2016

State of Utah, Plaintiff/Petitioner, v James Christopher McCallie, Defendant/Respondent.

Utah Supreme Court

Case No. 20160500-SC

IN THE

UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Petitioner,

v.

JAMES CHRISTOPHER MCCALLIE,
Defendant/Respondent.

Reply Brief of Petitioner

On Writ of Certiorari to the Utah Court of Appeals

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Pursuant to rule 24(c), Utah Rules of Appellate Procedure, the State submits this brief in reply to new matters raised in Defendant's responsive brief. The State does not concede any matters not addressed in the reply, but believes those matters are adequately addressed in the State's opening brief.

ARGUMENT

I.

THE COURT OF APPEALS ERRONESOULY HELD THAT DEFENDANT'S INCONSISTENT, POST-*MIRANDA* STATEMENTS WERE EQUIVALENT TO POST-*MIRANDA* SILENCE UNDER *DOYLE* AND *CHARLES*

When a defendant exercises his right not to talk to police, then testifies to an exculpatory version of events at trial, *Doyle v. Ohio* and *Anderson v. Charles* prohibit the State from arguing that the jury should not

believe the defendant's testimony on the basis that he withheld that version from police when he refused to talk to them. *Doyle*, 426 U.S. 610, 619 (1976); *Charles*, 447 U.S. 404, 407 (1980). The Supreme Court reasoned that (1) it is "fundamentally unfair" to use a defendant's post-*Miranda* silence when the warning implicitly assured him that "silence will carry no penalty," and (2) silence is not necessarily inconsistent with later trial testimony because it "may be nothing more than . . . [an] exercise of these Miranda rights." *Doyle*, 426 U.S. at 617.

Here, Defendant did not remain silent after *Miranda* warnings. The court of appeals nevertheless held that his post-*Miranda* statements were the equivalent of silence because it read them to be statements about the interrogation, not about the crime. *See State v. McCallie*, 2016 UT App 4, ¶22, 369 P.3d 103.

In its opening brief, that State argued that *Doyle* and *Charles* only proscribe attempts to draw meaning from silence and do not create a class of silence-equivalent statements related to the interrogation. The State argued alternatively that Defendant's post-*Miranda* statements were not merely related to the interrogation. They were instead a conflicting version of Defendant's knowledge of and participation in the events that even the court of appeals' reading of *Doyle* allowed the prosecutor to explore.

Defendant responds that the "court of appeals did not expand the meaning of *Doyle*." Br.Resp.16. Rather, he asserts that "*Doyle* made the distinction the court of appeals made here—that statements about the interrogation are the equivalent of silence." Br.Resp.9. He further contends that Defendant's "statements to the police almost exactly mirror those the Court treated as the equivalent of silence in *Doyle*" and thus were correctly treated as silence here. Br.Resp.7.

Defendant is mistaken on both fronts. First, neither *Doyle* nor *Charles* created a category of silence-equivalent statements that the State cannot use at trial. Second, even if *Doyle* and *Charles* created a category of silence-equivalent statements, Defendant's statements do not qualify here because his statements were about the facts of the crime, not about his interrogation.

A. *Doyle v. Ohio* and *Anderson v. Charles* did not create a category of silence-equivalent statements that the State cannot use at trial.

Defendant argues that the court of appeals' correctly read *Doyle* to have already understood that statements related only to the interrogation are the equivalent of silence. According to him, this is because one of the two petitioners in *Doyle v. Ohio* was not actually silent, but made one or two post-*Miranda* statements and yet, the Court treated both petitioners as if

they had been silent. Br.Resp.10-11 (citing *Doyle v. Ohio*, 426 U.S. 610, 622 n.4 (Stevens, J., dissenting)).

But *Doyle* does not support Defendant's or the court of appeals' reading, nor support creating a category of statements that operate as silence. Foremost, *Doyle* neither considered nor held that a defendant's statements are to be treated as silence when he speaks about his interrogation. Indeed, the majority in *Doyle* never directly acknowledged that petitioner Doyle made any post-*Miranda* statements. The fact that Doyle had spoken was revealed only amid a lengthy footnote quoting the transcript of his cross-examination, where in response to the question of whether he had protested his innocence at arrest, Doyle answered that he had said only, "'What's this all about?'" 426 U.S. at 614 n.5. And while the dissent briefly noted that "petitioner Doyle did not even remain silent," it too examined the case in terms of silence. *Id*. at 628 (Stevens, J., dissenting) & n.4 (quoting at length Doyle's cross-examination at co-petitioner's trial, where Doyle testified that he also said "you got to be crazy" and possibly "I don't know what you are talking about").

Doyle framed the issue as "whether impeachment use of a defendant's post-arrest *silence* violates any provision of the Constitution." *Id*. at 616 (emphasis added). Likewise, the parties argued the case as one of silence.

See id. (stating that Ohio argued that "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") (emphasis added). *Doyle* thus says what it says and nothing more: "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. *Doyle* simply never held that a defendant's statements operate as silence when his statements only concern his interrogation.

Doyle's reasoning likewise conflicts with an expansion of its rule to include a category of silence-equivalent statements. *Doyle* reasoned it is fundamentally unfair to tell a Defendant that he has a constitutional right not to talk to police, and then penalize him when he exercises that right. *See Doyle*, 426 U.S. at 618. But when, as here, a defendant does talk to police, inquiring into the conversation does not punish him for exercising his right not to talk to police.

Doyle also reasoned that silence cannot inform whether trial testimony is true because exercising the right not to tell the story sheds no light on whether it is true. *See id*. at 617. But statements can make such a showing when they conflict with trial testimony.

Later courts, including Utah, took *Doyle* at its word. "*Doyle* can have no application to a case in which the defendant did *not* exercise his right to remain silent." *State v. Velarde*, 675 P.2d 1194, 1196 (Utah 1984) (per curiam) (emphasis in original). *See also Lofton v. Wainwright*, 620 F.2d 74, 76 (5th Cir. 1980) ("We simply do not have a Doyle situation in the case before us [because] Lofton chose not to remain silent; he elected to talk"); *United States v. Agee*, 597 F.2d 350, 355 (3d Cir. 1979) ("Doyle can have no application to a case in which the defendant did [n]ot exercise his right to remain silent."), *cert. denied* 442 U.S. 944 (1979); *United States v. Warren*, 578 F.2d 1058, 1073 (5th Cir. 1978) (holding that 5th Amendment did not prohibit admission of Warren's statement that he represented his companions and advised them to say nothing), *abrogated on other grounds as recognized by United States v. Bengivenga*, 845 F.2d 593 (5th Cir. 1988); *United States v. Turner*, 551 F.2d 780, 782 (8th Cir. 1977) (per curiam) (holding that under *Doyle*, Turner's statement to police that he "didn't know anything" about forgery was not an exercise of his right to remain silent), *cert. denied*, 431 U.S. 942 (1977).

And in case *Doyle* left any doubt, the United States Supreme Court later made clear that *Doyle* only applies to silence on the subject matter of the crime. In *Anderson v. Charles*, it held that "*Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements." 447

U.S. at 408. While "two inconsistent descriptions of events may be said to involve 'silence' insofar as it omits facts included in the other version . . . *Doyle* does not require any such formulistic understanding of 'silence.'" *Id*. at 409. *Charles* thus rejected Defendant's argument here: there is no *Doyle* violation where a prosecutor uses a defendant's "failure to tell the police the story he recounted at trial" where his "design[]" is not "to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement." *Id*. at 408-409.

The most that can be said about Doyle's post-arrest statements is that the Supreme Court concluded that they were divorced from the subject matter of the crime about which the police were asking him. Defendant nevertheless argues that *Charles* justifies the court of appeals' creation of a category of silence-equivalent statements. Br.Resp.11-12. He points to *Charles*'s declaration that the petitioners in *Doyle* "'made no postarrest statements *about their involvement in the crime*.'" *Id*. at 12 (quoting *Charles*, 447 U.S. at 407) (emphasis provided by Defendant). This, he asserts, demonstrates that *Doyle* purposely treated Doyle's statements as the equivalent of silence because he did not speak to the facts of the crime. *Id*. In other words, he says that under *Doyle* and *Charles*, the State could have

used his post-*Miranda* statements against him only if he used the words "I did not shoot the victim." *See id*.

Charles holds the opposite. *Charles* merely acknowledged—in another footnote—that while Doyle made one or two statements after arrest, the issue in *Doyle* "was said to involve cross-examination of a person who 'does remain silent' after police inform him that he is legally entitled to do so." *Charles*, 447 U.S. at 407 n.2 (quoting *Doyle*, 426 U.S. at 620 (Stevens, J., dissenting)). And *Charles* concluded that in "any event, neither [statement] contradicted the defendant's later trial testimony." *Id*. In other words, even though Doyle may have spoken to police, his statements to police—*and the omissions therein*—were not inconsistent. *Id*. Thus, "[a]s to the subject matter of his statements, the defendant has not remained silent at all." *Charles*, 447 U.S. at 407. *See also United States v. Hale*, 422 U.S. 171, 176 (1975) ("A basic rule of evidence provides that prior inconsistent statements may be used to impeach the credibility of a witness," but "the court must be persuaded that the statements are indeed inconsistent."); *Harris v. New York*, 401 U.S. 222, 225-226 (1971) (explaining any witness may be impeached with prior statement that is inconsistent with trial testimony).

Here, just like in *Charles*, "[a]s to the subject matter of his statements, the defendant has not remained silent at all." *Charles*, 447 U.S. at 407. And

also like in *Charles*, the statements Defendant made on this subject matter were patently inconsistent with the testimony he gave at trial.

After hearing his *Miranda* rights, Defendant claimed that the police had awakened him and professed to be unaware that the shooting had happened. He demanded to know why the police were questioning him, telling them, "You people woke me up." R.298:65. When informed that he had been arrested for attempted murder, he asked, "To who?" and "Whose got a gunshot wound?" R.298:65, 70. And again, he told police, "You woke me up. I want to know what's going on." R.298:65.

Yet at trial, Defendant admitted that he had been awake and knew about the shooting, but claimed that he fired the gun accidentally after Defendant pulled his gun in self-defense. R.298:44-46. Under *Charles*, this is exactly the kind of "inconsistent descriptions of events" that a prosecutor is free to use to impeach trial testimony and to highlight in closing arguments. 447 U.S. at 409.

In reality, the court of appeals and Defendant employ the same "formulistic understanding of 'silence'" *Charles* eschewed. *Id*. at 409. Defendant argues that because the prosecutor told the jury in closing rebuttal that Defendant "'*didn't say* it was an accident. He *doesn't say* this was self-defense,'" he improperly asked the jury to "consider his failure to

speak—to tell his side—as evidence of guilt." Br.Resp. 15, 22 (quoting R.298:120) (emphasis provided by Defendant). But *Charles* rejected the notion that for *Doyle* purposes, "silence" includes facts omitted in the defendant's contradictory story. 447 U.S. at 409. And it condoned the prosecutor's argument that Charles "fail[ed] to tell the police the story he recounted at trial" because the prosecutor's "design[]" was not "to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement." *Id*. at 409. That is all the prosecutor did here.

In closing rebuttal, the prosecutor paraphrased some of Defendant's statements and then contrasted those statements with what Defendant testified to at trial:

> The evolution of his story from the very beginning when they questioned him, what does he say? Why am I here? Why are you jerking me off? Nothing happened. You woke me up. You woke me up. He didn't say it was an accident. He doesn't say this was self-defense [like he testified at trial].

R.298:120. Thus, like in *Charles*, the prosecutor's design was not "to draw meaning from silence," but to lay bare the inconsistencies in his stories. 447 U.S. at 408-409. His argument did not violate *Doyle*.

Defendant also contends that the court of appeals correctly determined that the prosecutor committed a *Doyl*e violation here because his statements "were nothing different than those in *Doyle*." Br.Resp.17. But

they were different. At most, Doyle said, "What's this all about?", "you got to be crazy," and perhaps, "I don't know what you are talking about." 426 U.S. at 614 n.5, 628 n.4 (Stevens, J., dissenting). In contrast, Defendant told the police, "You people woke me up," asked "To who?" and "Whose got a gunshot wound?" when informed that he had been arrested for attempted murder, and again told police, "You woke me up. I want to know what's going on." R.298:65, 70. These queries and statements were not, like in *Doyle*, consistent with his later trial testimony. *See Charles*, 447 U.S. at 407 n.2. Rather, Defendant's statements to police—that he had been asleep, was unaware of any shooting, and was not involved—told a very different story than what he testified to at trial—that he was awake and fired the gun accidentally. *See Sallahdin v. Gibson*, 275 F.3d 1211, 1230 (10th Cir. 2002) (holding that prosecutor's cross-examination was "within permissible limits because [Sallahdin] presented a new story at trial that was materially different from the information he provided to the police").

Both the court of appeals and Defendant do not acknowledge that Defendant asked "To who?" and "Whose got a gunshot wound?" when he was informed that he had been arrested for attempted murder. *See McCallie*, 2016 UT App 4, ¶6; Br.Resp.17. Instead, Defendant and the court of appeals omitted these queries from their analyses. *Id*. This may be because the court

of appeals examined the prosecutor's closing rebuttal argument where he paraphrased some of Defendant's statements and did not include these two questions. *See* R.298:120.

But this does not mean that these queries should be ignored when considering whether Defendant's legally exculpatory trial story was inconsistent with the factually exculpatory story he told police. The prosecutor asked Defendant about these queries and he then summarized Defendant's inconsistent story during his rebuttal argument. *See* R.298:65, 70, 120.

But even without considering these two questions, Defendant's statement(s) alone that the police had awoken him—and thus he was asleep during the shooting and could not have been involved—was inconsistent with his trial testimony that he was awake and that he fired the gun accidentally after Defendant pulled his gun in self-defense. *See* R.298:44-46. Defendant's statements were thus not like Doyle's at all; they were statements that were directly contradictory to his testimony at trial. Consequently, neither *Doyle* nor *Charles* supports the court of appeals' creation of silent-equivalent statements here.

The cases Defendant cites in his responsive brief likewise do not support the court of appeals' decision. Indeed, in the forty-five years since

Doyle, the State is aware of no other case—and the court of appeals cited none—that also treated a defendant's statements as the equivalent of silence.

Defendant relies primarily on selective silence cases. *See* Br.Resp.12-13, 19-21 (citing *Hurd v. Terhune*, 619 F.3d 1080 (9th Cir. 2010); *United States v. Caruto*, 532 F.3d 822 (9th Cir. 2008); *Kibbe v. Dubois*, 269 F.3d 26 (1st Cir. 2001); *United States v. Canterbury*, 985 F.2d 483 (10th Cir. 1993); *United States v. Scott*, 47 F.3d 904 (7th Cir. 1995), and *United States v. May*, 52 F.3d 885 (10th Cir. 1995)). None speaks to the statements Defendant made.

Unlike in this case, a defendant is selectively silent if he chooses not to answer a particular question, but answers others throughout a voluntary police interview. *See* Evelyn French, *Note, When Silence Ought to Be Golden: Why the Supreme Court Should Uphold the Selective Silence Doctrine in the Wake of* Salinas v. Texas, 48 Ga. L. Rev. 623, 625 (Winter 2014). *See also, e.g., Hurd*, 619 F.3d at 1084 (Hurd answered police questions but refused to reenact shooting several times and prosecution argued this refusal was affirmative evidence of guilt); *Caruto*, 532 F.3d at 824, 829 (Caruto answered some questions, but after five minutes invoked right to counsel; prosecution argued Caruto's silence to police's unanswered questions demonstrated guilt); *Kibbe*, 269 F.3d at 30 (Kibbe answered postarrest, post-*Miranda*

questions about why he was at scene of the crime, but not about why he fled when police arrived); *Canterbury*, 985 F.2d 483 (Canterbury made three statements to police—he bought a silencer, he bought it for protection, and he did not have any other silencers; his defense at trial was entrapment and prosecution argued his failure to tell arresting officers that he was set up showed guilt); *May*, 52 F.3d at 889 (May gave "various versions of his 'story' when speaking to authorities," but not his trial version).

The issue in a selective silence case is whether the prosecutor may use the defendant's *silence* in not answering particular questions. But none of these cases illuminate whether *Doyle* barred using Defendant's statements here. In fact, the United States Supreme Court has not answered this question and the circuit courts are split on the answer. *See* French, *When Silence Ought to Be Golden*, at 639-640. Currently, the First, Fifth, and Eighth Circuits allow admission of a defendant's silence in selective silence cases while the Seventh, Ninth, and Tenth Circuits do not. In circuits that permit admission of a defendant's silence, they reason that *Doyle* does not apply where a defendant waived his right to remain silent by talking voluntarily with the police. His entire conversation—including omissions—is thus admissible until the defendant re-invokes his right to remain silent. *See United States v. Burns*, 276 F.3d 439, 442 (8th Cir. 2002) ("[W]here the accused

initially waives his or her right to remain silent and agrees to questioning, but subsequently refuses to answer further questions, the prosecution may note the refusal because it now constitutes part of an otherwise admissible conversation between the police and the accused."); *United States v. Pando Franco*, 503 F.3d 389, 397 (5th Cir. 2007) (holding that Pando Franco "waived his right to have the entire conversation, including the implicit references to his silence contained therein, used against him as substantive evidence of guilt").

And in circuits that prohibit use of silence in this way, they reason that *Miranda* "applies to every question investigators pose" and a defendant's refusal to answer any one question is therefore inadmissible. *Hurd*, 619 F.3d at 1087. *See also Scott*, 47 F.3d at 907 (explaining that suspects may "refuse to answer certain questions, and still be confident that *Doyle* will prevent the prosecution from using his silence against him"); *May*, 52 F.3d at 890 (explaining that "partial silence does not preclude him from claiming a violation of his due process rights under *Doyle*").

But even in circuits that disallow evidence of a defendant's silence in response to a particular question, the inquiry is still whether the prosecutor aimed to draw meaning from the defendant's silence: "As stated in *Charles*, the *primary* inquiry in cases where a defendant waives his or her *Miranda*

rights is whether the prosecutor's question or argument is 'designed to draw meaning from silence' or instead merely 'to elicit an explanation for a prior inconsistent statement.'" *Caruto*, 532 F.3d at 830 (quoting *Charles*, 447 U.S. at 409) (emphasis added). *See also Canterbury*, 985 F.2d at 486 ("[T]his case turns on whether the cross-examination was designed to impeach the defendant's trial testimony by calling attention to prior inconsistent statements or, instead, was designed to suggest an inference of guilt from the defendant's post-arrest silence."); *May*, 52 F.3d at 890 (explaining "test" is "'whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment' on the defendant's right to remain silent").

Where the prosecutor's questions or argument was not designed to draw meaning from the defendant's silence, there is no *Doyle* violation even in these jurisdictions. *See Scott*, 47 F.3d at 906 (finding no *Doyle* violation because prosecutor was pointing out inconsistencies in Scott's story where prosecutor asked whether he "never mentioned to Special Agent Hinkle this story you're telling us today, did you?"); *Canterbury*, 985 F.2d at 486 (holding that Canterbury's post arrest statements were not inconsistent with his defense at trial and prosecutor's argument was designed to show his failure to present his exculpatory story at arrest); *May*, 52 F.3d at 886-887,

890 (finding no *Doyle* violation where May raised defense of withdrawal from conspiracy for first time at trial, but gave a different story at arrest because prosecutor's design was to call attention to prior inconsistent statements).

Selective silence cases do not answer the question here. Defendant was not silent and the prosecution did not admit evidence that Defendant remained silent in response to a particular question. Instead, Defendant made certain exculpatory statements and the prosecutor contrasted these with his trial testimony. Thus, as shown above, *Charles* controls. But nonetheless, all the selective silence cases cited in Defendant's brief support the State's position. This is because even where a defendant's *silence* is admitted, there is no *Doyle* violation if the prosecutor's aim was merely to call attention to prior inconsistent statements. *See id*. Here, where Defendant's *statements*—not his silence—were contrasted, there surely was no *Doyle* violation. *See United States v. Gomez*, 725 F.3d 1121, 1127 (9th Cir. 2013) ("Because the impeachment evidence here concerned Defendant's *statement*, however, *Doyle*'s rule does not apply.") (emphasis in original). *See also Kibbe*, 269 F.3d at 37 (explaining that "when a defendant makes a post-*Miranda* statement on a particular subject, and then makes a second statement on the same subject at trial, the prosecutor can refer to post-arrest

silence to expose any inconsistencies between the two statements"); *State v. Sorrels*, 642 P.2d 373, 375 (Utah 1982) (explaining that to constitute *Doyle* violation, the State must use the silence in a way that "raises the inference that silence equals guilt."); *State v. Singleton*, 693 P.2d 68, 69-70 (Utah 1984) (finding no *Doyle* violation where prosecutor asked officer several questions about Singleton not having anything to say because "the testimony was elicited solely to provide foundation for the relevant and admissible" statement and did "not suggest that it was conducted in any effort to encourage any inference of guilt from appellant's silence"); *State v. Bakalov*, 979 P.2d 799, 820 (Utah 1999) (explaining "*Doyle* prohibits the prosecutor's *use* of defendant's silence to demonstrate guilt") (emphasis in original).

The remaining cases upon which Defendant relies are similarly unavailing. For example, citing *State v. Wiswell*, Defendant claims that this "is exactly what occurred here." Br.Resp.23 (citing *State v. Wiswell*, 639 P.2d 146 (Utah 1981)). But *Wiswell* found a *Doyle* violation where Wiswell said nothing at all to officers and yet the prosecutor argued to the jury that Wiswell was guilty because he "didn't tell the officer that he was an unwilling participant." *Wisell*, 639 P.2d at 147. Likewise, the Virgin Islands found a *Doyle* violation where the defendant made no statements at all to the police, but the prosecutor argued that the defendant was guilty for not

coming forward and telling the police that "someone else had shot the victim." when. *Gov't of Virgin Islands v. Davis*, 561 F.3d 159, 162 (3rd Cir. 2009). And in *United States v. Christian*, unlike here, the court determined that the defendant's refusal to make a written statement "should not have been alluded to at trial." 22 M.J. 519, 521-522 (N.-M. C.M.R. 1986).

Again, that is not what happened here. The State merely argued that Defendant's trial testimony that he was awake, at the crime scene, and fired the gun accidentally conflicted with his *statements* to police that he was asleep and demanding to know who had been shot.

In sum, none of the cases Defendant cites support the court of appeals' treatment of his statements as silence here. Rather, controlling authority compels the conclusion that the court of appeals incorrectly applied *Doyle* and *Charles*.

Finally, Defendant's own hypothetical examples further demonstrate that the court of appeals' decision expands *Doyle* far beyond its reasoning, denying the State access to impeachment evidence that no constitutional rule prohibits using and skewing the truth-finding function of the courts in the process. Defendant asserts that a defendant's statements about his interrogation that would rebut an insanity defense or to show intoxication "are not problematic" and are still admissible under *McCallie* because they

"do not use a person's silence to impeach their testimony." Br.Resp.14 n.3. But *McCallie* is not so limited. Unlike *Charles*, it does not consider whether the prosecutor's design was to use a defendant's silence. Instead, rather than accounting for context, *McCallie requires* all statements about an interrogation to be treated as silence: "under [*Charles*], post-arrest statements about the suspect's involvement in the interrogation itself . . . are, for *Doyle* purposes, the equivalent of silence [and] the prosecutor may not use such statements to impeach a defendant's trial testimony." *McCallie*, 2016 UT App 4, ¶21. Contrary to what Defendant says now, *McCallie* would prohibit the prosecutor from impeaching a defendant with statements that are not about his involvement in the crime, but reflect on his level of intoxication or mental health. *Id*.

Likewise, Defendant is mistaken when he declares that a prosecutor "could clearly ask" a defendant "why he lied about his name and residence" to arresting officers. Br.Resp.22. *McCallie* compels the opposite conclusion. Because the lies are not about the facts of the crime, the State would be prohibited from asking the defendant about his misrepresentations. *Id.*

B. Even if *Doyle* and *Charles* created a category of silence-equivalent statements, Defendant's statements do not qualify here because they were about the facts of the crime.

Defendant also argues that the court of appeals correctly held that the prosecutor committed a *Doyle* violation because Defendant's statements were not about his involvement in the shooting, but were about his interrogation. Br.Resp.25-27. He asserts that his statements "were no more [than] general questions asking what was going on and why he was there." Br.Resp. 26.

This reasoning promotes labeling over substance. The reasoning goes like this: because Defendant told police that they had awakened him, asked to know why, and asked who had been shot, they could be characterized as questions about the interrogation and off limits.

But as explained, Defendant's statements were much more than questions about his interrogation and provided an exculpatory story that conflicted with the story he later gave at trial. Thus, even if the court of appeals' distinction between statements about a defendant's interrogation—which the court concluded receive *Doyle* protection—and statements about a defendant's involvement in the crime—which the court acknowledged would not receive *Doyle* protection—were supportable, the court of appeals still erred here. This Court should reverse.

CONCLUSION

For the foregoing reasons and those stated in the State's opening brief, the Court should reverse the judgment of the Court of Appeals.

Respectfully submitted on March 16, 2017.

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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 4,637 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.

_____

TERA J. PETERSON
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on March 16, 2017, two copies of the Reply Brief of Petitioner were ☑ mailed ☐ hand-delivered to:

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Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format (pdf):

☑ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.

_____