
In the Supreme Court of the United States

OUTHODORM ROS,

Petitioner,

v.

CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA
COURT OF APPEAL, FOURTH DISTRICT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner was arrested for making a criminal threat. Upon his arrest and before receiving a warning under *Miranda v. Arizona*, 384 U.S. 436 (1966), he volunteered that he wanted to invoke his *Miranda* right to silence. At trial, he argued that he lacked the mental capacity to form the specific intent required under the State's criminal threat statute. The trial court instructed the jury, and the prosecution reiterated in closing argument, that petitioner's invocation of his right to silence could not be considered to show that he was guilty. The court instructed, and the prosecution repeated, that the jury could consider petitioner's invocation only for the limited purpose of determining whether he had the requisite mental state. The question presented is:

Whether this use of petitioner's invocation of his right to silence violated either the Fifth Amendment or the Due Process Clause.

DIRECTLY RELATED PROCEEDINGS

California Supreme Court:

People v. Ros, No. S266748 (Mar. 24, 2021) (this case below) (denying petition for review on direct appeal).

California Court of Appeal:

People v. Ros, No. D076616 (Dec. 31, 2020) (this case below) (affirming judgment).

San Diego County Superior Court:

People v. Ros, No. SCD279952 (Sep. 20, 2019) (this case below) (judgment of conviction).

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STATEMENT

1. Petitioner Outhdorm Ros entered a San Diego laundromat talking to himself and at one point closed himself inside a dryer. Pet. App. A2, A9-A10. When he exited the dryer, he sat on a bench near a female patron and then followed her around the laundromat as she moved to different locations to avoid him. *Id.* Afraid of petitioner's behavior, she retrieved her cell phone from her car and called a nonemergency police number. *Id.* at A10. Petitioner said to customers that he "'was going to cut [their] necks.'" *Id.* at A3 (alterations in original). When the female patron re-entered the laundromat, petitioner came within a few feet of her and said: "'Don't lie to me or I'll slit your throat and rob you and everybody.'" *Id.* at A2-A3. He "repeated [that] he was going to 'slit [her] throat,' and added he was going to 'kill' her." *Id.* at A3 (alterations in original). Petitioner was holding a box cutter in one hand and a pocketknife with the blade exposed in the other. *Id.* at A4, A10. The laundromat attendant called the police, as petitioner yelled at customers to "'shut the fuck up.'" *Id.* at A4 (footnote omitted).

A San Diego Police Department officer arrived and identified himself to petitioner. Pet. App. A4. Petitioner dropped various items, including a folding knife in the collapsed position and .62 grams of methamphetamine. *Id.* at 4, n.4. Footage from the officer's body-worn camera showed his initial contact with petitioner, petitioner following the officer's commands, and the following exchange:

"[Petitioner]: Hey, I'm gonna remain silent right now. I know my rights are gonna be read, but I said today, I'm gonna invoke my rights now.

[Officer]: Your what?

[Petitioner]: I said my Miranda rights uh being read to me and told me, and as you say it to me, I'm gonna remain silent right now.

[Officer]: Okay. [¶] You got any other weapons on you? You got any other weapons on you?"

Pet. App. A4.

Petitioner was taken to a hospital for a mental evaluation and then to jail. Pet. App. A5. He was charged with making a criminal threat that would result in death or great bodily injury and misdemeanor drug possession. *Id.* at A1-A2, A4.

2. a. Before trial, defense counsel moved to exclude petitioner's statements invoking his right to remain silent. Pet. App. A6-A7. The prosecution argued that the statements were not admissible to show petitioner's guilt but could be considered to evaluate his contention that he was under a methamphetamine-induced psychosis and thus could not form the specific intent that his threat be taken as a threat, which the prosecution was required to prove under the criminal threat statute. *Id.* at A7; *see also id.* at A9 (discussing Cal. Pen. Code § 422).

The trial court denied petitioner's motion but stated it would give a limiting instruction. Pet. App. A7. The court agreed that petitioner's statements "could not be used to support the inference 'he's hiding something'

or ‘he’s guilty.’” *Id.* But it concluded that they could be considered to show that petitioner “was able to form the specific intent to do what he did in the [l]aundromat which is going to be his defense that he couldn’t form that specific intent.” *Id.* (internal quotation marks omitted). The court reasoned that petitioner made the statements voluntarily, before any warning under *Miranda v. Arizona*, 384 U.S. 436 (1966), was administered. Pet. App. A7. Their use at trial for the limited purpose of establishing his mental state did not implicate the concerns that arise when police advise a suspect of his right to silence and then penalize him for exercising that right. *Id.* (discussing *Doyle v. Ohio*, 426 U.S. 610 (1976)).

b. In the case-in-chief, the prosecution called several witnesses, including the female patron and attendant, and presented the 911 calls and the footage from the officer’s body-worn camera, including the excerpt in which petitioner asserted his *Miranda* rights. See Pet. App. A2 -A4. Petitioner claimed that he was unable to form the specific intent that his threat be taken as a threat. *Id.* at A9-A10. He did not testify, but did call a clinical forensic psychologist, who opined that on the morning of the incident petitioner likely was suffering from a severe stimulant-use disorder and experienced delusions and hallucinations. *Id.* at A5-A6, A10; 5 Reporter’s Transcript 386, 396-398. On cross-examination, the prosecution asked petitioner’s expert, who had reviewed a transcript of the body-worn-camera footage, whether it was consistent with either delusions or hallucinations for a person to “invoke *Miranda* rights on

your own accord." 5 RT 393, 428, 431. The expert responded that it was not. 5 RT 428, 431. In rebuttal, a nurse from the jail testified that petitioner was alert and cooperative upon his arrival and did not request a psychological evaluation in jail. Pet. App. A6.

The trial court instructed the jury that it could not consider petitioner's invocation of his right to silence as evidence of guilt but could consider it for another, limited purpose:

You have heard evidence that the defendant, Mr. Ros, invoked his right to remain silent to Officer Almond. Every individual has the right to remain silent and to request an attorney. You are not to use his invocation of this right against him as any evidence of his guilt. He's not trying to hide anything. You can't use it for that purpose. You may only use that evidence to evaluate Mr. Ros's intent and/or mental state.

Pet. App. A8 (internal quotation marks omitted). The court also instructed the jury that petitioner had "'an absolute constitutional right not to testify,'" which the jury could not consider "'for any reason at all'" and which was not to be discussed during deliberations or allowed to influence the verdict "'in any way.'" *Id.*

In closing argument, the prosecution argued that if petitioner had truly been in a psychotic state when threatening the female patron's life, he likely would have acted in a delusional manner when the officer arrived about two minutes later. Pet. App. A8. But instead petitioner followed the officer's directions and dropped incriminating items, including methamphetamine and a knife. *Id.*

The prosecution then told the jury:

This is the most important part. He says, "I'm going to remain silent right now. I know my rights are going to be read, but I said today I'm invoke my rights right now." "Your what?" "I said my Miranda rights being read to me and told me. And as you say to me, I'm going to remain silent right now." "Okay."

First and foremost, I will never ever argue that his invocation of his rights show that he's guilty in any way because he invokes them. Every individual in this United States has that right, and that's not what you are allowed to use it for. The judge has told you numerous times. I'm going to tell you.

This is what you can use it for. Without being asked, this individual, Mr. Ros, who's apparently going through a hallucination, has thought of his Miranda rights himself. He has. This isn't a case where he's being asked, "Do you want to remain silent? These are your rights." If that was the case, we would have never read it to you or told you about this, but he's thought of them himself. He realized, remember, that that's an option you have when you get arrested. He knows those are rights that he has. And he says, you know what, I'm going to invoke them. This is the thought process in his head without being asked. Who does he tell them to, though? An officer. He tells them to an officer. He knows he's being arrested, and he knows he's speaking to an officer now.

5 RT 516-517; *see also* Pet. App. A8.

The jury found petitioner guilty of both charges. Pet. App. A2. The court sentenced him to 11 years in prison, which included enhancements for petitioner's prior conviction for a serious felony. *Id.*

3. The California court of appeal affirmed in an unpublished opinion. Pet. App. A1-A14. The court first rejected petitioner's state-law claim that the evidence of his invocation of his right to silence was irrelevant and unduly prejudicial. *Id.* at A10-A11. The court reasoned that petitioner's statements

were admitted for the limited purpose of evaluating his intent and mental state and that the statements were both “fleeting” and voluntary. *Id.*

The court also rejected petitioner’s claim that introduction of the statements violated the Fifth and Fourteenth Amendments. Pet. App. A11-A14. The court explained that in *Griffin v. California*, 380 U.S. 609 (1965), this Court held that the Fifth Amendment prohibits the prosecution and court from commenting on a defendant’s failure to testify on his own behalf at trial. Pet. App. A11. The court of appeal further recognized that under *Doyle v. Ohio*, 426 U.S. 610 (1976), the prosecution may not use a defendant’s post-*Miranda*-warning silence to impeach his testimony at trial. Pet. App. A11. In this case, unlike in *Doyle*, petitioner “invoked his right to remain silent *before* police had advised him of his *Miranda* rights.” *Id.* Also unlike in *Doyle*, “the record unambiguously shows the invocation of [petitioner’s] right to remain silent was not admitted to prove guilt.” *Id.* at 12. It was not offered “to show that defendant was ‘hiding something.’” *Id.* Instead, petitioner’s statements were admitted as evidence of “intent and his mental state,” with respect to whether he had “the capacity to make a criminal threat”. *Id.*

4. Petitioner filed a petition for review in the California Supreme Court presenting the question whether the admission of his post-arrest assertion of the right to silence violated his constitutional right against self-incrimination. Pet. for Review 4-7. The court denied review. Pet. App. B.

ARGUMENT

Petitioner principally argues that this Court should grant review to resolve a conflict among the lower courts on the question of whether a defendant's post-arrest, pre-*Miranda* silence may be used as substantive evidence of his guilt during the prosecution's case-in-chief. Pet. 9, 15-25. Although the lower courts have taken different approaches to addressing the circumstances under which a defendant's pre-*Miranda* silence may be used as part of the prosecution's case, the facts of this case do not present the specific question on which those courts have principally divided. Unlike most of the cases cited in the petition, petitioner invoked his right to silence rather than simply declining to speak. And unlike most of those cases, petitioner's invocation was not used to support a direct inference of guilt. Rather, the invocation was used to counter petitioner's defense that he lacked the capacity to form the intent required under the State's criminal threat statute. Indeed, the trial court specifically instructed the jury—and the prosecution reiterated—that petitioner's invocation of his rights could *not* be considered to show that he was guilty.

1. In *Salinas v. Texas*, 570 U.S. 178 (2013), this Court granted certiorari "to resolve a division of authority in the lower courts over whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief." *Id.* at 183 (plurality opinion). The plurality, however, found "it

unnecessary to reach that question," because Salinas "did not invoke the privilege" during his interview with law enforcement. *Id.* Justice Thomas, joined by Justice Scalia, concurred in the judgment. Justice Thomas would have rejected Salinas's claim "even if he had invoked the privilege because the prosecutor's comments regarding his precustodial silence did not compel him to give self-incriminating testimony." *Id.* at 192-193 (Thomas, J., concurring in judgment); *see also id.* at 192 (concluding that *Griffin's* "no-adverse-inference rule" should not be extended).

Relying on many of the cases cited in the petition in *Salinas*, petitioner urges the Court to grant review to resolve a conflict among the lower courts on the question whether the prosecution may use a defendant's post-arrest, pre-*Miranda* silence as part of its case-in-chief. *Compare* Pet. 9, 15-25, *with* Pet. for Writ of Certiorari, *Salinas v. Texas*, No. 12-246 (Aug. 24, 2012). Petitioner is correct that the lower courts have taken different approaches to the circumstances under which the prosecution may rely on a defendant's silence before he receives *Miranda* warnings. But the cases cited in the petition principally involve circumstances different from those here.

a. Petitioner's asserted conflict centers on cases in which the prosecution elicited testimony of a defendant's pre-*Miranda* silence for the purpose of demonstrating his guilt. Pet. 18-25. As he notes, some courts have held that reliance on such silence for that purpose violates the Constitution. For example, in *United States v. Moore*, 104 F.3d 377 (D.C. Cir. 1997), the D.C.

Circuit held that the Fifth Amendment barred the prosecution from using a defendant's post-custody but pre-*Miranda* silence as evidence that he committed the crime. *Moore*, 104 F.3d at 384-389. There, the prosecution elicited testimony during its case-in-chief that defendants did not say anything when guns and drugs were found in their car. *Id.* at 384. During closing argument, the prosecution argued that if one of the defendants was truly unaware of the contraband's presence, "he would [have] at least looked surprised. He would at least have said, 'Well, I didn't know it was there.'" *Id.* (internal quotation marks and alterations omitted). The court held that such comments on defendant's silence violated the Fifth Amendment because "the prosecution cannot, consistent with the Constitution, use a defendant's silence against him as evidence of his guilt." *Id.* at 389.

Likewise, in *United States v. Whitehead*, 200 F.3d 634 (9th Cir. 2000), the Ninth Circuit held that the defendant's Fifth Amendment rights were violated when the prosecution adduced evidence of the defendant's post-arrest, pre-*Miranda* silence and then "argued to the jury that [he] remained silent because he knew he was guilty." *Id.* at 638 (arguing that an innocent person would have protested arrest, but "'the defendant didn't say a word because he knew. He knew there were drugs in the car'"); see also *State v. Mainaupo*, 178 P.3d 1 (Hawaii 2008) (prosecution urged jury to conclude "that [defendant] was guilty in light of his post-arrest silence, that is, his failure to act like an 'innocent person'"); *United States v. Hernandez*, 948 F.2d 316, 322-325 (7th Cir.

1991) (prosecution elicited testimony of defendant's post-arrest silence, which could have contained an "implication of guilt"); *United States v. Velarde-Gomez*, 269 F.3d 1023, 1028-1032 (9th Cir. 2001) (en banc) (prosecution argued that defendant showed "'no emotion at all'" when marijuana was found in his car and that "'[h]e was the perfect guy to bring drugs across the border'" because "'[h]e was able to control any feelings he might have had'"); *United States v. Burson*, 952 F.2d 1196, 1200-1201 (10th Cir. 1991) (error to rely on defendant's pre-arrest silence in response to law enforcement questioning).

But other lower courts have concluded that the prosecution may rely on a defendant's pre-*Miranda* silence as evidence of the defendant's guilt. See Pet. 20-23. For example, in *United States v. Love*, 767 F.2d 1052 (4th Cir. 1985), the Fourth Circuit held that the trial court properly admitted a law enforcement agent's testimony that defendants made no effort to explain their presence on a farm used for an illegal narcotics operation. *Id.* at 1063. Similarly, in *United States v. Rivera*, 944 F.2d 1563 (11th Cir. 1991), the Eleventh Circuit concluded that the prosecution could properly introduce testimony that the defendant did not react when her suitcase, later found to contain cocaine, was being searched. *Id.* at 1567-1568.¹ The Eighth Circuit reached the same conclusion in *United States v. Frazier*, 408 F.3d 1102 (8th

¹ See also *United States v. Cabezas-Montano*, 949 F.3d 567, 595 (11th Cir. 2020) (relying on *Rivera* to reject Fifth Amendment challenge to use of post-arrest, pre-*Miranda* silence as "consciousness of guilt") (footnote omitted), *cert. denied sub nom. Palacios-Solis v. United States*, 141 S. Ct. 162 (2020).

Cir. 2005), holding that the prosecution committed no constitutional error in eliciting testimony about defendant's silence upon arrest and in arguing that his silence was inconsistent with innocence. *Frazier*, at 1109-1111 (discussing circuit conflict); *see also People v. Schollaert*, 486 N.W.2d 312 (Mich. Ct. App. 1992) (prosecution properly elicited testimony concerning defendant's failure to question deputies' presence at his home, which court concluded was relevant to his "consciousness of guilt"); *United States v. Zanzaria*, 74 F.3d 590, 593 (5th Cir. 1996) (prosecution properly relied on defendant's pre-arrest silence to rebut claim of duress).

Since *Salinas*, however, this Court has denied certiorari in at least two cases presenting questions that implicate that conflict. *Wilchcombe v. United States*, 137 S. Ct. 2265 (2017); *Palacios-Solis v. United States*, 141 S. Ct. 162 (2020). And even if the Court were inclined to resolve that conflict, this case does not present an appropriate opportunity for doing so. Here, the prosecution never argued that petitioner's invocation of his right to silence supported a direct inference of guilt. To the contrary, the prosecution expressly disavowed any such inference, and the trial court specifically instructed the jury that it could not use petitioner's statements for that purpose. *Supra* pp. 4-5; Pet. App. A8.

Moreover, as the above discussion makes clear, most of the cases cited in the petition involve a defendant's mere silence, and not (as here) an affirmative invocation of the right to silence. While petitioner frames the questions

presented as involving *both* an invocation and ensuing silence (Pet. i), he argued in his petition for review in the California Supreme Court that “it was not [petitioner’s] silence that was used against him to prove his guilt, but his assertion of his constitutional right to silence.” Pet. for Review 6. Although he argued that silence purporting to be a rights-invocation is functionally equivalent to an assertion of a right to silence (*id.* at 7), his petition for review in the California Supreme Court presented only the issue of the use of that assertion, *id.* at 4-5. Accordingly, to the extent the lower courts have taken different approaches on the question whether the prosecution may comment on a defendant’s silence in support of an inference of guilt, that question is not presented here.

b. The petition cites a handful of cases that addressed a defendant’s affirmative invocation of his Fifth Amendment rights in response to police questioning. Pet. 15-17, 24-25. Three of the cases involved situations where the prosecution’s use of the invocation could have led the jury to draw an inference of guilt. For example, in *United States v. Okatan*, 728 F.3d 111 (2d Cir. 2013), the Second Circuit held that it violated the Fifth Amendment for the prosecution to elicit evidence of the defendant’s request for a lawyer in response to non-custodial questioning and then to argue in closing that such actions reflected the “kind of conduct that someone who’s been caught engaged in.” *Id.* at 115 (internal quotation marks omitted). In *Coppola v. Powell*, 878 F.2d 1562 (1st Cir. 1989), the First Circuit granted habeas relief after

determining that the introduction of a defendant's statement "if you think I'm going to confess to you, you're crazy" in the context of a precustodial interrogation likely contributed to the jury's guilty verdict. *Coppola*, 878 F.2d at 1567 (internal quotation marks omitted); *id.* at 1571. In *United States ex rel. Savory v. Lane*, 832 F.2d 1011 (7th Cir. 1987), the Seventh Circuit held that it was unconstitutional for the prosecution to refer to a defendant's noncustodial refusal to talk to police as substantive evidence of guilt. *Id.* at 1017; *id.* at 1015 (defendant said "'he didn't want to talk about it, he didn't want to make any statements'").² In this case, however, petitioner's invocation was not in response to police interrogation; and the trial court instructed the jury—and the prosecution reiterated in closing argument—that the jury could *not* use petitioner's invocation to draw a direct inference of guilt, as opposed to a legitimate inference of mental acuity that could lead to guilt. *Supra* pp. 4-5; Pet. App. A8.

Only one of petitioner's cited cases involved the use of an invocation, also in response to police questioning, to support the prosecution's arguments that the defendant had the requisite mental state. *See* Pet. 17. In *Combs v. Coyle*, 205 F.3d 269 (6th Cir. 2000), the defendant invoked his right to counsel in

² In *Ordway v. Commonwealth*, 391 S.W.3d 762 (Ky. 2013), also cited by petitioner (Pet. 24-25) the Kentucky Supreme Court appeared willing to reject a Fifth Amendment challenge to the admission of an invocation of the right to silence, but it held that the defendant's particular utterance was irrelevant and inadmissible under state evidentiary rules. *Ordway*, 391 S.W.3d at 778-779 & n.8.

response to a police officer's question asking what had happened. *Combs*, 205 F.3d at 279. The Sixth Circuit held that it violated the Fifth Amendment when the prosecution relied on that invocation to rebut the defendant's intoxication defense and the trial court instructed the jury that it could consider that evidence to evaluate defendant's purpose and prior calculation and design, which supported habeas corpus relief due to defense counsel's failures to object to these actions. *Id.* at 279, 285-286, 286 n.11. To the extent this pre-*Salinas* holding conflicts with the decision below, that division in authority would reflect a shallow conflict between a two-decades old circuit decision and an unpublished and non-precedential decision of an intermediate court of appeal. That is not the type of conflict that warrants this Court's review.

2. Review is unwarranted for the additional reason that there is an alternative basis supporting the prosecution's introduction of petitioner's invocation. As noted above, petitioner's statements about his *Miranda* rights were used not only as part of the prosecution's case-in-chief, but also formed the basis of cross-examination of petitioner's expert. *Supra* pp. 3-4. This Court has recognized that the Fifth Amendment does not forbid the prosecution from referring to a defendant's exercise of his privilege against self-incrimination when it is offered as a "fair response" to a claim made by defendant. *United States v. Robinson*, 485 U.S. 25, 32 (1988); *cf. Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (per curiam) (permitting the use of post-arrest, pre-*Miranda* silence to impeach a testifying defendant on cross-examination). Accordingly, even if

petitioner is correct that the Constitution precludes the use of a defendant's post-arrest, pre-*Miranda* invocation as part of the prosecution's case-in-chief, that principle likely would not have barred the introduction of petitioner's statements on cross-examination, where he put his mental state at issue by calling an expert to testify and where the expert reviewed transcripts that included petitioner's invocation of his right to silence. 5 RT 393, 428, 431.³

3. Finally, the court of appeal reasonably applied this Court's precedents. This Court held in *Griffin* that prosecutorial comment on a defendant's decision not to take the stand at trial as evidence of guilt imposed an unconstitutional penalty on his Fifth Amendment privilege against self-incrimination. *Griffin*, 380 U.S. at 614. As noted above, the prosecution here acknowledged that petitioner's invocation could not be used to draw an inference of guilt, and the court of appeal emphasized the limited purpose of the evidence in rejecting petitioner's constitutional claim. *Supra* pp. 4-5. Petitioner seeks to extend *Griffin* to preclude the use of petitioner's invocation for a different and more limited purpose, but this Court has made clear that

³ In the court below, respondent argued that any error in allowing the introduction of petitioner's invocation was harmless beyond a reasonable doubt due to other evidence demonstrating petitioner's intent that his statements to the female victim be taken as a threat. Resp. Br. 26-27 (Cal. Ct. App.) (May 6, 2020). The court of appeal did not need to resolve that alternative ground for affirming the trial court's judgment. But if petitioner's constitutional theory were correct, the court of appeal would need to address that harmlessness issue (including the prosecution's ability to use the invocation in cross-examining petitioner's expert) and resolve it in petitioner's favor before petitioner could obtain relief.

"the Constitution does not forbid every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights." *Jenkins v. Anderson*, 447 U.S. 231, 236 (1980) (internal quotation marks omitted); *cf. Portuondo v. Agard*, 529 U.S. 61, 69-71 (2000) (declining to extend *Griffin* to prosecutorial comment on defendant's ability to tailor his testimony to that of prior witnesses where comment went to defendant's credibility and not directly to his guilt). Moreover, petitioner has not shown that his voluntary statements invoking his right to silence were testimonial, which is ordinarily required by the Fifth Amendment. See *Pennsylvania v. Muniz*, 496 U.S. 582, 596-597 (1990) (distinguishing between testimonial and non-testimonial statements for purposes of the Fifth Amendment and defining "testimonial" to include responses to police questioning that communicate an express or implied assertion of fact or belief). And petitioner cites no decision of this Court applying *Griffin's* rule to circumstances like those here—where the defendant's invocation occurred before trial and before any interrogation, where the statements were used only for the purpose of demonstrating petitioner's mental functioning, and where the jury was affirmatively instructed not to use petitioner's exercise of his constitutional privilege as direct evidence of his guilt.

In addition, the court of appeal was correct in rejecting petitioner's arguments based on the due process principles this Court articulated in *Doyle*. As explained above, *Doyle* held that the prosecution may not use a defendant's

post-*Miranda* silence to impeach his testimony at trial. *Doyle*, 426 U.S. at 618-619. Likewise, in *Wainwright v. Greenfield*, 474 U.S. 284 (1986), the Court held that it violated due process to use evidence of a defendant's post-*Miranda* invocation of his right to counsel to support the prosecution's argument that he had sufficient mental capacity to commit the crime. But the Court has made clear that *Doyle's* prohibition is premised on the fundamental unfairness that arises when the government seeks to use the defendant's silence after implicitly promising him through *Miranda* warnings that "silence will carry no penalty." *Doyle*, 426 U.S. at 618; *see also Jenkins*, 447 U.S. at 239-240; *Fletcher*, 455 U.S. at 606; *Portuondo*, 529 U.S. at 74-75; Pet. App. A11-A13 (discussing cases). Here, it is undisputed that petitioner asserted his right to silence before any *Miranda* warnings were administered. Pet. 6 (citing 1 RT 179). The lower court thus properly rejected petitioner's reliance on *Doyle*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 15, 2021