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State v. Cobell Appellant's Reply Brief Dckt. 35410

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 35410
)	
v.)	
)	
EUGENE RAY COBELL,)	REPLY BRIEF
)	
Defendant-Appellant.)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA

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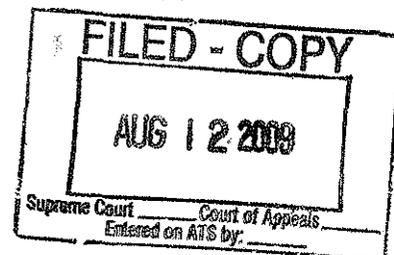


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STATEMENT OF THE CASE

Nature of the Case

Mr. Cobell appeals from the district court's Judgment of Conviction and Commitment. He asserts on appeal that: the district court violated his Fifth Amendment rights when it allowed the prosecution to question him regarding his previous assertions of his right in such a way that the jury was invited to consider his prior silence as an inference of guilt; his right to a fair trial was violated due to prosecutorial misconduct; and the district court abused its discretion in sentencing him to excessive sentences. This Reply Brief is necessary to address the State's assertions that it was proper for the jury to consider Mr. Cobell's silence as evidence of guilty and that the prosecution's references to Mr. Cobell's previous silence was not misconduct.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Cobell's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES FOR REPLY

1. Did the district court violate Mr. Cobell's Fifth Amendment rights when it allowed the prosecution to question him about previous assertions of his rights and allow the jury to infer guilt from such assertions?
2. Did the State violate Mr. Cobell's right to a fair trial by committing prosecutorial misconduct?

ARGUMENT

I.

The District Court Violated Mr. Cobell's Fifth Amendment Rights When It Allowed The Prosecution To Question Him About Previous Assertions Of His Rights And Allowed The Jury To Infer Guilt From Such Assertions

The State asserts that, "The district court was correct in determining the line of questioning was proper and did not, as Cobell asserts, invite the jury to consider pre-arrest silence as evidence of guilt." (Respondent's Brief, p.16.) However, in its' Respondent's Brief the State misconstrues the issue on appeal. Mr. Cobell does not assert that it was improper for the State to question Mr. Cobell about statements made on the night in question, either to family or the responding officers, but that it was improper to use his later, post-arrest silence to infer his guilt. He further asserts that it was error for the district court to find that a waiver of his Fifth Amendment through testifying at trial also waived his previous assertion of these rights allowing his post-arrest silence to be used against him.

Mr. Cobell does not have a Fifth Amendment right regarding the statements he made to family members, nor responding officers, prior to being in custody. However, once Mr. Cobell was placed in custody and chose not to waive his *Miranda* rights¹, that assertion of silence could not be used against him. It is the use of this post-arrest silence that Mr. Cobell addresses on appeal.

The State mistakenly relies on *Anderson v. Charles*, 447 U.S. 404 (1980); *State v. Rodgers*, 119 Idaho 1066, 812 P.2d 1227 (Ct. App. 1990); and *State v. Wolverton*, 120 Idaho 559, 817 P.2d 1083 (Ct. App. 1991), for the position that it is not improper to

¹ *Miranda v. Arizona*, 384 U.S. 436, 467-473 (1966).

cross-examine a defendant about the inconsistencies of a previous statement given after a knowing and voluntary waiver of the right to remain silent. *Id.* In each of these cases, the defendant had been given *Miranda* warnings, subsequently waived his rights, and spoke with officers. *Anderson*, 447 U.S. at 405; *Rogers*, 119 Idaho at 1074, 812 P.2d at 1235; *Wolverton*, 120 Idaho at 563, 817 P.2d at 1087. In *Anderson*, the Supreme Court held that:

Doyle [*v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976),] bars the use against a criminal defendant of silence maintained after receipt of governmental assurances. But *Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. 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. As to the subject matter of his statements, the defendant has not remained silent at all.

Anderson, 447 U.S. at 407 (citations omitted).

However, Mr. Cobell did not execute a waiver of his *Miranda* rights and, as such, *Doyle v. Ohio*, 426 U.S. 610 (1976), is the controlling authority in the instant case. *Doyle* held that an arrested person, who has been advised of his constitutional rights as described in *Miranda*, cannot have his post-arrest silence used against him to raise an inference of guilt or to impeach the defendant's testimony. *Id.* at 610. The *Doyle* Court went on to state that:

The warnings mandated by that case, as a prophylactic means of safeguarding Fifth Amendment rights . . . require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. Moreover, 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. In such

circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Id. at 617-618 (citations omitted).

The questions asked of the defendant in *Doyle* were similar to the questions asked of Mr. Cobell. *Id.* at 613-614. In the case at hand, the prosecution questioned Mr. Cobell repeatedly about his previous silence, protected by the Fifth Amendment, for the purpose of inferring guilt:

Q. (Prosecutor) All right. And when law enforcement came to the house and they told you that they were there because Danny had accused you of sexually assaulting her, you didn't tell them that story either; did you?

A. (Mr. Cobell) I don't understand.

Q. You never told the police this story; have you? Yes or no?

A. No.

Q. And when you went down and were taken to the detective's office and were given the opportunity to explain your side of the story, you never offered up any of this; did you?

A. No.

Q. So the same – the story that you want this jury to believe, that would exonerate you if it was quote "consensual", you didn't tell anyone about it that night; did you?

A. No.

...

Q. So when you were being led away in handcuffs at four in the morning and taken to jail, you didn't think then would be a good time to set the record straight? That didn't occur to you?

A. No.

...

Q. It never occurred to you to tell the police that this was all just a big misunderstanding, did it?

A. My hope –

Q. It is really just a yes or no question sir. Did it occur to you to tell them?

A. I don't know.

Mr. Carr: Judge I am going to object. The defendant has a right to remain silent upon questioning, upon being with the police and remaining silent. And counsel is badgering him about that.

The Court: I will overrule the objection. When the defendant chooses to take the witness stand, he waives his right to be silent and that State can pursue the reason that he chose to remain silent on the night of his arrest. So I don't believe it is improper cross-examination and I will overrule the objection.

(Tr., p.44, Ls.10-23, p.455, L.4 – p.456, L.11.)

These questions directly implicated Mr. Cobell's right to remain silent. The prosecution clearly intended the questions to infer guilt. Accordingly, it was erroneous for the district court to overrule the objection and allow the questioning. The district court's action in overruling the objection was equivalent to giving an additional jury instruction, informing the jury that they could consider Mr. Cobell's previous assertion of his Fifth Amendment rights to infer guilt and requires that his case be remanded for a new trial.

II.

The State Violated Mr. Cobell's Right To A Fair Trial By Committing Prosecutorial Misconduct

The State asserts that, "the state's cross-examination of Cobell did not even bring his Fifth Amendment rights or due process into question. The state properly cross-

examined Cobell in an attempt to impeach him by pointing out the vast difference between his own version of events on the night in question and on the day he took the stand at trial. It follows that the state's comments on such in closing argument were likewise without error." (Respondent's Brief, pp.19-20.) However, the State has again misconstrued the issue on appeal. Mr. Cobell does not assert that it was improper for the State to question him about statements made on the night in question, either to family or the responding officers, or to make reference to such statements in closing arguments, but that it was improper to use his later, post-arrest silence to infer his guilt both during cross-examination and in closing argument.

In a criminal case, a prosecutor may not directly or indirectly comment on a defendant's invocation of his constitutional right to remain silent, either at trial or before trial, for the purposes of inferring guilt. *Griffin v. California*, 380 U.S. 609 (1965); *Phillips*, 144 Idaho at 86, 156 P.3d at 587.

In the case at hand, the prosecution committed misconduct by asking Mr. Cobell a number of questions involving his post-arrest silence and invocation of his Fifth Amendment rights. The impropriety of such questioning is discussed in section I of the Appellant's Reply Brief and is incorporated herein by reference. While the district court erroneously allowed the questioning, such error did not grant the prosecution *carte blanche* to commit repeated misconduct and deprive Mr. Cobell his right to a fair trial.

The prosecutorial misconduct continued throughout closing arguments where the State again presented the theme that Mr. Cobell was guilty because of his post-arrest silence and invocation of his Fifth Amendment rights. The following excerpt from the improper arguments illustrates the prosecution's malevolent theme:

But for the defendant to say to you today through his attorney that he didn't have to explain anything to this family, that he didn't have to explain anything to the police, but just to simply come here today and give you this dilly of a story, is pretty incredible. To want to comment that there is a divide in this family with an aisle down the middle and to express how painful that may be, when he had an opportunity to explain what? That he engaged in an incestual relationship with your daughter? And that somehow that would be okay?

Credibility is huge in this case. But ladies and gentleman, again, you don't leave that at the door. Where is his shame and his humiliation when he takes that stand and tell you this story in this fashion?

(Tr., p.507, L.21 – p.508, L.12 (emphasis added).) Much like the questions asked during trial, these statements were clearly designed to influence the jury to infer the guilt of Mr. Cobell from his post-arrest silence and, as a result, are undoubtedly misconduct which deprived Mr. Cobell of his right to a fair trial.

CONCLUSION

Mr. Cobell respectfully requests that his conviction be vacated and his case remanded for further proceedings. Alternatively, he requests that this Court reduce his sentences as it deems appropriate.

DATED this 12th day of August, 2009.



ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12th day of August, 2009, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

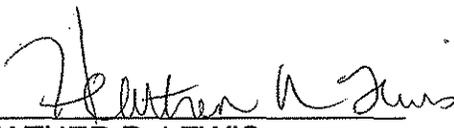
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