No. 11–175

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

VS.

JOHNATHAN ANDREW DOODY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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REASONS FOR GRANTING THE WRIT

Doody asserts that "in this unusual case" this Court should not squander its "valuable and limited resources," claiming that "the majority's analytical approach and its conclusions were fully respectful of the State Court, and appropriately implemented this Court's Constitutional and AEDPA jurisprudence." (Brief in Opposition at 8.) Nothing could be further from the truth. As aptly pointed out by the dissent:

> The Supreme Court has repeatedly told us to adhere to the highly deferential standard of review of state court judgments that the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d), requires in federal habeas cases. But *my colleagues continue to treat this case as if it were on direct appeal to be reviewed de novo*. The majority will not yield to the shot across our bow fired by the Supreme Court when it granted Arizona's petition for certiorari and vacated and remanded our original en banc decision for reconsideration in light of *Florida v. Powell*, 130 S. Ct. 1195 (2010)—a case that reaffirms the Court's precedent under which the Arizona Court of Appeals' decision upholding Doody's confession reasonably fits. *See Ryan v. Doody*, 131 S. Ct. 456 (Oct. 12, 2010) (Mem.). Subsequently, the Court fired a torpedo amidships in *Harrington v. Richter*, 131 S. Ct. 770 (2011). But the majority steams defiantly ahead, far from the rest of the fleet.

(App. A at 96–97, emphasis added.) Quite simply, the majority is "unrepentant." (*Id.* at 98.) In fact, this case is a perfect candidate for summary *per curiam* reversal. *See*, *e.g.*, *Felkner v. Jackson*, 131 S. Ct. 1305, 1307 (2011) (*per curiam*) ("On federal habeas review, AEDPA imposes a highly deferential standard for evaluating state-court rulings' and 'demands that state-court decisions be given the benefit of the doubt'") (quoting *Renico v. Lett*, 130 S. Ct. 1855, 1862 (2010)); *Woodford v. Visciotti*, 537 U.S. 19, 24–27 (2002) (*per curiam*) (noting that in finding state court's determination "unreasonable," the Ninth Circuit disagreed with the state court's assessment of facts, but that AEDPA "leaves primary responsibility with the state courts for these judgments, and authorizes federal-court intervention only when a state-court decision is objectively unreasonable")

I. *The Arizona Court of Appeals' Determination that Doody was Adequately Advised of and Waived his Miranda Rights was not Objectively Unreasonable.*

In his opposition, Doody asserts, "Arizona did not even defend these [*Miranda*] warnings on the merits in State court." (Brief in Opposition at 10.) This mischaracterizes the state court record.

In state court, the State of Arizona asserted that Doody was not "in custody" when he voluntarily accompanied detectives to the Task Force headquarters and was questioned and, therefore, *Miranda* was simply inapplicable. *See*, *e.g.*, *Stansbury v. California*, 511 U.S. 318, 322 (1994) (*Miranda* warnings required only if person being questioned is "i*n custody*"); *Oregon v. Mathiason*, 429 U.S. 492, 494–95 (1977) (same).

Indeed, the trial court found that Doody was not "in custody" for purposes of *Miranda*:

> As to [Doody], this Court finds that *he was not under arrest or in custody when he was transported to the task force offices for questioning* on October 25, 1991. Even though not in custody, law enforcement did advise defendant Doody of his Miranda rights in language that could, and, in fact, was, clearly understood by defendant Doody. This Court further finds that defendant Doody did knowingly, voluntarily, and intelligently give up his right to remain silent and to have an attorney or a parent present while being questioned and did agree to talk.

(App. D at 4, emphasis added.)

On appeal, the State argued that Doody waived the trial court's finding that he was not "in custody," because he did not challenge the trial court's ruling to that effect. (See App. C at 17.) The State *alternatively* argued that Doody was adequately advised of and waived his *Miranda* rights. (See id.) The Arizona Court of Appeals gave Doody the benefit of the doubt in finding that *Miranda* applied:

> The state's waiver argument relies on an overbroad reading of the trial court's findings. The trial court's factual findings resolved only the limited issue that Doody "was not under arrest or in custody *when he was transported to the task force offices for questioning* on October 25, 1991." Contrary to the state's assertion, the

> trial court did not address whether Doody was in custody during the interrogation. Doody's failure to challenge the trial court's narrow finding that he was not in custody prior to the interview does not constitute a waiver of his argument that the officers failed to advise him sufficiently of his rights before obtaining his inculpatory statements. For purposes of review, we accept Doody's characterization of the questioning as a custodial interrogation requiring *Miranda* warnings.

(*Id.*, emphasis in original.) The court of appeals then went on to find that Doody was adequately advised of and waived his *Miranda* rights. (*Id.* at 17–18.)

Thus, while the State asserted, both in the trial court and on appeal, that *Miranda* was inapplicable, it has *always* maintained that Doody was adequately advised of and waived his rights.

Doody also asserts, "At oral argument before the *en banc* Court, Arizona's attorney *thrice* acknowledged that these if-you-were involved words to Doody were confusing." (Brief in Opposition at 11.) Doody has taken counsel's statements entirely out of context. Petitioner's counsel merely acknowledged that, if viewed myopically and in isolation, Detective Riley's explanation of the parenthetical on the Juvenile *Miranda* Waiver Form (App. E at 2) was confusing. However, as this Court has made clear, that is *not* how a reviewing court evaluates the adequacy of *Miranda* warnings; rather, the warnings must be considered "in their totality" and '[i]n context." *Florida v. Powell*, 130 S. Ct. 1195, 1204, 1205 (2010) (quoting *Duckworth v.*

Eagan, 492 U.S. 195, 205 (1989)). Detective Riley read the right to counsel off the waiver form *before* attempting to explain the parenthetical. (App. F at 10.) Doody had the form in front of him and initialed each of the *Miranda* rights—including the right to counsel—set forth on the written form, acknowledging that he understood each right (App. E). Viewed in context, it is clear that Doody was adequately advised of and waived his *Miranda* rights, and that the Arizona Court of Appeals' determination to that effect is not "unreasonable."

Petitioner notes that all 11 *en banc* judges wrote that this Court's decision in *Powell* "did 'not materially change the analysis' nor did it change the result." (Brief in Opposition at 13) (quoting App. A at 114, citing App. A at 41–43, 91–92, 114–15). However, both the majority and concurring judges failed to heed this Court's reiteration in *Powell* that "[i]n determining whether police officers adequately conveyed the four warnings, we have said, reviewing courts are not required to examine the words employed 'as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably 'convey to [a suspect] his rights as required by *Miranda*.'" 130 S. Ct. at 1204 (quoting *Duckworth*, 492 U.S. at 203). In short, the majority and concurring judges failed to "yield to the shot fired across [their] bow" by this Court. (App. A at 96.)

Petitioner relies extensively on Chief Judge Kozinski's concurrence, which myopically focused upon Detective Riley's attempt to explain the parenthetical regarding the right to counsel to the exclusion of the

remainder of the colloquy and the written waiver. (Brief in Opposition at 14–16.) In addressing Chief Judge Kozinski's concurrence, including his hypothetical purporting to transform into writing Detective Riley's oral explanation of the parenthetical, the dissent exposed the fatal flaws in his methodology:

> To make the argument that the warnings given to Doody did not satisfy Miranda, the Chief Judge's concurring opinion approaches the record de novo and asks us to imagine that Detective Riley's spoken words were printed on a state produced form and given to Doody to initial. *See* Concurrence at 5846-47. But even if we were on direct review, and even assuming that Detective Riley's spoken words would be insufficient if presented on a printed form, that does not decide this case because that is not the test we apply. We do not reduce all that is spoken into writing in order to "examine the words employed as if construing a will or defining the terms of an easement." *Powell*, 130 S. Ct. at 1204. Instead, we assess Miranda warnings "in their totality" and "in context." *Id.* at 1204, 1205. Thus, just as we should not isolate and emphasize only one component of a warning, *see id.* at 1204, we should not isolate Detective Riley's passing oral explanations and give them unnatural emphasis through the imprimatur of an official form. After all, the concurrence's reliance on this hypothetical only helps make the point that printed words often carry more import than passing speech.

(App. A at 120–21.)

Doody also claims that statements by detectives "made hours into the interrogation" regarding not telling others what Doody told the detectives and imploring Doody to cooperate "conveyed a message at odds with *Miranda* and the Constitutional rights it safeguards." (Brief in Opposition at 17–18.) First, statements "made hours into the interrogation" are simply irrelevant to whether Doody was advised of and waived his *Miranda* rights hours earlier. Doody does *not* assert that he, at any point, invoked his *Miranda* rights, and the record refutes any such assertion. Moreover, as this Court recently made clear, "an accused who wants to invoke his or her right to remain silent [must] do so unambiguously." *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010).

Second, the statements quoted by Doody were made in the context of attempting to assuage Doody's claimed fear that individuals responsible for the murders would kill Doody, his family, and Doody's girlfriend, if Doody informed on them. Thus, the statements were made in an attempt by the detectives to assure Doody that he and his loved ones could be protected if Doody cooperated.

II. *The Arizona Court of Appeals' Determination that Doody's Statements were Voluntary was not Objectively Unreasonable.*

Doody attempts to support the *en banc* majority's conclusion that the Arizona Court of Appeals made an "unreasonable determination" of fact by attacking the Arizona Court of Appeals' statement that "Each of the

officers involved . . . testified at the suppression hearing that Doody remained alert and responsive throughout the interrogation and did not appear overtired or distraught. Our review of the audio tapes confirms the officers' testimony." (Brief in Opposition at 19–20) (quoting App. C at 10.) Doody writes that the *en banc* majority concluded that "*the State record shows that not a single one of Doody's interrogators testified that Doody remained alert throughout the interrogation*. The State has never pointed to a shred of testimony that shows otherwise." (*Id.* at 20, emphasis in original). To the contrary, Petitioner pointed out in its brief in the Ninth Circuit that Detective Riley testified that Doody was "very attentive" and never "display[ed] any real overt sign of being fatigued or tired," and never asked to sleep. (Ans. Br. at 16–17.) Petitioner also pointed out that Detective Sinsabaugh testified that, when he entered the room at about 2:45 a.m. and became the primary questioner, Doody was "very erect, had a military bearing, and he appeared alert." (*Id.* at 17–18.) Thus, Petitioner has identified testimony supporting the Arizona Court of Appeals' finding.

Moreover, as pointed out by the dissent, Doody's decision not to answer certain questions does not negate the Arizona Court of Appeals' finding that he was "alert and responsive." (App. A at 137–38.) Rather, it is more reasonably interpreted as selective avoidance of questions for which he did not have a ready answer as he attempted to conjure up a story distancing himself as much as possible from the murders.

Doody stresses the *en banc* majority's conclusion that the Arizona Court of Appeals erred in finding that Doody admitted borrowing the rifle "at the time of the temple murders." (Brief in Opposition at 21.) However, Doody fails to acknowledge the majority's blatant mischaracterization of that statement as an admission "to involvement in the temple murders after two and one half hours of questioning." (App. A at 61.) Rather, as noted by the dissent, the Arizona Court of Appeals drew a crucial distinction between Doody's admission to merely borrowing the rifle and subsequently admitting participation in the crimes:

> Indefatigable in its mischaracterization of the state court's findings, the majority next claims that, "contrary to the finding of the Arizona Court of Appeals, Doody decidedly did *not* admit to involvement in the temple murders after two and one-half hours of questioning." Maj. Opinion at 5823. The court of appeals did *not* say Doody "admitted to involvement" after two and a half hours. It said, "Doody admitted he had borrowed Caratachea's rifle at the time of the temple murders." *Doody*, 930 P.2d at 446. This is a reasonable finding of fact. It is also a significant admission because it contradicts the lie he told at the outset of the interview that he had never had possession of the rifle. Doody said he borrowed the rifle "close to the end of June." The murders occurred in August. Considering the Arizona Court of Appeals reviewed the case roughly five years later, "at the time" reasonably describes the time frame. It is disingenuous to rewrite the state court's

> findings in order to declare them "patently unreasonable." Maj. Opinion at 5824.

(App. A at 140–41.) The fact that the *en banc* majority seized upon this relatively insignificant statement evidences the lengths to which it went to find fault with the Arizona Court of Appeals' factual and legal findings.

Finally, Doody takes issue with the Arizona Court of Appeals' statement that the audio tapes reveal a "'courteous, almost pleading style of questioning [employed] during most of the interview.'" (Brief in Opposition at 22.) As pointed out by Petitioner and the dissent, both Doody and the majority ignore the qualifier "most" in attacking this statement. (Petition at 33; App. A at 139.)

III. *Petitioner has not "Waived" Harmless Error and Any Conceivable Constitutional Error did not have a Substantial and Injurious Effect or Influence on the Verdicts.*

Doody asserts that Petitioner has somehow "waived" its harmless error argument because it did not expressly raise it in its petition for writ of certiorari from the *en banc* panel's original decision. (Brief in Opposition at 26.) Doody cites no authority for this assertion, and none exists. Petitioner raised an alternative harmless error argument both in the district court (Respondents' Response to Petitioner's Supplemental Memorandum, at 57–65) and on appeal in the Ninth Circuit (Answering Brief at 32–37, 56–57). There was no need for "a single state or federal judge" (Brief in Opposition at 26) to address the harmless

error argument *until* a court found constitutional error. As pointed out by Petitioner, the majority failed to adequately address the harmless error argument. (See App. A at 79–82.) There was no need for the dissenters to address the harmless error issue because they found no unreasonable application of federal law. (App. A at 141–43.) Moreover, "in § 2254 proceedings a [federal] court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the 'substantial and injurious effect' standard set forth in *Brecht* [*v. Abrahamson*, 507 U.S. 619 (1993)], whether or not the state appellate court recognized the error and reviewed it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in *Chapman* [*v. California*], 686 U.S. 18 (1967)]." *Fry v. Pliler,* 551 U.S. 112, 121–22 (2007).

Doody asserts that error in admitting his (largely self-exculpatory) statements cannot be harmless because the prosecutor referred to the statements during opening statement and closing arguments. (Brief in Opposition at 26.) The prosecutor was merely previewing the evidence, and putting a pro-prosecution spin on Doody's incredible, self-serving statements.

Doody also claims that without his "confession" "the prosecution's case against Doody was extremely weak." (Brief in Opposition at 26.) Not so; it was probably *stronger*. Doody's self-serving exculpatory statements were inconsistent with Alex Garcia's unimpeached trial testimony, which in turn was overwhelmingly supported by the physical and circumstantial evidence.

Doody dismisses his admissions to three friends that he and Garcia committed the murders as "teenage

posturing." (Brief in Opposition at 27.) While Doody's admissions were embellished with false bravado (such as claims that he was working for the OSI), they were far more accurate and reliable than the statements he made to law enforcement. And, the fact that Doody said that he and Garcia alone committed the crimes is entirely consistent with the physical evidence and Garcia's trial testimony.

Doody does not dispute the fact that his fingerprints were found on three of the items taken during the robbery, or that items taken from the Temple were found in the bedroom he shared with Garcia. More importantly, Doody fails to address the fact that the jurors were instructed that they could not even "consider" any statements Doody made to law enforcement officers unless they first found "beyond a reasonable doubt that [Doody] made the statements voluntarily." (App. 6 at 12.) This instruction negated *any* possibility that admission of Doody's statements had a "substantial and injurious effect or influence" on the jurors verdicts. *Brecht*, 507 U.S. at 637–38.

CONCLUSION

Petitioner requests that this Court grant certiorari and reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted

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