No. 20-6179

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

HAI A. DUONG — PETITIONER

vs.

DARREL VANNOY, WARDEN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

HAI A. DUONG
613130, CYPRESS—3
LOUISIANA STATE PENITENTIARY
ANGOLA, LA 70712

QUESTIONS PRESENTED

1. Under the particularized need doctrine, indigent defendants are allowed to file applications for post-conviction relief without supporting documentation after having made specific references to constitutional violations in their trial. Duong filed an application for post-conviction relief that satisfied this constitutional obligation but was denied access to the record and his claims denied as speculation and conclusory allegations. Was Duong denied due process and equal protection when the lower courts deprived him of an opportunity to collaterally attack his convictions and sentences?

2. The prosecutor intentionally drew the jury's attention to Duong's post-arrest silence to impeach him and call him guilty contrary to *Doyle v. Ohio* 426 U.S. 610 (1976). The lower courts agreed the violation was serious but said it was harmless because the evidence was overwhelming. Because only testimonial evidence was presented, should Duong have been afforded a new trial free from an error that clearly prejudiced him in the minds of the jurors?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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STATUTES AND RULES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts:**

The opinion of the United States Fifth Circuit Court of Appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States Eastern District Court of Louisiana appears at Appendix B to the petition and is reported at 2019 WL1558008.

[x] For cases from **state courts:**

The opinion of the Louisiana Supreme Court to review the merits appears at Appendix G to the petition and is reported at 2014-1883 (La. 4/17/15); 168 So.3d 395.

The opinion of the Louisiana Fifth Circuit Court of Appeal appears at Appendix H to the petition and is reported at 13-763, (La. App. 5 Cir. 8/8/14); 148 So.3d 623.

JURISDICTION

[x] For cases from **federal courts:**

The date on which the United States Fifth Circuit Court of Appeals decided my case was August 25, 2020.

[x] No petition for rehearing was timely filed in my case.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[x] For cases from **state courts:**

The date on which the Louisiana Supreme Court decided my case was August 4, 2017.

A copy of that decision appears at Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> [N]or 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[.]

The Sixth Amendment to the United Sates Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.

The Fourteenth Amendment to the United Sates Constitution provides in pertinent part:

> 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.

Article I § 16 of the Louisiana Constitution:

> No person shall be compelled to give evidence against himself.

CONFIDENTIALITY OF NAMES

Fictitious names have been assigned to JT and NT for easier reading. JT is called Janet and NT Nicole. *Fed. R. Crim. P.* 49.1; *La. R.S.* 46:1844(W)(3).

STATEMENT OF THE CASE

On June 21, 2012, Duong was formally charged by a five count indictment: counts 1 and 2 accused him of aggravated rape; counts 3 and 4 accused him of molestation of a juvenile; and count 5 accused him of aggravated oral sexual battery, all in violation of Louisiana law. On July 18, 2012, Duong pled not guilty to the allegations. A jury was selected June 10, 2013, and began June 11, 2013. On June 12, 2013, a non-unanimous jury returned a verdict of guilty as charged on counts 1, 3, 4 and 5. On count 2, the non-unanimous jury returned a verdict on the lesser charge of attempted aggravated rape. The trial court sentenced Duong to imprisonment terms of: life on count 1; fifty years on count 2; fifteen years each on counts 3 and 4; and 10 years on count 5. The sentences are to be served at hard labor, concurrently and without the benefits of probation, parole or suspension of sentence. Duong was unsuccessful in the direct appeal of his convictions and sentences. *State v. Duong*, 13-763, (La. App. 5 Cir. 8/8/14); 148 So.3d 623, *writ denied*, 2014-1883 (La. 4/17/15); 168 So.3d 395.

On August 24, 2015, Duong filed an Application for Post-Conviction Relief ("APCR") and Request for Supporting Documentation and Discovery along with motions for production of documents under the particularized need doctrine. Appendix I, pp. 110-137. The trial court denied relief and said Duong failed to:

> ... provide any facts or evidence in support of []his claim[s]. The court finds the claim is speculative and conclusory ... Petitioner fails to provide any evidence or exhibits in support of this claim ... The court finds this claim completely speculative and conclusory.

Appendix F, pp. 66-68.

The trial court, as well as the other state and federal courts, failed to consider Duong's APCR was filed to present colorable claims that would entitle him to a free copy of the trial record because he never received a copy of the record during the direct appeal of his convictions and sentences. The United States Eastern District Court of Louisiana denied and dismissed Duong's petition for writ of a habeas corpus August 10, 2019, and refused to issue a certificate of appealability. On August 25, 2020, the Fifth Circuit Court of Appeals denied Duong's request for a Certificate of Appealability. This instant petition for a writ of certiorari timely follows.

REASONS FOR GRANTING THE WRIT

Under Rule 10, the Louisiana courts and the United States Court of Appeals for the Fifth Circuit has contrarily decided an important question of federal law that has been settled by this Court and has decided an important federal question in a way that conflicts with relevant decisions of this Court as set forth below:

The state appellate court acknowledged that Duong presented a serious *Doyle* violation and not one court thereafter disputed it. The federal district court claimed that Duong's Fifth Amendment claim is unexhausted and defaulted because, allegedly, Duong only referenced the Fifth Amendment in his brief and failed to argue it. The lower courts have obviously overlooked that Duong is a pro se petitioner who is entitled to liberal construction. *Andrade v. Gonzalez*, 459 F.3d 538, 543 (5th Cir. 2006).

Additionally, Duong has been deprived of his right to collaterally attack his convictions and sentences because he was denied a copy of the trial record after he presented colorable claims and met legal requirement of showing a particularized need for the requested documents. See *United States v. MacCollom*, 426 U.S. 317, 324, 96 S.Ct. 2086, 2091, 48 L.Ed.2d

666 (1976) (quoting *Ross v. Moffitt*, 417 U.S. 600, 616, 94 S.Ct. 2437, 2447, 41 L.Ed.2d 341 (1974).

1. The lower courts have deprived Duong of his due process and equal protection rights contrary to clearly established law, as determined by this Court and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

According to the federal district court, "Duong d[id] not present any evidentiary support, and the record contains nothing, to suggest or establish his actual innocence on the underlying convictions. In other words, he fails to present any evidence or argument of the kind of actual innocence that would excuse the procedural default." Appendix C, p. 28. The district court's contention is clearly erroneous in light of the particularized need doctrine. *Lane v. Brown*, 372 U.S. 477, 83 S.Ct. 768, 9 L.Ed.2d 892 (1963); *Smith v. Bennett*, 365 U.S. 708, 89 S.Ct. 895, 6 L.Ed.2d 39 (1969); *State ex rel. Bernard v. Orleans Criminal District Court Section J*, 94-2247 (La. 4/28/95); 653 So.2d 1174. In fact, the district court acknowledged that the trial court did not provide Duong with a free copy because he, allegedly failed to make "a sufficient showing of particularized need for a free copy of the other transcripts." Appendix C, p. 19. However, the trial court's reason(s) for refusing to provide Duong with a free copy of the record is what guarantees Duong relief under § 2254. See Appendix F, pp. 66-67.

The Louisiana Supreme Court, applying clearly established federal law—as determined by this Court—held:

> [A]n indigent inmate has the constitutional right to free copies only in those instances in which he shows that denial of the request will deprive him of an "adequate opportunity to present [his] claims fairly." *United States v. MacCollom*, 426 U.S 317, 324, 96 S.Ct. 2086, 2091, 48 L.Ed.2d 666 (1976) (quoting *Ross v. Moffitt*, 417 U.S. 600, 616, 94 S.Ct. 2437, 2447, 41 L.Ed.2d 341 (1974)). Meeting that constitutional threshold requires a showing of what this Court has called "particularized need."

State ex rel Bernard v. Criminal District Court Section J, 653 So.2d at 1175.

When Duong submitted his properly filed Application for Post-Conviction Relief and Request for Supporting Documentation and Discovery, he explained he was relying on his memory and cited applicable state and federal law to support his request. See Appendix I, pp. 110-37.

The federal district court noted that there is "no general due-process right of access to state-court records on collateral review in criminal proceedings." Appendix C, p. 32. However, as a disadvantaged indigent, the Fourteenth Amendment and its Fifth Amendment counterpart gives Duong "an adequate opportunity to present [his] claims fairly ..." *U.S. v. MacCollom*, 426 U.S at 324, 96 S.Ct. at 2091. Even so, the court claimed Duong should not be given a copy of the record to perfect his claims. In support of his request, Duong argued that he was denied his constitutional right to the

effective assistance of counsel and that his trial was adversely affected by prosecutorial misconduct. Appendix I, pp. 110-37.

2. The prosecutor made numerous improper references to Duong's post-Miranda silence contrary to clearly established law as determined by this Court.

In Duong's case, the prosecutor candidly admitted: "I was just going to ask him if he was informed of his rights and if he was willing to make a statement....He's informed me of his rights, and he is cognizant of his rights, and he is taking advantage of the constitutional rights that he understands." Over trial counsel's objection, and with the trial court's permission, the prosecutor asked Detective Richard Broussard if Duong agreed to give him a statement. The detective said Duong did not want to give a statement after he was advised of his rights because, the detective said, Duong's attorney advised him not to talk to the police. In his closing argument, the prosecutor reminded the jury that "... when the police went to interview [Duong] at the jail here, he had a lawyer before they even got there. So at some point, over the 13 years that he was gone, he did learn about the legal system. Did he call anybody down here? Did he turn himself in? No. He stayed on the run until he was caught. That's what he did because he is guilty." There is no dispute in this case that the prosecutor's statements and questions were designed to draw

the jury's attention to Duong's exercise of his right to counsel and to remain silent.

The prosecutor asked Detective Broussard about Duong's apprehension and extradition back to Louisiana. Detective Broussard said Duong had been pulled over in a routine traffic stop in Cheyenne, Wyoming, when the arresting officer learned he was wanted in Louisiana. When Duong arrived in Jefferson Parish, Louisiana, Detective Broussard came into contact with him for the first time. R. pp. 434-35:

STATE: Okay. Was Mr. Duong subsequently extradited back to Louisiana?

WITNESS: Yes, he was.

STATE: Okay. Did you ever have the occasion to meet with Mr. Duong?

WITNESS: Well, when he was returned here and I was aware that he was arrested and returned to Jefferson Parish, myself and my partner at that time, Detective Thibideaux went to Jefferson Parish Correctional Center, which was on the 12th of March 2012. I had called in advance to have him brought down to intake booking.

DEFENSE: May I approach the bench?

COURT: Yes.

(Bench conference)

DEFENSE: I think we're at this–

COURT: All right. And let me say this right now. Quietly.

STATE: Okay.

DEFENSE: This is going that he went down and talked to him, and he said, I have an attorney who's advised me not to talk to you. Okay?

COURT: Uh-huh.

DEFENSE: And I don't think that's admissible. It was against his constitutional right. And it's within his privilege not [] to remain silent. And I don't think it can be used as evidence. They're presenting it as evidence. Since they don't have a statement, they should stop.

COURT: You want him to testify as to what his attorney advised him?

STATE: No. I was just going to ask him if he was informed of his rights and if he was willing to make a statement.

DEFENSE: And that—Right. And I don't think you can do that. I don't think that—He's under no obligation to give that statement.

STATE: He's informed of his rights, and he is cognizant of his rights, and he is taking advantage of the constitutional rights that he understands.

COURT: I'm going to overrule the objection.

DEFENSE: Note our objection.

(Bench conference ends)

STATE: When you met with Mr. Duong, Detective, was he advised of his rights?

WITNESS: He was advised of his rights, yes.

STATE: Did you do that?

WITNESS: Yes, I did.

STATE: Did you need an interpreter?

WITNESS: No, no.

STATE: Did he indicate to you that he understood his rights?

WITNESS: He understood his rights, yes.

STATE: Okay. Did he agree to give you a statement?

WITNESS: No. After I told him I wanted to talk—after I advised him of his rights, I wanted to talk to him about the charges, he immediately told me that he and his family had secured an attorney, Bruce Netterville. And he told me his attorney told—advised not to talk to me. I then stopped ....I didn't interview. I didn't have anymore questions. And I left.

R. pp. 435-437.

Duong's trial counsel alerted the trial court and the prosecutor to the specific problem he anticipated in a timely and professional manner. The court overruled counsel's objection and allowed the prosecutor to trample Duong's constitutional right and ask Detective Broussard to highlight Duong's exercise of his right to remain silent. Making matters worse, the prosecutor launched, what amounts to, a personal attack against Duong and asked the jury:

> What else did he do when he was on the run?... when the police went to interview him at the jail here, he had a lawyer before they even got there. So at some point, over the thirteen years that he was gone, he did learn about the legal system. Did he call anybody down here? Did he turn himself in? No. He stayed on the run until he was caught. That's what he did because he is guilty. That's why he fled.

R. pp. 12-13.

Contrary to law, as determined by this honorable Court, the prosecution used Duong's exercise of his right to remain silent to impeach him.

The lower courts acknowledged that the State's reference to Duong's post-Miranda silence was indeed serious; however, the lower courts claim the violations were not serious enough in the face of the so-called overwhelming evidence. Granted, the testimony of any witness, if believed, is sufficient to convict and affirm a conviction; however, where one victim is impeached by the prosecution's expert testimony and the expert's testimony itself is suspect, the verdict in this case cannot be considered reliable. The *Doyle* violation in this case is clear and Duong was deprived of his constitutional right to not have the prosecutor taint the jury against him because he chose to exercise his Fifth Amendment right to remain silent. The lower courts have unconstitutionally justified the prosecution's repeated and calculated attempts to focus the jury's attention on Duong "lawyering up."

The Fifth Amendment to the United States Constitution holds that no one "shall be compelled in any criminal case to be a witness against himself." Likewise, Article I § 16 of the Louisiana Constitution holds that no one "shall be compelled to give evidence against himself." To protect this substantial right, this Court has held that "the prosecution may not use statements,

whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). "At the outset," the Court ruled, "if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent." *Miranda v. Arizona*, 384 at 467-468. And, "[t]he warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court." *Miranda v. Arizona*, 384 at 469. The Court said the "warning is needed in order to make him aware of the privilege, but also of the consequences of foregoing it." *Miranda v. Arizona*, 384 at 469. The Court also said that "[o]nce 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." *Miranda v. Arizona*, 384 at 473-474.

As the Court is aware, the use of a defendant's post-Miranda silence is commonly referred to as a "Doyle" violation. *Doyle v. Ohio*, supra; *State v. Pierce*, 11-320, pp. 6-7 (La. App. 5 Cir. 12/29/11); 80 So.3d 1267, 1272.

More than thirty-five years ago, this honorable Court decided that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Doyle v. Ohio*, 426 U.S. 610, 618, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). In doing so, the Court explicitly rejected the prosecution's argument that it ought to be able to cross-examine a defendant to impeach him because "the discrepancy between an exculpatory story at trial and silence at time of arrest gives rise to an inference that the story was fabricated somewhere along the way." *Doyle v. Ohio*, 426 U.S. at 616. The Court explained that "[s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights....Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested." *Doyle v. Ohio*, 426 U.S. at 617.

The Court also held "that the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving Miranda warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." *Doyle v. Ohio*, 426 U.S. at 618; also see *Wainwright v. Greenfield*, 474 U.S. 284, 291, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986), (quoting *South Dakota v. Neville*, 459 U.S. 553, 565, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983)). This

Court reaffirmed its ruling that post-Miranda silence in itself is invocation of the right and "pointing to the fact that a defendant was silent after he heard Miranda warnings" violates due process. *Salinas v. Texas*, 570 U.S., n. 3, 133 S.Ct. 2174, n. 3, 186 L.Ed.2d 376 (2013); also see *Jenkins v. Anderson*, 447 U.S. 231, 240, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980); *State v. Montoya*, 340 So.2d 557 (1976) (trial court erred in allowing arresting officer to testify that defendant remained silent after arrest).

The Court has recognized in, numerous post-Doyle opinions, that the *Doyle* rule rests on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation offered at trial. *Wainwright v. Greenfield*, supra; *South Dakota v. Neville*, supra; also see *Brecht v. Abrahamson*, 507 U.S. 619, 628, 113 S.Ct. 1710, 1716, 123 L.Ed.2d 353 (1993); *Greer v Miller*, 483 U.S. 756, 763, 107 S.Ct. 3102, 3107-3108, 97 L.Ed.2d 618 (1987). The source of this "implicit assurance" is the giving of *Miranda* warnings, through which a person taken into custody is expressly advised "that he has the right to remain silent ... and that he has a right to retained or appointed counsel before submitting to interrogation." See *Doyle*, 426 U.S., at 617, 96 S.Ct. at 2244. Thus, although the improper references at issue in *Doyle* concerned only the

defendant's post-Miranda silence, the prohibition extends equally to impeachment use of a defendant's post-Miranda invocation of the right to counsel. See *Wainwright*, 474 U.S. at 295 & n. 13, 106 S.Ct. at 640 & n. 13; *United States v. McDonald*, 620 F.2d 559, 562-63 (5 Cir. 1980).

In *Wainwright v. Greenfield*, supra, the prosecutor argued that the defendant's silence, after receiving Miranda warnings, was evidence of his sanity. The Court held that use of the defendant's post-arrest silence as evidence of his sanity violated due process. The Court found no distinction between the use of such comments during the State's case-in-chief, in rebuttal, or between use on the merits of the crime or for attacking a sanity defense. As noted above, the rationale of these cases rest on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence, or his exercise of the right to counsel, against him at trial.

There are two tests for determining if a prosecutor's remarks constitute as a comment on a defendant's silence in violation of *Doyle* and its progeny: (1) whether the manifest intent was to comment on defendant's silence; and (2) whether the character of the remark was such that the jury naturally would construe it as a comment on defendant's silence. *United States v. Shaw*, 701

F.2d 367, 381 (5th Cir. 1983), *cert denied*, 465 U.S. 1067, 104 S.Ct. 1419, 79 L.Ed.2d 744 (1984); also see *State v. Widenhouse*, 582 So.2d 1374, 1384-1385 (La. App. 2 Cir. 1991).

The Prosecution's questions in *Greer v. Miller*, supra, and *Doyle* focused the jury on the defendant's silence. In *Greer*, after the defendant gave an exculpatory story at trial, the prosecutor asked the defendant, "Why didn't you tell this story to anybody when you got arrested?" Greer, 483 U.S. at 759, 107 S.Ct. at 3105. In a similar way, the defendant in *Doyle* offered an exculpatory story during trial and the prosecutor asked him: "If that is all you had to do with this and you are innocent, when [Agent] Beamer arrived on the scene why didn't you tell him?" *Doyle*, 426 U.S. at 614, 96 S.Ct. at 2243. In *United States v. Ruz- Salazar*, 764 F.2d 1433, 1435 (11th Cir. 1985) the prosecution asked the Customs officer who was testifying for the government, "Did anyone else make any statements while aboard the vessel?" The officer said "no" thus highlighting the defendant's silence. Again, the question posed by the prosecution specifically called attention to the defendant's silence and constituted a *Doyle* violation.

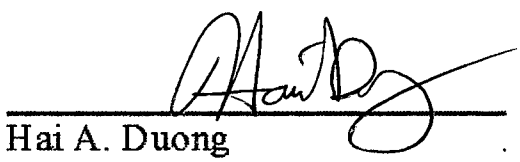
A prosecutor cannot make a reference to an accused exercising his constitutional right to remain silent, after he had been advised of the right,

solely to ascribe a guilty meaning to his silence or to undermine, by inference, an exculpatory version related by an accused for the first at trial. *State v. Arvie*, 505 So.2d 44, 46 (La. 1987); *State v. Williams*, 902 So.2d 485, 495-496 (La. App. 5 Cir. April 26, 2005); *State v. Ladesma*, 01-1413 (La. App. 5 Cir. 4/30/02); 817 So.2d 390, 393.

CONCLUSION

For the foregoing reasons Duong's petition for a writ of certiorari should be granted.

Respectfully submitted,



Hai A. Duong

Date: October 16, 2020