.Ct. 2180.

This Court said in *Anderson v. Charles* that "*Doyle* bars the use against a criminal defendant of *silence*

maintained after receipt of governmental assurances. But *Doyle* does not apply to cross-examination that merely inquires in *prior inconsistent statements*." *Id*. at 408, 100 S.Ct. 2180. (Emphasis added). This is because "[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. *As to the subject matter of his statements*, the defendant has not remained silent at all." *Id*., 100 S.Ct. 2180. (Emphasis added). The colloquy in *Anderson v. Charles* did not refer to Charles's silence because Charles never invoked *Miranda*, and thus the prosecutor's questions could not have been designed to draw meaning from constitutionally protected "silence." *Id.* at 409, 100 S.Ct. 2180.

Justices Brennan and Marshall dissented, affirming the judgment of the Court of Appeals in which the Court of Appeals recognized that "the respondent could be questioned about prior statements inconsistent with his trial testimony" but, the exchange about "failure to tell arresting officers the same story he told the jury," were unconstitutional inquiries about post-arrest silence barred by *Doyle*. *Id*. at 408-09, 100 S.Ct. 2180.

The United States Court of Appeals for the Ninth Circuit has rendered a reported opinion with a similar procedural background to the instant case. In *United States v. Caruto*, 532 F.3d 822 (9th Cir. 2008), as a matter of first impression, the Ninth Circuit held that *Doyle* barred a prosecutor's arguments emphasizing what the defendant *failed* to say to the police after an

initial waiver of *Miranda*, where the defendant made a limited statement about the offense and thereafter invoked *Miranda*.

The *Caruto* Court considered *Doyle* as well as this Court's opinion in *Anderson v. Charles*, 447 U.S. 404, 100 S.Ct. 2180, where this Court considered the prosecutor's impeachment with "silence" in a case in which the defendant, when arrested, was advised of *Miranda*, waived *Miranda*, gave a statement, but *never* subsequently invoked *Miranda*.

The *Caruto* Court distinguished its facts from *Anderson v. Charles* because Caruto actually *did* invoke after making a brief post-*Miranda* statement about the offense. Additionally, the prosecutor in *Caruto* did not probe Caruto's inconsistencies between Caruto's post-arrest statements and trial testimony, but rather, the prosecutor sought to impeach Caruto by asking Caruto what she did *not* say. *Id*. at 830. The *Caruto* Court was swayed by the fact that:

> Caruto could not fully explain why her post-arrest statement was not as detailed as her testimony at trial without disclosing that she had invoked her *Miranda* rights. Moreover, the prosecution commented on her failure to explain further what had happened. This is the type of penalty for exercising one's Fifth Amendment rights that *Doyle* prohibits.

Id.

The *Caruto* Court concluded that "[w]here, as here, it is a defendant's invocation of her *Miranda*

rights that results in the omitted facts that create the difference between two descriptions, cross-examination based on those omissions draws meaning from the defendant's protected silence in a manner not permitted by *Doyle*." *Id*. at 831.

B. The State cross-examined Petitioner as to what he *failed* to tell the police.

During the April 14, 2014 custodial interview, after Petitioner had invoked his *Miranda* right to silence, Detective Colbert continued to interrogate Petitioner. Although Petitioner answered some of the questions posed by Detective Colbert, Petitioner did not provide Detective Colbert with *any* answers as to where he was on November 18, 2002, or whom he was with. The only response that Petitioner provided to Detective Colbert about the time of the murder was to deny being "there," which was wholly consistent with his alibi defense at trial that he was not "there" in Maryland.

Other than the denials about being at the murder scene, Petitioner did not provide details about the murder, or about November 18, 2002. When specifically asked about the time of the murder, Petitioner told Detective Colbert, "There's nothing I have to say," "There's nothing I have to say. You're trying to solve a homicide and – ," "I have nothing to say."

What Petitioner said to the police was that during the *month* of November of 2002, he was "*probably*" in

the Virgin Islands, that he was "not in Maryland" the month of "November of 2002."

By contrast, with respect to providing answers about his whereabouts at *the time of the murder*, Petitioner merely said, "I was not there." Petitioner provided no details about where he was or who he was with, on November 18, 2002, at the time of the murder.

At trial, Petitioner testified that he was in New York City at the time of the murder and provided the names of alibi witnesses George, Gill, and Smith, all of whom testified as alibi witnesses for the defense.

Despite his silence to Detective Colbert regarding his whereabouts at the time of the murder, and his silence regarding *any* alibi witnesses, the State erroneously asked Petitioner these three improper questions:

1) "So, instead of telling the police about Caroline [sic] George, or Karlene Gill, who could truly alibi you, you started naming Rose Lopez and Byron Matamora, who isn't even a real person?" (App. 104).

2) "And just so we're clear, you never said anything about Caroline [sic] George or Karlene Gill?" (App. 104).

3) "But you agree, you've never mentioned the alibi to the police?" (App. 105).

C. The impropriety of the questions.

The prosecutor's questions were improper for two reasons. First, because Petitioner invoked silence, not providing *any* details about an alibi, the names George and Gill were not mentioned to the police, and so they should not have been inquired into in the context of names that he did not provide to the police. Second, when the names Byron and Rose were brought up to the police, it was in the context of the year 2000, not 2002 when the murder occurred, and the names therefore had nothing to do with the alibi defense.

The prosecutor mischaracterized how the names "Rose Lopez" and "Byron Matamora" came about during the interview, suggesting that Petitioner just "started naming" names.

Petitioner invoked silence each time he was asked about the murder, whether he wanted to talk about it, or his thoughts about it. Petitioner had the constitutional right not to offer up information about his alibi, *Miranda*, 384 U.S. at 445, and where he exercised such a right, it was improper to ask Petitioner at trial what he failed to tell the police about his alibi. Like in *Caruto*, "[w]here, as here, it is a defendant's invocation of [his] *Miranda* rights that results in the omitted facts that create the difference between two descriptions, cross-examination based on those omissions draws meaning from the defendant's protected silence in a manner not permitted by *Doyle*." *Caruto*, 532 F.3d at 831.

Because Petitioner invoked silence multiple times, in the face of questions directed to the murder, and because his silence was not an "inconsistency" with his direct examination, the *Harris-Hass* rule of impeachment is not applicable to Petitioner's case.

Unlike in *Harris*, Petitioner was not asked "seriatim" about specific alibi statements that he made to the police, rather he was asked about the fact that he failed to the tell the police about these alibi facts. 401 U.S. at 223, 91 S.Ct. at 644. Petitioner was not impeached with prior inconsistent "utterances" but rather by prior silence. *Id*. at 226, 91 S.Ct. at 646. Petitioner's direct testimony about alibi, did not contrast sharply with his police statement, because Petitioner did not provide the police with facts about the alibi. Lastly, the trial court did not instruct the jury during any of Petitioner's cross-examination into the police statement that the statement should only be used to pass on Petitioner's credibility, rather than to be considered for guilt.

In *Hass*, like in *Harris*, the defendant was impeached by what he *told* the police, not by what he *failed* to tell the police.

Petitioner's case is distinguishable from *Anderson v. Charles* in which the colloquy there did not refer to Charles's silence because Charles never invoked *Miranda*. Thus the prosecutor's questions could not have been designed to draw meaning from constitutionally protected "silence" in that case. *Id.* at 409, 100 S.Ct. 2180.

Petitioner is asking this Court to find that Petitioner's failure to tell the police about Gill, George, or his alibi were exercises of constitutionally protected "silence" and that the State erred in asking Petitioner what he *did not tell* the police about his alibi defense.

This case presents an important issue because the precedent set by the Maryland Court of Appeals is that if any statement is made to the police, in a post-*Miranda*-invocation setting, the prosecutor is free to ask the defendant not just about inconsistencies in what he *did* say, but is free to ask a litany of "you never told the police this" type of questions, even though the defendant's explanation would be that it was because the defendant invoked his right to silence in the face of those specific questions.

This Court has said that "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." *Hale*, 422 U.S. at 180, 95 S.Ct. 21. The jury in Petitioner's case was prevented from hearing *why* the Petitioner did not give information about his alibi or alibi witnesses for November 18, 2002, because a jury cannot be informed that a defendant has exercised a right to remain silent.

Permitting the State to ask Petitioner about what he *failed* to tell the police, when those failures were not inconsistencies but were *Miranda*-invoked silences or omissions, violates previous precedent set by this Court and is inconsistent with the Ninth Circuit's

finding in *Caruto*. This is an area that is likely to recur in both Federal and State courts across the country, and therefore guidance on this issue is in the public interest.

CONCLUSION

For all these reasons, this Court should grant the petition.

Respectfully submitted,

ROBERT C. BONSIB
Counsel of Record
MARCUSBONSIB, LLC
6411 Ivy Lane, Suite 116
Greenbelt, Maryland 20770
(301) 441-3000
robertbonsib@
marcusbonsib.com

MEGAN E. COLEMAN
MARCUSBONSIB, LLC
6411 Ivy Lane, Suite 116
Greenbelt, Maryland 20770
(301) 441-3000
megancoleman@
marcusbonsib.com

Counsel for Petitioner