

NO. \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

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ALBERT JONES,

*Petitioner,*

v.

STATE OF CALIFORNIA,

*Respondent.*

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On Petition for Writ of Certiorari to the  
California Court of Appeal,  
First Appellate District, Division Three

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED FOR REVIEW**

Do the protections of *Doyle v. Ohio*, 426 U.S. 610 (1976)—which prohibit a prosecutor on commenting on a defendant’s post-*Miranda* warning invocation of silence—apply when a defendant *selectively* invokes his right to remain silent as to certain topics, but freely answers questions on other topics?

### **INTERESTED PARTIES**

Petitioner Albert Jones is an inmate in the California Department of Corrections and Rehabilitation at the Pleasant Valley State Prison in Coalinga, California. Mr. Jones was the defendant in the superior court and the appellant below. Respondent is the State of California.

**RULE 14.1(b)(iii) STATEMENT**

There are no proceedings directly related to the case in this Court.

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## INTRODUCTION

At the heart of this petition is a novel constitutional question of general importance to trial courts and litigants: do the constitutional protections of *Miranda v. Arizona*, 384 U.S. 436 (1964) and *Doyle v. Ohio*, 426 U.S. 610 (1976) extend to defendants who *selectively* invoke their right to silence following a *Miranda* advisal?

The answer to this question is crucial to the administration of criminal trials generally, and to the validity of Petitioner Albert Jones' conviction specifically. The primary piece of evidence at Mr. Jones' trial were statements he made during a lengthy, six hour long custodial interrogation. The trial court found Mr. Jones' selectively invoked his right to silence on certain topics and suppressed some of his statements. Following a mistrial after jurors were hung 6-6 and could not reach a unanimous decision, the prosecutor convinced the trial court before the retrial to reconsider and modify its prior suppression order to admit one previously suppressed exchange. In closing argument and rebuttal at the trial, the prosecutor relied on that statement and commented on Mr. Jones' selective invocation of his right to silence to the jury in urging for a conviction. The California Court of Appeal rejected Mr. Jones' Fifth Amendment claim, and affirmed his conviction by suggesting that the protections of *Doyle* do not apply to a selective invocation of silence.

Because courts are split on how *Doyle* applies to the selective invocation of silence, Mr. Jones respectfully petitions this Court for a writ of certiorari.

## OPINION BELOW

The California Court of Appeal's opinion affirming Mr. Jones' conviction is unreported but available at 2023 WL 6304727 (Cal. Ct. App. 2023) and included in the Appendix at 1a. The California Supreme Court's order denying a petition for review is unreported and included in the Appendix at 27a.

## JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The California Court of Appeal entered its judgment in favor of respondent on September 28, 2023, and the California Supreme Court denied Mr. Jones' petition for discretionary review on December 13, 2023. This petition is timely under Sup. Ct. R. 13.1.

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides:

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.

U.S. CONST. AMEND. V.

## STATEMENT OF THE CASE

### I. The death of Alexander Martinez.

On April 10, 2016, police responded to a 911 call about a shooting at a music studio in Castro Valley, California. Upon arrival, the police found Alexander Martinez lying on the ground of the music studio's parking lot with a gunshot wound to the head. He was taken to the hospital and pronounced dead a few hours later. 2a. The Alameda County Sheriff's Office investigation did not generate any leads about the shooting, and the investigation stalled. 2a.

Months later, Alameda County Sheriff's Office Detective Joshua Armijo learned that Martinez had several life insurance policies opened in November 2015 and March 2016, naming Marie Padilla as the beneficiary. Armijo made no effort to contact Padilla, and the investigation stalled again. 2a.

On February 10, 2017, Jolene Cordova (whose name had changed to Masinas by the time of Mr. Jones's trial) was in the garage of the home she rented from Mr. Jones. A man approached her, looking for Mr. Jones. The man hit Masinas with a piece of wood, mentioned Martinez's name, and then fled. 6a.

A few days later, Hercules police officers questioned Masinas about the attack. Masinas explained that she and Padilla had both worked with Mr. Jones and had rented an apartment from him. 6a. Masinas explained that Mr. Jones told her Martinez owed him money and had stolen from him. 6a. According to her later

testimony, Mr. Jones told Masinas that “he had Alex murdered” when he was out of town. 6a. She also testified that in November 2016, Mr. Jones said that he had life insurance policies in Martinez’s name.

Soon after police interviewed Masinas, Detective Armijo interviewed Padilla. According to Padilla, Martinez was a tenant in Mr. Jones’s apartment in 2016. 7a. Mr. Jones became upset with Martinez about an unpaid bill and property that Martinez had stolen from him. 7a. Padilla later testified that Mr. Jones said “he was going to hire somebody” which she did not take seriously. 7a. After Martinez’s death, Padilla testified that Mr. Jones showed her papers identifying her as the beneficiary of a life insurance policy in Martinez’s name, told her to call the life insurance companies, and took her to see a lawyer, claiming to be Martinez’s fiancée. 7a. Padilla signed several documents before a notary. She tried to get Martinez’s death certificate and a police report about the shooting. 7a.

Based on Masinas’ and Padilla’s statements, Detective Armijo obtained an arrest warrant for Mr. Jones and search warrants for homes belong to Padilla and Mr. Jones. 3a. Upon executing the warrants, officers found “numerous pieces of mail, life insurance policy mail, related mail, as well as debit cards, credit cards, bearing the name of Alexander Martinez, as well as the policies in the name of Alexander Martinez” in Mr. Jones’s house. 3a.

## **II. Mr. Jones repeatedly declines to answer questions during a six-hour interrogation.**

Mr. Jones was arrested and taken to the Alameda County Sheriff’s office. 3a. Just before 8:00 p.m., after Mr. Jones had been in custody for more than five hours, Armijo and his partner began interrogating him. 8a.

Detectives read Mr. Jones his *Miranda* rights and confirmed he understood them. Then, for several hours, Mr. Jones answered questions about Masinas and Padilla. The detectives also asked about Martinez, the life insurance policies in Martinez’s name with Padilla as beneficiary, a trip Mr. Jones took to Mexico in April 2016, and his financial situation. Mr. Jones freely answered these questions.

Two-and-a-half hours into the interview, the detectives became more confrontational and questioned his account. Mr. Jones responded, “I told you exactly what’s going on. I’m not sure what else you want me to say.” (CT 425.) The detectives continued to question Mr. Jones.

In marked contrast to his earlier willingness to answer, Mr. Jones became silent in response to the detectives’ continued questioning. For large stretches of time, the detectives’ questions were met with silence from Mr. Jones. After several hours, the lead detective told Mr. Jones that if he did not start speaking, the detectives would leave and his opportunity to talk to them would be gone. Mr. Jones reluctantly opened up, saying “I’ve just done so much for him over these years, and he just kept screwing me over, kept screwing me over.” 9a. He continued, “Just over and over people keep screwing me over when you’re trying to be a good person,” and that “it was like he was like my brother type of thing. For him just to rob me after being disrespectful just was the last straw, I guess. That’s all I want say. You guys can go home to your wives and stuff like that.” 9a. Rather than stop the questioning, the detective responded by saying “My wife probably prefers when I’m at work. I’ve been married going on 19 years now, so she’s probably pretty happy when I’m gone, staying away from her for a while.” 9a-10a.

The detectives continued asking questions, and Mr. Jones explained he did not want to answer by saying things like “I’d rather skip that.” 10a. Nonetheless, the detectives persisted, questioning Mr. Jones on topics he did not want to discuss, including the identity of the shooter. After several hours, the lead detective asked, “is there anything else you want to get off your chest right now?” and Mr. Jones answered “No, that’s it.” 10a. The interrogation seemingly over, the conversation shifted to whether Mr. Jones wanted food, the detective’s interrogation style, and the detective’s dog.

While waiting for food to arrive, the detective again asked Mr. Jones about the identity of the shooter, and Mr. Jones told the detectives that he would “rather not answer” and wanted to “skip” their questions about the shooter’s identity. 10a. Although it was clear that Mr. Jones did not want to answer questions about the

shooter, the detectives continued pressuring Mr. Jones to talk. Mr. Jones continued telling the detectives that he'd "rather not say" or wanted to "skip that." 10a.

Finally, a detective asked Mr. Jones "do you think you'd ever answer it," to which Mr. Jones replied "nah." 10a.

Questioning continued for another 45 minutes, and it would be an hour before Mr. Jones was let out of the interrogation room. By then, he had been awake for almost 24 hours, in police custody for 12 hours, and interrogated for almost six hours.

The state of California charged Mr. Jones with first degree murder, and a special circumstance allegation of murder for financial gain.

### **III. Recognizing that Mr. Jones selectively invoked his right to silence during the interrogation, the trial court granted in part Mr. Jones' motion to suppress.**

Mr. Jones filed a motion to suppress the statements he gave to detectives on the night of his arrest. The trial court granted the motion in part and denied it in part. While the court found that Mr. Jones did not unambiguously invoke his right to silence on all topics, it determined—over the state's objection—that Mr. Jones unambiguously selectively invoked on six specific topics: "(1) the number of life insurance policies taken out; (2) the policy application process; (3) how he initially found the shooter; (4) the manner and means by which he communicated with the shooter; (5) the price of the murder contract; and (6) whether he still owed money on the contract." 19a.

In making this ruling, the trial court determined that a portion of the interrogation referred to as the "arrangement exchange" fell within the topics on which Mr. Jones had invoked his right to silence. The "arrangement exchange" provided:

**Detective:** What was the arrangement that was made?

**Detective:** We've already talked about it, man.

**Jones:** Yeah.

**Detective:** So it's not like it's something new.

**Jones:** What was the question again? Sorry.

**Detective:** I said, what was the arrangement that was made? What were you going to do for what to be done?

**Jones:** I was going to pay X amount of dollars for somebody to take care of him.

**Detective:** What do you mean “take care of”?

**Jones:** To shoot him.

**Detective:** So there's no confusion, to shoot who?

**Jones:** Alexander Martinez.

20a. Because the court concluded that this passage included topics that Mr. Jones had elected to remain silent on, the court excluded it. 4a.

**IV. The first trial ends in a mistrial with jurors hung 6-6.**

During the first trial, the state called Masinas, law enforcement agents, and an insurance expert as witnesses. Because Padilla and an eyewitness to the shooting, Taylor, were “unavailable,” the state admitted the transcripts of their preliminary hearing testimony. The state introduced and played Mr. Jones's videotaped interview, with the portions excluded by the trial court omitted, including the “Arrangement Exchange.” 4a. After three days of deliberations, the jury indicated they it was deadlocked 6-6 and the trial court declared a mistrial. 4a.

**V. Before the second trial, the trial court modified its two prior rulings excluding the “arrangement exchange” and admitted that evidence.**

After the start of jury selection in the retrial, the People moved the trial court to reconsider its prior ruling to exclude the so-called “arrangement exchange.” 4a-5a. The trial court granted the People's motion to reconsider. Acknowledging no changed circumstance, the trial court nonetheless reconsidered and reversed its prior suppression order as to the “arrangement exchange” only. 5a. It left the remainder of its *Miranda* suppression order intact.

**VI. Mr. Jones is convicted at retrial.**

The second trial was almost identical to the first, with just minor differences. Taylor testified in person at the second trial. 5a. Masinas testified again; she stated

on cross-examination that she had lied to the police and committed perjury in the first trial. 6a. The only major difference in the retrial was the fact the second jury heard the “arrangement exchange,” which had been excluded in the first trial.

The prosecutor’s closing argument relied heavily on Mr. Jones’s statements and on his silence and, in particular, the “arrangement exchange” excluded from the first trial. He told the jury, “the only thing Mr. Jones does not want to talk about during this interview is the identity of the shooter.” 23a. The prosecutor continued, “on a portion of the video where Detective Armijo is discussing the way to find out who the shooter is, Mr. Jones declares he doesn’t want to talk about that” and “Mr. Jones does not want to assist Detective Armijo in locating who shot Alexander Martinez.” 23a. In his rebuttal closing, the prosecutor again commented on Mr. Jones’ silence, telling the jury “When the police asked him, is there money still owed on the contract? He said, ‘I don’t want to talk about that, skip that.’” 23a.

After two days of deliberations, the jury returned a guilty verdict.

## **VII. The Court of Appeal affirms.**

On appeal, Mr. Jones argued that his right to due process was violated because the prosecutor commented on his post-*Miranda* selective silence. The Court of Appeal recognized this Court held in *Doyle v. Ohio*, 426 U.S. 610 (1976) that “the prosecution may not, consistent with due process and fundamental fairness, use post arrest silence following *Miranda* warnings to impeach a defendant’s testimony at trial.” 24a (citing *Doyle*, 426 U.S. at 617–18). But the Court of Appeal declined to afford Mr. Jones *Doyle* protection.

Citing an earlier California Court of Appeal opinion, the court below explained that it did “not think *Doyle* was meant to preclude the prosecutor from commenting on highly relevant evidence,” including a defendant’s “refusal to provide critical details, when he had voluntarily waived his right to remain silent.” 24a (quoting *People v. Hurd*, 62 Cal.App.4th 1084, 1093-94 (Ct. App. 1998)). It explained the California Supreme Court had observed that “whether *Doyle* precludes the use of partial silence to the extent that the defendant relied on *Miranda* warning in refusing to answer specific questions is open for debate.” 24a

(citing *People v. Coffman and Marlow*, 34 Cal. 4th 1, 118 (2004)). Acknowledging that in Mr. Jones' case, "the challenged comments clearly were based on topics that Jones had selectively invoked his right to remain silent," it nonetheless declined to "resolve the open question" because it believed any error was harmless. 24a–25a. It thus affirmed Mr. Jones' conviction.

Mr. Jones filed a timely petition for review in the California Supreme Court on November 7, 2023, which was denied without comment on December 13, 2023.

27a.

### **REASONS FOR GRANTING THE WRIT**

A petition for certiorari should issue so this Court may secure uniformity of decision and settle an important and disputed question of constitutional law.

The lower court, relying on California state cases interpreting the Fifth Amendment to the U.S. Constitution, suggested there is no exception to the *Doyle* rule for individuals who invoke their right of silence only selectively. Despite acknowledging that the prosecutor had clearly commented on Mr. Jones' selective invocation of his right to silence, the lower declined to resolve what it believed was an "open question" because it believed any error was harmless.

Whether *Doyle* applies to a selective invocation to silence has led to conflicting opinions from lower courts. While California courts have found *Doyle* does not extend to selective invocations of silence, most federal circuit courts to consider the issue have applied the protections of *Doyle* to defendants who selectively invoke their right to silence. This Court has never weighed in on this issue and should resolve that constitutional question definitively.

Mr. Jones respectfully requests this Court grant a writ of certiorari.

#### **I. Courts have issued conflicting opinions on how to apply *Doyle* to selective invocations of silence.**

The Fifth Amendment to the U.S. Constitution states no person "shall be compelled in any criminal case to be a witness against himself." To safeguard that privilege against self-incrimination, law enforcement must advise a person subjected to custodial interrogation of their right to remain silent. *Miranda*, 384

U.S. at 444, 467–73, 478–79. *Miranda* warnings serve to assure a defendant, “at least implicitly, that his silence will not be used against him.” *Fletcher v. Weir*, 455 U.S. 603, 606 (1982) (quoting *Anderson v. Charles*, 447 U.S. 404, 407–08 (1980)). *Miranda* noted that a suspect could invoke his right to silence selectively, explaining “the mere fact that [a criminal defendant] may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries.” *Miranda*, 384 U.S. at 445; *see also Michigan v. Mosely*, 423 U.S. 96, 103–04 (1975) (the “right to cut off questioning” in *Miranda* includes the suspect’s “control” over “the subjects discussed”).

This Court held in *Doyle* held that due process prohibits a prosecutor from impeaching a defendant’s testimony by reference to his post-*Miranda* silence. *Doyle*, 426 U.S. at 618. Specifically, this Court 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.” *Id.* at 619. In *Doyle*, two defendants were arrested for selling marijuana; each was informed of his *Miranda* rights and chose to remain silent. *Id.* at 611–13. At their separate trials, both defendants testified that that they had not sold marijuana and had been “framed.” *Id.* at 613. The prosecutors sought to impeach the defendants by questioning why they had not relayed this version of events during their post-*Miranda* interrogations. *Id.* at 618–19.

This Court ruled that impeachment based on post-*Miranda* silence was improper because *Miranda* warnings contain an implicit promise that silence will carry no penalty—a promise on which a defendant who invokes his right to silence relies. *Id.* Thus, 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 subsequently offered at trial.’” *Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993) (quoting *Wainwright v. Greenfield*, 474 U.S. 284, 291 (1986)). Following *Doyle*, this Court has recognized that a due-process violation occurs when a prosecutor uses a defendant’s post-arrest silence against

him either through questioning during cross-examination or by referencing that silence during closing argument. *See Greer v. Miller*, 483 U.S. 756, 766 (1987) (noting “prosecutor attempted to violate the rule of *Doyle* by asking an improper question in the presence of the jury.”).

Federal courts of appeal have found no issue with the proposition that the protections of *Doyle* apply to selective invocations of silence. *See, e.g., United States v. Scott*, 47 F.3d 904, 907 (7th Cir. 1995) (“a suspect may speak to the agents, reassert his right to remain silent or refuse to answer certain questions, and still be confident that *Doyle* will prevent the prosecution from using his silence against him.”); *Hurd v. Terhune*, 619 F.3d 1080, 1087 (9th Cir. 2010) (“the right to silence is not an all or nothing proposition. A suspect may remain selectively silent by answering some questions and then refusing to answer others without taking the risk that his silence may be used against him at trial.”); *United States v. May*, 52 F.3d 885, 890 (10th Cir. 1995) (“when a defendant is “partially silent” by answering some questions and refusing to answer others, this partial silence does not preclude him from claiming a violation of his due process rights under *Doyle*”).

Nonetheless, California courts—including the lower court in this case—have expressed confusion about whether *Doyle* applies when a suspect selectively invokes his right to remain silent. In *People v. Hurd*, the defendant waived his *Miranda* rights and proceeded to answer questions about the context and manner in which he killed his wife. 62 Cal.App.4th at 1090–91. But the defendant refused to physically reenact the shooting or take a polygraph test. *Id.* The California Court of Appeal held that the defendant, after waiving his *Miranda* rights and answering questions about the attack, could not later selectively choose to invoke his right to silence as to certain questions or requests made along these same lines. *Id.* at 1093–94. According to the Court of Appeal, “a defendant has no right to remain silent selectively.” *Id.* at 1093.<sup>1</sup> Later, the California Supreme Court relied on *Hurd* to

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<sup>1</sup> The Ninth Circuit subsequently held on habeas review that the California Court of Appeal’s analysis in *Hurd* was an unreasonable application of constitutional law. *See Hurd*, 619 F.3d at 1087.

conclude that the question of whether *Doyle* applies in selective-invocation cases is an open one. *Coffman and Marlow*, 34 Cal.4th at 118–19.

Here, the Court of Appeal relied on *Hurd* and *Coffman and Marlow* to suggest that no *Doyle* violation occurred because the prosecutor commented only on Mr. Jones’s selective invocation of his right to silence. 24a. Believing the issue was “open for debate,” the lower court declined to determine whether there was a *Doyle* error because it believed any such error was harmless. *Id.*

This Court should make clear to the California courts generally, and the Court of Appeal reviewing Mr. Jones’ case specifically, how the protections of *Doyle* apply to selective invocations of silence. The competing decisions of the California Court of Appeal and the Ninth Circuit in *Hurd* demonstrate the current conflict, with the state court determining there was no *Doyle* error and the Ninth Circuit concluding the state court’s analysis was flawed. This Court should provide guidance to state and federal courts, prosecutors and defense attorneys on how to apply *Doyle* when a suspect selectively invokes his constitutional right to remain silent.

## II. This case is a good vehicle for resolving the split.

Mr. Jones’s case is an excellent vehicle for resolving the question of *Doyle*’s scope. Invoking his right selectively as *Miranda* itself explained was permissible, Mr. Jones sought to remain silent in response to certain lines of questioning by the detectives. Nonetheless, the prosecutor repeatedly used Mr. Jones’s post-*Miranda* silence on those topics to urge the jury to infer guilt despite being informed by the trial court that the statements were obtained in violation of Mr. Jones’ Fifth Amendment right to remain silent.

Contrary to the conclusion of the Court of Appeal, the comments were prejudicial. A first trial without the prosecutor’s improper comments resulted in a hung jury split 6-6. Only after the state convinced the trial court to reconsider its decision to exclude the “arrangement exchange,” and only after the prosecutor commented to the jury in closing and rebuttal about Mr. Jones’ selective silence was the state able to secure a conviction in this case.

So in addition to resolving a split of opinion amongst lower courts, resolving this issue would likely lead to a new jury trial for Mr. Jones.

This Court should thus grant Mr. Jones's petition for certiorari.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Dated: March 12, 2024

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