NO. 07-50041

IN THE UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ELIDE T. CARUTO,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of California
Honorable William Q. Hayes, District Judge Presiding

APPELLANT'S OPENING BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	U.S.C.A. No. 06-50041
	)	
Plaintiff-Appellee,	)	U.S.D.C. No. 06cr0281-WQH
	)	
v.	)	
	)	
ELIDE T. CARUTO,	)	
	)	
Defendant-Appellant.	)	
	)	

Preliminary Statement and Issues Presented

Due Process forbids the government from first *Mirandizing* a suspect, then punishing her at trial for using those rights. Though Ms. Caruto asked for a lawyer only a few questions into a post-arrest interview – and after agents assured her that it was her right to do so – the trial prosecutor highlighted various facts that Ms. Caruto "failed to provide" during her interrogation. Did the government unfairly punish Ms. Caruto for exercising her *Miranda* rights?

Jurisdictional Statement

Ms. Caruto appeals from the judgment and 168-month sentence imposed by the United States District Court for the Southern District of California, the Honorable William Q. Hayes, presiding.[1]

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[1] Clerk's Record of the case (hereafter CR) at 47; Excerpts of Record (hereafter ER) at 373. Hereafter, citations to the record and legal authority, and these citations alone, will appear in footnotes.

Jurisdiction was proper in the district court. The government charged Ms. Caruto under 21 U.S.C. § 952 and 960, importation of cocaine. The district court had original jurisdiction over this offense.[2]

Appellate jurisdiction is likewise proper in this Court. This Court has jurisdiction over a timely appeal from a final order entered within the Ninth Circuit's geographical jurisdiction.[3] Ms. Caruto filed her notice of appeal on January 23, 2007,[4] within ten days of the January 22, 2007 entry of judgment.[5] A criminal judgment is a final order.[6] The Southern District of California is within the Court's geographical jurisdiction.

Statement of the Case

The government indicted Ms. Caruto and charged her with importation of, and possession with intent to distribute, a controlled substance.[7] She entered a not-guilty plea.

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2 CR 5; ER 1.

3 *See* Fed. R. App. 4(b); 28 U.S.C §§1291, 1294(1).

4 CR 48; ER 378.

5 CR 47; ER 373.

6 *See Berman v. United States*, 302 U.S. 211, 213 (1937).

7 CR 5; ER 1.

Pretrial, discovery revealed that Ms. Caruto had given perhaps a three-or-four-sentence statement to agents after her arrest, and then invoked her Fifth Amendment rights. Before trial, the defense moved to preclude the government from exploiting the fact that Ms. Caruto invoked her rights, including through "impeachment by omission" at trial.[8] The government opposed the motion.[9] At trial, the government introduced testimony concerning facts that Ms. Caruto failed to tell agents before she invoked.[10] During closing argument, the government argued in essence that she would have provided certain details about her story if she were truly innocent.[11] The district court overruled defense objections during closing; it denied the defense motion for a mistrial.[12]

At sentencing, Ms. Caruto, a grandmother whose only prior criminal convictions stemmed from a drunk driving conviction, received 168 months in federal prison.[13] This appeal follows.

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8 CR 22, 23; ER 4, 9.

9 ER 32-33.

10 ER 101.

11 ER 322-23; 345-46.

12 ER 356-358.

13 CR 47; ER 373.

Statement of Facts

The government accused Elide Caruto, a nearly sixty-year-old mother and grandmother, of attempting to import a load of narcotics into the United States.[14] Customs officers arrested Ms. Caruto at the Calexico Port of Entry after discovering narcotics in her car.[15] Ms. Caruto professed her innocence – both during her brief interrogation at the border and later throughout pretrial proceedings. Her case proceeded to trial.

I. Pretrial Motions

Pretrial discovery revealed that Ms. Caruto received *Miranda* rights at the border security office, she made a few discrete statements, and then invoked her right to stop answering questions.[16] As a result, Ms. Caruto moved to preclude the government from exploiting this invocation of her rights at trial through "impeachment by omission."[17] The government opposed the motion, and indicated that it intended to employ exactly the tactic that Ms. Caruto sought to preclude.[18]

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[14] CR 5; ER 1.

[15] *Id.*

[16] ER 4, 8-9.

[17] CR 22, 23; ER 4, 8-9.

[18] CR 31; ER 32-33.

At a pretrial motion *in limine* hearing, the district court took testimony about Ms. Caruto's post-arrest interrogation. The case agent testified that he provided Ms. Caruto with written *Miranda* rights.[19] The form included the admonition that Ms. Caruto could "stop the questioning at any time, or to stop the questioning for the purpose of consulting an attorney."[20] Ms. Caruto initially agreed to answer questions.[21]

However, the interview was soon interrupted. Almost immediately, Ms. Caruto said that she was scared.[22] Within four or five minutes, she requested a lawyer.[23] Ms. Caruto then vomited in the bathroom of the security office,[24] and an ambulance transported her to the hospital.[25] Including the preliminary review, signing, and initialing of the *Miranda* form, the entire interaction with the case agent lasted no more than five to seven minutes.

Neither the district court nor the government ever disputed that the

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19 ER 42-45.

20 ER 3.

21 ER 44.

22 Id.

23 ER 49.

24 ER 47.

25 ER 46.

interview was both brief and incomplete. For example, at the motion hearing, Ms. Caruto's counsel drew numerous objections in eliciting that Ms. Caruto denied knowledge of the contraband in the car. The district court relied heavily on the brevity of the interview in sustaining objections to this line of questioning: "[C]ounsel, this was a five-to-seven minute interview," the Court admonished.[26] "[I]t just seems that such a short period of time. It's a five-to-seven minute interview."[27] The government ultimately agreed that the interview was "at best five minutes" long.[28] On at least one occasion (in the context of the defense eliciting the remainder of her statement on cross), the government stated, "well, your honor, I guess the problem there is, the defendant didn't provide any clarification. She invoked. And so I'm not really sure what – what position the agent can be in to provide with respect to that statement."[29] The government later admitted that Ms. Caruto did not provide what it described as a "critical detail" of

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[26] ER 52.

[27] ER 53.

[28] ER 60.

[29] ER 68.

her story because the agent did not get a chance to ask her about it before she invoked.[30]

Despite the admitted brevity of the interview and the fact that certain topics were not discussed at all – the government announced that it intended to either cross examine Ms. Caruto on things that she did not mention to agents, or to call agents in rebuttal to describe these omissions.[31] The government also maintained, however, that Ms. Caruto should not be permitted to elicit any of her own post-arrest statements that it did not choose to elicit.[32]

The district court rejected the government's argument that it was entitled to impeach by omission during its case-in-chief: "So you know exactly what you can do in your case," the district court cautioned the prosecutor, "[y]ou can call someone to introduce her statements, what she said . . . and you can't ask any questions about what she didn't say, did she say this, did she say that. All you can do is introduce what it was that she said and leave it at that."[33] Unfortunately for

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30 ER 295.

31 ER 61a-b.

32 ER 31-32.

33 ER 61d.

Ms. Caruto, the evidence and argument at trial did not follow the pretrial ruling, and the district court appeared to change its view once Ms. Caruto testified.

II. Trial Testimony

The case agent testified during the government's case in chief. He related three sentences that Ms. Caruto supposedly told him:

- She had lent her truck to "unknown" individuals in Mexicali, three to four weeks prior to her arrest;
- She received the vehicle on the date of her arrest and was going to drive the vehicle to Los Angeles;
- She said she believed she was helping her friend.[34]

On cross examination, and over vigorous objection, the Court permitted the defense to elicit one more statement that Ms. Caruto had made – that she did not know that cocaine was in the vehicle.[35]

Cross-examination also clarified the substance of the three discrete sentences that the case agent introduced. First, the agent clarified that the second and third sentences did not necessarily relate to one another. When asked if Ms. Caruto was driving to Los Angeles *because* she was helping a friend, the agent responded, "[s]he said that she was driving to Los Angeles, *and* she said that

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[34] ER 66.

[35] ER 86.

she was helping a friend."[36] Second, the agent admitted that in his contemporaneous interview notes, he crossed out the word "going" in "going to L.A.," and wrote, "*told* to go to L.A."[37] Thus, his notes reflected only that Ms. Caruto was "told to go to L.A." – not that she said she was actually going to L.A.[38] Third, the agent admitted that Ms. Caruto may not have said that she did not know who borrowed the truck. Instead, he admitted that it was possible that "she said someone had borrowed the truck and it just never got discussed exactly who it was."[39] Finally, the agent also admitted that an audio or video recording of the interview would have revealed the exact content of Ms. Caruto's statement. He further conceded that he knew how to use audio and video recording devices, but that he did not record the interview in any way.[40]

On redirect examination, the government immediately attempted to penalize Ms. Caruto for invoking her right to counsel:

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36 ER 86 (emphasis provided).

37 ER 88

38 ER 89.

39 ER 90.

40 ER 92-93.

Q: (BY THE GOVERNMENT): Agent Kelley, when you were interviewing the defendant, did she say she was going home to Calexico?

A: No, she did not.

Q: Did she tell you the name of the person who had borrowed the car from her?[41]

Although the district court prevented the government from eliciting an answer to the last question, the first question and answer stood without any curative instruction.

Ms. Caruto testified after the government rested. Ms. Caruto described a phone call that she received from her friend the day before her arrest.[42] This friend and her brother-in-law, Jose Jimenez, had borrowed Ms. Caruto's truck three to four weeks prior, and she wondered whether the truck was still for sale.[43] She also asked Ms. Caruto if she could lend her some money as a favor when she came to Mexicali.[44]

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41 ER 101.

42 ER 144.

43 ER 144.

44 ER 144-146.

Ms. Caruto testified that she traveled to Mexicali, lent her friend the money, and also met with the brother-in-law Jose Jimenez to show him the truck.[45] She allowed Jose to test drive the vehicle and take it to a mechanic – or so he said – and she ran errands with friends the rest of the day.[46] Jose brought the truck back to her later that afternoon.[47] He said he would buy the truck, but told Ms. Caruto to drive it to Los Angeles and that he would pay her there.[48] Ms. Caruto refused, responding that she was going to Calexico, not L.A.[49] She then drove to the Calexico border crossing, where she was arrested. Although she also provided the entire context of these discrete statements, Ms. Caruto confirmed on the stand that she had lent the car to persons three to four weeks prior to her arrest, that she was told to drive to L.A., and that she was doing a favor for a friend.

Ms. Caruto also elaborated that she had been trying to open a small business selling incense in Mexicali, and that she had been treated by a doctor there. She discussed that in the past, as on this occasion, she sometimes bought and sold used

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[45] ER 149.

[46] ER 150.

[47] ER 151-152.

[48] ER 152.

[49] ER 152.

cars for extra income.[50] The defense then called a series of witnesses who corroborated Ms. Caruto's testimony as to the events in Mexicali prior to her arrest.[51]

III. Closing Argument

In closing argument, the government engaged in the exact kind of argument that the defense had sought to prohibit. It reviewed the three discrete statements that it had introduced against Ms. Caruto, and then argued:

> Ladies and gentleman, that's how you know [that she is guilty]. She didn't say that it was Jose Jiminez, and by the way, here's his phone number because I just spoke to him. She didn't say it was Jose Jiminez who gave her the truck, and by the way, here's his phone number because I just spoke to him few hours ago.[52]

Despite the fact that the government had already admitted that no one asked her about selling the truck before she invoked, the government explicitly continued, "*She didn't say 'I was selling the truck.'*"[53] The prosecutor continued

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[50] ER 132-144.

[51] *See e.g.*, ER 182-186 (corroborating errands and that Jose took the truck shortly before Ms. Caruto's arrest); ER 203-207 (different witness, similar testimony); ER 209-216 (corroborating medical appointment in Mexicali that day); ER 234-237 (establishing that Ms. Caruto had legitimate business in Mexicali and Calexico).

[52] ER 322-23 (overruled objections omitted).

[53] ER 323.

"but now, seven months later, she comes here into court and here's what she has to say...."[54]

After the defense closing argument, the government renewed these arguments of omission:

> You have to ask yourself why? Why, at the port of entry, did she not say someone or some unknown individual had borrowed her truck? Why didn't she say the person who borrowed my truck is Jose Jiminez, and here's his phone number?[55]

The government continued:

> Here is his phone number? I just spoke to him, and this is the man who had my truck but a few hours ago. This is the man who must have put the cocaine in my truck. Why didn't she say that? Why didn't she say I'm going home to Calexico, and he thinks I'm going home to Calexico?[56]

The district court overruled defense objections during closing; it denied the motion for a mistrial.[57] The jury deliberated for approximately two days, and requested several read backs of testimony before ultimately convicting Ms. Caruto. The district court ultimately imposed a prison sentence of 168 months. This appeal follows.

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[54] ER 323.

[55] ER 345-346 (overruled objections omitted).

[56] *Id.*

[57] ER 356-358.

Summary of the Argument

Ms. Caruto's conviction and 168-month sentence should be reversed for three reasons. First, the government obtained it by exploiting the fact that she exercised her Fifth Amendment rights during her post-arrest interview in violation of *United States v. Doyle*. Under *Miranda*, a person has the right to stop answering questions at any time. *United States v. Doyle* holds that *Miranda* rights carry an implied assurance that the exercise of these rights will carry no penalty. However, after Ms. Caruto stopped answering questions – as she had been told she could – the government informed her jury that she had omitted certain facts from her post-arrest statement, and it argued that she was guilty because she did not relate her full story at the time of her arrest.

Second, though the government will argue that *Anderson v. Charles* and *United States v. Ochoa-Sanchez* permits its actions in this case, those cases do not apply here. Neither case addressed a situation where a client gives a short statement then invokes. At most, those cases permit impeachment of actual inconsistencies. Given that Ms. Caruto's post-arrest statements were not logically incompatible with her trial testimony, the government effectively punished her for her silence post-arrest.

Finally, the offending testimony and argument should have been excluded under the Rules of Evidence if nothing else. Since the Supreme Court's decisions in *United States v. Hale* and *Grunewald,* the law has recognized that post-arrest omissions are of dubious probative value but carry substantial prejudicial effect. It has contemplated judicial oversight to remedy the kind of unfairness that was visited upon Ms. Caruto. Whether under this supervisory power or under Fed. R. Evid. 403, non-constitutional reversible error also occurred.

Argument

I. Because Ms. Caruto invoked her right to stop answering questions after receiving *Miranda* warnings, it was fundamentally unfair to highlight omissions in her post-arrest statement at trial.

A. Standard of review.

This Court reviews *de novo* whether there has been a violation of a defendant's Fifth Amendment rights.[58]

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[58] *See United States v. Gregory*, 322 F.3d 1157,1161 (9th Cir. 2003); *United States v. Velarde-Gomez*, 269 F.3d 1023, 1028 (9th Cir. 2001) (en banc).

B. Under *Doyle,* due process prohibits the "fundamental unfairness" of impliedly assuring a suspect that no penalty will result from the exercise of *Miranda* rights, and then punishing the exercise of that right at trial.

Due process prohibits the government from punishing a defendant for exercising their *Miranda* rights.[59] In *Doyle,* two defendants claimed at trial that they had been framed. On cross examination, the prosecutor impeached the defendants with their failure to tell their frame-up story to police after their arrest. The Supreme Court granted certiorari to resolve whether this impeachment violated the defendants' Fifth Amendment rights. The Court held that it did, for two reasons: 1) every post-arrest silence is "insolubly ambiguous" in light of the preceding *Miranda* warnings;[60] and 2) because *Miranda* warnings carry the implicit insurance that their use will carry no penalty, "it would be fundamentally unfair and a deprivation of due process" to later penalize exercise of the right through comment at trial.[61]

The Supreme Court has since held that it is the "fundamental unfairness" of inducing reliance on *Miranda* rights and then punishing the same that constitutes a

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[59] *Doyle v. Ohio*, 426 U.S. 610 (1976).

[60] *Id.*, at 617.

[61] *Id.*, at 618.

constitutional violation.[62] For example, when a judge permits a defendant to invoke the Fifth Amendment on the witness stand – even if erroneously – the prosecutor may not then comment on the invocation to the defendant's detriment.[63] Simply put, due process prohibits the government from informing a defendant of a constitutional right, then punishing him for using it. It is a question of "fundamental fairness."[64] Ms. Caruto was the victim of this kind of fundamental unfairness after she invoked a similar right – the right to stop answering questions after an interview has begun.

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[62] *See Jenkins v. Anderson*, 447 U.S. 231, 240 (1980) (finding no constitutional violation in impeachment with pre-arrest silence, because government had not induced silence); *Fletcher v. Weir*, 455 U.S. 603 (1982) (same for post-arrest but pre-*Miranda* silence, again because the government did not induce silence).

[63] *See Johnson v. United States*, 318 U.S. 189, 197 (1943) ("An accused having the assurance of the court that his claim of privilege would be granted might well be entrapped if his assertion of the privilege could then be used against him. His real choice might then be quite different from his apparent one. . . . Elementary fairness requires that an accused should not be misled on that score.").

[64] *See Wainwright v. Greenfield*, 474 U.S. 284, 291 (1986) ("*Doyle* and subsequent cases have thus made clear that breaching the implied assurance of the *Miranda* warnings is an affront to the fundamental fairness that the Due Process Clause requires").

C. The right to stop answering questions is a distinct right from remaining completely silent, and the government assured Ms. Caruto that no penalty would result from the exercise of that right.

Among the rights guaranteed by *Miranda* is the right to stop answering questions at any time. *Miranda* holds that when a suspect "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning."[65] An initial *Miranda* waiver does not compromise this later right to terminate questioning. [66]

In advising Ms. Caruto of her *Miranda* rights in this case, the government told her that she could stop answering questions at any time. As the Immigration and Customs form presented to Ms. Caruto reads, "If you decide to answer questions now, you still have the right to stop the questioning at any time, or to stop the questioning for the purpose of consulting an attorney."[67] When the government provides *Miranda* warnings, it implicitly guarantees that there will be

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[65] *Miranda*, 384 U.S. at 444-445.

[66] *See Id.* at 473-74 ("The mere fact that he 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 until he has consulted with an attorney and thereafter consents to be questioned.").

[67] ER 3.

no penalty for using those rights.[68] Ms. Caruto, then, was in effect told that she could stop answering questions at any time – without any detriment to her. She did so, shortly after the interview began. As the evidence and argument unfolded at trial, however, the government's assurances proved false.

D. The government unfairly punished Ms. Caruto's exercise of her right to stop answering questions.

At trial, the government committed *Doyle* error by highlighting things that Ms. Caruto did not say before she invoked. As an initial matter, these facts were not inconsistencies but omissions or ambiguities that would have been resolved had Ms. Caruto chosen to continue the interview. Viewed in light of the agent's testimony on both direct and cross examination, Ms. Caruto's statements – both before and during trial – can be summarized as follows:

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[68] *See Doyle*, 426 U.S. at 618-619 ("while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings.")

Post-Arrest Statement[69]	Trial Testimony[70]
• lent the truck to individuals (either didn't say who or not asked who in the interview) in Mexicali, three to four weeks prior to her arrest;	• lent the truck to individuals Elisa and Jose in Mexicali, three weeks prior to her arrest
• received the vehicle on that date and was going or told to go to Los Angeles;	• received vehicle on that date after test drive, told to drive to Los Angeles if she wanted to sell to Jose;
• believed she was helping her friend.	• believed she was helping her friend by giving money to Elisa and trying to sell truck to Jose.

The government, however, punished Ms. Caruto for what she did *not* say. Despite the fact that it had already admitted that no one asked her about selling the truck before she invoked, the government explicitly argued, "She didn't say I was selling the truck."[71] Though the case agent admitted that he may not have asked who borrowed her truck,[72] the prosecutor argued that Ms. Caruto should have volunteered this information – including Jose's phone number and the fact that she

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[69] ER 66 (direct of agent); 85-90 (cross of agent).

[70] ER 144-152 (direct of Ms. Caruto).

[71] ER 323.

[72] ER 90.

declined to go to L.A.[73] These questions and arguments attempted to create inconsistency where there was none, and highlighted things that Ms. Caruto did not say to the agents, rather than what she did. They punished the exercise of her right to stop questioning. Under *Doyle* and *Miranda*, reversal must result.

II. *Ochoa-Sanchez* and similar right-to-silence cases do not apply where a person gives a short statement and then invokes.

A. *Anderson v. Charles* and *Ochoa-Sanchez* are factually distinguishable because those defendants did not invoke their rights after a brief statement.

The government will claim that *Anderson v. Charles*[74] and *United States v. Ochoa-Sanchez*[75] permitted its actions in this case. Given that these cases do not address instances where the defendant invokes, and they cannot be stretched to apply to the facts of this case, they do not control here.

First, neither *Charles* nor *Ochoa-Sanchez* dealt with a defendant who invoked their rights and stopped the interview. They certainly did not address a situation where the defendant gives a short statement, then almost immediately invokes. Both cases seemed to involve full statements post-arrest, and they analyzed the right to complete silence. Neither case spoke to the right to stop an

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[73] ER 345-346 (overruled objections omitted); ER 101.

[74] 447 U.S. 404 (1980).

[75] 676 F.2d 1283, 1286 (9th Cir. 1982).

interview after it began. The right to terminate an interview was never raised or addressed in either case. As such, *Doyle* controls the result here, not *Charles* and *Ochoa-Sanchez*.

Legal scholarship also confirms that notwithstanding *Anderson v. Charles*, a defendant who invokes or selectively answers questions should still enjoy *Doyle*'s full protections. In *Protecting Doyle Rights after Anderson v. Charles: the Problem of Partial Silence*, the author posited a case "where the defendant answers several questions and then decides to remain completely silent"[76]:

> *Doyle* surely prevents a prosecutor from impeaching the defendant by referring to this silence. The defendant clearly has the right to reassert his right to remain silent at any time; therefore, when a defendant ceases to answer questions there is a distinct possibility that he is relying on this right.[77]

The Note concluded that "[t]o allow the prosecution to refer to the defendant's silence in such a case would be inconsistent with *Doyle*."[78]

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[76] *See* Note, *Protecting Doyle Rights after Anderson v. Charles: the Problem of Partial Silence*, 69 Va. L. Rev. 155, 166 -167 (1983).

[77] *Id.*

[78] *Id.*

Second, both *Charles* and *Ochoa-Sanchez* permitted impeachment on actual inconsistencies – not omissions like the government highlighted in this case. In *Charles*, a defendant was found driving the car of a person who had been found murdered. Upon questioning, he stated that he had stolen the car from a particular intersection, about two miles away from the local bus station.[79] At trial, he testified that he took the car from a tire store parking lot – not an intersection – and that it was right next the bus station – not two miles away. The prosecutor inquired why the defendant did not provide the new, contradictory story at the time of his arrest. The Supreme Court found that no due process violation occurred under those facts. "Such questioning makes no unfair use of silence," the Supreme Court held, "because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all."[80]

Likewise in *Ochoa-Sanchez*, a defendant gave a post-arrest statement stating that he had driven into Mexico that morning, and that his purpose was to visit a friend.[81] He eventually stated that the man's name was Angel Ortega, and he

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79 *Id.* at 404-405.

80 *Id.* at 408.

81 676 F.2d 1283, 1284.

gave the street and apartment number where Angel lived. He did not provide a phone number. At trial, the defendant testified that he went to Tijuana with a person named Jose Angel Ortega actually in the car, that a person named Daniel Santillion was in the car, and that he eventually drove the car back because he did not want to be in Tijuana any longer. This Court acknowledged that "[i]f defendant had invoked his right to remain silent in response to Miranda warnings, questioning that asked why certain information had not been revealed would have been improper." However, because the defendant did not invoke, and the statements were inconsistent at trial, the Court held that cross-examination was proper.[82] In both cases, actual inconsistencies presented themselves, and the prosecutor arguably did no more than a highlight these inconsistencies to the jury. However, there were not actual inconsistencies in Ms. Caruto's case and these cases do not control.

The government may point to broad language in *Ochoa-Sanchez* suggesting that the prosecutor "may probe all post-arrest statements . . . including defendants' failure to provide critical details,"[83] however, reliance on that language is misplaced here. First, as addressed above, *Ochoa-Sanchez* did not

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[82] *Id.* at 1286-1287.

[83] *Id.* at 1286.

address an invocation case. There is no way to reconcile the Supreme Court holding in *Doyle* with the notion that the government can impeach "the omission of critical details" after assuring the suspects that they can stop an interview at any time. Moreover, the language quoted above has been criticized as not essential to the holding of the case, and as failing to take into account the strictures of *Doyle* itself.[84] In initially agreeing to answer questions, a defendant does not forever abandon his *Miranda* and *Doyle* rights to stop an interview without a penalty. *Ochoa-Sanchez* and *Anderson v. Charles* do not hold otherwise. This Court should recognize the limitations of those holdings, and reverse Ms. Caruto's conviction for a more basic violation of her Fifth Amendment rights as expressed in *Doyle*.

C. Even assuming that the law permits impeachment on inconsistencies in an invocation case, error still occurred.

Even if the Constitution permits impeachment on actual inconsistencies in invocation cases, the Court should still reverse here. Even right-to-silence cases (as opposed to the right-to-stop-questioning question presented here)

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[84] *See United States v. Makhlouta*, 790 F.2d 1400, 1408 n.3 (9th Cir. 1986) (Norris, J., dissenting); *Ochoa-Sanchez*, 676 F.2d at 1289-1291 (Fletcher, J.dissenting); *Bass v. Nix*, 909 F.2d 297(8th Cir. (1990) ("The dissent in *Ochoa-Sanchez* merits some attention.").

hold that the government should be permitted only to impeach on actual inconsistencies.

In *United States v. Cantebury*,[85] a federal appellate court held that the prosecution committed *Doyle* error by cross-examining the defendant on his failure to inform arresting officers of the details of his exculpatory story.[86] During his post-*Miranda*, post-arrest interview, the defendant, who was charged with possession of a firearm, only made three statements: he had no other silencers; that he had bought the silencer at issue; and that he needed the weapon for protection.[87] At trial, he asserted a defense of entrapment and testified on his own behalf.[88] During cross-examination, the prosecutor questioned the defendant about his failure to tell police that he had been set up.[89] The court concluded that this cross-examination was improper because the post-arrest statements were consistent with the trial testimony, and the "inference suggested by the line of questioning [was]

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85 985 F.2d 483, 484-85 (10th Cir. 1993).

86 *Id.* at 486.

87 *Id.* at 484-85.

88 *Id.*

89 *Id.* at 485.

that Cantebury was guilty because an innocent person would have presented the set-up theory to the arresting officers."[90]

Similarly, the Second Circuit has recognized that even where a defendant has made statements after receiving *Miranda* warnings, he is "deemed to maintained his silence, unless the post-arrest statements are inconsistent with the defendant's testimony at trial."[91] There, the defendant acknowledged during post-arrest questioning that he knew a co-defendant, and that they were considering buying a pizzeria.[92] At trial, he asserted that he was in the business of importing precious stones. On cross-examination, the prosecutor questioned the defendant as to whether he had ever told agents that he had been dealing precious stones with the co-defendant.[93] Given that the defendant's post-arrest statement was not logically inconsistent with his testimony, in that it was plausible that he could have considered buying a pizzeria while concurrently having a business of

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90 *Id.* at 486.

91 *United States v. Casamento*, 887 F.2d 1141, 1179 (2d Cir. 1989).

92 887 F.2d at 1179.

93 *Id.*

importing stones, the appellate court held that questions regarding this omission violated *Doyle.*[94]

In *United States v. Laury,*[95] a suspect gave a post-*Miranda* statement during which he denied participating in a robbery. At trial, he provided an excuse that he had previously failed to mention. The prosecutor cross examined the defendant on this omission, and argued it to the jury.[96] Citing *Doyle,* and following the same reasoning described above, the Fifth Circuit held that error occurred.

Finally, in *Bass v. Nix,*[97] the Eighth Circuit considered a case in which the defendant made some statements about a murder after his arrest. The prosecutor later impeached the defendant at trial with things that the defendant did not say after his arrest. The Eighth Circuit held that "[t]he key to the inquiry has always been whether the impeachment was based on post-arrest statements contradicting later trial testimony or whether the impeachment was based on silence contradicting later trial testimony."[98] The Court found that the statements made at

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94 *Id.*

95 985 F.2d 1293 (5th Cir. 1993).

96 1301-1302.

97 909 F.2d 297, (8th Cir. 1990) (overruled on unrelated grounds by *Brecht v. Abrahamson,* 507 U.S. 619 (1993).

98 *Id.* at 304.

trial did not contradict the statements made before, as such it found error in the impeachment.

As in each of these cases, Ms. Caruto's trial testimony was not logically irreconcilable with her post-arrest statements. The fact that she allowed people to borrow her truck either did not preclude the fact that she was trying to sell the same truck that day. The fact that she did not say who borrowed the car earlier did not foreclose that it was Jose Jimenez who gave her the car back shortly before her arrest. Also the fact that Ms. Caruto said she was told to go to Los Angeles – or even that she was *going* to Los Angeles (for the sake of argument) – did not preclude the fact that she was first going to Calexico. The statements were simply not inconsistent.

However, the government did not limit itself even to what it considered inconsistencies. It argued, repeatedly, that Ms. Caruto should have provided a phone number for Jose. The government stressed that she should have told agents that she was trying to sell her truck, as she did at trial. The government asked rhetorically why Ms. Caruto did not say she just talked to Jose and that he must have put the cocaine in the vehicle. These are all facts that the government never asked her about, and that it admitted did not come

up in the truncated interview. Even affording the government the most favorable view of the evidence possible – which this Court does not have to do on *de novo* review – the fact remains that the government impeached on omissions, not inconsistencies.

In sum, *Ochoa-Sanchez* and *Anderson v. Charles* simply do not apply to a case where the defendant invokes mid-interview. At a minimum, this Court should hold these cases closely to their facts in a case like this, where the government attributed only three discrete sentences to the accused. In light of the majority rule articulated in *Bass*, *Laury*, *Cantebury*, and *Casamento*, and given the government's arguments punishing silence, not inconsistency here, this Court should reverse and remand for a new trial.

III. Even if no Constitutional violation occurred, the district court should have excluded the government's evidence and argument under the *Hale / Grunewald* supervisory power and Fed. R. Evid. 403.

Even if this Court were to find no Constitutional violation, it should reverse on evidentiary reasons because the evidence and argument was far more

prejudicial than probative. In *United States v. Hale*[99] and *Grunewald v. United States*,[100] the Supreme Court used its supervisory authority and the principles of evidence to prevent unfair impeachment of a defendant who invoked his rights. In so doing, it identified three factors that suggested that silence was not inconsistent with later statements at trial: (1) repeated assertions of innocence during the pretrial statement; (2) the secretive nature of the tribunal in which the initial questioning occurred; and (3) the focus on the defendant as potential defendant at the time of the arrest.

Though the *Hale* Court addressed complete silence instead of the partial silence that Ms. Caruto adopted, all three factors were present here. First, Ms. Caruto repeatedly professed her innocence during the brief interview. Second, the interview was secretive: the agent purposefully failed to audio or videotape the questioning. Third, Ms. Caruto was the only suspect at the time of arrest – she was the driver and sole occupant of the car containing drugs. These factors all demonstrate that any omissions lack probative force – even if *Anderson v. Charles* and *Ochoa-Sanchez* somehow permitted their exploitation.

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[99] 422 U.S. 171 (1975).

[100] 353 U.S. 391 (1975).

The Supreme Court also identified the unique pressures of post-arrest interrogation that tend to render omissions and inconsistencies of questionable probative value. "In these often emotional and confusing circumstances," the Court observed, "a suspect may not have heard or fully understood the question, or may have felt there was no need to reply."[101] "He may have maintained silence out of fear or unwillingness to incriminate another. Or the arrestee may simply react with silence in response to the hostile and perhaps unfamiliar atmosphere surrounding his detention."[102]

These factors also fully apply here. It is entirely possible that Ms. Caruto and the agent miscommunicated, that the circumstances did not lend themselves to linear answers to agents' questions, or that Ms. Caruto was scared to discuss Jose Jimenez at the time. None of these facts are probative of guilt, but the omissions elicited were greatly prejudicial. Whether under the supervisory powers articulated in *Hale* and *Grunewald*, or simply under Fed. R. Evid. 403, this conviction should be reversed.

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101 422 U.S. at 177.

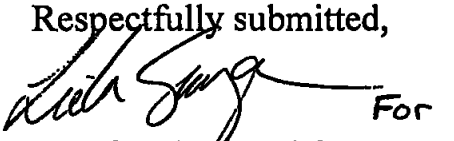
102 *Id.*

Conclusion

Sound policy and fundamental fairness require that Ms. Caruto receive a new trial. A government agent purposefully failed to record her post-arrest interrogation, then the government attempted to exploit "inconsistencies" that were not born out by the agent's notes. The prosecutor then went beyond even those purported inconsistencies to comment on facts that were admittedly never addressed in the interview. This Court should take the opportunity to hold that *Miranda* means what it says – a person can stop answering questions at any time. The Court should enforce *Doyle*'s implied assurance that the exercise of Fifth Amendment rights will exact no penalty at trial – even if the defendant first answered a few questions. Unless *Miranda* warnings actually read: "you may stop answering questions at any time – but we will then highlight anything that you neglected to mention or that we forgot to ask," this case should be reversed and remanded for a new trial.

Dated: July 10, 2007

Respectfully submitted,



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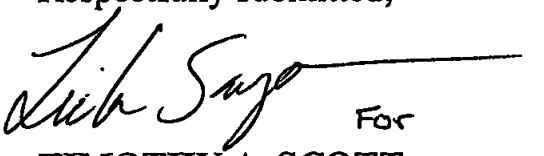
CERTIFICATE OF RELATED CASES

Counsel for the Appellant is unaware of any related cases pending before this Court, which should be considered in this appeal.

Respectfully submitted,



DATED: July 10, 2007

TIMOTHY A. SCOTT
Attorney for Mr. Caruto

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 07-50041

I certify that: (check appropriate options(s))

X 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/~~answering/reply/cross~~ appeal brief is

X Proportionately spaced, has a typeface of 14 points or more and contains 6,480 words (opening, answering, and the second and third briefs filed in cross-appeals must **NOT** exceed 14,000 words; reply briefs must **NOT** exceed 7,000 words),

or is

❑ Monospaced, have 10.5 or fewer characters per inch and contain _____ words or _____ lines of text (opening, answering, and second and third briefs filed in cross-appeals must **NOT** exceed 14,000 words, or 1,300 lines of text; reply briefs must **NOT** exceed 7,000 words or 650 lines of text).

___ 2. The attached brief is **NOT** subject to the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because

❑ This brief complies with FED. R. APP. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

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___ 3. *Briefs in Capital Cases*

- ❑ This brief is being filed in a capital case pursuant tot he type-volume limitations set fourth a Circuit Rule 32-4 **and is**

- ❑ Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering, and the second and third briefs filed in cross-appeals must **NOT** exceed 21,000 words; reply briefs must not exceed 9,800 words)

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_____4. *Amicus Briefs*

- ❑ Pursuant to FED. R. APP. P. 29(d) and 9TH CIR. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less.

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- ❑ **NOT** subject to the type-volume limitation because it is an amicus brief of no more than 15 pages and complies with FED. R. APP. P. 32(a)(1)(5).

July 10, 2007
Date

For Timothy A. Scott
Signature of Attorney or
Unrepresented Litigant

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Petitioner-Appellee, v. **ELIDE T. CARUTO,** Respondents-Appellant.	)	**U.S.C.A. No. 07-50041**

I, the undersigned, say:

1. That I am over eighteen (18) years of age, a resident of the County of San Diego, State of California, not a party in the within action, and that my business address is 56 4th Avenue, Suite 203, Chula Vista, California, 91910; and

2. That I mailed and ORIGINAL AND FIFTEEN (15) COPIES OF THE APPELLANT'S OPENING BRIEF; FIVE COPIES OF THE EXCERPTS OF RECORD; to the United States Court of Appeals for the Ninth Circuit; P.O. Box 193939, San Francisco, California, 94119-3939; and

3. That I served the within Petitioner-Appellant's Opening Brief and Excerpt of Record along to counsel for Respondent-Appellee by mailing a copy to:

KAREN P. HEWITT, United States Attorney
Attention: Nedville Hedley
Assistant U.S. Attorney
880 Front Street
San Diego, California 92101

4. That I caused to be delivered an additional copy to Appellant-Defendant and the same were delivered and deposited in the U.S. mails, first class postage prepaid, at San Diego, California, on July 10, 2007.

I certify that the foregoing is true and correct. Executed on July 10, 2007, in San Diego, California.

SYLVIA FREEMAN