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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **RICHARD TOM,** **Defendant and Appellant,** **In re RICHARD TOM,** **Defendant and Appellant.**	Case No.

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SUPREME COURT
FILED

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First Appellate District, Division Three, Case Nos. A124765, A130151
San Mateo County Superior Court, Case No. SC064912
The Honorable H. James Ellis, Judge

PETITION FOR REVIEW

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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **RICHARD TOM,** **Defendant and Appellant,**	Case No. A124765
In re RICHARD TOM, **On Habeas Corpus.**	Case No. A130151

Respondent respectfully petitions for review of the decision of the Court of Appeal for the First Appellate District, Division Three. (Exhibit A.) The Court of Appeal issued its decision on March 19, 2012. The decision is published at 204 Cal.App.4th 480. Respondent's petition for rehearing was denied April 6, 2012. This petition is timely. (Cal. Rules of Court, rule 8.500(e).)

ISSUES PRESENTED

1. Does the use of a defendant's postarrest, pre-*Miranda*[1] silence to prove consciousness of guilt violate the Fifth Amendment privilege against self-incrimination or the Fourteenth Amendment right to due process?

2. Assuming an affirmative answer to question one, does the admission of substantive evidence of defendant's prearrest silence render the error harmless?

[1] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

STATEMENT OF THE CASE AND FACTS

A. Facts

On February 19, 2007, defendant drove his Mercedes at high speed, broadsiding a Nissan Maxima driven by Loraine Wong. Wong's two daughters were riding in the rear passenger seat of her vehicle. (Ct.App. Opn. (Typed Opn.) at p. 1.)

Immediately after the collision, defendant, groaning in pain, told the driver of another vehicle, his friend retired San Francisco Police Officer Peter Gamino, "'I didn't' even see it.'" (Typed Opn. at p. 6.)

Wong and her 10-year-old daughter Kendall Ng were injured and taken to Stanford hospital. Wong was released from the hospital that night. Kendall remained in the hospital for a week. Wong's eight-year-old daughter Sydney Ng, who was restrained by a booster seat in the vehicle, died without regaining consciousness. (Typed Opn. at p. 5.)

B. Trial Proceedings

An information charged defendant with vehicular manslaughter with gross negligence while intoxicated (unlawful killing of Sidney Ng) as a proximate result of violations of Vehicle Code sections 22350 (basic speed law) and 23103 (reckless driving), in violation of Penal Code section 191.5, subdivision (a) (count 1); driving under the influence and causing injury to another, in violation of Vehicle Code section 23153, subdivision (a) (count 2); and driving a vehicle with an blood alcohol level of 0.08 percent or more and causing injury to another, in violation of Vehicle Code section 23153, subdivision (b) (count 3). The charges included allegations that appellant personally inflicted great bodily injury within the meaning of Penal Code sections 1192.7, subdivision (c)(8), 12022.7, subdivision (a), and proximately caused bodily injury to more than one victim within the meaning of Penal Code section 23558. (3CT 769-773.)

The trial court granted defendant's pretrial motion to exclude his statements obtained without a valid *Miranda* waiver during an interrogation at the police station and in a later interview. In the course of the hearing, the court ruled defendant "was under 'de facto arrest' when he was sitting in Gamino's car and Officer Price denied his request to walk home." (Typed Opn. at p. 15, fn. 9.)

The prosecution's evidence at trial included the following facts:

> Sergeant Alan Bailey and Officers Price and Felker of the Redwood City Police Department were among the first law enforcement officers to arrive at the scene of the collision. Sergeant Bailey arrived at 8:30 p.m. and took charge of coordinating the investigation. He observed that conditions were dry and it was a "pleasant evening." Bailey noted Santa Clara Avenue is a two-lane roadway, running east and west, which intersects Woodside Road, a four-lane roadway running north-south. Defendant's silver-colored Mercedes E320 was a considerable distance north of the Woodside Road/Santa Clara intersection. The Mercedes had sustained major front-end damage, the windshield was cracked and it had a couple of flat tires. Defendant was seated in the driver's seat of the Mercedes with the air bag deployed. Paramedics were attending to defendant and Officer Price was standing beside the vehicle.
>
> Bailey parked near defendant's vehicle, and walked south through a "very large debris field." He noted that the other vehicle involved in the collision, a 1996 Nissan Maxima, had sustained "major, total damage." There was massive intrusion to the Nissan's left rear passenger door, the entire rear end of the vehicle was "destroyed," and the front windshield, the back window and the left rear passenger window were all shattered. The occupants of the Nissan had been removed from the vehicle by paramedics by the time Bailey arrived.
>
> After examining the scene, Bailey was told by several officers that defendant was now seated in the Camry driven by Gamino. Bailey directed Officer Felker to place defendant in a patrol car. Bailey also told the officers to ask defendant if he would go to the station in order to make a statement and give a voluntary blood test. Defendant was placed in the patrol vehicle at 9:30 p.m., transported from the scene at 9:48 p.m. and arrived

at the police station at 9:57 p.m. Bailey received no information at the scene as to whether defendant had shown any signs of intoxication.

Bailey arrived at the police station at about 10:00 p.m. He entered the police station and spoke with David Redding, the phlebotomist. Redding told Bailey that he could not draw a sample of defendant's blood because defendant was not formally under arrest. Redding advised Bailey that defendant would need to be transported to the hospital for a voluntary blood test. At approximately 10:30 p.m., Bailey went to speak with defendant about obtaining a blood sample. He found defendant in an interview room with Officer Price. Defendant asked Bailey to use the restroom. Bailey consented and escorted him to the restroom. During defendant's interaction with Bailey at the police station, defendant never asked Bailey about the occupants of the other vehicle.

Officer Price arrived at the accident scene and was directed by Officer Felker to contact defendant. Price found defendant sitting in the driver's seat of his silver Mercedes being attended by two paramedics. Price spoke briefly with defendant. About ten minutes later, Price observed defendant walking around. At this point, he (defendant) was accompanied by his girlfriend. Paramedics were trying to convince defendant to go to the hospital but defendant did not want to go. Defendant was limping slightly but otherwise "seemed okay."

Later, Price observed defendant and his girlfriend with Peter Gamino, all sitting in the Toyota Camry which was parked in the cordoned-off collision scene. Defendant was sitting in the front passenger seat, Peter Gamino was sitting in the driver's seat, and defendant's girlfriend was sitting in the rear seat of the car. While Price spoke with Gamino, he observed that defendant appeared calm. Defendant asked Price if he could walk home because "he lived only half-a-block away." Price told defendant that he had to stay at the scene because the investigation was still in progress. During this conversation, defendant did not ask about the condition of the occupants of the other vehicle.

Officer Felker testified that at approximately 9:48 p.m., he transported defendant from the accident scene to the police station to obtain a blood sample and a statement from defendant. Defendant was not handcuffed during the ride to the police

station and his girlfriend was allowed to accompany him in the patrol car. Defendant appeared irritated that he had to go to the police station and asked Price why a blood sample could not be taken at the scene.

Officer Price arrived at the police station shortly after 10:00 p.m. and learned that a blood sample could not be obtained from defendant because he was not under arrest. Price spoke with defendant about going to the county hospital for a voluntary blood draw. Shortly after speaking with Price, defendant was escorted to the restroom by Sergeant Bailey. When he was finished in the restroom, Bailey escorted defendant and his girlfriend to an interview room. Officer Price and Gomez entered the interview room and observed defendant talking on his cell phone. While defendant conversed on the telephone, Officers Gomez and Price both detected an odor of alcohol from defendant. Price then had defendant take a series of Field Sobriety Tests (FSTs). Based on the results of the FSTs, Price concluded defendant was under the influence of alcohol at the time of the collision. Price informed defendant he was under arrest and took him to county jail for booking. Price testified that during the roughly three hours or so that he had contact with defendant between approximately 8:20 and 11:30 p.m., defendant never asked about the condition of the occupants of the Nissan.

(Typed Opn. at pp. 6-8.)

The jury acquitted defendant on count 1 of alcohol-related vehicular manslaughter (Pen. Code, § 191.5, subds. (a) & (b)), but convicted him of the lesser included offense of vehicular manslaughter with gross negligence (*id.*, subd. (c)(1)). (4CT 1178-1179, 1191, 1194-1195; 11RT 1991-1993.) It found that he personally inflicted great bodily injury on Kendall Ng, but not on Loraine Wong. (4CT 1179, 1198-1199; 11RT 1994-1195.) The jury acquitted defendant on counts two and three. (4CT 1179, 1192-1193; 1196-1197; 11RT 1991-1994.) The court imprisoned him for an aggregate term of seven years. (6CT 1660-1661; 12RT 2048-2049.)

C. Court of Appeal Decision

Defendant appealed the judgment on several grounds. The Court of Appeal addressed a claim, not presented in the trial court, that the prosecution violated defendant's Fifth Amendment privilege against self-incrimination by introducing evidence at trial of his postarrest, pre-*Miranda* silence as proof of guilt. (Typed Opn. at pp. 2, 11-12.) Noting that defendant moved pretrial for exclusion of his statements made without a valid *Miranda* waiver while under a de facto arrest, the appellate court held the claim came within an exception to the contemporaneous objection rule found in *In re Sheena K.* (2007) 40 Cal.4th 875, 888, footnote 7, for "'constitutional claims initially raised on appeal when closely related to claims raised at trial regarding the admission or exclusion of evidence.'" (Typed Opn. at pp. 12-13 & fn. 7.)

The Court of Appeal next found, in factual distinction to *Berkemer v. McCarty* (1984) 468 U.S. 420, that under the totality of the circumstances, "the police restraints placed upon defendant ripened into those 'tantamount to a formal arrest' *when police transported [him] from the accident scene in a patrol car at 9:48 p.m.*" and that he "did not receive *Miranda* warnings until he was placed under formal arrest much later that evening." (Typed Opn. at p. 17, fn. omitted and italics added.)

Turning to the Fifth Amendment issue, the court found that "[n]either the United States Supreme Court, nor any California court has directly addressed the issue of whether the government can admit, in its case-in-chief, evidence of a defendant's post-arrest, pre-*Miranda* silence." Typed Opn. at p. 17.) It found federal circuit court decisions in conflict. (Typed Opn. at pp. 17, 20-23 [contrasting *United States v. Moore* (D.C. Cir. 1997) 104 F.3d 377, 384-385 (*Moore*) and *United States v. Velarde–Gomez* (9th Cir. 2001) 269 F.3d 1023, 1028-1029 (en banc) (*Velarde–Gomez*) with *United States v. Frazier* (8th Cir. 2005) 408 F.3d 1102, 1111].)

The Court of Appeal held, as a matter of first impression, that "the right of pretrial silence under *Miranda* is triggered by the inherently coercive circumstances attendant to a de facto arrest. Therefore, the government may not introduce evidence in its case-in-chief of a defendant's silence after arrest, but before *Miranda* warnings are administered, as substantive evidence of guilt. (See, e.g., *Moore*, *supra*, 104 F.3d at p. 385 ['custody and not interrogation is the triggering mechanism for the right of pretrial silence under *Miranda*'].)" (Typed Opn. at pp. 23-24, fn. omitted.)

The court said its holding that the right of pretrial silence under *Miranda* is triggered by the inherently coercive circumstances attendant to a de facto arrest is both "coextensive with constitutional guarantees of the Fifth Amendment" and protects the Amendment's "core . . . values." (Typed Opn. at p. 24.) It characterized the contrary rule as one that "tends to obfuscate the truth-finding function of the criminal trial (Typed Opn. at p. 25) and "renders Fifth Amendment protections illusory . . . ." (Typed Opn. at p. 26.)

The Court of Appeal also endorsed and applied the Ninth Circuit's rule "allowing only two possible 'exception[s] to the bar against the use of silence,' namely, use of defendant's silence against a testifying defendant for impeachment purposes (sanctioned in *Jenkins*[*v. Anderson* (1980) 447 U.S. 231], and *Fletcher*[*v. Weir* (1982) 455 U.S. 603 (per curiam)]), and use of a defendant's *pre-arrest* silence as substantive evidence of guilt (acknowledged as an open question in *Jenkins*, *supra*, 447 U.S. at p. 236, fn. 2). (See *Moore*, *supra*, 104 F.3d at p. 389.)" (Typed Opn. at p. 24.) It found "neither exception applies in this case because defendant did not testify and the prosecution elicited evidence of defendant's post-arrest silence. Thus, as in *Moore*, we conclude defendant's constitutional rights were violated by the introduction of evidence of his pre-trial silence in the

prosecution's case-in-chief." (Typed Opn. at p. 25 [citing *Moore*, *supra*, at p. 389.)

Summarizing its ruling, the court said "defendant was under de facto arrest when he was driven from the scene of the accident in a patrol car and he was not given *Miranda* warnings at that time. During its case-in-chief, the government elicited testimony from Sergeant Bailey and Officer Price that, subsequent to his arrest, defendant never inquired about the welfare of the occupants of the other vehicle. The government offered this evidence of defendant's post-arrest, pre-*Miranda* silence as substantive evidence of defendant's guilt, in violation of his Fifth Amendment right against self-incrimination. (*Velarde–Gomez*, *supra*, 269 F.3d at p. 1028 [testimony regarding defendant's lack of emotional response when informed marijuana found in his vehicle was 'tantamount to evidence of silence' in violation of defendant's Fifth Amendment rights].)" (Typed Opn. at pp. 26-27, fn. omitted.)

The Court of Appeal found the error was not harmless under *Chapman v. California* (1967) 386 U.S. 18. (Typed Opn. at p. 27.) It reasoned that the evidence was in "equipoise," and that the prosecutor placed "great emphasis" on the erroneously admitted evidence in closing argument. (*Ibid.*) Of that argument, it said:

> [T]he prosecution vigorously pressed the jury to find defendant's speed at impact was reliably determined by its expert. The prosecutor argued that defendant's speed, at the time of impact, demonstrated the "I don't care" attitude consistent with establishing gross negligence. After asserting that defendant "barrel[ed] down Woodside at double the speed limit," the prosecutor rhetorically stated, "Why did he not . . . at least slow down? . . . Because he was grossly negligent. He was driving down that night . . . without a care of what was going to happen. I don't care is the attitude that he had." The prosecutor explained to the jury that it could not consider defendant's failure to testify, but "should and can absolutely consider [] how he acted the night of the collision. And there's

> so much evidence about this. And all of it points to one thing; his consciousness of his own guilt." Pressing his [sic] theme, the prosecutor added: "The next one I think is particularly offensive, he never, ever asked, hey, how are the people in the other car doing? Not once. . . . Now you step on somebody's toe . . . what is your first thing out of your mouth? Whoops. I'm sorry. I'm not saying that he has to say sorry as an expression of his guilt or as some kind of confession, but simply as an expression of his regret. Look, I'm sorry those people were hurt. [¶] Not once. Do you know how many officers he had contact with that evening? Not a single one said that, hey, the defendant asked me about how those people were doing. Why is that? Because he knew he had done a very, very, very bad thing, and he was scared. [¶] . . . And he was obsessed with only one thing, that is, saving his own skin. That's why he said, hey, can I just go home."
>
> (Typed Opn. at pp. 28-29.)

The Court of Appeal characterized the prosecutor as "urging the jury to consider defendant's failure to ask about the welfare of the occupants of the other vehicle as substantive evidence of his guilt" and found that it contributed to the verdict by using erroneously admitted evidence of defendant's postarrest, pre-*Miranda* silence. (Typed Opn. at p. 29.)[2]

REASONS FOR GRANTING REVIEW

I. REVIEW IS NECESSARY TO RESOLVE A SIGNIFICANT QUESTION OF FIRST IMPRESSION REGARDING THE USE OF A DEFENDANT'S POSTARREST, PRE-*MIRANDA* SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT

The decision below requires review as a significant constitutional of first impression in this state. The Court of Appeal held that the Fifth Amendment precludes evidence of the defendant's failure to speak after a de facto arrest when the defendant has not been advised of the right to

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[2] The court disposed of an unrelated claim for the guidance of the parties in the event of a retrial. (Typed Opn. at pp. 29-32.)

remain silent and is not subjected to interrogation. It ventured a categorical solution to the purported problem it perceived, a solution that is both overbroad and uncertain in application. It then decided that its new rule for defendants who remain silent applies to this case—in which the defendant was not silent and at the critical moment was *not* speaking while under a de facto arrest. Defendant asked the police if he could go home *when he was sitting with a friend in one of defendant's own cars and was not under restraints let alone under a functional arrest.* This holding requires review by the Supreme Court.

The Court of Appeal tacitly acknowledged (Typed Opn. at p. 17) that its holding lacks authoritative support in any California decision or in any United States Supreme Court decision construing the Fifth Amendment. Additionally, its holding goes far beyond accepted principles enunciated by the high court in *Miranda* (which established prophylactic procedures to protect the Fifth Amendment right of a defendant subjected to custodial interrogation, which is not at issue here) or in *Doyle v. Ohio* (1976) 426 U.S. 610 (which holds that a prosecutor may not, at trial, use the silence of a defendant who has been advised he has a constitutional right to remain silent, because to do so violates the due process clause of the Fourteenth Amendment). (See Typed Opn. at pp. 18-20.)

Furthermore, the Court of Appeal rests its holding on federal circuit court decisions, which it candidly admitted are in conflict. (Typed Opn. at pp. 17, 20.) Such decisions are not binding on a California court. (*People v. Crittenden* (1994) 9 Cal.4th 83, 120 fn. 3 ["we are not bound by decisions of the lower federal courts, even on federal questions"].) In these several ways, the decision below singularly lacks authority.

Considering the tenuous support for the decision and the significance of the constitutional issue the Court of Appeal reached out to address, respondent respectfully suggests that the guidance of this court is required.

California courts and law enforcement agencies, which are now required to deal with the sweeping impact of the Court of Appeal's novel holding under the Fifth Amendment, would be greatly assisted by review of this question since it potentially impacts the admission of evidence in numerous criminal trials. (See Cal. Rules of Court, rule 8.500, subd. (b).)

Decisions of this Court and the United States Supreme Court do not offer such guidance, since they do not point toward the Court of Appeal's conclusion. For example, *Doyle* and its California analogue, *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 118, hold that post-*Miranda* silence cannot be used as evidence of guilt during the People's case-in-chief because the *Miranda* warnings themselves implicitly promise a person subjected to custodial interrogation that silence will not be held against the defendant at trial. Here at the time of defendant's "silence," that is, when he spoke to the police, defendant was given no promise his silence was unusable, because there was not yet any legal obligation to advise defendant of his Fifth Amendment rights. The *Miranda* rights were provided, as usual, when defendant was formally arrested and subjected to interrogation. If, however, a defendant may invoke the Fifth Amendment to bar the use of silence when a restraint equivalent merely to a "de facto arrest" is exerted (here transportation to a police station), the triggering event for the bar which was formerly so clear from *Miranda* and *Doyle* (custodial interrogation) becomes significantly less certain both to the defendant and to the police.

For the period after defendant's arrest and before the giving of *Miranda* warnings, the opinion below provides greater protection for a defendant's *silence* than is provided under *Miranda* for a defendant's voluntary incriminatory *statements* made during that same time period. Generally, a defendant's incriminating statements after arrest ordinarily may be admitted to prove his guilt if they were not given in response to

interrogation. Under the decision below, a defendant's silence during the same period is not admissible to prove his guilt. This opinion will render that silence inadmissible regardless of how probative it may be of the defendant's guilt and regardless of the presence or absence of any compulsion beyond the sheer fact of an arrest.

This reflects the Court of Appeal's holding is both overbroad and anomalous. Moreover, its rule fails to consider factors that led the *Miranda* court to require both custody and interrogation as prerequisites for *Miranda* advisements. Custodial interrogation is the trigger for the giving of *Miranda* advisements, and it serves as the critical point to determine the admissibility of an in-custody suspect's statements.

The Court of Appeal's holding signals a drastic movement away from *Doyle*. Now, prosecutorial reliance upon a defendant's silence *after arrest* is Fifth Amendment error, even absent interrogation or a *Miranda* admonition. The Court of Appeal's novel rule gives too little weight to the *Fletcher v. Weir* (1982) 455 U.S. 603 (per curiam), where the high court stated: "In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand. A State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony." (*Id.* at p. 607.)

There is no constitutional reason to limit this view to situations where a defendant's silence is offered to impeach in-court testimony. If the defendant's silence has probative value, the evidence should be admissible. The focus here should be on the measure of compulsion, not whether the defendant is testifying. If the defendant's postarrest, pre-*Miranda* silence is not the product of government compulsion, the defendant's later choice as

to testifying should make no difference in terms of the admissibility of the evidence.

If pre-*Miranda* silence is not the product of some governmental compulsion, the defendant's silence should be admissible at trial to prove guilt just as if it were an adoptive admission made by the defendant in the face of an accusation. (See *People v. Medina* (1990) 51 Cal.3d 870, 889-891; *People v. Preston* (1973) 9 Cal.3d 308, 315 [observing that neither *Griffin v. California* (1965) 380 U.S. 609 and *People v. Cockrell* (1965) 62 Cal.2d 659, both of which "proscribe drawing an inference adverse to a defendant from his failure to reply to an accusatory statement in a situation where failure to reply was based upon his constitutional right to remain silent," nor the Fifth Amendment privilege against self-incrimination "appl[ies] to commentary on defendant's nonassertive conduct prior to trial, absent a showing that such conduct was in assertion of the privilege to remain silent"].)

Custodial *interrogation* is inherently compulsive such that it might produce a statement that is unknowing or involuntary. Therefore, before any statement that follows custodial interrogation is admitted at trial *Miranda* advisements are given and waivers obtained. But custody alone is not so compulsive of self-incriminating speech that *Miranda* warnings are required where there is no custodial *interrogation*.

As suggested by the court in *Howes v. Fields* (2012) ___U.S. ___ [182 L.Ed.2d 17, 29, 2012 U.S. LEXIS 1077, **21-23], the danger of compulsion during a period of custodial interrogation is that the suspect will make a statement, not that he will remain silent. During a postarrest period with no interrogation, there is no inherent risk the defendant will be compelled by government action to incriminate himself.

In *South Dakota v. Neville* (1983) 459 U.S. 553, the Supreme Court considered a case where police officers stopped a defendant's car for a stop

sign violation. The driver failed field sobriety tests and was placed under arrest. The officers read the defendant his *Miranda* rights and asked the driver to submit to a blood-alcohol test. The defendant refused to take the test. The Supreme Court stated:

> As we stated in *Fisher v. United States*, 425 U.S. 391, 397 (1976), "[t]he Fifth Amendment is limited to prohibiting the use of 'physical or moral compulsion' exerted on the person asserting the privilege." This coercion requirement comes directly from the constitutional language directing that no person "shall be *compelled* in any criminal case to be a witness against himself." U.S. Const., Amdt. 5 (emphasis added [in *Neville*]). And as Professor Levy concluded in his history of the privilege, "[the] element of compulsion or involuntariness was always an ingredient of the right and, before the right existed, of protests against incriminating interrogatories." L. Levy, Origins of the Fifth Amendment 328 (1968).

(*South Dakota v. Neville*, *supra*, 459 U.S. at p. 562.)

In *Neville*, the Court held that "no impermissible coercion is involved when the suspect refused to submit to take the test" (*Neville*, *supra*, 459 U.S. at p. 562.) "[T]he fact that the government gives a defendant or suspect a 'choice' does not always resolve the compulsion inquiry." (*Id.* at pp. 562-563.) "[T]he choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices. [Citation.]" (*Id.* at p. 564.) Applying a purely Fifth Amendment analysis, the Supreme Court held that "a refusal to take a blood-alcohol test, after a police officer lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination." (*Id.* at p. 564.)

The *Neville* court distinguished *Doyle*, holding that the evidence of the defendant's refusal to take a blood test could be admitted *as evidence of the defendant's guilt*, even though the defendant was not warned that his

refusal could be used against him at trial. (*Neville*, *supra*, 459 U.S. at p. 565.) *Neville* analogized to *Fletcher v. Weir*, *supra*, 455 U.S. 603, which held that postarrest silence without *Miranda* warnings may be used to impeach trial testimony.

A defendant who has been arrested, but who has neither been subjected to interrogation nor advised that may remain silent, may thus choose to speak or to remain silent. The difficulty of that personal choice is not the constitutional measure of compulsion. If, as in *Neville*, an arrestee who has been asked by an officer to take a blood-alcohol test is not under a constitutionally impermissible compulsion, and if, as *Neville* holds, the results of his refusal to take a blood test may be used at trial as evidence of his guilt, then, similarly, an arrestee's voluntary silence, unaccompanied by any governmental effort to interrogate the arrestee or to coerce the arrestee into speaking, should not be precluded as evidence of guilt by the Fifth Amendment.

The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself . . . ." The Court of Appeal (Typed Opn. at p. 20 & fn. 11) states that the majority in *Jenkins v. Anderson* (1980) 447 U.S. 231, when considering the use of prearrest silence *to impeach the defendant's credibility*, "noted that defendant's 'failure to speak occurred before [defendant] was taken into custody and given *Miranda* warnings. Consequently, the fundamental unfairness present in *Doyle* is not present in this case.' (*Jenkins*, *supra*, 447 U.S. at p. 240.)" The same is true where postarrest evidence of silence is used to prove guilt, so long as the silence occurred prior to *Miranda* advisements or custodial interrogation.

The *Jenkins* case supports respondent's request for review. Justice Stevens's concurrence in *Jenkins*, *supra*, 447 U.S. at p. 239, states with respect to prearrest silence:

> The fact that a citizen has a constitutional right to remain silent when he is questioned has no bearing on the probative significance of his silence before he has any contact with the police. . . . When a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why this voluntary decision to do one or the other should raise any issue under the Fifth Amendment. For in determining whether the privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent. A different view ignores the clear words of the Fifth Amendment.

(*Jenkins*, 447 U.S. at p. 241 (conc. opn. of Stevens, J.) (italics added); see *United States v. Oplinger* (9th Cir. 1998) 150 F.3d 1061, 1066.)

The Court of Appeal's decision would below exclude evidence of defendant's pre-*Miranda* silence after arrest. A defendant's right to silence is protected by the prophylactic warnings required by *Miranda* when a defendant is undergoing *custodial* interrogation. What constitutes "custody" for *Miranda* purposes depends upon whether [the circumstances] "'exert[] the coercive pressure that *Miranda* was designed to guard against—the "danger of coercion [that] results from the interaction of custody and official interrogation."' [Citations.]" (*Howes v. Fields*, *supra*, 182 L.Ed.2d at p. 26.) "Custody," as defined for *Miranda* purposes, is not synonymous with "de facto arrest," the term the Court of Appeal uses for marking the point at which the defendant acquires broader protection to be free of compulsion to self-incriminate, even when divorced from interrogation.

"Custody," for *Miranda* purposes, "is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion. In determining whether a person is in custody in this sense, the initial step is to ascertain whether, in light of 'the objective circumstances of the interrogation,' *Stansbury v. California*, 511 U.S. 318, 322-323, 325 . . . (1994) (per curiam), a 'reasonable person [would] have felt he or she was

not at liberty to terminate the interrogation and leave.' [Citation.] And in order to determine how a suspect would have 'gauge[d]' his 'freedom of movement,' courts must examine 'all of the circumstances surrounding the interrogation.' Stansbury, 511 U.S., at 322, 325. . . ." (*Howes v. Fields*, *supra*, 182 L.Ed.2d at p. 27.)

In the hiatus between the imposition of restraints tantamount to formal arrest and the giving of *Miranda* warnings, the Court of Appeal's opinion establishes greater protection for a defendant's *silence* than is provided under the *Miranda* line of cases for a defendant's voluntary, incriminating *statements* made during that same time period. This anomalous rule requires correction.

If the circumstances following a defendant's being taken into custody are not so compulsive as to require *Miranda* warnings, then the defendant's silence should not be protected any more than speech. (See *People v. Eshelman* (1990) 225 Cal.App.3d 1513, 1520-1521 [forbidding governmental use of defendant's silence where silence is accompanied by, or shown objectively by the record to have been, an assertion of the right to remain silent].)

The Fifth Amendment protects against governmental compulsion to incriminate oneself. Here, the only compulsion here was a mere arrest. There was no governmental interrogation prior to defendant's initial periods of silence offered to prove his guilt, and the circumstances here provide no indication that the defendant's silence at that time was predicated upon an interest in invoking his right to silence. The question presented here is a matter of first impression in this State, and the sweeping consequences of any answer to that question warrant review by this Court.

II. REVIEW IS NECESSARY BECAUSE THE USE OF DEFENDANT'S POSTARREST, PRE-*MIRANDA* SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT IS HARMLESS WHERE PREARREST SILENCE IS EVEN MORE PROBATIVE OF GUILT

The Court of Appeal's decision finding the assumed error prejudicial requires review. The finding does not square with the court's description of defendant's substantial *prearrest* silence, or with other evidence of his guilt.

A. Evidence of Defendant's Prearrest Silence Was Properly Admitted and Rendered Any Constitutional Error in Admitting Evidence of Postarrest Silence Harmless

In finding prejudice, the Court of Appeal relied heavily on the prosecutor's comment during argument that defendant requested to go home. (Typed Opn. at p. 29.) The prosecutor had asked Officer Price about that request. The prosecutor had asked if, at the time of that request, defendant inquired about the condition of the people in the other car. Officer Price answered, "No." (Typed Opn. at 14.) Defendant's prearrest silence occurred at the scene, in a tableau of responders extracting the injured from the other car to be taken to the hospital by ambulance. *During these plainly horrific events*, all defendant could think of was to express his desire to go home. That expression demonstrated he was not relying on his right to remain silent. He spoke. Considered as evidence of his prearrest silence about the victims, the statement was properly admitted.

Defendant was seated in the car his friend had been driving. They were at the accident scene when defendant asked the officer if he could go home. That statement preceded his being told to stay put, his being placed in a patrol vehicle, and his transportation to the police station. And it was just that—a statement—the opposite of "silence." Neither the evidence of defendant's request to go home, nor the argument by the prosecutor in

reference to that prearrest statement, was error, let alone any demonstration of prejudice. That the prosecutor referred to this prearrest statement in the argument to the jury that the Court of Appeal prominently quoted is compelling evidence of harmlessness, rather than of prejudice. (Typed Opn. at pp. 28-29.)

The evidence of prearrest silence by defendant at the crime scene before a de facto arrest was clear. Defendant was moving about the scene in the aftermath of the collision. His silence about what was happening with the victims was clearly probative of his consciousness of guilt. The properly admitted evidence of his failure to inquire about the victims during the critical prearrest period overwhelmed any harm that might accrue from the admission of evidence that he did not inquire about the victims later. The use of defendant's earlier "silence" at the crime scene as substantive evidence was not error under its ruling. The Court of Appeal's opinion disregards that fact in assessing harmless.

Defendant moved under *Miranda* for exclusion of his statements in custodial interrogation, but not to limit evidence of consciousness of guilt to evidence of prearrest silence.[3] The prosecutor asked the police officers whether appellant had *ever* inquired about the condition of the occupants of the other vehicle at any time during their contacts with him on the night of the collision. That necessarily included *before and after* his transportation to the police station. All of the officers testified that he *never* inquired about the condition of the occupants of the other vehicle at any time. (Typed Opn. at p. 14.) That the evidence showed defendant remained silent

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[3] That said, no reasonably competent counsel would be expected to seek such an order for the very reason stated in this argument: that the evidence of prearrest silence swamps any evidence of silence following a de facto arrest would have been as apparent to defense counsel and the jury as it should have been to the Court of Appeal.

about the victims' condition before and after a de facto arrest is hardly a compelling reason for reversal. Instead, it mainly reflects the inappropriateness of the Court of Appeal's decision to entertain defendant's Fifth Amendment claim for the first time on appeal when the trial court had no opportunity to make remedial orders that would avoid any possibility of prejudice.

The admission of *prearrest* silence regarding the welfare of the people in the other car rendered harmless the evidence of defendant's later postarrest silence on the identical subject. The evidence of postarrest silence and the prosecutor's references in argument to such silence were harmless beyond a reasonable doubt.

B. The Evidence as a Whole, the Jury's Acquittal of Defendant on Counts Two And Three, and the Jury's Conviction on a Lesser Offense Demonstrate the Assumed Error Did Not Contribute To The Verdict

The unchallenged evidence of defendant's guilt of gross vehicular manslaughter was strong. Defendant clearly drove too fast for conditions. The testimony of the experts regarding his speed was conflicting, but the excessiveness of his speed was evident from the photos showing the impact of the collision (4 CT 1034-1039, 1058-1070), the size of the debris field, the distance which his vehicle traveled after impact, the degree of damage to both vehicles, and the seriousness of the injuries inflicted. A police sergeant, who had investigated more than a thousand collisions, 20 to 30 of them fatal, testified, "You know, looking at this damage, looking at this debris field, looking at the points of rest of the vehicles in relation to the point of impact of the collision, everything about it screams speed." (3RT 396.)

The jury's acquittal of defendant on all three of the charged offenses, and its return of a single, lesser guilty verdict as to manslaughter with gross negligence, demonstrate that the evidence of postarrest silence was not

prejudicial. The jury did not jump to the conclusion that silence meant defendant was guilty. For all these reasons, review should be granted of the Court of Appeal's decision that its finding of error requires reversal of the judgment.

CONCLUSION

Accordingly, respondent respectfully requests that the petition for review be granted.

Dated: April 30, 2012

Respectfully submitted,

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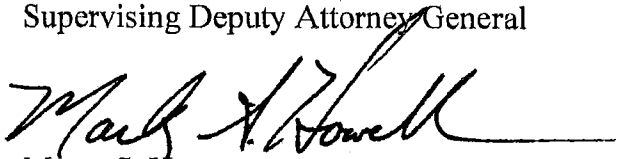

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CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains 6,441 words.

Dated: April 30, 2012

KAMALA D. HARRIS
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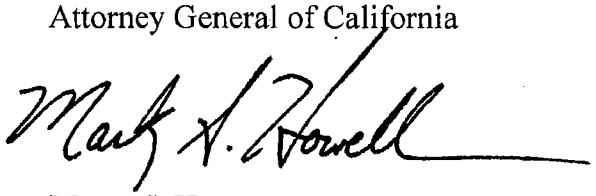

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EXHIBIT A

HOWELL

COPY

Filed 3/19/12

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD TOM,

Defendant and Appellant.

A124765

(San Mateo County Super. Ct. No. SC064912)

In re RICHARD TOM,

on Habeas Corpus.

A130151

(San Mateo County Super. Ct. No. SC064912)

On the evening of February 19, 2007, defendant Richard Tom, while driving at a high rate of speed, broadsided a vehicle driven by Loraine Wong as she was making a left turn from Santa Clara Avenue onto Woodside Road in Redwood City. Wong's two daughters, Kendall (aged 10) and Sydney (8) were riding in the rear passenger seat. Sydney was strapped into a booster seat on the side of the vehicle that bore the brunt of the impact. Sydney died as a result of injuries sustained in the collision. Kendall survived, but sustained serious injuries.

As a result of the collision, defendant was charged with gross vehicular manslaughter while intoxicated, driving under the influence causing harm to another, and driving with a blood alcohol level of 0.08 percent or higher causing harm to another. Defendant pleaded not guilty to all charges. After a lengthy trial, the jury acquitted

defendant on all alcohol-related charges but returned a verdict of guilty on the lesser included offense of vehicular manslaughter with gross negligence.

In case number A124765, defendant appeals the judgment imposed following his jury-trial conviction. Defendant asserts multiple grounds for reversal of the judgment, including deprivation of constitutional rights, prosecutorial misconduct, improper admission of opinion testimony, prosecutorial failure to disclose exculpatory evidence, ineffective assistance of counsel, and sentencing error.

In case number A130151, defendant collaterally attacks the judgment by way of a petition for a writ of habeas corpus, asserting as prejudicial error many of the same issues raised in his direct appeal. On the court's own motion, we consolidated the two cases and deferred our determination of whether to issue an order to show cause on defendant's writ petition until we considered the issues raised on appeal.

Having considered the contentions raised by defendant on appeal, we conclude that the prosecution violated defendant's Fifth Amendment privilege against self-incrimination by introducing evidence at trial of his post-arrest, pre-*Miranda* silence as proof of guilt. We also conclude that defendant was prejudiced by this violation of his Fifth Amendment right. Accordingly, we reverse the judgment and remand the matter for further proceedings consistent with this opinion. We dismiss the writ petition as moot given our resolution of defendant's Fifth Amendment claim.

PROCEDURAL BACKGROUND

In an amended felony information filed on October 7, 2008, the San Mateo County District Attorney (DA) charged defendant with vehicular manslaughter with gross negligence while intoxicated (unlawful killing of Sidney Ng as a proximate result of violations of Vehicle Code sections 22350 (basic speed law) and 23103 (reckless driving), in violation of Penal Code section 191.5, subdivision (a) (count 1); driving under the influence and causing injury to another, in violation of Vehicle Code section 23153, subdivision (a) (count 2); and driving a vehicle with an blood alcohol level of 0.08% or more and causing injury to another, in violation of Vehicle Code section 23153, subdivision (b) (count 3).

The DA alleged that the offense charged in count 1 was a serious felony in which the defendant inflicted great bodily injury on someone other than an accomplice, pursuant to Penal Code section 1192.7, subdivision (c)(8). The DA also alleged with respect to count 1 that in the commission of the offense the defendant personally inflicted great bodily injury upon Loraine Wong and Kendall Ng, within the meaning of Penal Code section 12022.7, subdivision (a).

The evidentiary phase of defendant's jury trial began on October 16, 2008. The jury delivered its verdicts on October 29, 2008. The jury found defendant not guilty of count 1 and acquitted him of the lesser included offense of committing vehicular manslaughter while intoxicated with ordinary negligence. However, the jury found defendant guilty on the lesser included offense of count one, vehicular manslaughter with gross negligence, in violation of Penal Code section 192, subdivision (c)(1). The jury also found true the allegation that defendant personally inflicted great bodily injury on Kendall Ng but found the same allegation had not been proven with respect to Loraine Wong. Furthermore, the jury acquitted defendant of the charges in counts 2 and 3 and also acquitted him of lesser included misdemeanor offenses related to those counts.

On April 22, 2009, defendant filed a motion for a new trial based on newly discovered evidence. The trial court denied the motion for a new trial and proceeded to sentencing on April 24, 2009. The trial court sentenced defendant to the middle term of four years on his conviction for vehicular manslaughter with gross negligence and imposed an additional term of three years for the personal infliction of great bodily injury upon Kendall Ng, for an aggregate term of seven years in state prison. In addition, the court ordered that defendant pay restitution in the amount of $147,860.82. Defendant filed a timely notice of appeal on April 27, 2009.

FACTUAL BACKGROUND

At trial, the prosecution presented testimony of several police officers who described the scene at the collision, as well as the ensuing investigation culminating in defendant's arrest on alcohol-related charges. Other prosecution witnesses included Loraine Wong and Peter Gamino, a retired police officer and friend of defendant.

Gamino was with defendant during the evening the accident occurred and was driving another vehicle behind defendant's vehicle when the collision occurred. There were no third-party witnesses to the collision and both sides presented expert testimony regarding the speed of appellant's vehicle at the time of the collision. We recount the pertinent trial testimony below and provide more detail where required to resolve the issues raised by defendant.[1]

The Accident

On the evening of February 19, 2007, Loraine Wong decided to take her daughters, Sidney and Kendall Ng (ages eight and ten), to her sister's house in Sunnyvale for an overnight visit. Wong drove a Nissan Maxima automatic sedan to her sister's house that evening. Kendall was seated in the rear passenger side of the Maxima and Sidney sat in a booster seat next to Kendall. Before departing, Wong secured both girls in their seat belts and fastened her own seat belt.

Wong took Santa Clara Avenue to Woodside Road en route to her sister's home. Upon reaching the intersection of Woodside Road and Santa Clara, Wong planned to turn left and proceed on Woodside to the Southbound I-280 on ramp. Wong drove this route to her sister's home hundreds of times during the 15 years she lived on Santa Clara Avenue. Wong backed out of her driveway and called her sister on a hand-held cell phone to let her know "we were on our way to her house." The evening was chilly and clear. Wong spoke with her sister for a few minutes until she came to a full stop at the intersection of Santa Clara and Woodside Road. Wong recalled that her headlights and left-turn indicator were on at this time.

At this point, Wong was finished talking with her sister but had the cell phone in her hand. She began to inch forward, and looked to her left and observed the next cross-street, Alameda de las Pulgas. Wong then looked right and left again. Seeing no on-

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[1] The parties also presented expert testimony regarding whether defendant's blood-alcohol level, measured several hours after the accident, indicated that he was impaired at the time of the accident. We need not recount any of that expert testimony because defendant was acquitted on the alcohol related offenses.

coming vehicles in either direction, she eased onto the accelerator pedal to execute a left turn. As she began to turn she "saw a big flash of light" and was struck by a vehicle on her left (driver's) side. Before she saw the flash of light, Wong heard no sound associated with a car braking, or a horn. She did not see headlights to her left and never saw defendant's car. Wong estimated she was going about 15 miles per hour at the time of the collision.

After the collision, Wong discovered that her daughters were injured. She yelled their names; Kendall responded, but Sidney didn't and never regained consciousness. Shortly, medical personnel arrived at the scene and extracted Wong and her daughters from the vehicle. Sidney and Kendall were transported to Stanford hospital. At the hospital, Wong was informed that Sidney had died.[2] Kendall sustained a cut to her forehead that required 30-40 stitches, a broken arm and an injury to her neck, and Wong suffered a broken rib and finger. Wong was released from the hospital on the night of the collision but Kendall remained in the hospital for a week.

Retired San Francisco Police Officer Peter Gamino testified that he had known defendant for about 20 years. Gamino was visiting California and staying at defendant's house on Sequoia Street near Woodside Road when the accident occurred. On the evening of the accident, Gamino and defendant had a couple of cocktails before dinner. They ate around 7:00 p.m. and finished about half an hour later. After dinner, they drove in defendant's Mercedes to defendant's son's house in order to pick up a Toyota Camry. After retrieving the Toyota, they left. Defendant drove his Mercedes and Gamino drove the Toyota. Gamino followed defendant onto Woodside Road. Gamino was about 200 yards behind defendant driving at about 40 miles per hour when he observed "dust and dirt [] all over the place," indicating that a collision had occurred. He made a U-turn and

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[2] Dr. Tom Rogers, a forensic pathologist, performed the autopsy on Sidney Ng. Rogers testified that the cause of death was multiple external and internal injuries caused by blunt force trauma. The injuries were consistent with a child restrained in a booster seat in a vehicle that was T-boned by a speeding car.

circled back to the collision scene to check on defendant. Defendant was groaning in pain, and said, "I didn't even see it."

Post-Accident Investigation Through Defendant's Arrest at the Police Station

Sergeant Alan Bailey and Officers Price and Felker of the Redwood City Police Department were among the first law enforcement officers to arrive at the scene of the collision. Sergeant Bailey arrived at 8:30 p.m. and took charge of coordinating the investigation. He observed that conditions were dry and it was a "pleasant evening." Bailey noted Santa Clara Avenue is a two-lane roadway, running east and west, which intersects Woodside Road, a four-lane roadway running north-south. Defendant's silver-colored Mercedes E320 was a considerable distance north of the Woodside Road/Santa Clara intersection. The Mercedes had sustained major front-end damage, the windshield was cracked and it had a couple of flat tires. Defendant was seated in the driver's seat of the Mercedes with the air bag deployed. Paramedics were attending to defendant and Officer Price was standing beside the vehicle.

Bailey parked near defendant's vehicle, and walked south through a "very large debris field." He noted that the other vehicle involved in the collision, a 1996 Nissan Maxima, had sustained "major, total damage." There was massive intrusion to the Nissan's left rear passenger door, the entire rear end of the vehicle was "destroyed," and the front windshield, the back window and the left rear passenger window were all shattered. The occupants of the Nissan had been removed from the vehicle by paramedics by the time Bailey arrived.

After examining the scene, Bailey was told by several officers that defendant was now seated in the Camry driven by Gamino. Bailey directed Officer Felker to place defendant in a patrol car. Bailey also told the officers to ask defendant if he would go to the station in order to make a statement and give a voluntary blood test. Defendant was placed in the patrol vehicle at 9:30 p.m., transported from the scene at 9:48 p.m. and arrived at the police station at 9:57 p.m. Bailey received no information at the scene as to whether defendant had shown any signs of intoxication.

Bailey arrived at the police station at about 10:00 p.m. He entered the police station and spoke with David Redding, the phlebotomist. Redding told Bailey that he could not draw a sample of defendant's blood because defendant was not formally under arrest. Redding advised Bailey that defendant would need to be transported to the hospital for a voluntary blood test. At approximately 10:30 p.m., Bailey went to speak with defendant about obtaining a blood sample. He found defendant in an interview room with Officer Price. Defendant asked Bailey to use the restroom. Bailey consented and escorted him to the restroom. During defendant's interaction with Bailey at the police station, defendant never asked Bailey about the occupants of the other vehicle.

Officer Price arrived at the accident scene and was directed by Officer Felker to contact defendant. Price found defendant sitting in the driver's seat of his silver Mercedes being attended by two paramedics. Price spoke briefly with defendant. About ten minutes later, Price observed defendant walking around. At this point, he (defendant) was accompanied by his girlfriend. Paramedics were trying to convince defendant to go to the hospital but defendant did not want to go. Defendant was limping slightly but otherwise "seemed okay."

Later, Price observed defendant and his girlfriend with Peter Gamino, all sitting in the Toyota Camry which was parked in the cordoned-off collision scene. Defendant was sitting in the front passenger seat, Peter Gamino was sitting in the driver's seat, and defendant's girlfriend was sitting in the rear seat of the car. While Price spoke with Gamino, he observed that defendant appeared calm. Defendant asked Price if he could walk home because "he lived only half-a-block away." Price told defendant that he had to stay at the scene because the investigation was still in progress. During this conversation, defendant did not ask about the condition of the occupants of the other vehicle.

Officer Felker testified that at approximately 9:48 p.m., he transported defendant from the accident scene to the police station to obtain a blood sample and a statement from defendant. Defendant was not handcuffed during the ride to the police station and his girlfriend was allowed to accompany him in the patrol car. Defendant appeared

irritated that he had to go to the police station and asked Price why a blood sample could not be taken at the scene.

Officer Price arrived at the police station shortly after 10:00 p.m. and learned that a blood sample could not be obtained from defendant because he was not under arrest. Price spoke with defendant about going to the county hospital for a voluntary blood draw. Shortly after speaking with Price, defendant was escorted to the restroom by Sergeant Bailey. When he was finished in the restroom, Bailey escorted defendant and his girlfriend to an interview room. Officer Price and Gomez entered the interview room and observed defendant talking on his cell phone. While defendant conversed on the telephone, Officers Gomez and Price both detected an odor of alcohol from defendant. Price then had defendant take a series of Field Sobriety Tests (FSTs). Based on the results of the FSTs, Price concluded defendant was under the influence of alcohol at the time of the collision. Price informed defendant he was under arrest and took him to county jail for booking. Price testified that during the roughly three hours or so that he had contact with defendant between approximately 8:20 and 11:30 p.m., defendant never asked about the condition of the occupants of the Nissan.

Accident Reconstruction Investigation and Expert Testimony

Redwood City Police Motor Officer Janine O'Gorman, the lead traffic investigator for the accident in question, testified in the prosecution's case-in-chief. She arrived at the scene at 9:30 p.m. O'Gorman first walked around the perimeter of the large debris field and made a visual inspection of the vehicles involved in the collision in order to establish a reference point and map out the scene. Based on the gouge mark on the roadway and the point at which the yaw[3] and tire friction marks began, O'Gorman determined that the point of impact was at the intersection of Woodside and Santa Clara. O'Gorman observed yaw marks which began at the point of impact and led straight to defendant's Mercedes. The distance from the point of impact to the Mercedes was 239.9 feet.

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[3] O'Gorman explained that a yaw mark is one made by a tire when the tire is not turning in the direction in which the vehicle is moving.

O'Gorman determined that the Nissan came to rest 60 feet from the point of impact. There was no evidence of pre-braking tire friction marks consistent with the Mercedes' anti-lock braking system, indicating that defendant did not apply his brakes before the collision.

On cross-examination, O'Gorman testified that under California's basic speed law a driver must drive at a speed that is safe under prevailing conditions. O'Gorman regularly patrols the stretch of Woodside Road where the collision occurred. On that stretch, drivers usually exceed the posted speed limit of 35 miles per hour at night when traffic is extremely light. Using a radar gun, O'Gorman clocked the average night time driving speed at 40 miles per hour. Police deem that speeds of 50 miles per hour and above are unsafe on that stretch of Woodside Road.

Officer Jincy Pace, a traffic accident investigator with the San Jose Police Department, testified for the prosecution as an expert in the area of collision reconstruction. Based on her review of photos of the collision scene, Officer Gorman's diagram mapping the scene, and forensic mapping of the crush-depth on the vehicles, Pace concluded that the operation of defendant's Mercedes at a speed unsafe for conditions was the primary factor in the collision.

To determine the speed of the Mercedes at the point of impact, Pace used a method known as conservation of linear momentum. Using this methodology, Pace first calculated the post-impact speed of the Mercedes and then she applied what she considered a "ludicrous[ly]" low drag factor of 0.3 (the equivalent of slamming brakes on in snow), to account for the fact that the Mercedes was spinning post-impact.[4] Pace opined that defendant's post-impact speed was 47 miles per hour using "a low drag factor." If she applied a drag factor of 0.65, more typical for dry pavement, her estimate of defendant's post-impact speed would have been 69 miles per hour. Using the lower post-impact speed estimate of 47 miles per hour, Pace opined that the speed of

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[4] A drag factor of 1.0 is the equivalent of driving through sand, a drag factor of 0.1 is the equivalent of driving on ice, and the "normal" drag factor used for an asphalt surface is 0.7-0.8.

defendant's Mercedes at impact (pre-impact speed) was 67 miles per hour. She estimated that the Nissan's pre-impact speed was 12 miles per hour.

The defense relied upon the testimony of Christopher Kauderer, an expert in accident reconstruction, to counter the opinions of Officer Pace. Kauderer testified that he was not permitted to do any destructive testing or examination of defendant's vehicle, i.e., not allowed to take anything apart. As a consequence, he was unable to conduct a mechanical inspection of the car's three major systems, braking, throttle and steering, to see if there was any pre-existing mechanical condition and to document any effects of the collision on those systems. Kauderer opted not to use the wholesale "drag factor" analysis employed by Pace because assigning a drag factor to the Mercedes was, in his opinion, too speculative. The drag factor for the Mercedes was "unknown" because there were too many incalculable variables; in particular post-impact driver input, such as whether defendant had his "foot on the accelerator," steered or braked post-impact.

Instead, to calculate the speed of the vehicles at impact, Kauderer used the principle of conservation of momentum.[5] Employing this methodology, Kauderer opined that the Mercedes was traveling at 49 to 52 miles per hour and the Nissan was traveling at 7-9 miles per hour at impact. Based on his examination of the scene and the vehicles, human factors in play, as well as forensic mapping and his conservation of momentum analysis, Kauderer opined the primary collision factor was that the driver of the Nissan

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[5] The conservation of momentum principle operates on the assumption that the momentum of the vehicles (weight x velocity) going into the collision has to equal the momentum of the vehicles coming out of the collision. Using a drag factor range for the Nissan that was similar to the range used by the prosecution, Kauderer applied that range to the Nissan's known distance of travel after impact (68 feet) to arrive at an estimate of the Nissan's post-impact speed of 27 to 29 miles per hour. Next, Kauderer assumed that both vehicles reached a common velocity during the collision and assigned a separation velocity (post-impact speed) of 27-29 miles per hour to the Mercedes also. Having determined the post-impact speed of both vehicles, Kauderer examined the pre- and post-impact departure angles and the pre-impact approach angles, of both vehicles. Based on these speeds and angles, Kauderer arrived at a speed for the Mercedes at the point of impact.

entered into the roadway and violated the right of way of the driver of the Mercedes, leaving the driver of the Mercedes insufficient reaction time to brake.

In rebuttal, the prosecution called San Jose Police Officer David Johnson as an expert in accident reconstruction because Officer Pace was unavailable to testify. Johnson conducted a visual inspection of defendant's Mercedes and observed that the car's front left tire was wedged against the wheel-well. Johnson opined that the position of the wedged left front tire would prevent any post-impact steering by the driver and increase the Mercedes' drag factor. Johnson also disagreed with Kauderer's assumption that the vehicles reached a common separation velocity and opined that a 29 miles per hour post-impact speed for the Mercedes was inconsistent with the distance the vehicle traveled after impact. Finally, Johnson opined that the Mercedes fuel pump would have shut off on impact.

DISCUSSION

A. Fifth Amendment Privilege Against Self-Incrimination

Defendant contends that the testimony of Sergeant Bailey and Officer Price regarding his failure to inquire about the well being of the occupants of the other vehicle involved in the collision was erroneously introduced as substantive evidence of guilt, in violation of his Fifth Amendment privilege against self-incrimination, and that the error was not harmless beyond a reasonable doubt.

We first address respondent's contention that defendant has forfeited his Fifth Amendment claim by failing to raise an objection below on that ground, citing *People v. Stewart* (2004) 33 Cal.4th 425 (*Stewart*) and *People v. Arias* (1996) 13 Cal.4th 92 (*Arias*).[6] "Ordinarily, a criminal defendant who does not challenge an assertedly

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[6] Whereas respondent argues in terms of "waiver," the issue here is more accurately described as one of "forfeiture," which refers to "a failure to object or to invoke a right," rather than "waiver," which refers to "an express relinquishment of a right or privilege." (*In re Sheena K.* (2007) 40 Cal.4th 875, 880, fn. 1 (*Sheena K.*).) Moreover, the cases cited by respondent hold that the failure to object to prosecutorial misconduct in the trial court "bars presentation of a misconduct claim on appeal" (*Stewart, supra,* 33 Cal.4th at p. 484; *Arias, supra,* 13 Cal.4th at p. 159 ["failure to object and request an admonition

erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal (citations)," even if the claim is one of constitutional magnitude. (*Sheena K., supra,* 40 Cal.4th at pp. 880-881.) " 'The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected. [Citation.]' (Citations.)" (*Id.* at p. 881.)

And yet the forfeiture rule is not absolute. "In general, forfeiture of a claim not raised in the trial court by a party has not precluded review of the claim by an appellate court in the exercise of that court's discretion. (Citations.)" (*Sheena K., supra,* 40 Cal.4th 887, fn. 7.) "Thus, an appellate court may review a forfeited claim—and '[w]hether or not it should do so is entrusted to its discretion.' (Citation.)" (*Ibid.*) Typically, appellate courts "have engaged in discretionary review only when a forfeited claim involves an important issue of constitutional law or a substantial right. (Citations.)" (*Ibid.*)

Nevertheless, appellate court discretion to review forfeited claims of constitutional magnitude is circumscribed by the "established rule" that "a forfeited claim of trial court error in admitting or excluding evidence is not subject to discretionary appellate review." (*Sheena K., supra,* 40 Cal.4th at p. 888, fn. 7; see e.g., *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1028, fn. 19 [defendants forfeited confrontation clause claim by failing to raise it below].) However, our Supreme Court has recognized a "limited exception" to the established rule "for constitutional claims initially raised on appeal when closely related to claims raised at trial regarding the admission or exclusion of evidence. . . ." (*Sheena K., supra,* 40 Cal.4th at p. 888, fn. 7.)

Defendant's claim that the prosecution violated his Fifth Amendment privilege against self-incrimination by introducing evidence at trial of his post-arrest, pre-*Miranda* silence as proof of guilt falls within the limited exception sanctioned by our Supreme Court because it is a question of constitutional law initially raised on appeal and closely

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waives a misconduct claim on appeal unless an objection would have been futile or an admonition ineffective"]), and thus are inapposite to the issue before us, which concerns the erroneous admission of testimonial evidence.

related to a claim raised at trial.[7] Accordingly, we shall exercise our discretion to consider this legal issue on appeal.

(1) Background

Defendant identifies several occasions during trial when police officers testified he did not ask or inquire about the occupants of the Nissan involved in the collision. Defendant asserts that the admission of this testimony violated his Fifth Amendment right to remain silent.[8] The first arose during Officer Price's direct examination about his encounter with defendant as defendant sat in the front passenger seat of Gamino's car:

"Prosecutor: At that time did he [defendant] ask you any questions?

[¶] . . . [¶]

Price: He asked me if he could leave, go home.

Prosecutor: What specifically did he say about that?

Price: He said that he lived only half a block away. He just - - - he wanted to go home. He asked if it would be okay for him to walk home.

[¶] . . . [¶]

Prosecutor: When he made this request to go home, what was your response?

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[7] In this regard, defendant filed a pre-trial motion in limine to exclude statements obtained without a valid *Miranda* waiver while he was under de facto arrest, (see fn. 9, *post*). This issue is closely related to defendant's claim on appeal that evidence of his silence while under de facto arrest violated his constitutional rights under the Fifth Amendment.

[8] We discount one such alleged incident, in which the prosecutor asked Sergeant Bailey, "Now, on the way to the bathroom [at the police station], describe the defendant's appearance to you." Bailey responded in pertinent part, "He seemed calm to me . . . but nervous. He was clearly nervous. *And the only other thing I can think to say is he showed no remorse, no asking about how the folks in the other vehicle were.*" Defense counsel immediately objected and moved to strike the italicized portion of the response. The trial court struck the testimony and ordered the jury not to consider it. Because the trial court acted appropriately in striking the objectionable portion of Bailey's testimony and admonishing the jury not to consider it, we are satisfied that defendant suffered no prejudice. (See *People v. Alexander* (2010) 49 Cal.4th 846, 915 stating that " '[i]t must be presumed that the jurors acted in accordance with the instruction and disregarded the question and answer.' (Citation.)"]; (*People v. Burgener* (2003) 29 Cal.4th 833, 870 [same].)

Price: I told him no. That obviously the investigation was still ongoing. We needed him to remain at the scene.

Prosecutor: At this point, when he made his request to go home, had he asked you any questions about the condition of the occupants in the Nissan?

Price: No."

Later in Price's examination, the prosecutor asked whether, during Price's contact with defendant from about 8:20 p.m. to approximately 11:30 p.m. on the evening in question, the defendant ever asked him "about the condition of the occupants of the Nissan." Price answered, "No." The prosecutor also elicited a similar response from Sergeant Bailey when he asked, "So, during any of this time [prior to defendant's arrest at the police station], did the defendant ever ask you about the occupants of the other vehicle?" Bailey replied, "No, he did not."

(2) Analysis

In the seminal case of *Miranda v. Arizona* (1966) 384 U.S. 436, the high court held that before a person is subjected to custodial interrogation, police must warn the person "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." (*Id.* at p. 444.) The purpose of the *Miranda* warnings is to reduce the risk of coerced confessions and safeguard the Fifth Amendment right against self-incrimination. (See *Chavez v. Martinez* (2003) 538 U.S. 760, 790.) In order to facilitate our analysis of defendant's Fifth Amendment claim, we first consider when defendant was taken into custody, or restrained in a manner that constitutes the functional equivalent of a formal arrest, for *Miranda* purposes.

Whether an individual is in custody for *Miranda* purposes is "resolved by an objective standard: Would a reasonable person interpret the restraints used by the police as tantamount to a formal arrest? (Citations.) The totality of the circumstances surrounding an incident must be considered as a whole. (Citation.) Although no one

factor is controlling, the following circumstances should be considered: '(1) [W]hether the suspect has been formally arrested; (2) absent formal arrest, the length of the detention; (3) the location; (4) the ratio of officers to suspects; and (5) the demeanor of the officer, including the nature of questioning.' (Citation.)" (*People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403, fn. omitted (*Pilster*).) A custody determination "presents a mixed question of law and fact. (Citation.) We apply a deferential substantial evidence standard to the trial court's factual findings, but independently determine whether the interrogation was custodial. (Citation.)"[9] (*Pilster, supra,* 138 Cal.App.4th at p. 1403.)

Our custody determination here is guided by the United States Supreme Court's decision in *Berkemer v. McCarty* (1984) 468 U.S. 420 (*Berkemer*). In *Berkemer*, the high court addressed the issue of whether "the roadside questioning of a motorist detained pursuant to a traffic stop constitute custodial interrogation for the purposes of the doctrine enunciated in *Miranda*?" (*Id.* at p. 423.) The high court acknowledged "that a traffic stop significantly curtails the 'freedom of action' of the driver and the passengers, if any, of the detained vehicle[,]" and also that "few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so." (*Berkemer, supra,* 468 U.S. at p. 436.)

However, the Court stated that an "ordinary traffic stop" rarely rises to the functional equivalent of a formal arrest because it is "presumptively temporary and brief" compared to "stationhouse interrogation, which frequently is prolonged." (*Berkemer, supra,* 468 U.S. at pp. 437-438.) Moreover, "circumstances associated with the typical

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[9] In a motion in limine filed before trial, defendant sought to exclude all statements elicited in violation of his *Miranda* rights, in particular statements made during an "Intoxication Interrogation" conducted at the police station after officers detected alcohol on his breath and administered FSTs, as well as statements made in a later interview conducted by Sergeant Sheffield after defendant stated he did not wish to cooperate further with the investigation until his attorney was present. At a pre-trial hearing, the court granted defendant's motion in limine and all these statements were excluded at trial. In the course of its oral ruling, the trial court ruled that defendant was under "de facto arrest" when he was sitting in Gamino's car and Officer Price denied his request to walk home.

traffic stop are not such that the motorist feels completely at the mercy of the police" because of the exposure to public view normally attendant in the situation and the fewer police normally involved; "[i]n short, the atmosphere surrounding an ordinary traffic stop is substantially less 'police dominated' than that surrounding the kinds of interrogation at issue in *Miranda* itself. . . ." (*Id.* at pp. 438-439.) Accordingly, the court concluded that persons temporarily detained pursuant to an ordinary traffic stop "are not 'in custody' for the purposes of *Miranda*." (*Berkemer, supra,* 468 U.S. at p. 440.)

Nevertheless, the high court cautioned that "[[i]f a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*. (Citation.)" (*Berkemer, supra,* 468 U.S. at p. 440.) Turning to the case before it, the court noted that a short period of time elapsed between the stop and the arrest, and at "no point during that interval was respondent [motorist] informed that his detention would not be temporary." (*Id.* at pp. 441-442) In addition, the record established that "a single police officer asked respondent a modest number of questions and requested him to perform a simple balancing test at a location visible to passing motorists." Thus, the court concluded that "[t]reatment of this sort cannot be fairly characterized as the functional equivalent of formal arrest." (*Id.* at p. 442.)

Berkemer controls our analysis, however the facts here compel a different outcome. First, unlike in *Berkemer,* the stop in this case was not "temporary and brief." (*Berkemer, supra,* at p. 440.) Rather, defendant was held at the scene for approximately an hour and a half before he was placed into a patrol car and transported to the police station. Moreover, during that time frame of approximately an hour and a half, the atmosphere surrounding defendant's detention became increasingly coercive. In this regard, after paramedics had examined defendant and police officers had surveyed the accident scene, defendant asked Officer Price if he could walk to his home less than a block away. Price replied, "I told him no. That obviously the investigation was still ongoing. We needed him to remain at the scene." Later, after police denied defendant's request to walk home, Officer Felker removed defendant from the Toyota Camry, where

he was seated with his girlfriend and Gamino, and placed him in the back of the patrol car at approximately 9:30 p.m. Defendant was held in the patrol car for another twenty minutes before he was transported from the accident scene at 9:48 p.m. and driven to the police station for further investigation. At no point prior to defendant's transportation from the scene did police tell defendant he was free to leave the accident scene. To the contrary, defendant's request to leave the scene was denied.

Under these increasingly coercive circumstances, where defendant was held for approximately an hour after the collision, was denied permission to leave the scene, and then placed in the rear of a patrol car for another twenty minutes before being transported from the accident scene to the police station for further investigation, we conclude that any reasonable person would interpret those restraints "as tantamount to a formal arrest." (*Pilster, supra,* 138 Cal.App.4th at p. 1403.) Under the totality of the circumstances here, we find the police restraints placed upon defendant ripened into those "tantamount to a formal arrest" when police transported defendant from the accident scene in a patrol car at 9:48 p.m. Additionally, the record clearly reflects that defendant did not receive *Miranda* warnings until he was placed under formal arrest much later that evening.[10]

Having established defendant was in custody for *Miranda* purposes when he was transported from the accident scene in a patrol car, and that he did not receive *Miranda* warnings at that point, we now turn to defendant's claim that the prosecutor's references to his post-arrest, pre-*Miranda* silence violated his Fifth Amendment right against self-incrimination. Neither the United States Supreme Court, nor any California court, has directly addressed the issue of whether the government can admit, in its case-in-chief, evidence of a defendant's post-arrest, pre-*Miranda* silence. However, several federal circuit courts have addressed this issue and arrived at conflicting results. Before we

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[10] At the pre-trial suppression hearing, Officer Price testified to the chronology of events at the police station, stating that defendant completed the FSTs, answered a series of intoxication questions, and was then handcuffed, placed under formal arrest and advised of his *Miranda* rights.

discuss the decisions of the federal circuit courts which have addressed this issue and offer our view of the same, we will first outline several key United States Supreme Court decisions which provide the framework for the analysis of the federal circuit decisions and ours.

In *Griffin v. California* (1965) 380 U.S. 609, the high court held that the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." (*Id.* at p. 615.) In reaching this holding, the high court observed that "comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice (citation) which the Fifth Amendment outlaws. It is a penalty imposed . . . for exercising a constitutional privilege [and] . . . cuts down on the privilege by making its assertion costly." (*Id.* at 614.)

Thereafter, in *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*), the high court focused its attention on the issue of whether the State could "impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda* warnings at the time of his arrest." (*Id.* at p. 611, fn. omitted.) The court acknowledged "the importance of cross-examination," and expressly noted that the State did not seek to use defendant's silence "as evidence of guilt." Nevertheless the court concluded "the *Miranda* decision compels rejection of the State's position." (*Id.* at p. 617.) Referencing *Miranda*, the court stated: "The warnings mandated by that case, as a prophylactic means of safeguarding Fifth Amendment rights, (citation), 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. (Citation.) 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." (*Doyle, supra,* 426 U.S. at pp. 617-618.) Accordingly, the high court held that "the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." (*Id.* at p. 619.)

Subsequently, in *Jenkins v. Anderson* (1980) 447 U.S. 231, the high court clarified the scope of its holding in *Doyle.* In *Jenkins,* defendant was charged with murder after he allegedly stabbed and killed a man. Defendant surrendered himself to police two weeks after the stabbing. At trial, defendant testified that he stabbed the victim in self-defense. On cross examination, the prosecution questioned defendant regarding his failure to offer his self-defense justification prior to turning himself in to police authorities. (*Id.* at p. 233.) During closing argument, the prosecution reminded the jury defendant waited two weeks before reporting the crime. (*Id.* at p. 234.) Before the Supreme Court, defendant contended the prosecutor's actions, in commenting on his pre-arrest silence, violated his Fifth Amendment right to remain silent. The court rejected defendant's contention. First, the court observed that the prosecutor's actions did not impermissibly burden defendant's Fifth Amendment right, noting defendant waived " 'the immunity from giving testimony . . . by offering himself as a witness.' " (*Id.* at p. 235.) Second, having chosen to testify, defendant was " 'under an obligation to speak truthfully and accurately.' " (*Id.* at pp. 237-238.) Third, the Court considered "the legitimacy of the challenged government practice,"— the attempted impeachment of a defendant on cross-examination — noting that once a defendant decides to testify, the "regard for the function of the courts of justice to ascertain the truth" becomes relevant. [¶] Thus, impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial." (*Id.* at p. 238.) Accordingly,

the court concluded that when a criminal defendant opts to testify, the Fifth Amendment does not bar use of pre-arrest silence to impeach the defendant's credibility. (*Ibid.*)[11]

Finally, in *Fletcher v. Weir* (1982) 455 U.S. 603 (*per curiam*) (*Fletcher*), the Supreme Court rejected a habeas petitioner's claim that he was denied due process of law under the Fourteenth Amendment when the prosecutor used his post-arrest silence to impeach his testimony at trial. (*Id.* at p. 603.) In *Fletcher,* petitioner allegedly stabbed a man during a brawl. As in *Jenkins, supra,* defendant was charged with murder and at trial his defense was that he acted in self-defense. Fletcher testified at trial. On cross-examination, the prosecutor inquired about Fletcher's failure to inform the police, at the time of his arrest, that he acted in self defense. (*Id.* at p. 604.) The *Fletcher* court stated that *Doyle* was inapposite on the question before it because in *Doyle* "the government had induced silence by implicitly assuring the defendant [via the *Miranda* warnings] that his silence would not be used against him." (*Id.* at p. 606.) "In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings," the Court concluded, "we do not believe that it violates due process of law for a State to permit cross-examination as to post-arrest silence when a defendant chooses to take the stand." (*Id.* at p. 607.)

Federal circuit courts addressing the issue of whether the prosecution may elicit evidence of and comment on defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt have drawn on one or more of the above-cited Supreme Court opinions in arriving at conflicting conclusions regarding the admissibility of this evidence. The D.C. Circuit addressed the issue in *United States v. Moore* (D.C. Cir. 1997) 104 F.3d 377 (*Moore*). In *Moore,* defendant remained silent after police stopped the vehicle he was driving (defendant was also the registered owner of the vehicle), searched the vehicle and found weapons and drugs in the engine compartment. At trial, the prosecutor elicited evidence of defendant's silence in the face of the discovery of the drugs and weapons via

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[11] The court also noted that defendant's "failure to speak occurred before [defendant] was taken into custody and given *Miranda* warnings. Consequently, the fundamental unfairness present in *Doyle* is not present in this case." (*Jenkins, supra,* 447 U.S. at p. 240.)

the testimony of the arresting officer. Then, during closing summation, the prosecutor argued that if defendant did not know "the stuff was underneath the hood, . . . [he] would at least have said, 'Well, I didn't know it was there.' " (*Moore, supra,* 104 F.3d at p. 384.)

Following defendant's conviction, the *Moore* court addressed defendant's claim the prosecutor improperly commented on his post arrest, pre-*Miranda* silence. The court stated that "[a]lthough in the present case, interrogation per se had not begun, neither *Miranda* nor any other case suggests that a defendant's protected right to remain silent attaches only upon the commencement of questioning as opposed to custody. While a defendant who chooses to volunteer an unsolicited admission or statement to police before questioning may be held to have waived the protection of that right, the defendant who stands silent must be treated as having asserted it. Prosecutorial comment . . . on a defendant's post-custodial silence unduly burdens that defendant's Fifth Amendment right to remain silent at trial, as it calls a jury's further attention to the fact that he has not arisen to remove whatever taint the pretrial but post-custodial silence may have spread. We therefore think it evident that custody and not interrogation is the triggering mechanism for the right of pretrial silence under *Miranda*. Any other holding would create an incentive for arresting officers to delay interrogation in order to create an intervening 'silence' that could then be used against the defendant." (*Moore, supra,* 104 F.3d at p. 385.)

Similarly, in *United States v. Velarde-Gomez* (9th Cir. 2001) 269 F.3d 1023 (en banc) (*Velarde-Gomez*), the Ninth Circuit concluded the admission of evidence of defendant's post-arrest, pre-*Miranda* silence violated his Fifth Amendment privilege against self-incrimination. In *Velarde-Gomez*, defendant was convicted of importation of marijuana and possession of marijuana with intent to distribute after 63 pounds of marijuana were found in the gas tank of the vehicle defendant was driving when he attempted to cross the border from Mexico into the United States. At trial, the arresting U.S. Customs Agent testified as to defendant's non-responsiveness after defendant was

informed the drugs had been discovered in his vehicle: According to the arresting agent, defendant "just sat there" and said nothing. (*Id.* at p. 1027.)

Addressing defendant's claim that admission of evidence of his post-arrest, pre-*Miranda* silence violated his Fifth Amendment privilege against self-incrimination, the *Velarde-Gomez* court noted that whereas "*Miranda* warnings are required to reduce the risk that suspects subject to the inherent coercion of custodial interrogation will be compelled to incriminate themselves (citation)", the warnings themselves are merely " 'a prophylactic means of safeguarding Fifth Amendment rights,' (citation)—they are not the genesis of those rights." (*Velarde-Gomez, supra,* 269 F.3d at pp. 1028-1029, citing *Doyle v. Ohio* 426 U.S. 610, 617.) Therefore, the court reasoned, "once the government places an individual in custody, that individual has a right to remain silent in the face of government questioning, regardless of whether the *Miranda* warnings are given." (*Id.* at p. 1029.) The *Velarde-Gomez* court continued, "the government may not burden that right by commenting on the defendant's post-arrest silence at trial." (*Ibid.* [citing *Griffin v. California* (1965) 380 U.S. 609, 614 ("[c]omment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' which the Fifth Amendment outlaws") and *Miranda, supra,* 384 U.S. at p. 468 fn. 37, ("The prosecution may not, therefore, use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation.")].)

In contrast to the decisions of the D.C. and Ninth Circuits, the Eighth Circuit has sanctioned the government's use in its case-in-chief of a defendant's post arrest, pre-*Miranda* silence as evidence of guilt, finding the admission of such evidence does not violate a defendant's Fifth Amendment rights. (*United States v. Frazier* (8th Cir. 2005) 408 F.3d 1102, 1111 (*Frazier.*) In *Frazier,* police stopped a U-Haul truck driven by defendant. After defendant gave police permission to search the vehicle, police found boxes filled with pseudoephedrine pills behind two mattresses in the rear of the truck. (*Id.* at pp. 1106-1107.) At trial, the arresting officer testified that defendant did not say anything when officers told him he was being arrested for possession of a controlled substance. (*Id.* at p. 1107.) Following his jury-trial conviction, defendant argued that

testimony elicited by the government during its case-in-chief concerning defendant's post-arrest, pre-*Miranda* silence violated his Fifth Amendment right against self-incrimination. (*Id.* at p. 1109.)

After reviewing several of the United States Supreme Court authorities that we discussed above, the *Frazier* court focused on the concurring opinion by Justice Stevens in *Jenkins, supra,* in which Justice Stevens opined that "the 'privilege against compulsory self-incrimination is simply irrelevant to a citizen's decision to remain silent when he is under no compulsion to speak.' " (*Frazier, supra,* 408 F.3d at p. 1110, citing *Jenkins v. Anderson, supra,* 447 U.S. at p. 241 (Stevens, J., concurring).) Based on Justice Stevens concurring opinion in *Jenkins, supra,* the *Frazier* court reasoned that the crux of the issue before it was "to determine at what point a defendant is under 'official compulsion to speak' because silence in the face of such compulsion constitutes a 'statement' for purposes of a Fifth Amendment inquiry." (*Ibid.*) The court concluded that the defendant in the case at bar was under no compulsion to speak at the time he maintained his silence. The court observed that although defendant was under arrest, "there was no governmental action at that point inducing his silence. . . . It is not as if [defendant] refused to answer questions in the face of interrogation." (*Id.* at p. 1111.) Where defendant is under no compulsion to speak, the court concluded, the use of post-arrest, pre-*Miranda* silence during the government's case-in-chief does not constitute "an impermissible use of an accused's coerced incriminating 'statement.' " (*Id.* at pp. 1110-1111.)

Having considered the federal circuit court decisions directly addressing this significant issue, as well as United States Supreme Court authority addressing more generally the protections afforded defendants under the Fifth Amendment privilege, we now join the federal circuits holding that the right of pretrial silence under *Miranda* is triggered by the inherently coercive circumstances attendant to a de facto arrest and therefore the government may not introduce evidence in its case-in-chief of a defendant's silence after arrest, but before *Miranda* warnings are administered, as substantive evidence of defendant's guilt. (See, e.g., *Moore, supra,* 104 F.3d at p. 385 ["custody and not interrogation is the triggering mechanism for the right of pretrial silence under

Miranda"].)[12] Our holding is coextensive with the constitutional guarantees of the Fifth Amendment. The Fifth Amendment commands that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." (U.S. Const., 5th Amend.) This principle is "the essential mainstay of our adversary system" and is fulfilled "only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.' (Citation.)" (*Miranda v. Arizona, supra,* 384 U.S. at p. 460.) As importantly, the Fifth Amendment also prohibits the government from using that silence as inferential evidence of a defendant's guilt. (*Id.* at p. 468, fn. 37 ["The prosecution may not, therefore, use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation."].) Our holding that the right of pretrial silence under *Miranda* is triggered by the inherently coercive circumstances attendant to a de facto arrest protects these core Fifth Amendment values.

Furthermore, we concur in the *Moore* court's conclusion that a rule precluding the government from using a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt, is compelled by existing high court precedent. As stated in *Moore*, "[I]t is plain from *Griffin* and *Miranda* that the prosecution may not use a defendant's silence in its case-in-chief." (*Moore, supra,* 104 F.3d at p. 385.) The *Moore* court read Supreme Court precedent as allowing only two possible "exception[s] to the bar against the use of silence," namely, use of defendant's silence against a testifying defendant for impeachment purposes (sanctioned in *Jenkins, supra,* and *Fletcher, supra*), and use of a defendant's *pre-arrest* silence as substantive evidence of guilt (acknowledged as an open question in *Jenkins, supra,* 447 U.S. at p. 236, fn. 2). (See *Moore, supra,* 104 F.3d at p. 389.) The court stated, "Neither exception applies in this case as Moore did not testify and the record does not support the proposition that the prosecution was referring to pre-

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[12] Accord *United States v. Velarde-Gomez, supra,* 269 F.3d at pp. 1028-30; *United States v. Whitehead* (9th Cir. 2000) 200 F.3d 634, 639 [admission of evidence of defendant's post-arrest, pre-*Miranda* silence infringed upon defendant's privilege against self-incrimination]; *United States v. Hernandez* (7th Cir.1991) 948 F.2d 316, 322-23 [prosecutor's use of a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination].

arrest silence." (*Ibid.*) Likewise, neither exception applies in this case because defendant did not testify and the prosecution elicited evidence of defendant's post-arrest silence. Thus, as in *Moore,* we conclude defendant's constitutional rights were violated by the introduction of evidence of his pre-trial silence in the prosecution's case-in-chief. (See *Ibid.*)

Moreover, our conclusion on this point finds additional support in the high court's guidance that we should consider the legitimacy of the challenged government practice "[i]n determining whether a constitutional right has been burdened impermissibly." (*Jenkins, supra,* 447 U.S. at p. 238.) In *Jenkins,* the high court endorsed the legitimacy of impeaching a testifying defendant with his or her post-arrest silence as it "follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial." (*Ibid.*) Here, by contrast, defendant did not cast aside his cloak of silence but instead exercised his Fifth Amendment right to remain silent and did not testify in his defense. Under these circumstances, no legitimate purpose is served by allowing the prosecution to introduce evidence of defendant's post-arrest silence because it does nothing to advance the truth-finding function of the criminal trial. If anything, evidence of a defendant's post-arrest silence tends to obfuscate the truth-finding function of the criminal trial: First, its probative value is minimal (see *Doyle v. Ohio, supra,* 426 U.S. at p. 617 [stating evidence of silence is "insolubly ambiguous because of what the State is required to advise the person arrested"]); second, despite its minimal probative value, the prosecution inevitably seeks to draw highly prejudicial inferences from defendant's silence; and third, its introduction may impermissibly shift the burden of proof to the defendant in the sense that a defendant must surrender the right against self-incrimination in order to refute the negative inferences inevitably drawn by the prosecution from post-arrest silence. Accordingly, we conclude that no legitimate purpose is served by allowing the prosecution to introduce defendant's post-arrest silence as substantive evidence of guilt. (Cf. *Jenkins, supra,* 447 U.S. at p. 238.)

In reaching this conclusion, we respectfully disagree with the rule articulated by the Eighth Circuit that only post-arrest, pre-*Miranda* silence in the face of actual police

interrogation is entitled to the privilege. (See *Frazier*, 408 F.3d at p. 1111 [Fifth Amendment privilege against self-incrimination does not attach until a person is under a "government imposed compulsion to speak"].)[13] In our view, the Eighth Circuit's rule renders Fifth Amendment protections illusory because it neither accounts for the inherently coercive atmosphere attendant to an arrest nor recognizes the compulsion to speak inherent in allowing the government to comment adversely on a defendant's silence at the time of arrest. Thus, under the rule adopted by the Eighth Circuit, if a defendant does not speak out after arrest but before receiving *Miranda* warnings, then he or she must either surrender the Fifth Amendment right against self-incrimination at trial or suffer the consequences of allowing the government to articulate how his or her post-arrest failure to speak points to guilt. Accordingly, we reject the Eighth Circuit rule because it impermissibly burdens the constitutional guarantees of the Fifth Amendment. (See *Moore, supra,* 104 F.3d at p. 385 ["Prosecutorial comment . . . on a defendant's post-custodial silence unduly burdens that defendant's Fifth Amendment right to remain silent at trial, as it calls a jury's further attention to the fact that he has not arisen to remove whatever taint the pretrial but post-custodial silence may have spread"].)

In sum, defendant was under de facto arrest when he was driven from the scene of the accident in a patrol car and he was not given *Miranda* warnings at that time. During its case-in-chief, the government elicited testimony from Sergeant Bailey and Officer Price that, subsequent to his arrest, defendant never inquired about the welfare of the occupants of the other vehicle. The government offered this evidence of defendant's post-arrest, pre-*Miranda* silence as substantive evidence of defendant's guilt, in violation of his Fifth Amendment right against self-incrimination. (*Velarde-Gomez, supra,* 269 F.3d at p. 1028 [testimony regarding defendant's lack of emotional response when

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[13] See also *United States v. Love* (4th Cir.1985) 767 F.2d 1052, 1063 [government may use defendant's post-arrest, pre-*Miranda* silence during its case-in-chief as substantive evidence of guilt]; *United States v. Rivera* (11th Cir.1991) 944 F.2d 1563, 1567-68 [accord].)

informed marijuana found in his vehicle was "tantamount to evidence of silence" in violation of defendant's Fifth Amendment rights].)[14]

(3) Prejudice

The erroneous introduction of evidence of defendant's silence is trial error subject to the harmless error analysis the standards of *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 310.) The *Chapman* standard " 'requir[es] the beneficiary of a [federal] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' (Citation.) 'To say that an error did not contribute to the ensuing verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.' (Citation.) Thus, the focus is what the jury actually decided and whether the error might have tainted its decision. That is to say, the issue is 'whether the . . . verdict actually rendered in *this* trial was surely unattributable to the error.' (Citation.)" (*People v. Neal* (2003) 31 Cal.4th 63, 86.)

On this record, the People cannot show that the verdict rendered in this case was "surely unattributable to the error." (*People v. Neal, supra,* 31 Cal.4th at p. 86.) The evidence against defendant in this case, as described above, was essentially in equipoise, and the prosecutor placed great emphasis upon the erroneously admitted evidence in closing argument. (Compare *People v. Lewis* (2008) 43 Cal.4th 415, 465-466 [any error in admission of co-defendant's redacted statement at joint trial was harmless beyond a reasonable doubt in light of "powerful evidence supporting the jury's verdicts . . . and the prosecutor's minimal use of [disputed] statement in the relevant portions of his closing

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[14] While the rule we announce today precludes government comment on the fact a defendant remains silent after arrest, the rule does not extend to "demeanor" evidence. (See *Velarde-Gomez, supra,* 269 F.3d at pp. 1030-1032 [distinguishing "demeanor" evidence from evidence that defendant "did not react . . . but remained silent"].) Nor does the rule we announce today hamper the prosecution of those charged with public offenses. The prosecution must establish a defendant's guilt using competent evidence. Drawing an inference of gross negligence from a defendant's silence is speculative at best. (See *People v. Babbitt* (1988) 45 Cal.3d 660, 681-682 [stating that evidence allowing only speculative inferences is irrelevant and inadmissible].)

argument"]; with *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1487 [erroneous admission of defendant's statements not harmless beyond a reasonable doubt where other evidence of defendant's involvement in killing was mainly circumstantial and prosecutor heavily relied upon the statements to undermine the defense case].)

For example, a key issue at trial was determining the pre-impact speed of defendant's vehicle. There was no dispute defendant was traveling faster than the posted speed limit of 35 miles per hour on Woodside Road. The question, however, was whether defendant acted with gross negligence in driving over the speed limit and whether his conduct displayed an "I don't care attitude"[15] and was so reckless that it created a high risk of death or great bodily injury. There were no eye-witnesses to the accident and no physical evidence, mechanical or recorded, which could conclusively determine defendant's speed at impact. Rather, both sides presented the testimony of accident reconstruction experts, and each adopted a different methodology in calculating defendant's speed at impact. The prosecution's evidence established defendant's speed at impact was, *at minimum*, 67 miles per hour, and possibly much higher. However defendant's expert opined defendant's speed at impact was between 49 and 52 miles per hour, on a stretch of road where drivers routinely exceed the posted speed limit and police deem speeds of up to 50 miles per hour safe under certain conditions. Thus the resolution of defendant's guilt hinged upon the jury's resolution of the conflicting expert testimony.

During closing argument, the prosecution vigorously pressed the jury to find defendant's speed at impact was reliably determined by its expert. The prosecutor argued that defendant's speed, at the time of impact, demonstrated the "I don't care" attitude consistent with establishing gross negligence. After asserting that defendant "barrel[ed] down Woodside at double the speed limit", the prosecutor rhetorically stated, "Why did he not . . . at least slow down? . . . Because he was grossly negligent. He was driving

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[15] The jury was instructed that "Gross negligence is the exercise of so slight a degree of care as to exhibit a conscious indifference or 'I don't care' attitude concerning the ultimate consequences of one's conduct."

down that night . . . without a care of what was going to happen. I don't care is the attitude that he had." The prosecutor explained to the jury that it could not consider defendant's failure to testify, but "should and can absolutely consider [] how he acted the night of the collision. And there's so much evidence about this. And all of it points to one thing; his consciousness of his own guilt." Pressing his theme, the prosecutor added: "The next one I think is particularly offensive, he never, ever asked, hey, how are the people in the other car doing? Not once. . . . Now you step on somebody's toe . . . what is your first thing out of your mouth? Whoops. I'm sorry. I'm not saying that he has to say sorry as an expression of his guilt or as some kind of confession, but simply as an expression of his regret. Look, I'm sorry those people were hurt. [¶] Not once. Do you know how many officers he had contact with that evening? Not a single one said that, hey, the defendant asked me about how those people were doing. Why is that? Because he knew he had done a very, very, very bad thing, and he was scared. [¶] . . . And he was obsessed with only one thing, that is, saving his own skin. That's why he said, hey, can I just go home."

Under these circumstances—an emotionally charged case, involving the death of one child and serious injury to another, and hinging on competing theories of accident reconstruction yielding widely different estimates of defendant's speed at the point of impact—the prosecutor's argument urging the jury to consider defendant's failure to ask about the welfare of the occupants of the other vehicle as substantive evidence of his guilt was highly prejudicial. In sum, because the State has failed to demonstrate beyond a reasonable doubt that the erroneous admission of evidence of defendant's post-arrest, pre-*Miranda* silence did not contribute to the jury's guilty verdict, the judgment must be reversed. (See *People v. Neal, supra,* 31 Cal.4th at p. 86.)

B. Other Issues

Given our conclusion that the violation of defendants Fifth Amendment rights requires reversal, we need not resolve the other issues raised on appeal, with one exception. For the guidance of the parties in the event the issue is raised upon a retrial

(see *People v. Neely* (1993) 6 Cal.4th 877, 896), we shall address defendant's contention that the jury instructions on gross vehicular manslaughter (GVM) were legally deficient.

Defendant asserts that standard of gross negligence defined in the court's GVM instruction is legally indistinguishable from the "wanton disregard for safety" standard defined in the reckless driving instruction. Therefore, according to defendant, the GVM instruction eliminates the requirement that the prosecution prove the predicate offense of reckless driving.[16] We disagree.

Gross negligence is defined in the GVM instruction (CALCRIM 592) as follows: "Gross negligence involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with gross negligence when: [¶] 1. He or she acts in a reckless way that creates a high risk of death or great bodily injury; AND, [¶] 2. A reasonable person would have known that acting in that way would create such a risk. [¶] In other words, a person acts with gross negligence when the way he or she acts is so different

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[16] Defendant relies on *People v. Soledad* (1987) 190 Cal.App.3d 74 (*Soledad*) but the case has no application here. In *Soledad*, defendant was convicted of gross vehicular manslaughter while intoxicated, pursuant to Penal Code section 192 (that offense is now defined under Penal Code section 191.5). Penal Code section 192 then defined the offense as driving a vehicle under the influence of alcohol or drugs [in violation of section 23152 or 23153 of the Vehicle Code] and in the commission of an "unlawful act not amounting to a felony" with gross negligence. (*Soledad, supra,* 190 Cal.App.3d at p.80 [italics added].) The *Soledad* court noted that to prove the offense the prosecution had to show defendant (1) drove a vehicle in the commission of an "unlawful act" not amounting to a felony with gross negligence *and* (2) drove the vehicle in violation of section 23152 or 23153 of the Vehicle Code. (See *id.* at p. 81.) Reversing defendant's conviction on ground of instructional error, the appellate court concluded "the jury was neither instructed nor advised at anytime that it must make a finding on the *unlawful act element* of vehicular manslaughter" in addition to finding defendant drove the vehicle in violation of section 23152 or 23153 of the Vehicle Code. (*Id.* at p. 83 [italics added].) No such omission occurred here. The jury was instructed that to prove defendant guilty of gross vehicular manslaughter, the prosecution had to show defendant drove the vehicle in the commission of a misdemeanor or infraction (i.e., an unlawful act not amounting to a felony) with gross negligence. Thus, the vehicular manslaughter instruction was free of the defect identified in *Soledad, supra,* because the jury was required to make a finding on the unlawful act element of the offense.

from how an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act."

The elements of reckless driving[17] (CALCRIM 2200) are as follows: "1. The defendant drove a vehicle on a highway; [¶] AND, [¶] 2. The defendant intentionally drove with wanton disregard for the safety of persons or property. [¶] A person acts with wanton disregard for safety when (1) he or she is aware that his or her actions present a substantial and unjustifiable risk of harm, and (2) he [or she] intentionally ignores that risk. The person does not, however, have to intend to cause damage.

Defendant's contention fails because it assumes that "gross negligence" as defined in the GVM instruction is coextensive with the "wanton disregard for the safety of persons or property" as defined in the reckless driving instruction. However, as the court's instructions make clear, "gross negligence" is judged under an objective, reasonable-person standard. (*People v. Watson* (1981) 30 Cal.3d 290, 296 ["A finding of gross negligence is made by applying an *objective* test: if a *reasonable person* in defendant's position would have been aware of the risk involved, then defendant is presumed to have had such an awareness"].) On the other hand, to establish the mental state required to prove reckless driving, the evidence must establish that defendant acted with a "wanton disregard for the safety of persons or property" (*People v. Schumacher* (1961) 194 Cal.App.2d 335, 339), where "wantonness" includes the elements of consciousness of one's conduct, intent to do or omit the act in question, realization of the probable injury to another, and reckless disregard of consequences. (*Id.* at pp. 338-340; see also *People v. Dewey* (1996) 42 Cal.App.4th 216, 221.) Thus, under the court's instructions, if the jury concluded, under the reasonable person standard, that the defendant acted with gross negligence, they were required to make the additional finding that defendant acted with the requisite, subjective mental state required for reckless

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[17] The GVM instruction identified two predicate offenses — reckless driving (Veh. Code section 23103) and violation of the basic speed law (Veh. Code section 22350) — at least one of which the jury unanimously had to find beyond a reasonable doubt.

driving. Therefore, the jury instructions on GVM did not eliminate the predicate offense element of reckless driving and we reject defendant's assertion of instructional error.

DISPOSITION

We realize that the conclusion we reach today will not provide certainty of outcome for any of the parties impacted by the tragic vehicular accident which occurred on the evening of February 19, 2007. However, where, as here, a defendant's right to a fair trial is prejudiced as a result of a violation of constitutional rights, our duty is clear — we are required to reverse the conviction. Accordingly, the judgment is reversed and the matter remanded for further proceedings consistent with this opinion. The petition for habeas corpus is dismissed as moot.

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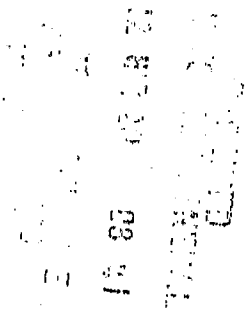
Jenkins, J.

We concur:

Pollak, Acting P. J.

Siggins, J.

Trial Court:	San Mateo County Superior Court
Trial Judge:	Hon. H. James Ellis
Counsel for Appellant:	Marc J. Zilversmit
Counsel for Respondent:	Edmund G. Brown Jr. Attorney General of California, Dane R. Gillette Chief Assistant Attorney General, Gerald A. Engler Senior Assistant Attorney General, Stan Helfman Supervising Deputy Attorney General, Mark S. Howell Deputy Attorney General



DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Richard Tom**

No.: _____

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On April 30, 2012, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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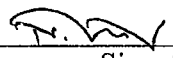
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 30, 2012, at San Francisco, California.

N. Newlin
Declarant


Signature

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