SC22-458

In the Supreme Court of Florida

STATE OF FLORIDA,
Petitioner,

v.

ZACHARY JOSEPH PENNA,
Respondent.

On Petition for Discretionary Review from the
Fourth District Court of Appeal
DCA No. 4D20-345

PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Other Authorities

STATEMENT OF THE ISSUES

The question presented, which was certified as a question of great public importance by the district court, is:

Whether a defendant's Fifth Amendment *Miranda* rights are automatically violated when an officer fails to re-read a *Miranda* warning following a defendant's voluntary re-initiation of contact.

STATEMENT OF THE CASE

1. In *Miranda v. Arizona*, the U.S. Supreme Court held that if the police elicit a statement in an interrogation without warning the suspect of his rights, that statement may not be used in the prosecution's case-in-chief. 384 U.S. 436 (1966). The Court "also indicated the procedures to be followed subsequent to the warnings." *Edwards v. Arizona*, 451 U.S. 477, 482 (1981). "If the accused indicates that he wishes to remain silent, 'the interrogation must cease.' If he requests counsel, 'the interrogation must cease until an attorney is present.'" *Id.* (quoting *Miranda*, 384 U.S. at 474). The Court has, however, always been clear that an accused can waive his *Miranda* rights. *E.g.*, *North Carolina v. Butler*, 441 U.S. 369, 373 (1979).

The question soon arose: what happens when an accused invokes his *Miranda* rights but then changes his mind and wishes to resume an interrogation? In *Oregon v. Bradshaw*, the Court answered that question. 462 U.S. 1039 (1983). The plurality opinion explained that when the accused reinitiates an interrogation, "the next inquiry" is "whether a valid waiver . . . ha[s] occurred, that is, whether the purported waiver [i]s knowing and intelligent and found

to be so under the totality of the circumstances." *Id.* at 1046 (plurality op.) (quoting *Edwards*, 451 U.S. at 486 n.9). Justice Powell agreed that the question is always whether under the "totality of the circumstances" the waiver is knowing and voluntary. *Id.* at 1048 (Powell, J., concurring). Thus, the U.S. Supreme Court held that if an accused invokes *Miranda*, "courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." *Smith v. Illinois*, 469 U.S. 91, 95 (1984).

In *Shelly v. State*, this Court added a requirement to the *Bradshaw* framework. 262 So. 3d 1, 11–14 (Fla. 2018). The Court explained that "if an accused invokes his or her *Miranda* rights but later reinitiates communication, an accused must be reminded of his or her *Miranda* rights." *Id.* at 13 (emphasis omitted). Justice Lawson, joined by Chief Justice Canady and Justice Polston, dissented. He argued that "the United States Supreme Court has never articulated or implied a third inquiry . . . requiring that police 'remind' the accused of his or her *Miranda* rights." *Id.* at 22 (Lawson, J., dissenting).

This case asks whether *Shelly*'s adoption of a third requirement was warranted.

2. Respondent stabbed two men to death, stole their SUV, stole the shirt off an elderly woman's back, abducted his co-worker at knifepoint, stabbed another man in an attempted robbery, and stabbed a police dog. App.6. For those crimes, he was convicted of two counts of first-degree murder, one count of robbery with a weapon, and one count of false imprisonment with a weapon. App.5. The Fourth District reversed, finding a *Miranda* violation. App.5.

This is not, however, a case where *Miranda* warnings were never read. App.5. Nor is it one where the police unilaterally rekindled an interrogation after a suspect invoked his rights. App.6–7. Rather, after receiving and invoking his *Miranda* rights, Respondent re-initiated conversation with a police deputy. App.7–11. More specifically, after committing his crimes, Respondent was brought to a hospital. App.6. He invoked his *Miranda* rights. App.6. About a month later, he began speaking to the deputy posted at his door. App.6, 7–11. Although the deputy reminded Respondent that he was "law enforcement" and would "write" down what Respondent said,

App.8, the deputy did not specifically give new *Miranda* warnings. App.8. In his conversations with the deputy, Respondent repeatedly confessed and undermined his insanity defense. App.7–11.

Nonetheless, the panel majority reversed because it considered itself bound by this Court's decision in *Shelly*, in which a 4-3 majority stated that anytime an interrogation is reinitiated, even at a defendant's prompting, new *Miranda* warnings must be "specifically given." App.21 (emphasis omitted) (quoting *Shelly*, 262 So. at 13). Because the officer in this case did not "specifically give" a new *Miranda* warning, the panel found error even though "a reasonable person in the defendant's position may have been able to remember," and thus knowingly and intelligently waive, "his *Miranda* rights." App.24–25.

Judge Artau dissented in part. App.30 (Artau, J., dissenting in part). As he explained, the U.S. Supreme Court has applied a "totality of the circumstances" test, rather than the test articulated in *Shelly*. App.30. And thus, he suggested that the court certify a question of great public importance on *Shelly*'s requirements. App.30–31.

The State moved for certification of a question of great public

importance. The court agreed and certified the following question of great public importance:

> Whether a defendant's Fifth Amendment *Miranda* rights are automatically violated when an officer fails to re-read a *Miranda* warning following a defendant's voluntary re-initiation of contact.

App.33–34.

ARGUMENT

THIS COURT SHOULD ACCEPT JURISDICTION TO REVIEW THE CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE.

A. This Court has jurisdiction to review the certified question.

This Court has discretionary jurisdiction to review a district court decision, like the one here, that "passes upon a question certified by it to be of great public importance." Art. V, § 3(b)(4), Fla. Const.

In response to the State's motion to certify, Respondent did not assert that there were any jurisdictional defects with the State's request for certification. At that time, Respondent apparently agreed that the district court had passed upon the question presented. But, in response to the State's later-filed motion to stay the issuance of the mandate, Respondent argued that the district court "may not

have passed upon the question certified" because, on his view, the district court "did not hold that a defendant's *Miranda* rights are 'automatically' violated when an officer fails to re-Mirandize following the defendant's re-initiation of contact." *See* Opp'n to Mot. to Recall the Mandate at 1–2. That is, however, exactly what the district court held. It explained that *Shelly* included "a requirement that the accused be specifically given his or her *Miranda* rights after an alleged reinitiation." App.21 (emphasis omitted). That issue decided the case. The district court reasoned that "the deputy's prefatory comments to the defendant's lengthy confession" did not satisfy "*Shelly*'s 'requirement that the accused be specifically given his or her *Miranda* rights after an alleged reinitiation.'" App.24 (emphasis omitted); *see also* App. 25 (finding another statement inadmissible because the deputy spoke "without having specifically given the defendant his *Miranda* rights again"); App.26 (same). And indeed, although the district court understood that "a reasonable person in the defendant's position may have been able to remember his *Miranda* rights without having a police officer specifically give the *Miranda* rights again," it nonetheless found a violation because *Shelly*

demanded that new *Miranda* warnings be "specifically given" on re-initiation. App.24–25. That is more than what is needed to pass upon the question presented. *See Weiand v. State*, 732 So. 2d 1044, 1047 (Fla. 1999) (question was passed upon when the district court "necessarily ruled" on it, even though the district court had no "discussion" of the "certified question").

B. This Court should exercise its discretion to review the certified question.

For four reasons, this Court should exercise its jurisdiction to hear this case.

First, accepting review would give this Court an opportunity to revisit *Shelly*, which is necessary because *Shelly* was wrongly decided.

Shelly derived its mandatory-new-*Miranda*-warning rule from *Bradshaw*. *See Shelly*, 262 So. 3d at 11. But as *Shelly* acknowledged "the standard [wa]s not explicitly" stated in *Bradshaw*. *Id.* That is an understatement—*Bradshaw* did not announce anything like the *Shelly* rule. Instead, in assessing a *Miranda* waiver, *Bradshaw* "unequivocally" asked only (a) whether the defendant initiated the post-*Miranda* discussion and (b) if so, whether the waiver of *Miranda*

rights was knowing and intentional. *Id.* at 22 (Lawson, J., dissenting). And in answering those questions, *Bradshaw* called for close analysis of the "particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused," the opposite of the wooden rule created in *Shelly*. *See Bradshaw*, 462 U.S. at 1046 (plurality op.) (quoting *Butler*, 441 U.S. at 374–75). In fact, the U.S. Supreme Court "has never articulated or implied a third inquiry or standard requiring that police 'remind' the accused of his or her *Miranda* rights, in *Bradshaw* or any other case." *Shelly*, 262 So. 3d at 22 (Lawson, J., dissenting).

In concluding otherwise, *Shelly* is at odds with the decisions of the federal courts. They have made clear that "where a defendant voluntarily re-instigates the interrogation with the police after invoking the *Miranda* right to be silent, the failure to re-administer *Miranda* rights is not fatal." *United States v. Muhammad*, 196 F. App'x 882, 887 (11th Cir. 2006); *accord United States v. Munera-Uribe*, 192 F.3d 126, 1999 WL 683823, at *10 (5th Cir. 1999). That is because "the presence or absence of renewed *Miranda* warnings [wa]s not the key factor in" *Bradshaw*. *See Moore v. Dugger*, 856 F.2d 129, 134

(11th Cir. 1988). Rather, *Bradshaw*, like all the U.S. Supreme Court cases before it, considered the "totality of the circumstances" in asking whether the waiver of *Miranda* was knowing and voluntary. *Jacobs v. Singletary*, 952 F.2d 1282, 1295 (11th Cir. 1992). And thus, the federal courts examine all the circumstances surrounding a waiver, rather than mechanistically applying *Shelly*'s rule. *See, e.g.*, *United States v. Montana*, 958 F.2d 516, 519 (2d Cir. 1992); *United States v. Kane*, 726 F.2d 344, 349 (7th Cir. 1984).

Worse still, the rigid rule adopted in *Shelly* swept well beyond what was necessary to decide the case. Far from involving an initial invocation of the *Miranda* rights followed by the defendant's re-initiation of contact, in *Shelly* the police violated *Miranda* because they "wholly ignored Shelly's invocations of his rights and immediately proceeded to attempt to coax him into continuing with the interrogation." *Shelly*, 262 So. 3d at 16. On the merits then, *Shelly*'s rule is pure "dicta." *Id.* at 24 (Lawson, J., dissenting).

And in sweeping so broadly, *Shelly* created a waiver test that is anomalous in the law. As a general matter, the only questions courts ask when a defendant seeks to waive a constitutional right is whether

the waiver is knowing, voluntary, and intentional. *See Morris v. State*, 931 So. 2d 821, 833 (Fla. 2006) (right to testify); *Torres-Arboledo v. State*, 524 So. 2d 403, 410 (Fla. 1988) (right to counsel). That follows because the standard that governs waivers of one constitutional right should be "the same waiver requirements" applicable to "any other." *State v. Contreras*, 979 So. 2d 896, 909 (Fla. 2008). But *Shelly* departs from that general standard: It says that *Miranda* waivers require a special reminder.

In short, *Shelly* is wrong as a matter of precedent, practice, and logic. Accepting review would permit this Court to correct *Shelly*'s errors.

Second, correcting *Shelly*'s errors is important because *Shelly*'s rule does little to protect *Miranda* rights but imposes substantial costs on law enforcement.

As Justice Lawson explained in his dissent, the *Shelly* rule adds very little protection for defendants. Consider first a sophisticated defendant. For that person, the *Shelly* rule adds nothing because it serves as a reminder of rights that are already known. Or in Justice Lawson's words, *Shelly* demands that police re-read *Miranda*

warnings even when the accused is "a seasoned criminal defense attorney who reinitiated contact by reminding police of her profession and stating that she was fully aware of the *Edwards* rule and was reinitiating communication with full knowledge that she was waiving her right to counsel and other Fifth Amendment rights." *Shelly*, 262 So. 3d at 22 n.8 (Lawson, J., dissenting). In that scenario, the *Shelly* rule adds nothing to ensuring that a waiver is knowing, intelligent, and voluntary. And, in the converse case—when the totality of the circumstances indicate that a reminder is needed to secure a valid *Miranda* waiver—the *Shelly* rule likewise adds nothing because a reminder is already necessary for the questioning to be lawful.

On the opposite side of the ledger, the *Shelly* rule has costs. Most prominently, it demands reversal of otherwise valid convictions, and will likely impact many cases. In the few years since *Shelly*, the district courts have already reversed two convictions on the theory that the police failed to re-*Mirandize* the defendant after interrogation was re-initiated. *See* App.29–30; *see also Quarles v. State*, 290 So. 3d 505, 508 (Fla. 4th DCA 2020). And that does not even begin to account for prosecutions that *Shelly* has deterred the State from

bringing in the first place or scotched in the trial courts.

Third, accepting review is consistent with this Court's historical practice. The certified question invites the Court to consider overruling *Shelly*. This Court has long recognized that when a district court believes a precedent of this Court is open to debate, it is "free to certify questions of great public interest to this Court for consideration." *Hoffman v. Jones*, 280 So. 2d 431, 434 (Fla. 1973). And this Court has repeatedly exercised its certified-question jurisdiction to review whether one of its precedents should be overruled. *See* Raoul G. Cantero III, *Certifying Questions to the Florida Supreme Court: What's So Important?*, 76 Fla. B.J. 40, 43 & n.53 (May 2002) (collecting cases).

Fourth, this case presents a clean vehicle for considering the vitality of *Shelly*. As explained, the district court reversed because it found itself "bound" by *Shelly*. App.25. Thus, the legal issue in this case is cleanly raised.[1]

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[1] Lest Respondent argue that the State failed to preserve its request to overturn *Shelly*, any such request in the Fourth District would have been futile. *See Hunt v. State*, 613 So. 2d 893, 898 n.4 (Fla. 1992) ("[F]utile efforts are not required to preserve matters for appeal."). And in any event, the State preserved the substance of its argument that the Constitution does not automatically require new

CONCLUSION

This Court should exercise jurisdiction and review the certified question.

Dated: April 18, 2022

Respectfully submitted,

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Miranda warning when a police officer continues a re-initiated conversation, *see* Appellee Br. 26–31, and explained its view that a totality of circumstances test should be applied. *See id.* at 28–29. The State thus put the district court on notice "of the perceived error." *See Aills v. Boemi*, 29 So. 3d 1105, 1109 (Fla. 2010).

CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in 14-point Bookman Old Style font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2) and contains 2,387 words.

/s/ Evan Ezray
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via the e-filing portal to Paul Edward Petillo, Assistant Public Defender, at appeals@pd15.state.fl.us, ppetillo@pd15.org, and mroberts@pd15.org via the Florida e-Filing Portal on this **18th** day of April 2022.

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