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 REPLY BRIEF

TIMOTHY A. SCOTT
433 G. Street, Suite 202
San Diego, California 92101
Telephone: (619)652-9962
Facsimile: (619)652-9964
Attorney for Ms. Caruto

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	U.S.C.A. No. 07-50041
	)	
Plaintiff-Appellee,	)	U.S.D.C. No. 06cr0281-WQH
	)	
v.	)	
	)	
ELIDE T. CARUTO,	)	
	)	
Defendant-Appellant.	)	
	)	

Introduction

This case squarely presents an important issue: when a defendant makes a brief post-arrest statement, and then accepts the government's invitation to "stop answering questions at any time" can the government later argue that the defendant is guilty because they failed to provide certain facts during the abbreviated interview? The answer in this case is no, for two reasons: 1) through impeachment by omission, the government impermissibly punished Ms. Caruto's exercise of her right to stop answering questions at any time; and 2) these comments extensively argued guilt through omission in this otherwise circumstantial case, demonstrating harmful error. For these reasons, the government's arguments in response should not be well taken, and this conviction and 168-month sentence should be reversed.

Argument in Reply

I. Ms. Caruto enjoyed the right to stop answering questions at any time, the government punished the exercise of this right by impeaching her testimony by omission rather than contradiction, and the government now erroneously limits its citations and analysis to right-to-silence cases.

The government argues in its response brief that Ms. Caruto did not remain silent after *Miranda* warnings, and that *Ochoa-Sanchez* and *Anderson v. Charles* thus permitted it to impeach with alleged inconsistencies "including the omission of crucial details."[1] This argument fails for three reasons: 1) this case involves the right to terminate an interview following a *Miranda* waiver – not the right to remain completely silent; 2) in a right-to-stop-questioning case, impeachment by omission violates *Doyle*, and the government impeached by omission here; and 3) the only authority that the government relies upon addressed defendants who gave full post-arrest statements and never invoked, thus does not apply to this case. This Court should reverse Ms. Caruto's conviction for all of these reasons.

A. This case concerns the right to stop answering questions at any time, and the government never addresses this distinct *Miranda* right in its brief.

In her opening brief, Ms. Caruto argued that the government obtained its

---

[1] *See e.g., GRB* at 15.

conviction and 168-month sentence by exploiting the fact that she exercised her Fifth Amendment rights partway into her post-arrest interview.[2] She argued specifically that the government violated *Doyle* when it implicitly promised Ms. Caruto that she could stop answering questions without penalty, and then argued that she was guilty because did not provide certain facts during this admittedly brief encounter.[3]

In response, the government misses the distinction between the right to stop an interrogation that is already underway, and the right to remain completely silent. The thrust of the government's response is that Ms. Caruto did not remain completely silent after receiving her *Miranda* warnings, thus its conduct did not constitute *Doyle* error.[4] The government overlooks that a *Miranda* waiver is not a binary affair. A defendant does not forever waive all *Miranda* protections the moment she agrees to answer questions. *Miranda* rights are more nuanced, and so must be the manner in which *Doyle* protects them. The Supreme Court teaches

---

[2] *See AOB* at 15, 17-22.

[3] *AOB* at 17-22.

[4] *See GRB* at 18 ("Caruto's contention . . . overlooks the fact that she did indeed make a brief statement"); *GRB* at 15 ("Caruto did not remain silent following the *Miranda* warnings, but rather made a statement, albeit a brief one. . . .'talking is not silence.").

that "[t]hrough the exercise of the option to terminate questioning, a suspect can control the subjects discussed, the time at which questioning occurs, and the duration of the interrogation."[5] "A person in custody may selectively waive his right to remain silent by indicating he will respond to some questions, but not to others" this Court has held.[6] Thus, contrary to the way the government frames its argument on appeal, the right to complete silence is not the only *Miranda* right that a defendant enjoys – and it is not the only right that the government can violate at trial.

It is the context of this distinct *Miranda* right – the right to *stop* answering questions partway into an interrogation – that this appeal arises. The government's case citations and analysis all address right-to-silence situations, rather than these different *Miranda* rights. The government does not begin to argue why its conduct did not violate the distinct right to terminate questioning. The fact remains that the government punished Ms. Caruto for terminating the interview without elaborating upon her post-arrest account. For this reason, the

---

5 *Michigan v. Mosley*, 423 U.S. 96, 103-04 (1975).

6 *United States v. Thierman*, 678 F.2d 1331, 1335 (9th Cir. 1982). *See also United States v. Lopez-Diaz*, 630 F.2d 661, 664 n.2 (9th Cir. 1980); *United States v. Lorenzo*, 570 F.2d 294, 297-98 (9th Cir. 1978).

Doyle error remains clear in this case, and this Court should reverse Ms. Caruto's conviction.

B. Impeachment by omission violates the right to stop answering questions at any time, and the government did so in this case.

Once one acknowledges that the right to stop questioning is a distinct right that can be violated under *Doyle*, the question becomes, did the government do so here? The answer is yes: impeachment by omission cannot be permitted when the defendant gives a brief statement then invokes, and the government did exactly that in this case.

1. When a defendant gives a brief statement and then invokes, the law prohibits impeachment by omission.

Federal precedent and legal scholarship alike confirm that when the government impeaches a defendant's brief or incomplete post-arrest statement by omission (rather than by showing actual contradictions), *Doyle* error results. The Second, Fifth, Eighth, and Tenth Circuits have all addressed situations where a defendant's limited post-arrest statement was impeached by omission, rather than

inconsistency, at trial.[7] Each circuit holds that impeachment by omission constitutes *Doyle* error.[8] Legal scholarship is in accord.[9] Though the government argues that it is permitted to highlight omissions from a post-arrest statement under these circumstances, the weight of federal authority and scholarship is to the contrary.

2. *The government impeached Ms. Caruto by omission by highlighting issues that it admits were not discussed in the brief post-arrest interrogation.*

The record – including the government's briefing on appeal – shows that impeachment by omission is exactly what occurred in Ms. Caruto's case.

First, the government admitted in the district court that Ms. Caruto's post-arrest statement was so brief that certain topics were not even discussed. Though

---

7 *See United States v. Cantebury*, 985 F.2d 483 (10th Cir. 1993) (finding *Doyle* error when prosecutor impeached by omission a defendant who made three statements post-arrest); *United States v. Casamento*, 887 F.2d 1141 (2d. Cir. 1989) (same); *United States v. Laury*, 985 F.2d 1293 (5th Cir. 1993) (same); *Bass v. Nix*, 909 F.2d 297 (8th Cir. 1990).

8 *Id.*

9 *See* Note, *Protecting Doyle Rights after Anderson v. Charles: the Problem of Partial Silence,* 69 Va. L. Rev. 155, 166-167 (1983) ("to allow the prosecution to refer to the defendant's silence in such a case would be inconsistent with *Doyle*.").

the government explicitly argued in closing, over objection, that "she didn't say I was selling the truck,"[10] the prosecutor had already conceded that Ms. Caruto *was never asked about this issue:*

[PROSECUTOR]: . . . . There was nothing in the post-arrest statement about selling the truck.

THE COURT: Was she asked about it?

[PROSECUTOR]: *I don't know that the agent necessarily had a chance to. She did invoke your Honor.* But that is a pretty critical detail.[11]

Thus, the government plainly argued an omission, not an inconsistency. It fails to justify this behavior in its response brief. On this fact alone, reversal is appropriate.

The government also admitted that the agents did not ask Ms. Caruto to elaborate on another statement she had made, stating, "*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.*"[12]

---

[10] ER 323.

[11] ER 295 (emphasis provided).

[12] ER 68 (emphasis provided).

The government's case agent made similar concessions during his testimony. Though the government attempts to characterize the name Jose Jiminez as an inconsistency in Ms. Caruto's post-arrest statement, not an omission, the facts from the government's own agent show otherwise:

Q: What it [the agent's contemporaneous notes] says is, she let someone borrow the truck, correct?

A: Yes.

Q: You would agree with me that nowhere in those notes does it say Ms. Caruto didn't know who.

A: That's correct.

Q: Or name unknown?

A: That's correct.

.....

Q: And isn't in fact what happened, she said someone had borrowed the truck and it just never got discussed exactly who it was?

A: That's possible.[13]

---

[13] ER 89-90 (omitting overruled government objection to the last question).

Thus, though the government attempts to suggest that Ms. Caruto stated that she did not know who had her car shortly before her arrest, its own witness's testimony contradicts this account. Before Ms. Caruto even testified, the record had been clarified that Ms. Caruto more likely said that someone had borrowed the car. Providing the name for this someone, when it had never been asked before, is not an inconsistency. It was an omission, caused by Ms. Caruto invoking her right to stop the interview.

Similarly, the case agent himself clarified that Ms. Caruto said that his notes reflect only that Ms. Caruto was *told* to go to L.A. – not that she was actually going to L.A.[14] As a result, the fact that she was actually *going* to Calexico was not inconsistent with this statement. Again, this clarification occurred through the government's own agent, before Ms. Caruto ever took the stand. Here too, there is no inconsistency, only later impeachment by omission.

Even on appeal, the government admits it impeached Ms. Caruto by omission. One need look no further than the government's Question Presented on appeal to discover what is really at stake in this case:

---

[14] ER 88-89.

> Whether the district court properly allowed the prosecutor to highlight during closing arguments the inconsistencies *and omissions* between Ms. Caruto's post-arrest statement following a valid waiver of her *Miranda* rights, and her testimony at trial.[15]

Citing distinguishable case law, the government further admits that "the prosecutor's comments during closing argument highlighted the arguable inconsistencies, *including Caruto's failure to provide critical details.*"[16] The government impeached by omission, and as a consequence, it violated *Doyle.* Reversal should result.

3. *The government erroneously attempts to characterize Ms. Caruto's post-arrest statements too broadly, in order to minimize its errors to this Court.*

When the government confronts particularly difficult portions of the arguments set forth above, it responds by attempting to frame Ms. Caruto's post-arrest statements as broadly as humanly possible: "the subject matter of that statement was her truck" it states repeatedly.[17] It employs this tactic, for example,

---

[15] *GRB* at 1.

[16] *GRB* at 23 (*citing United States v. Ochoa-Sanchez*, 676 F.2d 1283, 1286 (9th Cir. 1982) (emphasis provided) (internal punctuation omitted).

[17] *GRB* at 18. *See also GRB* at 20 ("there is no question that Caruto made a statement with respect to her truck."); at 22-23 (*Ochoa-Sanchez* not distinguishable "because Caruto did make a statement

to try to argue that it was fair to impeach Ms. Caruto by omission when she offered only a few sentences post-arrest, then said she was scared and invoked.[18] It does the same to claim that *Ochoa-Sanchez* and *Anderson v. Charles* are not distinguishable from this case, where Ms. Caruto invoked shortly after beginning the interview, and those defendants did not.[19] The government repeatedly suggests that the post-arrest was about "the truck" generally, thus any and all impeachment by omission was permitted under the law.

Several problems exist with this tactic, however. First, the record simply does not show what questions the government asked Ms. Caruto. The government purposefully presented only three discrete statements at trial. Because agents failed to preserve any kind of record of the interrogation, and the government chose not to elicit what questions the agents asked, we do not know *if* the agents asked her specifically about the truck, *what* they asked, or how they asked it. Second, the record affirmatively *does* show several things that the agents *did not* ask about: as discussed above, the government admits that the agents did not get a chance to ask about selling the truck – a key facet of the defense. Finally, in a

---

with respect to her truck and who used the truck.").

[18] *GRB* at 20.

[19] *GRB* at 22-23.

border-bust smuggling case, attempting to frame the issue this broadly is tantamount to arguing that "the subject of the statement was the issue of Ms. Caruto's guilt." Indeed, neither *Casamento*, *Cantebury*, *Laury*, or *Bass v. Nix* would have turned out the way they did if the government were permitted to paint a post-arrest statement with so broad a brush.[20] For all of these reasons, the government's attempt to reframe the issue on appeal should not be well received.

C. *Anderson v. Charles* and *Ochoa-Sanchez* involved defendants who gave full post-arrest statements and never invoked, thus they do not control this right-to-stop-questioning case.

The government half-heartedly states that "it is not entirely clear" whether the *Anderson* or *Ochoa-Sanchez* defendants ever invoked their rights to remain silent.[21] A reading of these cases actually makes this issue quite plain. The *Ochoa-Sanchez* statement of facts gives no hint that the defendant invoked his rights.[22] The Court's analysis squarely confirms that the defendant never invoked: "If defendant had invoked his right to remain silent in response to Miranda

---

[20] *See Discussion supra*, at 7.

[21] *GRB* at 22, n.7.

[22] *United States v. Ochoa-Sanchez*, 676 F.2d 1283, 1284 (9th Cir. 1982).

warnings, questioning that asked why certain information had not been revealed would have been improper" the Court began.[23] But the defendant "did not remain silent in response to Miranda warnings," this Court expressly found, "[h]e waived his right to remain silent and responded to the agent's questions."[24] It is fair to assume that if the defendant had invoked at the border in that case (as Ms. Caruto did here), the opinion would contain that fact, and this Court would have analyzed the issue. The record and opinion show instead that the defendant gave a complete statement at the border and did not invoke. The defendant's comments on cross-examination that he was silent were not supported by the record nor credited on appeal. The case remains distinguishable as a result.

Ochoa-Sanchez's legal analysis remains distinguishable too. It was explicitly a right-to-silence case.[25] That defendant-appellant did not argue or suggest that it was a right-to-terminate-interview case, as this one is. This key distinction, though ignored by the government in its brief, should not be ignored by this Court. *Ochoa-Sanchez* simply cannot be stretched to control a three-

---

23 *Id.* at 1286 (*citing Doyle v. Ohio*, 426 U.S. 610 (1976)).

24 *Id.*

25 *Id.* at 1286 ("Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent.").

sentence statement followed by invocation of *Miranda* rights.

It is equally clear that the defendant in *Anderson v. Charles*[26] gave a full statement, and did not invoke his rights at any time. Again, the statement of facts in that opinion does not suggest that the defendant ever ended the interrogation.[27] The Supreme Court never hints that the defendant invoked his rights or went silent. Again, if there is any language in *Anderson* or *Ochoa-Sanchez* suggesting that the defendants invoked, they were factual disputes resolved against the defendants and not credited on appeal. In this case the evidence was uncontradicted that Ms. Caruto basically gave three sentences, said she was scared, and invoked.[28] The issue of punishing someone for terminating an interview partway into it – as opposed to refusing to answer questions at all – was never presented in *Ochoa-Sanchez* or *Anderson*. It is squarely presented here, however, and should be resolved in Ms. Caruto's favor.

---

[26] *Anderson v. Charles*, 447 U.S. 404 (1980).

[27] *Id.* at 404-406.

[28] *See* ER 44-46.

II. The government stressed an inference of guilt from omission during testimony, closing argument, and rebuttal, thus error was harmful in this circumstantial evidence case.

When *Doyle* error occurs, the government bears the burden of proving that "absent the prosecutor's allusion . . . it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty."[29] In making this determination, this Court considers: 1) the extent of the comments made; 2) whether an inference of guilt from silence was stressed to the jury; and 3) the extent of other evidence suggesting the defendant's guilt.[30] In arguing harmlessness, the government marshals one unpublished alien-smuggling case where this Court has found harmless *Doyle* error.[31] The overwhelming majority of this Court's published decisions, however, demonstrate that under these facts, the prosecutor's comments must be considered extensive, as arguing guilt from silence, and as overshadowing any circumstantial evidence of guilt that might otherwise have existed. For all of these reasons, reversal is the only appropriate remedy.

---

[29] *United States v. Velarde-Gomez*, 269 F.3d 1023, 1034 (9th Cir. 2001) (en banc).

[30] *See United States v. Newman*, 943 F.2d 1155, 1158 (9th Cir. 1991).

[31] *GRB* at 25 (*citing United States v. Cline*, 2007 WL031572 (9th Cir., March 30, 2007)).

A. Because the government repeated its *Doyle* error during examination of a witness, closing argument, and again in rebuttal closing, its comments were "extensive" under this Court's precedent.

This Court's prior *Doyle* cases show what prosecutorial comments are considered "extensive" under the first prong of the harmless-error analysis. A review of *United States v. Baker*[32], *United States v. Newman,*[33] and *United States v. Foster*[34] demonstrates that the prosecutor's comments in this case were "extensive" as a matter of law.

In *Baker*, the prosecutor did not commit *Doyle* error with any witness or during the initial closing argument. In the rebuttal closing, however, the prosecutor argued:

> Reason and common sense in light of background experience. You're under arrest for bank robbery. What bank? I didn't do it. What are you talking about? Wouldn't that be the natural human response if you did it – not and not say anything more? There was no word from them after they were told what they were being arrested for.
>
> [objections and ruling]

---

32 999 F.2d 412 (9th Cir. 1993).

33 943 F.2d 1155 (9th Cir. 1991).

34 985 F.2d 466 (9th Cir. 1993).

> So there was no contesting by either defendant. Not even you as parents, when you have said, Johnny did you eat that extra cookie? No, mom. No, it wasn't me. You know how we all act when we're accused of something? There's nothing there.[35]

Though the government never elicited testimony from any witness that offended *Doyle,* and did not commit *Doyle* error in the first closing, this Court had no trouble holding that "the prosecutor's comments in his closing rebuttal were extensive" under the harmless error analysis.[36] It reversed the conviction accordingly.

This Court also reversed for harmful error in *United States v. Newman.*[37] There, the prosecutor elicited several comments about post-arrest silence from the same witness.[38] The trial judge, however, gave at least two curative instructions to counteract any *Doyle* error.[39] The prosecutor did not comment upon the silence through any other witnesses, in closing, or in rebuttal. This Court again found the

---

35 999 F.2d at 415.

36 *Id.* at 416.

37 943 F.2d 1155 (9th Cir. 1991).

38 *Id.* at 1156-1157.

39 *Id.*

comments "extensive" and reversed.[40]

And in *Foster,* the government asked the testifying defendant several questions about post-arrest silence, over defense objections. It also made "a later reference to her post-arrest silence . . . during closing argument" but the district court sustained the objection, instructing the jury to disregard it. Despite the fact that *Doyle* error occurred just twice, and that the district court actually instructed the jury not to consider the second instance, this Court found the error sufficiently extensive to require reversal.[41]

The government's testimony and comments were at least as extensive here as in *Baker*, *Newman*, and *Foster.* Compare the *Doyle* error in *Baker*, which this Court described as "extensive"[42] with what happened in Ms. Caruto's case:

---

[40] *Id.* at 1158.

[41] 985 F.2d at 468-469.

[42] 999 F.2d at 416.

Baker Witness Comments	*Caruto* Witness Comments
[None].	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?[43]
Baker Closing	*Caruto* Closing
[None].	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. She didn't say I was selling the truck.[44]
Baker Rebuttal	*Caruto* Rebuttal
Reason and common sense in light of background experience. You're under arrest for bank robbery. What bank? I didn't do it. What are you talking about? Wouldn't that be the natural human response if you did it – not and not say anything more? There was no word from them after they were told what they were being arrested for. So there was no contesting by either defendant. Not even you as parents, when you have said, Johnny did you eat that extra cookie? No, mom. No, it wasn't me. You know how we all act when we're accused of something? There's nothing there.[45]	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?[46] 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? No, she said I was told to go to LA. Her stories don't make sense. . . . Her testimony doesn't add up.[47]

[43] ER 101 (no curative instruction but sustained objection last question).

[44] ER 323-323 (overruled objections omitted).

[45] 999 F.2d at 415.

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

[47] *Id.*

If the conduct in *Baker* constituted "extensive" argument, then Ms. Caruto's was extensive as well.

A similar chart could be constructed for the *Newman* and *Foster* cases, with similar results. A column might also be added to show that in those cases, the juries received curative instructions, while none occurred here. In *Newman,* the trial judge gave repeated curative instructions when the prosecutor asked a series of questions from one witness; here, the district court gave no curative instructions at all. In *Newman,* the misconduct occurred with one witness, and not at all in closing or rebuttal. Here, it occurred with a witness[48], in closing, and in rebuttal alike. In *Foster,* there was a *Doyle* comment with one witness, which was permitted; and one in closing, which was not. Here, the district court sustained an objection with a witness (though it did not give a curative); then it overruled objections and permitted *Doyle* arguments in closing, and again in rebuttal. The

---

[48] The government thus misstates Ms. Caruto's position and the record when it asserts that "[t]he comments Caruto finds objectionable were two discrete comments in the midst of the prosecutor's closing and rebuttal arguments." *GRB* at 24. In reality, the government committed *Doyle* error with witness Kelley on redirect examination, as well. *See* ER 101. The government has yet to address the fact that it elicited comments from a witness in violation of *Doyle* and in defiance of the district court's motion in limine ruling at the time. *Cf.* ER 61d ([THE COURT:] "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.").

Baker, Newman, and *Foster* triad each resulted in reversal. Ms. Caruto's case was at least as extensive, and the result should be the same.

B. The prosecutor argued that Ms. Caruto's post-arrest omissions showed her knowledge of the concealed contraband, and made credibility the focus of his closing arguments, thus stressing guilt from silence to the jury.

Reversal is required under the second harmless-error factor because the government explicitly argued an inference of guilt from Ms. Caruto's omissions. The government did so: 1) with the language of its closing and rebuttal arguments itself; and 2) by making Ms. Caruto's credibility the centerpiece of its closing arguments. Reversal should result for both reasons.

1. The government explicitly argued that Ms. Caruto's omissions showed that she knew about the drugs concealed in the truck.

First, the government specifically pointed to Ms. Caruto's post-arrest omissions to argue guilt. At trial, both parties agreed that knowledge of the concealed contraband was the only disputed element of the offense.[49] Capitalizing on the omissions in Ms. Caruto's brief post-arrest statement, however, the

---

[49] *See* ER 322 (government stating "what is in dispute is whether the defendant knew"); ER 327 ("the attorney for the government is correct that the only question is whether this woman knew what was hidden in that gas tank...").

government specifically characterized her omissions as proof of her knowledge (and thus of her guilt). The government essentially began its closing with the statement, "Ladies and gentlemen, the defendant knew. And how do we know she knew? Well, let's look at what she said to Agent Kelly and Agent Ballard at the Port of Entry on the date of her arrest."[50] The prosecutor continued a moment later, "ladies and gentleman, *that's how you know.* She didn't say that it was Jose Jiminez, and by the way, here's his phone number because I just spoke to him."[51] "She didn't say I was selling the truck. . . . But now, seven months later, she comes here into court and here's what she has to say."[52] Rebuttal closing was no different, as the government clearly argued that Ms. Caruto's omissions showed her knowledge of the contraband and hence her guilt.[53] This closing argument and rebuttal explicitly offered the omissions as "how the jury could know" that Ms. Caruto was guilty. For this reason, the government's argument fails the second prong of the harmless-error analysis.

---

50 ER 322.

51 *Id.* (emphasis provided).

52 ER 323.

53 ER 345-346.

2. *The government admits that it made Ms. Caruto's credibility the centerpiece of its closing arguments, providing further evidence that the error was not harmless.*

This Court has recognized that when the government uses post-arrest omissions to undermine a defendant's credibility, and the accused's credibility is central to the defense, harmful error occurs. In *Foster*, this Court relied upon "the critical nature of [the defendant's] own testimony and the prejudicial effect of the government's use of the post-arrest silence" in reversing the conviction.[54] In a line of cases including the *en banc* decision *United States v. Velarde-Gomez*,[55] this Court consistently holds that when a defendant's testimony and credibility are key to the defense, *Doyle* violations constitute harmful error.

Here, by the government's own admission, Ms. Caruto's credibility was central to the case. It argued accordingly in its closing and rebuttal. "[T]he majority of the prosecutor's argument emphasized the fact that Caruto's trial testimony was not believable" the government states on appeal.[56] "The prosecutor

---

[54] 985 F.2d at 469.

[55] 269 F.3d 1023, 1035-1036 (9th Cir. 2001) (en banc) (citing *United States v. Foster*, 227 F.3d 1096, 1101 (9th Cir. 2000) (reversing border-bust conviction for erroneous admission of prior conviction because "credibility was of utmost importance.")).

[56] *GRB* at 24.

also devoted a substantial amount of time during rebuttal arguing that neither the post-arrest statement nor her trial testimony were [sic] to be believed" it continues.[57] But perhaps most strikingly, the government actually invited the jury *to ignore all of the government's other evidence and to convict Ms. Caruto based on her statements and post-arrest omissions alone.* As the government now admits:

> the prosecutor stated that the jury could disregard the evidence offered by the United States and still find Caruto guilty beyond a reasonable doubt "based on her own testimony, her testimony to [the jury] and not what she told Agent Kelley."[58]

These comments simply destroy any harmless-error argument. The government plainly told the jury to convict Ms. Caruto based on her testimony and post-arrest omissions alone. Even if the government were now to disavow the plain meaning of this argument, and claim that it meant something else, the result would be the same. The prosecutor's subjective intent cannot save prejudicial *Doyle* comments from being harmful error.[59] The prosecutor's comments stressed

---

[57] *GRB* at 25.

[58] *GRB* at 14.

[59] *See United States v. Baker*, 999 F.2d 412, 416 (9th Cir. 1993) (government "counsel's subjective intent cannot save his overly broad statements"); *United States v. Negrete-Gonzalez*, 966 F.2d 1277,

that Ms. Caruto was guilty and not credible because of her omissions, and were prejudicial by any standard. The error was harmful.

C. The government provided only circumstantial evidence to show knowledge of the contraband, considerable evidence corroborated Ms. Caruto's account, and the jury did not convict easily, thus the weight of the other evidence does not prove harmless error either.

The last factor that this Court considers in evaluating *Doyle* error is the weight of the other evidence against the defendant. When as here, evidence of guilt is purely circumstantial, the other evidence is generally insufficient to show harmless error beyond a reasonable doubt. In a 2000 case also called *Foster*, the defendant's car, which he did not own, contained sixty-eight pounds of marijuana, smelled strongly of fabric softener (to mask the smell of narcotics), the defendant wore poorly fitting clothes and shoes given to him by a person with an unknown last name, and he gave inconsistent statements to Customs agents at the border.[60] This Court nevertheless declined to find harmless error, because as here, the evidence of knowledge of the drugs was only circumstantial.[61]

1281 (9th Cir. 1992) ("We decline the government's invitation to allow subjective intent to rescue obviously impermissible questioning. To hold otherwise would render meaningless the rule of *Doyle* and *Fletcher*.").

60 227 F.3d 1096, 1098-99 (9th Cir. 2000).

61 *Id.*

This Court, sitting *en banc*, reached the same result in *Velarde-Gomez,* and for similar reasons. There, defendant's car contained sixty-three pounds of marijuana, its gas tank could hold less than two gallons of fuel but the defendant claimed he was returning home to Hemet, California, and he told a "not necessarily compelling" story at trial that a prostitute must have orchestrated the drug venture in twenty minutes while he was in the shower.[62] Despite acknowledging some problems with the defendant's story, the *en banc* Court reversed, holding that error was not harmless.[63] And in the 1993 *Foster* case, the government had independent, videotaped evidence of the defendant's presence at a methamphetamine lab. This Court still found that error was not harmless.[64] This evidence, plus some corroboration of the defendant's story by other witnesses "serves to underscore the critical nature of [the defendant's] own testimony and the prejudicial effect of the government's use of the post-arrest silence."[65] In each situation, fairly damning "other evidence" did not create harmless error.

---

[62] 269 F.3d 1023, 1035-36.

[63] *Id.* at 1035.

[64] 985 F.2d at 469.

[65] *Id.*

The weight of the other evidence against Ms. Caruto was no stronger, and was in fact considerably weaker, than in the cases cited above. Like the *Velarde-Gomez* case and the *Foster* border-bust case, the evidence of knowledge was entirely circumstantial. Ms. Caruto always professed her innocence. Her defense was considerably more plausible than in *Velarde-Gomez* or *Foster*, and the other evidence was no more damaging than in those cases. Like the 1993 *Foster* case, Ms. Caruto testified to a plausible version of events, and a variety of witnesses confirmed key portions of her story.[66] The government even admits on appeal that in a recorded phone call from the jail soon after her arrest, Ms. Caruto gave an account *consistent with* her trial testimony that she was trying to sell her truck in Mexico[67] (though this knowledge did not stop the government from portraying her

---

[66] *See e.g.*, ER 182-186 (corroborating errands and that Jose took the car 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).

[67] *See GRB* at 7 ("The United States had in its possession a phone call that Caruto made while in custody, in which she said to a friend that she was down in Mexico attempting to sell her truck, something which she did not mention in her post-arrest statement when the agents asked her about her truck.").

trial testimony as recently fabricated in closing argument).[68] The other evidence against this grandmother with virtually no criminal history was circumstantial and far from overwhelming.

The weight of the government's other evidence was revealed in difficult jury deliberations as well:

- The jury deliberations in this case spanned over two days – which was at least as long as the evidence itself;[69]
- the jury wanted a copy of the interrogating agent's report of investigation[70], showing that Ms. Caruto's post-arrest statement was at the heart of the case; and
- the jury inquired whether any transcripts were available, presumably for the same reason.[71]

---

[68] *See* ER 323 ("but now, seven months later, she comes here into court and here's what she has to say:").

[69] ER 385. *See Velarde-Gomez*, 269 F.3d at 1036 ("longer jury deliberations 'weigh against a finding of harmless error because lengthy deliberations suggest a difficult case.'") (internal punctuation and citations omitted).

[70] ER 363 (denying report to jury); GRB 15.

[71] ER 363 (advising that transcripts were not available).

The jury did not convict Ms. Caruto easily, and the deliberations and jury questions seemed to center on the interrogating agent and Ms. Caruto's post-arrest statements. The error was not harmful beyond a reasonable doubt.

D. Inviting the jury to convict Ms. Caruto on her testimony and omissions alone constitutes reversible error distinct from the three-pronged *Doyle* harmless-error analysis.

Independent of the traditional three-pronged harmless error analysis, Ms. Caruto's conviction should be reversed because the government "stated that the jury could disregard the evidence offered by the United States" and convict Ms. Caruto based upon her testimony and post-arrest omissions alone.[72] Consequently, it is difficult to tell – and impossible to tell beyond a reasonable doubt – whether the jury convicted on the other evidence or on the *Doyle* error. The Supreme Court has explained that when a jury is provided with two ways to convict a defendant, and one is unconstitutional, reversal is required: "In these circumstances we think the proper rule to be applied is that which requires a

---

[72] *See GRB* at 14 (admitting that "the prosecutor stated that the jury could disregard the evidence offered by the United States and still find Caruto guilty beyond a reasonable doubt 'based on her own testimony, her testimony to [the jury] and not what she told Agent Kelley.'").

verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected."[73] The Supreme Court has since affirmed "the principle that, where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground."[74]

Though *Yates* and its progeny addressed jury instructions rather than arguments by the prosecutor, the principle remains the same: it is impossible to say whether the jury accepted the government's invitation to disregard the other evidence, and convicted on Ms. Caruto's improperly impeached testimony alone. Because the government bears the burden of proving harmless error beyond a reasonable doubt, this predicament must be resolved in the appellant's favor. Reversal is the only appropriate remedy.

---

[73] *Yates v. United States*, 354 U.S. 298, 312 (1957) (citations omitted), *overruled on unrelated grounds by Burks v. United States*, 437 U.S. 1 (1978).

[74] *Griffin v. United States*, 502 U.S. 46, 53 (1991). *See also Williams v. North Carolina*, 317 U.S. 287, 292 (1942) ("[t]o say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury, would be to countenance a procedure which would cause a serious impairment of constitutional rights.").

Conclusion

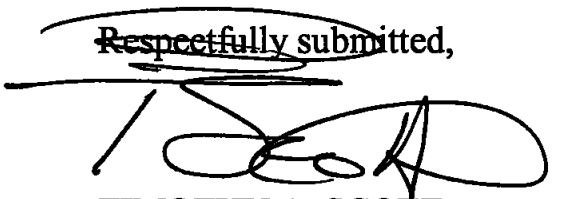
What happened to Ms. Caruto was not just. Customs agents arrested her and told her that she had certain *Miranda* rights, including the right to stop questions at any time. Legally, that warning carried with it the promise that if Ms. Caruto exercised her rights, she would not be punished for it. Ms. Caruto took the agents up on their offer, answering a few questions but then invoking. She told agents she was scared. She then began vomiting, and was taken by ambulance to the hospital.

At trial, the government did not keep its implicit promise not to punish her for stopping the interview. The prosecutor argued that she was guilty because she did not discuss facts that even the government admitted had not come up before she invoked. Though government deliberately failed to record the interview, thus destroying the only neutral record of what really happened, it then claimed that Ms. Caruto had testified inconsistently – even though these "inconsistencies" contradicted the agent's notes. The jury then convicted Ms. Caruto, but not before asking for the agent's report and for transcripts, and being told that they were not available. This grandmother is now serving a 168-month sentence. For all these reasons, this Court should hold that when a defendant gives a brief statement and then invokes, pure impeachment by omission constitutes *Doyle* error.

Accordingly, this conviction should be reversed and remanded for a new trial, uninfected by *Doyle* error.

Dated: September 24, 2007

Respectfully submitted,



TIMOTHY A. SCOTT
433 G. STREET, Suite 202
San Diego, California 92101
Telephone: (619)652-9962
Facsimile: (619)652-9964
Attorney for Ms. Caruto

LAW OFFICES OF
TIMOTHY A. SCOTT
A PROFESSIONAL CORPORATION

OLD CITY HALL BUILDING
433 G STREET, SUITE 202
SAN DIEGO, CALIFORNIA 92101

TELEPHONE (619) 652-9970
FACSIMILE (619) 652-9964

September 10, 2007

Neville S. Hedley
Assistant U.S. Attorney
Federal Office Building
880 Front Street, Room 6293
San Diego, California 92101-8893

Re: *United States v. Caruto*, 07-50041

Dear Mr. Hedley,

Per our conversation this morning, I have obtained a fourteen-day extension for the reply brief in this appeal. The brief is now due September 24, 2007.

Please do not hesitate to contact me with any questions or concerns that you may have.

Sincerely,

TIMOTHY A. SCOTT
Attorney for Ms. 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 option(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 6,527 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;

☐ This brief complies with a page or size-volume limitation established by separtate court order date _____ and is

☐ Proportionately spaced, has a typeface of 14 points or more and contains ____ words,

or is

☐ Monospaced, has 10.5 or fewer characters per inch and contains ____ pages or ____ words or ____ lines of text.

___ 3. *Briefs in Capital Cases*

☐ This brief is being filed in a capital case pursuant to the typ-volume limitations set forth in 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 brefs must not exceed 9,800 words)

☐ Monospaced, have 10.5 or fewer characters per inch and contain _____ words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must **NOT** exceed 75 pages or 1,950 lines of text; reply briefs must **NOT** exceed 35 pages or 910 lines of text).

___ 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.

or is

☐ Monospaced, has 10.5 or fewer characters per inch and contains not more than either 7,000 words or 650 lines of text.

or is

☐ **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).

September 24, 2007
Date

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, not a party to this action, that my business address is 433 G Street, Suite 202, San Diego, California, 92101; and

2. That I mailed an ORIGINAL AND FIFTEEN (15) COPIES OF THE APPELLANT'S REPLY BRIEF; 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 Reply Brief upon counsel for Respondent-Appellee by mailing a copy to:

KAREN P. HEWITT, United States Attorney
Attention: Neville 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 September 24, 2007.

I certify that the foregoing is true and correct. Executed on September 24, 2007, in San Diego, California.

Timothy A. Scott