IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. RICHARD TOM, Defendant/Appellant.	)	**No. S202107** (Ct. App. No. A124765, A130151) (San Mateo Sup. Ct. No. SC064912)
IN RE RICHARD TOM, On Habeas Corpus.	)	

SUPREME COURT
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ANSWER TO PEOPLE'S PETITION FOR REVIEW

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Richard Tom by this Answer opposes the People's Petition for Review of the First District Court of Appeal's unanimous opinion reversing his conviction. The People's Petition for Review was filed April 30, 2102; thus, this Answer is timely. (Cal. Rule of Court 8.500(e)(4)).

INTRODUCTION

Few cases present a more compelling case to *deny* review than this one. As set forth in the First District's Opinion below, although it would be impossible not to feel immense sympathy for Lorraine Wong, whose child was killed while in the backseat of the Nissan she was driving in her tragic collision with Appellant Richard Tom's Mercedes, a dispassionate view of the record favored acquittal, and the evidence of guilt was at best in "equipoise." While Mr. Tom was exceeding the posted speed limit, Ms. Wong was stopped at a stop sign on a small street and was required by law to yield to Mr. Tom's vehicle on a through street (Veh. Code § 21802a); yet she entered the intersection while still concluding a cell-phone conversation on her hand-held phone, and without seeing Mr. Tom's vehicle which was visible to her for at least 17 seconds before the collision.

The jury nonetheless convicted Mr. Tom, and he has served more than three-and-a-half years of his seven-year sentence. The convictions were largely due to the numerous and substantial constitutional errors which not only prevented substantial evidence of innocence from being heard, but

prejudicially urged the jury to convict based upon the prosecutor's knowingly false arguments regarding the facts, sympathy for the mother of the victim, and by impermissibly arguing that Appellant's explicit invocations and inquiries about his constitutional rights were proof he was guilty.

The First District, however, avoided reaching most of these complicated and thorny questions by properly choosing to decide the case upon the narrowest of constitutional grounds raised, based only upon the prosecutor's improper argument that the jury could use Appellant's silence and failure to inquire about the well-being of the occupants of the other car in the collision while he was detained in a police car and transported to the station, to prove his consciousness of guilt. The prosecutor's arguments in this case clearly violated Appellant's constitutional rights under settled United State Supreme Court precedents. (*Doyle v. Ohio* (1976) 426 U.S. 610, 634-635 [after defendant has received *Miranda*[1] warnings, "[i]t is not proper . . . for the prosecutor to ask the jury to draw a direct inference of guilt from silence-to argue, in effect, that silence is inconsistent with innocence"]; *Griffin v. California* (1965) 380 U.S. 609, 614 [prosecutor may not impose a "penalty . . . for exercising a constitutional privilege" by

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

arguing that defendant's failure to testify proved his consciousness of guilt]). Further, contrary to the state's argument that this case presents an important issue of first impression, the issue was settled more than a half-century ago by this Court's decisions in *People v. Cockrell* (1966) 63 Cal.2d 659, 669-670, and *In re Banks* (1971) 4 Cal.3d 337, 351-352, both of which held that *Griffin* compelled the conclusion that the constitution precludes the state from using the defendant's silence when the defendant has been arrested or detained, even where the defendant had not been read his *Miranda* rights. No California case disagrees with the First District on this point. Lower federal courts are largely in accord that a prosecutor may not use in-custody silence as proof of guilt, even before *Miranda* warnings are given. (*See*, *e.g.*, *United States v. Velarde-Gomez* (9th Cir. 2001) 269 F.3d 1023, 1026-29 (en banc); *United States v. Moore* (D.C. Cir. 1997) 104 F.3d 377, 384-385; *but see United States v. Frazier* (8th Cir. 2005) 408 F.3d 1102, 1111). Thus, there is no important issue which has yet to be settled by this Court, and review should be denied. (*See* Rule 8.500(b)(1)).

Second, review would be particularly unwise in this case, because the prosecutor's comments on Appellant's silence and his failure to inquire about the welfare of the occupants of the other car after he was transported to the police station, were intermingled with other similar egregious constitutional errors when the prosecutor asserted that Appellant

demonstrated consciousness of guilt simply by asking the police about his constitutional and statutory right not to submit to a blood test when he had not been formally arrested, and his constitutional right not to be transported to the police station when he was not under formal arrest. By deciding this case (correctly) under the more *limited* ground regarding Appellant's silence, the First District avoided addressing these arguably more serious and thorny questions of constitutional error, and avoided determining whether Appellant was under *de facto* arrest at an earlier stage when the police told Appellant he could not leave, as the trial court had found. This Court could not similarly avoid these questions, and even if the Court avoided these issues and reversed, the Court of Appeal would be required to vacate the convictions on these other grounds in any case.

Additionally, the Court of Appeal's narrow focus on the improper use of Appellant's silence, avoided a host of other more serious, fact-intensive and complex claims of error that also would merit overturning the convictions. The Court avoided finding that the prosecutor had committed additional, more serious misconduct by making a knowingly false argument to the jury, and by asking the jury to base their verdict on sympathy for Ms. Wong even if the jurors were unconvinced that the state had proven one of the elements of the crime. The Court also avoided fact-intensive questions about new evidence discovered after trial that supported the defense expert

on the key issue of defendant's speed; the Court avoided deciding whether this new evidence was not presented due to the police refusal to permit mechanical inspection of the vehicle raising a new evidence or *Brady*[2] claim, or whether it was due to counsel's ineffectiveness in failing to press the court to order an inspection; the appellate court also avoided answering whether the trial court improperly denied the new trial motion, or whether the trial court was improperly induced to deny the new trial motion by the prosecutor's demonstrably false argument to the trial judge that the accelerator pedal could be seen through the car's window without inspection. Additionally, the Court avoided complex legal claims about the enhancement for great bodily injury to the victim's sister, where the trial court failed to give any instruction on general intent applicable to the enhancement, and where the plain language of the great bodily injury enhancement statute precludes its application in a manslaughter case. Finally, by reversing on this one narrow issue on direct appeal, the Court below was able to dismiss as moot the habeas petition without an order to show cause, where the petition raised additional evidence of ineffective assistance of counsel, prosecutorial misconduct and *Brady* error.

Granting review would require this Court to issue an order to show

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[2] *Brady v. Maryland* (1963) 373 U.S. 83.

cause on the habeas petition which the Court below dismissed as moot, and after further briefing, either decide the matter in the same way as the Court below, or to review these other factually and legally challenging and complex questions, or to remand to the Court which would then undoubtedly reverse the convictions upon one of the more difficult questions which it prudently sought to avoid.

In sum, this Court should deny review because the issue has previously been decided by this Court and need not be revisited, and because the error here cannot be adequately addressed without addressing a host of other thorny and fact-intensive constitutional issues which would also require vacating the convictions.

SUMMARY OF FACTS

A. The Traffic Collision.

Most of the key facts in this case were undisputed. On February 19, 2007, at approximately 8:19 pm, Appellant was traveling northbound on Woodside Road in Redwood City, a through street, when his Mercedes collided with Ms. Wong's Nissan. Ms. Wong had stopped at a stop sign and had entered the intersection with Woodside Road to make a left turn. (Reporter's Transcript [hereafter: "RT"] 376-380).

Ordinarily, because Appellant was driving on a through street, he had the right-of-way and Ms. Wong could only enter the intersection if she

assured herself that there was no immediate hazard and that she could proceed with reasonable safety. (Veh. Code § 21802a). Yet, Ms. Wong conceded that she was ending a conversation with her sister on her hand-held cellular telephone while steering with the other hand when she entered the intersection. Ms. Wong stated that she looked to the left (the direction from which Mr. Tom was approaching) before entering the intersection; but, Ms. Wong conceded that she never saw Appellant's vehicle, although she contended she could see nearly a half-mile down Woodside Road in his direction. (RT 491-500, 514-517). Even at high speeds, Appellant's vehicle would have been visible for 17 seconds. (RT 880-881). Ms. Wong never told the officers she was on the phone until confronted with the records long afterwards. (RT 533, 636-637).

Ms. Wong's failure to see Appellant's vehicle may be attributed to the fact that in all of Ms. Wong's pretrial statements, she contended that she was looking to the right (away from Mr. Tom's vehicle). (RT 638-640). It may also have been attributed to her cell-phone use, which all experts agreed impairs driving ability as much as being intoxicated. (RT 1543-48, 1652). In any case, plainly Ms. Wong never assured herself that she could enter the intersection with reasonable safety, as required by the statute.

The state's case rested upon disputed expert testimony regarding Appellant's speed and blood alcohol level. Appellant had concededly

consumed some alcohol before driving and was exceeding the 35 mph posted speed limit on Woodside Road. Based upon a blood test of .04 given nearly 3 hours later, and upon a set of unconfirmed assumptions about the drinking pattern, the state's expert contended that his blood alcohol level could have been as high as .10 at the time of the collision. (RT 1033-35). No one, however, observed Appellant exhibiting any symptoms of intoxication for two hours after the collision. The jury thus acquitted Appellant of all alcohol-related counts and allegations, apparently crediting the defense expert's opinion and the state expert's concession that if Appellant was still absorbing alcohol at the time of the collision, his blood alcohol level was likely much lower than .07 at that time and could have been as low as .01. (RT 1331-36).

As to speed, the state's experts estimated Appellant's speed was between 52 mph and 67 mph or higher. (RT 796-797). The police conceded, however, that many drivers exceeded the 35 mph posted speed limit on that stretch of road, and that only speeds over 50 mph were considered so unsafe as to require them to issue a speeding violation. (RT 601-604, 631). The defense expert opined that Appellant's speed was between 49 and 52 mph. Moreover, all calculations of speed assumed that Appellant had not inadvertently stepped on the accelerator after the collision. Further, no testimony suggested that Appellant's speed prevented

Ms. Wong from seeing his approaching Mercedes.

B. The Improper Questions And Arguments That Appellant's Inqueries And Invocation Of His Rights And Silence Regarding The Condition Of The Occupants Of The Nissan Demonstrated Consciousness Of Guilt.

As set forth in the Opinion below, early on in the accident investigation, Appellant was seated in his friend's Toyota Camry when he asked Officer Price if he was free to leave the scene, asking if he could walk home to his house a block-and-a-half away. Price told the defendant he was not free to leave. (Typed Opn. at 7). The trial court ruled at this point, Appellant was under *de facto* arrest. (*See* Typed Opn. at 15 n. 9; RT 14-16). The prosecutor asked Price about Appellant's inquiry whether he was free to leave and another question of Price asking whether Appellant had inquired about the occupants of the Nissan, and Price replied "no." (RT 684-685).

The prosecutor also questioned Officer Price about Appellant's response to being told he would be transported to the station to get a voluntary statement and a sample of his blood. Over objection, Price was permitted to testify that Appellant "seemed irritated. He seemed like he didn't want to go to the station." (RT 687-689). Price also testified that "I don't think he [Mr. Tom] wanted to be inconvenienced going to the police department." A defense objection to that answer and question was

sustained. (RT 687-689). Price testified that Mr. Tom asked him "why couldn't they simply do the blood draw there at the scene." (RT 687-689). Mr. Tom then voluntarily agreed to go with the police to the station to have his blood drawn.

At the station, the phlebotomist refused to take a blood test, because the police had not arrested Appellant and did not believe they had probable cause to do so. The phlebotomist left, and the police asked Appellant to go to the hospital for a blood test. The prosecutor then asked about Appellant's response to the police request that Appellant go to the hospital for the test. The prosecutor elicited that Appellant appeared "irritated" at the request. The prosecutor again asked how Appellant responded to the police officer's statement. Over defense objection, the witness was permitted to answer that Appellant inquired about his right to "refuse to provide a blood sample." (RT 693-694).

While at the police station, Appellant spoke to an attorney on his cellular telephone and then informed the officers that on the advice of counsel he would not make a statement without his attorney present. (Pretrial RT 351-353, 390-392).

The prosecutor asked Officer Bailey about Appellant's behavior in the bathroom at the police station, specifically whether he showed any "remorse." An objection was sustained. The prosecutor then asked Bailey

if at any time during the evening, "the defendant ever ask[ed] you about the occupants of the other vehicle." The defense objection was overruled when the prosecutor proffered that the answer would be relevant to "consciousness of guilt." Bailey answered "no." (RT 423-424).

The prosecutor also asked Officer Price in summary form, whether during the entire evening from the time of the accident at 8:20 pm until 11:30 pm, "did the defendant ever ask you about the condition of the occupants of the Nissan?" A defense objection was overruled, and Price answered "no." (RT 706-707).

In closing, the prosecutor argued that the jury "should and can absolutely consider" that Appellant's inquires about his right to leave, and his right to not be tested, and his failure to ask about the condition of the occupants stated "all . . . points to one thing; his consciousness of his own guilt." (RT 1904).

The prosecutor continued, stating that the issue,

> . . . I think is particularly offensive, he never, ever asked, hey how are the people in the other car doing? Not once. . .
>
> Not once. Do you know how many officers that he had contact with that evening? Not a single one said that, hey, the defendant asked me how those people were doing. Why is that? Because he had done a very, very, very bad thing, and he was scared.
>
> He was scared or – either that or too drunk to care. But 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.
>
> Look at the magnitude of that collision, and ask yourselves, what reasonable person would say, hey, can I just go home now?
>
> And that – you know, I'm sorry, Mr. Tom, if we irritated you with the request for a blood draw at the scene. I'm sorry. But what are you so afraid? [sic] Why are you so afraid to give blood? We now know why, because it would have shown that he was at [.]10 at the scene.

(RT 1905-06).

I. THIS COURT SHOULD *DENY* REVIEW OF THE COURT OF APPEAL'S NARROW DECISION REGARDING THE PROSECUTOR'S IMPROPER COMMENTS ON APPELLANT'S POST-ARREST, PRE-*MIRANDA* SILENCE BECAUSE THE COURT'S DECISION IS CORRECT, AND IS IN ACCORD WITH THIS COURT'S LONG-STANDING PRECEDENTS.

As the Court of Appeal found, presentation of this evidence of Appellant's silence while he was detained by police was improper, as were the prosecutor's comments that the silence proved Appellant's guilt, because they improperly imposed a penalty on Appellant's silence while in police custody in violation of settled Supreme Court authority; furthermore, this evidence and these arguments also imposed a penalty on Appellant's assertion of his Fourth Amendment rights, and reliance on his Sixth Amendment right to counsel.

As the appellate court recognized the United States Supreme Court

has made clear that a prosecutor may not impose a "penalty . . . for exercising a constitutional privilege" by arguing that invocation of that right proves consciousness of guilt; such an argument improperly imposes a "penalty . . . for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." (*Griffin v. California* (1965) 380 U.S. 609, 614; *see also United States v. Jackson* (1968) 390 U.S. 570, 581 [constitution forbids imposing penalty on exercise of constitutional right to jury trial by permitting death penalty to be imposed after jury trial but not upon defendant who waives jury trial]). Further, the Supreme Court has clearly held that "[i]t is not proper . . . for the prosecutor to ask the jury to draw a direct inference of guilt from silence–to argue, in effect, that silence is inconsistent with innocence." (*Doyle v. Ohio* (1976) 426 U.S. 610, 634-635). As the state and the Court below point out, in *Doyle*, the defendant remained silent after receiving *Miranda* warnings. (*Id.; see also Wainwright v. Greenfield* (1986) 474 U.S. 284, 286-292 [prosecutor may not use post-*Miranda* silence or request for counsel in sanity phase]). Most lower federal courts agree with the First District's analysis, that *Doyle* and *Griffin* apply where a defendant remains silent in custody even before *Miranda* warnings have been given. (*See*, *e.g.*, *United States v. Velarde-Gomez* (9th Cir. 2001) 269 F.3d 1023, 1026-29 (en banc); *United States v. Moore* (D.C. Cir. 1997) 104 F.3d 377, 384-385; *but see United*

States v. Frazier (8th Cir. 2005) 408 F.3d 1102, 1111).

More pointedly, this Court, prior to *Doyle*, has similarly held that a defendant's silence in police custody cannot be used against him without penalizing his constitutional right to remain silent, even where no *Miranda* warning was given. (*People v. Cockrell* (1966) 63 Cal.2d 659, 669-670, citing *Griffin*, *supra*, 380 U.S. 609). Adopting the state's view, would thus require this Court to unwisely overrule its longstanding decision in *Cockrell*. Similarly, relying upon *Griffin* and *Cockrell*, this Court again held in *In re Banks* (1971) 4 Cal.3d 337, that the constitution precluded the state from using the defendant's silence in the face of accusations of police in a liquor store, when the defendant was detained but had yet to be formally arrested and had not been read his *Miranda* rights. (*Id.* at pp. 351-351; *see also People v. Maldonado* (1966) 240 Cal.App.2d 812, 817 [constitution forbids use of defendant's post-arrest silence in the face of police accusation where there were no *Miranda* warnings], *disapproved on other grounds People v. Triggs* (1973) 8 Cal.3d 884). These holdings by this Court have stood for more than half a century without question. Yet, the state would have this Court overrule these settled holdings and this controlling authority.

Moreover, the state's disagreement with the decision below are based upon inapposite cases. The state primarily relies upon cases that deal

only with *impeachment* of a defendant who has taken the stand in his defense. (*See Fletcher v. Weir* (1982) 455 U.S. 603, 607 (per curiam); *Jenkins v. Anderson* (1980) 447 U.S. 231). Yet these cases are premised on the principle that "defendant's own decision to cast aside his cloak of silence" by testifying permitted *impeachment* with his failure to previously recite the same defense. (*Jenkins*, 447 U.S. at p. 238; *see Fletcher*, 455 U.S. at pp. 606-607 ["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"]). Clearly, this reasoning has no application here where Appellant never testified and never "cast aside" his Fifth Amendment privilege.

The California cases cited by the Attorney General (Petition for Review at p. 13), are even less apposite. In each case cited, this Court found no Fifth Amendment violation where the defendant's silence after being accused by a *private party* was used against him when the defendant was *out of custody*, and where the police were not involved, and where there was no indication that the defendant believed the police were monitoring him, and there was no indication that the defendant had asserted any constitutional right. (*See People v. Medina* (1990) 51 Cal.3d 870, 889-

891; *People v. Preston* (1973) 9 Cal.3d 308, 314-316).[3] Here, by contrast, the defendant *was* in police custody, and *had* asked about his constitutional rights to leave the scene, to refuse transportation and to refuse a blood test where he was not under arrest; moreover, the prosecutor specifically questioned the police officers whether Appellant inquired to the *police* regarding the conditions of the occupants of the other car, not whether he had remained silent when sitting with private parties. *Medina* and *Preston* thus have no application here.

The citation to *South Dakota v. Neville* (1983) 459 U.S. 553 (Petition for Review at p. 13-15) is particularly perplexing. In *Neville*, the Court held that a defendant's *refusal* to take a test could be used as evidence of guilt, because the state had offered the choice of taking a test in lieu of forcibly taking the blood. (*Id.* at pp. 562-564). Yet, here, of course, the police assured Appellant that he was *not* under arrest. Thus, both the constitution, and the relevant statute *forbid* the police from taking the test without consent and gave Appellant the *right to refuse*. (*See, e.g.,* Veh. Code § 23612(a)(1)(A) ["A person who drives a motor vehicle is deemed to have

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[3] *People v. Eshelman* (1990) 225 Cal.App.3d 1513, 1520-21, cited by the state (Petition for Review at p. 17), is of even less help to the state. There, the Court held that it *was Doyle* error for the prosecutor to elicit the defendant's post-arrest silence when confronted by a *private party*, because the defendant stated he was relying on advice of counsel to remain silent.

given his or her consent to chemical testing . . . , *if lawfully arrested* . . ."] [emphasis added]; *Schmerber v. California* (1966) 384 U.S. 757 [no due process violation to forcibly take blood sample based upon probable cause]). Moreover, Appellant did not *refuse* a test; rather, Appellant *inquired* about his rights to refuse, before *voluntarily agreeing* to be transported to the station and to give a test. The state here sought to penalize Appellant for doing what the constitution absolutely protects–*inquiring* about his rights–and for doing what the law *encourages* citizens to do–cooperating with police in their investigation.

Finally, the state argues that the Court of Appeal added protection to Appellant's silence at a time when he was not yet in custody. (Petition for Review at pp. 16-17). Yet, the state concedes that a defendant is in custody when the totality of the circumstances demonstrate that a reasonable person would believe that he or she was not free to leave. (*Id.*, citing *Stansbury v. California* (1994) 511 U.S. 318, 322-323, 325 (per curiam)). In this case, it is undeniable that a reasonable person would understand that he was not free to leave at the outset of Appellant's contact with Officer Price, when he asked Price if he could leave, and Price unequivocally told Appellant he could *not* leave. (RT 684-685).

In short, the United States Supreme Court has found constitutional errors in similar cases, and this Court has repeatedly applied *Griffin* to

silence of defendants while in police custody, even in the absence of *Miranda* warnings. The decision by the Court of Appeal is in harmony with these decisions, and there is no reason here to question these settled rulings, particularly in a case such as this one where the evidence favored acquittal and where the prosecutor sought to use Appellant's inquiry regarding his rights and ultimate cooperation with police as evidence of consciousness of guilt. This Court should deny review.

II. REVIEW IS ALSO UNWARRANTED BECAUSE THE EVIDENCE WHICH THE STATE ARGUES DEMONSTRATES THAT THE CONSTITUTIONAL ERROR WAS HARMLESS, WAS ALSO ADMITTED IN VIOLATION OF THE CONSTITUTION AND EXACERBATED THE PREJUDICE.

The state also suggests that this Court should take review on the issue of harmlessness. The state does not suggest this is an important question, or that it merits review for any other reason for which this Court grants review. (*See* Rule of Court 8.500(b)). Review should be rejected for that reason alone.

Second, the Court of Appeal found that "[t]he 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." (Typed Opn. at p. 27). Indeed, as described above, the evidence objectively favored acquittal. Thus, it is doubtful that

any constitutional error could be demonstrated to be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 23-24).

Finally, the evidence which the state suggests was properly admitted and rendered the constitutional error harmless, was itself admitted in violation of the constitution, raising questions that the Court of Appeal's narrow decision declined to reach. If this Court takes review on the narrow question raised by the decision below, the Court would be required to address these questions as well.

As the state points out, the Court of Appeal found that Appellant was under *de facto* arrest at the time he was transported to the station. The state argues that the error in admitting evidence of Appellant's silence after being transported, was rendered harmless by allegedly properly admitted evidence of Appellant's failure to ask about the Nissan's occupants at an earlier time, and his inquiries about whether he was free to leave. (Petition for Review at pp. 18-19).

Yet, the trial court had found that Appellant was under *de facto* arrest as soon as Officer Price plainly told Appellant that he could not leave. (*See* Typed Opn. at p. 15 n. 9; RT 14-16). Further, as described above, it is undeniable that a reasonable person would understand that he was not free to leave when, at the outset of his contact with Officer Price, Appellant asked Price if he could leave, and Price unambiguously told Appellant he

could *not* leave. (RT 684-685; *see Stansbury v. California* (1994) 511 U.S. 318, 322-323, 325 (per curiam)). While the Court of Appeal decided the issue more narrowly, finding detention at the time of the transportation, if this Court were to grant review, it would also have to review the issue of whether Appellant was in custody earlier. (*See* Rule of Court 8.500(a)(2)).

The Court would be bound to conclude that Appellant was in custody at the time he was told he could not leave. (*Stansbury*, *supra*, 511 U.S. at pp. 322-323, 325). Thus, essentially the entire period of silence and failure to inquire about the welfare of the other parties, was while Appellant was in custody. There was no period of silence with police before Appellant was detained, and thus no period of silence which could render harmless the improper comments on the in custody silence.

Further, as state and federal courts have universally held, the state could not, consistent with *Griffin*, use Appellant's inquiries and assertions about his Fourth Amendment rights to prove his guilt. (*People v. Wood* (2002) 103 Cal.App.4th 803, 808-809 [constitution prohibits admission of defendant's refusal to grant officers access to his property in reliance on Fourth Amendment rights to prove consciousness of guilt]; *People v. Keener* (1983) 148 Cal.App.3d 73, 78-79 [admission of evidence of defendant's refusal to consent to a warrantless entry of his residence violated the privilege to be free from comment upon the assertion of a

constitutional right]; *United States v. Thame* (3d Cir. 1988) 846 F.2d 200, 206 [error for the prosecutor to argue that defendant's refusal to consent to search constituted evidence of his guilt]; *United States v. Taxe* (9th Cir. 1976) 540 F.2d 961, 969 [prosecutor's comments on defendants' refusal to consent to a search of their trucks was "misconduct"]). Under these settled cases, the prosecutor could not penalize Appellant's assertions and inquiries regarding his Fourth Amendment rights by arguing that Appellant's inquiries about his right to leave the scene if he was not being detained,[5] his right to not be transported unless arrested,[6] and his right to not be required to give a blood sample if not arrested,[7] demonstrated his consciousness of guilt.

These improper comments regarding Appellant's assertions of his Fourth Amendment rights do not prove that the comment on Appellant's silence were harmless; rather, they constituted *additional* constitutional error which *exacerbated* the error found by the Court of Appeal. This Court should thus deny review; but, if the Court does grant review, it should grant review on these issues as well. (*See* Rule of Court 8.500(a)(2)).

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[5] *See, e.g., Terry v. Ohio* (1968) 392 U.S. 1, 8-9.

[6] *See. e.g., Dunaway v. New York* (1979) 442 U.S. 200, 206-216.

[7] *See, e.g.,* Veh. Code § 23612(a)(1)(A); *Schmerber, supra,* 384 U.S. 757.

III. REVIEW IS ALSO UNWARRANTED BECAUSE THE COURT OF APPEAL'S NARROW DECISION AVOIDED A HOST OF SERIOUS AND THORNY ISSUES ON DIRECT REVIEW AND HABEAS WHICH THIS COURT WOULD BE REQUIRED TO ALSO REVIEW INCLUDING PROSECUTORIAL MISCONDUCT, INEFFECTIVE ASSISTANCE OF COUNSEL, NEW EVIDENCE OF INNOCENCE AND FAILURE TO INSTRUCT ON INTENT FOR THE GREAT BODILY INJURY ENHANCEMENT, AND IMPROPER IMPOSITION OF THE GREAT BODILY INJURY ENHANCEMENT IN A MANSLAUGHTER CASE CONTRARY TO THE STATUTE'S PLAIN LANGUAGE.

Finally, review is unwarranted and unwise, because the Court of Appeal's narrow decision avoided a host of other fact-intensive and thorny questions of egregious constitutional error on direct review and on habeas. Granting review would require this Court to issue an order to show cause on the habeas and address these other complicated issues, along with the *Doyle/Griffin* error. (*See* Rule of Court 8.500(a)(2)).

By deciding only the narrow issue, the Court of Appeal thus avoided addressing the prosecutor's egregious misconduct when she falsely argued in closing that there was "absolutely no evidence that the defendant had his headlights on," and "[t]here's no evidence his headlights were on." (RT 1901-02). The prosecutor, however, knew well that her own investigating officer had testified that the lights were on (RT 924-925, 1159-62), and that the prosecutor had in her possession police reports, video-tape and photographs indicating that the lights of Mr. Tom's Mercedes were on.

(Habeas Exhibits, B, C, Exhibit D; Exhibit E, Photo CK-08). Such false argument is "obvious misconduct" (*People v. Castain* (1981) 122 Cal.App.3d 138, 146), and violated Appellant's state and federal constitutional due process rights. (*Miller v. Pate* (1966) 386 U.S. 1, 6-7 ([conviction reversed where prosecutor falsely argued that pair of shorts were soaked in blood, when the prosecutor knew the stains were paint]); *Alcorta v. Texas* (1957) 355 U.S. 28, 31 [conviction reversed when based on testimony which gave jury "false impression" and which prosecutor knew was misleading]).

Additionally, the prosecutor committed misconduct by arguing that even if some of the jurors were "still unconvinced that the defendant was a substantial factor in this collision"–an element of the offense–the jury should nonetheless convict him, because Ms. Wong had already paid the ultimate price by losing her daughter. (RT 1906). This argument both impermissibly urged the jury to convict without finding proof of each element as required by the federal constitution (*See People v. Hill* (1998) 17 Cal.4th 800, 820-821), but also was a prohibited and starkly emotional appeal to the jurors to convict on the basis of sympathy for the mother of the victim, rather than the facts of the case. (*People v. Fields* (1983) 35 Cal.3d 329, 362; *People v. Vance* (2010) 188 Cal.App.4th 1182, 1187-88, 1192-93, 1198).

Additionally, after trial, when the state finally permitted the defense to inspect Appellant's Mercedes, the defense expert discovered evidence that Appellant had his foot on the gas pedal after impact, a fact that thoroughly discredited the prosecution experts' calculation of Appellant's speed, and supported the defense expert's testimony. The failure to disclose the evidence violated the prosecutor's *Brady* duties (*People v. Uribe* (2008) 162 Cal.App.4th 1457, 1482); alternatively, defense counsel was ineffective for failing to discover the evidence through diligent investigation. (*Strickland v. Washington* (1984) 466 U.S. 668, 691-694). Further, the prosecutor committed additional misconduct in opposing the new trial motion, falsely telling the trial court that counsel did not use due diligence because "[t]he accelerator pedal would clearly have been visible by the most casual of glances into the car" (Clerk's Transcript [hereafter: "CT"] 1496); however, photographic evidence submitted with the habeas petition conclusively demonstrated that the prosecutor's argument was false because the view of the accelerator pedal was in fact wholly obscured by the car's air bag, and could not have been seen by even the most diligent look through any of the windows. (Exhibit E, Photos CK-02, CK-03, CK-04; *see Giglio v. United States* (1972) 405 U.S. 150, 153-154 [prosecutor's "deception of a court . . . is incompatible with rudimentary demands of justice" and violates due process]).

Finally, the Court of Appeal's narrow decision avoided two complicated issues regarding the great bodily injury enhancement. First, in violation of Appellant's federal constitutional right to a jury verdict on every element, the trial court never instructed that the enhancement had a general intent requirement, and the trial court gave no general instructions which informed the jury that any intent was required. (*See People v. Verlinde* (2002) 100 Cal.App.4th 1146,1166-67 ([court must instruct that great bodily injury enhancement requires general intent]). Further, the plain language of the statute (Penal Code § 12022.7(g)), states that the great bodily injury enhancement "shall not apply to . . . manslaughter." (*People v. Beltran* (2000) 82 Cal.App.4th 693, 696; *see generally United States v. Santos* (2008) 128 S.Ct. 2020, 2025 [federal constitutional right to notice embodied in "[t]he rule of lenity requires ambiguous criminal statutes to be interpreted in favor of the defendants subjected to them"]; *Bouie v. City of Columbia* (1964) 378 U.S. 347, 353 [federal due process right precludes court from retroactively expanding reach of a state statute]; *but see People v. Weaver* (2007) 149 Cal.App.4th 1301, 1329-35).

Because the Court of Appeal decided the case narrowly, it avoided these complex, fact-intensive issues relating to numerous egregious constitutional violations. Review of the Court of Appeal's narrow decision would necessarily require this Court to grant an Order to Show Cause on the

habeas, which the Court of Appeal avoided, and to review these other issues which the lower court did not reach. (*See* Rule of Court 8.500(a)(2)). In the end, this Court would be required to reverse the convictions on one issue or the other.

For these reasons, this Court would do well to let the narrow holding of the Court of Appeal stand and avoid review of this well-settled issue which is entangled with these other serious constitutional violations.

CONCLUSION

The First District's narrow decision below is in line with well-settled precedents of this Court and the United States Supreme Court. Further, review of the narrow issue that was decided on direct appeal would require this Court to grant review on a host of entangled and more complicated constitutional issues raised on appeal and habeas, which the lower court had avoided. In the end, reversal would be required on one or more issues in this case in which the evidence was at best in "equipoise" as to Appellant's guilt, and largely favored acquittal. Review would simply postpone the inevitable retrial in this case where Appellant has already served three-and-a-half years of a seven-year sentence.

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This Court should deny review.

Dated: May 18, 2012

Respectfully submitted,

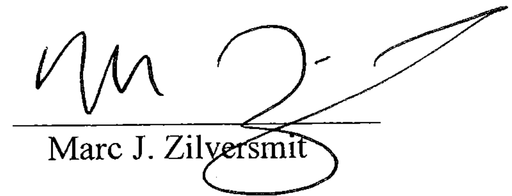
MARC J. ZILVERSMIT

Attorney for Defendant/Appellant
RICHARD TOM

CERTIFICATE OF COMPLIANCE

I, Marc J. Zilversmit, hereby certify that the attached Appellant's Answer to Petition for Review is proportionately spaced, has a typeface of 13 points, and contains 6,095 words.

Dated: May 18, 2012



Marc J. Zilversmit

PROOF OF SERVICE BY MAIL -- 1013(a), 2015.5 C.C.P.

Re: ***People v. Richard Tom,* No. S202107**

I am a citizen of the United States; my business address is 523 Octavia Street, San Francisco, California 94102. I am employed in the City and County of San Francisco, where this mailing occurs; I am over the age of eighteen years and not a party to the within cause. I served the within:

ANSWER TO PETITION FOR REVIEW

on the following person(s) on the date set forth below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box at San Francisco, California, addressed as follows:

ATTN Mark S. Howell, Esq.*
Attorney General's Office
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

San Mateo District Attorney's Office
400 County Center, 3rd Floor
Redwood City, CA 94063

Clerk of the Superior Court
County of San Mateo
400 County Center
Redwood City, CA 94063

First District Court of Appeal*
350 McAllister Street
San Francisco, CA 94102

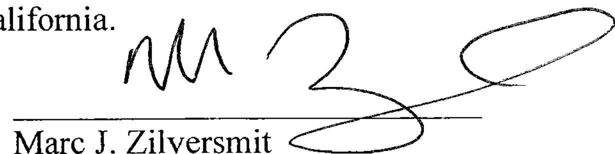
Richard Tom
(Appellant)

[x] **BY MAIL:** By depositing said envelope, with postage thereon fully prepaid, in the United States mail in San Francisco, California, addressed to said party(ies); **and**

[*] **BY PERSONAL SERVICE:** By causing said envelope to be personally served on said party(ies), as follows: **[ ] FEDEX [*] HAND DELIVERY [ ] BY FAX**

I certify or declare under penalty of perjury that the foregoing is true and correct.

Executed on May 18, 2012 at San Francisco, California.



Marc J. Zilversmit