RECENT DEVELOPMENT: *MARSHALL V. STATE*

By: Michael Rosemond
Invited Response Doctrine Not Justified by Defense Counsel's Comments

*MARSHALL v. STATE*: PROSECUTORS MAY INVoke THE INVITED RESPONSE DOCTRINE IN ORDER TO COMMENT ON A DEFENDANT’S REFUSAL TO TESTIFY ONLY IF THE COURT AGREES THAT SUCH COMMENT IS WARRANTED BY IMPROPER ATTACKS FROM DEFENSE COUNSEL.

The Court of Appeals of Maryland held that a defense attorney’s substitution of the term “drug addict” for “drug user” when referring to his client did not justify the prosecutor’s comments concerning the defendant’s refusal to testify. *Marshall v. State*, 415 Md. 248, 268, 999 A.2d 1029, 1040 (2010). The substitution was insignificant and did not manifest an introduction of unsupported health claims. *Id.* Since the prosecutor was not entitled to invoke the invited response doctrine, his comments violated the defendant’s due process rights against self-incrimination. *Id.* at 257, 999 A.2d at 1034.

Police arrested the defendant, Thomas Marshall (“Marshall”), during the search and seizure of a home to which he had arguable residential and commercial connections. Police charged Marshall with possession of cocaine, possession with intent to distribute, and possession of drug paraphernalia.

At trial, defense counsel described Marshall’s conduct in the home as that of a user, thus challenging the distribution charge. The prosecutor argued that, in light of neutral facts, defense counsel’s claims amounted to conclusory testimony, and that defense counsel’s description of Marshall as a cocaine addict should be taken with caution. The prosecutor reminded the jury that the defendant did not take the stand, and indicated that, without the defendant’s thoughts, the evidentiary analysis was incomplete. Defense counsel then moved for a mistrial on the grounds that the prosecutor’s comments violated Marshall’s right against self-incrimination. The trial judge denied the motion holding that, in light of the circumstances, the prosecutor’s comments were nothing more than a truism.

The Court of Special Appeals of Maryland held that the prosecutor’s comments were justified under the invited response doctrine. The court considered the comments to be a satisfactorily tailored rebuttal of defense counsel’s assertion of an unsupported fact. Thus, the court held that the
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prosecutor was entitled to respond in a way that would bring the jury back to a fair and calm consideration of the evidence.

The Court of Appeals of Maryland granted Marshall’s petition for certiorari. The court stated that the case turned on whether the prosecutor’s comments were permissible invited responses, or violations of the defendant’s privilege against self-incrimination. Marshall, 415 Md. at 257, 999 A.2d at 1034.

While due process protections against self-incrimination originated in the Fifth Amendment, the court held that Article 22 of the Maryland Declaration of Rights could be read in pari materia with its federal counterpart. Id. at 259, 999 A.2d at 1035. Article 22 states that no man ought to be compelled to give evidence against himself in a criminal case. Id. at 258 n.2, 999 A.2d at 1034 n.2 (citing MD. CONST. art. 22). The court also looked to the Maryland Code, which not only supports the privilege against self-incrimination, but also states that the refusal to testify on this basis does not create any presumption against the defendant. Id. at 258 n.3, 999 A.2d at 1034 n.3 (citing MD. CODE ANN., CTS. & JUD. PROC. § 9-107 (2010)). The court exclusively applied the Maryland version of the law, finding it more comprehensive than the Bill of Rights provision. Marshall, 414 Md. at 260, 999 A.2d at 1035.

The court observed that, in Maryland, the right to remain silent has always been liberally construed to give full effect to immunity. Id. at 261, 999 A.2d at 1036. Historically, prosecutorial comment on a defendant’s silence has been prohibited. See id. at 261-62, 999 A.2d at 1036-37. The court explained that such a tactic could cause a jury to infer indications of guilt from silence. Id. at 262-63, 999 A.2d at 1036-37 (citing Smith v. State, 169 Md. 474, 476, 182 A. 287, 288 (1936); Woodson v. State, 325 Md. 251, 267, 600 A.2d 420, 427 (1992)). In Marshall, the court concluded that a prosecutor alluding to a defendant’s refusal to testify, and lamenting the unavailability of his thoughts, was clearly and directly using the defendant’s silence to support the State’s case. Id. at 263-64, 999 A.2d at 1037.
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The court recognized that, in certain circumstances, a prosecutor could refer to a defendant’s decision not to testify. *Id.* at 264-65, 999 A.2d at 1038 (citing *United States v. Robinson*, 485 U.S. 25 (1988)). In *Robinson*, defense counsel argued that the government had refused to allow the defendant to tell his side of the story. *Id.* In holding that the prosecutor’s reference to the defendant’s silence was a fair response, the *Robinson* Court established that certain comments made by defense counsel could result in the forfeiture of a defendant’s Fifth Amendment protections. *Id.*

The Court of Appeals of Maryland had considered the invited response doctrine in two prior cases as a method of promoting judicial economy by balancing out improper conduct to avoid new trials. *Marshall*, 415 Md. at 266, 999 A.2d at 1039 (citing *Spain v. State*, 386 Md. 145, 157 n.7, 872 A.2d 25, 32 n.7 (2005)). The court found the doctrine applicable only where the defense counsel’s own impropriety requires the court to allow the prosecution to present a reasonable response. *Id.* at 266-67, 999 A.2d at 1039 (citing *Mitchell v. State*, 408 Md. 368, 382, 969 A.2d 989, 997 (2009); *Lee v. State*, 405 Md. 148, 169, 950 A.2d 125, 137 (2008)). Having found no improper defense arguments in both *Mitchell* and *Lee*, the court never applied the doctrine, and declined to consider its application to improper prosecutorial comments here. *Id.* at 265-66, 999 A.2d at 1038-39.

In the case at issue, the prosecutor attempted to invoke the invited response doctrine by considering defense counsel’s substitution of “addict” for “user” as an allusion to a health issue that had not been admitted into evidence. *Id.* at 255, 999 A.2d 1032-33. The court found that defense counsel made an insignificant substitution that did not amount to an impropriety, resulting in no unfair prejudice to the prosecution. *Id.* at 268, 999 A.2d at 1040. The prosecutor’s comments were not invited responses, thus, they violated the defendant’s rights against self-incrimination. *Marshall*, 415 Md. at 268, 999 A.2d at 1040. The court reversed the intermediate appellate court’s holding and remanded the case to the circuit court for a new trial. *Id.*

Since the court found the invited response doctrine inapplicable in *Marshall*, the relationship between prosecutorial comment and Maryland’s comprehensive due process protections remains
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intact. A prosecutor remains prohibited from referring to a defendant’s silence in a way that could potentially cause a jury to infer guilt. *Marshall* also established that, should the doctrine ever apply in this context, prosecutors would not benefit from its protections merely by perceiving impropriety by the defense. While the court has acknowledged the danger of prejudice against prosecutors, and the need to balance out impropriety in the name of judicial economy, such considerations have yielded to a defendant’s right against self-incrimination. In order to avoid subjecting their comments to due process scrutiny, Maryland prosecutors must thoroughly examine the record and anticipate how a court will interpret any contentious statements. When uncertain, prosecutors should move for an in camera discussion of the propriety of invoking the invited response doctrine.