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. S202107

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

OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

ISSUES PRESENTED

1. Does the use of a defendant's postarrest, pre-*Miranda* silence to prove consciousness of guilt violate the Fifth Amendment privilege against self-incrimination when that silence is neither compelled nor induced by governmental action?

2. Is the improper admission of postarrest silence prejudicial when that silence was nothing more than a continuation of otherwise admissible prearrest silence?

INTRODUCTION

The Court of Appeal held appellant's postarrest, pre-*Miranda* silence was constitutionally protected and could not be used in the prosecution's case-in-chief. Custody alone triggered Fifth Amendment protection, according to that court. That is incorrect. The Fifth Amendment guards against governmental compulsion, not mere custodial silence. *Miranda* extends the reach of the Fifth Amendment beyond actual compulsion, but requires custodial interrogation in lieu of compulsion. Custody alone does not trigger *Miranda*'s protections. Consequently, silence responsive neither to compulsion nor to interrogation is not constitutionally protected.

At the very least, protected silence must be an assertion of the constitutional privilege induced by governmental action. Appellant's pre-*Miranda* silence was not a product of compulsion, a response to custodial interrogation, or an assertion of the privilege. Appellant was not even silent, but instead spoke freely to a friend, paramedics, and police officers, just not about his victims. That was not constitutionally protected silence, and the prosecution did not err in eliciting that fact in its case-in-chief.

STATEMENT OF THE CASE

A. Overview

On the evening of February 19, 2007, appellant Richard Tom drove his Mercedes nearly twice the speed limit and broadsided a Nissan sedan driven by Loraine Wong. Ms. Wong's daughters, Kendall and Sydney, ages 10 and 8 respectively, were in the rear passenger seats. The main force of the impact was near Sydney, who was belted into a booster seat. Sydney died. Kendall survived, but sustained serious injuries. (Typed Opn. at p. 1.)

B. The Fatal Crash

In the hours preceding the crash, appellant was entertaining a long-time friend and visitor from Nevada, 72-year-old retired police officer Peter Gamino. (5 RT 927-929; 3 CT 849.) About 5:30 or 6:00 p.m., appellant woke Mr. Gamino from a nap, gave him a vodka tonic cocktail, and began made dinner. Appellant drank a vodka tonic as he cooked. (5 RT 933-935.) Mr. Gamino prepared their second round of drinks, then they ate. (5 RT 935-936.)

Around 7:30 p.m., appellant drove them to his son's house to pick up his son's car. (5 RT 936-937.) Returning home, appellant had Mr. Gamino drive his son's black Camry, while appellant drove his silver Mercedes. (4 RT 675; 5 RT 937.) Mr. Gamino followed appellant, driving the speed limit. (5 RT 937-938.) Mr. Gamino was driving around 40 miles per hour when he turned north onto Woodside Road, but appellant was already well ahead, about 200 yards up the road. (5 RT 939-941; 3 CT 856-857.)

About 8:15 p.m., Lorraine Wong left home with her daughters in the backseat of her Nissan Maxima. (3 RT 482, 487, 491.) They were going to visit Ms. Wong's sister who just had a baby. (3 RT 485, 494.) As Ms. Wong drove up Santa Clara Avenue toward Woodside, she used her cell

phone to let her sister know they were on their way. (3 RT 493, 516-520.) Ms. Wong had completed her call when she reached the intersection of Santa Clara Avenue and Woodside Road, but was still holding the phone in her hand. (3 RT 529.) She stopped at the stop sign, looked both ways, then inched forward for a better view, in preparation to turn left (south) on Woodside Road. (3 RT 495-497.) Ms. Wong stopped again at the top of the crosswalk where she could look down Woodside Road without obstruction. (3 RT 497-498.) She looked left, right, then left again before starting her turn. She had her lights and turn signal on, and did not see anyone approaching. (3 RT 499.)

Woodside Road is a divided road with two lanes in each direction, an island in the middle, and a posted speed limit of 35 miles per hour. (3 RT 378, 384.) Ms. Wong drove across Woodside Road around 15 miles per hour to make her left turn. Halfway across the northbound lanes, she "saw a big flash of light" and was struck by appellant's speeding Mercedes on the driver's side by the back door. (3 RT 386, 499.) Before the flash, Wong heard no sounds of a car braking, or horn honking. She did not see headlights to her left and never saw appellant's car. (3 RT 507, 525, 534.)

When her car came to rest, Ms. Wong checked her daughters, who were both unconscious and bleeding from cuts on their faces. (3 RT 501.) Kendall soon regained consciousness, but Sydney never did. (3 RT 501.) Medical personnel soon arrived. Sydney was flown to Stanford Hospital, but was pronounced dead at 8:53 p.m. (3 RT 504; 4 RT 769.) She died from multiple blunt trauma injuries, including a severely damaged spleen and liver resulting in internal bleeding, brain hemorrhage, and a pelvic fracture. (4 RT 770-775.) Kendall suffered a broken arm, a neck injury requiring a brace, and a forehead wound requiring 30 stitches. (3 RT 504-505.) Ms. Wong suffered a cracked rib and a broken finger. (3 RT 506, 535-536.)

Mr. Gamino was trailing appellant by a substantial distance on Woodside Road and only saw a cloud of dust and dirt suddenly fly up from the road well in front of him. (5 RT 943.) He drove past the intersection of Woodside Road and Santa Clara Avenue, made a U-turn at the next intersection and stopped near appellant's Mercedes, which had come to rest in the southbound lanes of Woodside Road. (5 RT 943-944.) Mr. Gamino approached appellant, who sat in his damaged Mercedes. Mr. Gamino asked if he was all right; appellant responded that "he didn't even see it." (5 RT 945.) Mr. Gamino returned to his car when the paramedics arrived. (5 RT 945.)

Officers and medical crews were dispatched at 8:20 p.m., shortly after the collision. (3 RT 376.) Redwood City Police Officers Russell Felker and Josh Price arrived first, followed shortly by medical personnel. (4 RT 674.) After assessing the scene, Officer Felker directed Officer Price to contact appellant. (4 RT 675.)

Appellant was seated in his Mercedes, being examined by two paramedics who had also just arrived. (4 RT 677.) One paramedic was seated directly behind appellant, making sure his neck was stable, while the other was in the front passenger seat checking appellant's condition. (4 RT 677.) Officer Price had a brief conversation with appellant, then left to confer with Sergeant Alan Bailey of the Redwood City Police Department, who had just arrived at the scene to oversee the investigation. (3 RT 376, 401; 4 RT 678.) Officer Price did not notice any signs of intoxication in his encounter with appellant. (4 RT 678.)

Sergeant Bailey, a 30-year veteran with expertise in over a thousand traffic collision investigations, noted the accident scene was quite chaotic, with substantial areas to cordon off, numerous bystanders to question as potential witnesses, officers from overlapping law enforcement

jurisdictions to coordinate, and medical personnel to assist. (3 RT 368-373, 378, 382, 386-387, 400, 408-409, 430-432.)

The sergeant walked through the scene and determined from gouge marks in the asphalt that the collision occurred close to the center of Woodside Road's northbound lanes, at its intersection with Santa Clara Avenue. (3 RT 391-392.) The debris field was very large, and the distance between the two cars at rest was "incredible." (3 RT 383.) Appellant's Mercedes had major front end damage, a cracked windshield, broken driver's side mirror and two flat tires. (3 RT 381-382.) The Nissan Maxima had a direct hit to the rear passenger door area. The rear axle was broken; the rear quarter panel and rear end of the car was destroyed; and the passenger window and rear window were shattered. (3 RT 386.) Sergeant Bailey concluded, based on his observations of the collision scene, the damage, and the final resting spots of the cars, that appellant was driving "extremely fast"—"not even close" to the posted 35 m.p.h. speed limit. (3 RT 396-397.)

Sergeant Bailey had Officer Price check appellant again and inquire of the paramedics about any signs of intoxication while treating appellant. (3 RT 433.) Officer Price returned to appellant's car, where appellant was already walking around. The paramedics were asking appellant to go to the hospital for a more thorough examination. (4 RT 679.) Appellant refused, explaining his insurance would not cover the costs. The paramedics had appellant sign a form indicating his decision was made against their advice. (4 RT 679.) Officer Price noticed that appellant was limping slightly, but otherwise appeared okay. His demeanor was calm. (4 RT 679-680.) By this time, appellant's girlfriend, Winnie Jiang, had arrived and was with him. (3 RT 475; 4 RT 680; 5 RT 945.)

Officer Price again spoke with appellant and then consulted the paramedics, who had not noticed any odor of alcohol. (4 RT 715, 724-

725.) Officer Price interviewed several bystanders to determine if they had witnessed the crash. (4 RT 680-681.) This process took roughly 20 minutes, after which he reported back to Sergeant Bailey. (4 RT 680, 714.)

Within 40 to 45 minutes of his arrival, Sergeant Bailey learned appellant was now sitting in a black Toyota Camry that was parked within the cordoned-off area under investigation. (3 RT 402-403; 4 RT 682.) Sergeant Bailey directed Officer Price to find out the connection between appellant and the driver of the Camry. (4 RT 404.)

Appellant and his girlfriend had been sitting in the Camry for about 15 minutes before Officer Price came over. (5 RT 945-946.) Mr. Gamino was in the driver's seat; appellant was in the front passenger seat; and Ms. Jiang was in the back. (4 RT 683.) Officer Price had a brief conversation with Mr. Gamino. (4 RT 683.) During that conversation, appellant interjected that he only lived a block away and asked if he could walk home. (4 RT 684.) Officer Price told him no, the investigation was ongoing and they needed him to remain at the scene. (4 RT 685.) Officer Price continued to go back and forth between Sergeant Bailey and appellant in order to keep Sergeant Bailey apprised of any information he learned from appellant. (4 RT 685.)

At some point after appellant moved to the Camry, he complained to Officer Price that his ankle hurt and asked for an ice pack. Officer Price found a paramedic, who obtained an ice pack for appellant. (4 RT 686.)

Subsequently, Sergeant Bailey asked Officer Price to see if appellant would go to the stationhouse for a voluntary blood draw. (3 RT 449-450; 4 RT 687-688.) Irritated by the request to go to the station, appellant asked if a blood draw could be done at the scene. (4 RT 688-689, 727.) Officer Price explained to him that it was against the policy of the paramedics to conduct a blood draw outside a controlled environment. Appellant agreed to accompany the officers to the station for the blood draw. (4 RT 689,

729.) The officers asked appellant to sit in the back of Officer Felker's patrol car. He was not formally arrested or placed in handcuffs, and he was accompanied in the patrol car by his girlfriend Ms. Jiang. (3 RT 406; 4 RT 687-690.)[1]

Appellant and Ms. Jiang waited in a stationhouse interview room for a paramedic to arrive for the blood draw. When the paramedic arrived, he informed the police he could not perform a blood draw unless appellant was actually under arrest. (3 RT 412-413, 458-459; 4 RT 490-493.) Officer Price and Sergeant Bailey asked appellant if he would mind going to the hospital for a voluntary blood draw. (3 RT 413, 462-464; 4 RT 693-694.) When appellant asked if he could refuse, the officers merely encouraged him to volunteer by telling him it would be in his interest to provide a blood sample to rule out the presence of drugs or alcohol. (3 RT 413, 462-466; 4 RT 693-695.)

Appellant agreed, but first asked to use the restroom. Sergeant Bailey accompanied appellant into the bathroom. Appellant asked Sergeant Bailey for an aspirin for his ankle pain, but Sergeant Bailey said he could not provide medications. (3 RT 414-416.) In the close confines of the bathroom, Sergeant Bailey noticed alcohol on appellant's breath and that appellant's eyes were bloodshot and glassy. (3 RT 418-420.) When appellant returned to the interview room, Officers Price and Gomez both noted the smell of alcohol. (4 RT 750, 755-756.) Officer Price administered three field sobriety tests on appellant, the horizontal gaze nystagmus test, the standing Romburg test, and the finger to nose test. (4 RT 700-704.) Based on the results of those tests, Officer Price concluded

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[1] CAD logs reflect that appellant was seated in the patrol car at 9:30 p.m. Officer Felker left the scene with appellant at 9:48 p.m. They arrived at the station at 9:57 p.m. (3 RT 405-408.)

appellant was under the influence at the time of the accident and placed him under arrest. (4 RT 705.) A paramedic was called and appellant's blood was drawn at 11:13 p.m. (4 RT 667.) Appellant's blood alcohol concentration (BAC) was .04 percent. (4 RT 778-779.)

Officer Price testified at trial that during the time he had contact with appellant, appellant never asked about the condition of the occupants of the Nissan. (4 RT 685, 707.)

C. Crime Scene Investigation and Expert Testimony

Around the time appellant went to the police station, Officer Janine O'Gorman, a 10-year veteran and expert in collision investigations, arrived to document and evaluate the crash scene. (3 RT 540-543.) She determined the point of impact based on gouges in the pavement at the intersection of Santa Clara Avenue and Woodside Road. (3 RT 551.) From the point of impact, the Mercedes traveled 239.9 feet leaving tire friction marks or yaw marks along the roadway as it traveled in a direction that was not aligned with the tires' direction of spin. (3 RT 551-554.) The Mercedes started in the northbound lanes of Woodside Road before the collision, hit the Nissan, skidded across the lanes to the center island, jumped the island into the southbound lanes, then rotated back toward the island where it came to rest. (3 RT 556-557.) The Mercedes engine was demolished, and the front tires were turned, causing the tires to be in a locked skid. (3 RT 563, 565, 571.) The Nissan traveled 60 feet from the point of collision, rotating 360 degrees, spraying glass in a circular pattern, and strewing debris from the interior of the car, including Sydney's booster seat stripped of the armrests that held the seatbelt in place, across the roadway. (3 RT 557-559.)

Officer O'Gorman testified that on that stretch of Woodside Road, cars often exceed the 35 m.p.h. speed limit, typically to 40 m.p.h. (4 RT 603-604.) A traffic engineering study determined the critical speed, i.e., the

point where the speed is unsafe for the conditions, was 39.7 m.p.h. (4 RT 650.) She opined that driving 50 m.p.h. on Woodside Road was unsafe for the conditions. (4 RT 629.) A driver heading north on Woodside Road ordinarily has the right of way over a driver turning left onto Woodside Road from Santa Clara Avenue. Driving 20 miles per hour over the posted speed limit, however, would result in the Woodside Road driver losing his right of way because of the unsafe speed. (4 RT 629.) Officer O'Gorman concluded that appellant's excessive speed was the primary factor causing the collision. (4 RT 652.)

San Jose Police Officer Jincy Pace is an expert in collision reconstruction. (5 RT 790-794.) She examined the Mercedes and the Nissan and forensically mapped the crush depth of damage to the cars. She also reviewed the measurements taken by Officer O'Gorman at the scene. (5 RT 794-795.) Using this data, she reconstructed the accident. (5 RT 797-800.) She determined the path of the Mercedes from the friction marks and fluid trail left as it skidded across the roadway and leapt the island. (5 RT 804-812.)

The drag factor for a car in a full skid on dry pavement is between .65 and .85. A rotating car would experience brief periods where the wheels would be aligned with the direction of travel, resulting in a lower rolling drag factor. Rather than assigning varying drag factors for different parts of the skid, Officer Pace elected to use an artificially low (which she described as "ludicrously low") drag factor of .3, which would more than encompass any fluctuation due to rotation or fluid leaking onto the roadway and tires. (5 RT 815-817, 848, 894.) Using that artificially low drag factor, the postcollision distance traveled by the Mercedes, the near perpendicular angle of the two cars at collision, and the angle of departure for the cars,

Officer Pace calculated appellant's postcollision speed as 47 m.p.h. (5 RT 806-817.)[2] From that postcollision speed, Officer Pace determined that appellant was traveling at least 67 m.p.h. when he hit Ms. Wong's Nissan. (5 RT 797, 819, 840.) The Nissan had a precollision speed of 12 m.p.h. when it was broadsided, and it had a postcollision speed of 29 m.p.h., when pushed into a fast spin by the Mercedes. (5 RT 818-820.) The damage to the vehicles was consistent with the Mercedes hitting the Nissan at 67 m.p.h. (5 RT 821.)

Officer Pace examined the collision reconstruction analysis of defense expert Chris Kauderer and vigorously disagreed with his conclusions regarding speed. (5 RT 831, 885.) Mr. Kauderer concluded that the postcollision speed of the Mercedes was 27 to 29 m.p.h. (5 RT 897.) For the Mercedes to have traveled postcollision as far as it did at 27 to 29 m.p.h. would require a drag factor of merely .09 to .11, lower than that for sliding across ice. (5 RT 897.)

Officer Pace opined that by traveling 67 m.p.h. on Woodside Road, appellant forfeited his right of way. Ms. Wong could reasonably assume that the Mercedes was obeying the law by driving a reasonable speed, and therefore her turn did not pose a risk to his car when it was 300 to 400 feet from the intersection. (5 RT 900-901.)

Toxicologist Carlos Jiron testified that, if appellant stopped drinking sometime before the crash at 8:20 p.m., and his BAC was .04 percent at 11:13 p.m., then assuming a standard burn off rate of .02 percent per hour, his BAC at the time of the crash was approximately .10 percent. (5 RT 1002, 1019-1024; 6 RT 1034-1035.)

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[2] A more realistic drag factor like .65 results in a postcollision speed of 69 m.p.h. (5 RT 817.)

D. Defense Experts

Seven months after the collision, Ken Boots mapped the relevant distances and gouge marks, but could not map friction marks, which were no longer present at the scene. (5 RT 1166, 1173, 1196-1198.) He examined the exterior of the two cars and forensically mapped the crush depth of the collision points. (5 RT 1179.) Mr. Boots opined that a driver on Woodside Road would maintain the right of way regardless of excessive speed. He asserted a driver only loses right of way by voluntarily relinquishing it. (6 RT 1209.)

Christopher Kauderer testified as appellant's expert in collision reconstruction. (7 RT 1370.) Mr. Kauderer decided that determining a drag factor for the Mercedes would be too complicated given the direction changes, possible fluid spill on the roadway, and potential for driver input. (7 RT 1453-1454; 8 RT 1498-1500.) Mr. Kauderer came up with several figures similar to those calculated by Officer Pace, including the drag factors and postcollision speed and distance for the Nissan. (7 RT 1456; 8 RT 1506-1508 1514.) However, rather than assign a drag factor for the Mercedes, he used a different method of calculating its postcollision speed. He assumed that the Mercedes and the Nissan reached a common velocity during the collision, and that the Mercedes must therefore have left the collision traveling at 27 to 29 m.p.h., the same speed as the Nissan. (8 RT 1501-1502.) This assumption was the only significant difference between his and Officer Pace's analysis. On this assumption, Mr. Kauderer concluded that appellant's precollision speed was 49 to 52 m.p.h. rather than 67 m.p.h. as calculated by Officer Pace. (8 RT 1503, 1507, 1516.) He disagreed with the officers who opined that the distance the Mercedes traveled, the size of the debris field, and the amount of damage reflected a higher speed. (8 RT 1519.) He opined that Ms. Wong caused the accident

by pulling out in front of appellant who did not have enough time to react. (8 RT 1543, 1546, 1559-1560.)

On cross-examination, Mr. Kauderer said he could not assign a drag factor for the Mercedes because of the possibility appellant accelerated after the crash, which would allow the Mercedes to achieve the total distance it traveled. (8 RT 1567.) Using a standard wet asphalt drag coefficient of .4 to .6, with the front tire turned to the right, in the absence of any postcollision driver acceleration, his formula resulted in a precollision speed of 60 to 70 m.p.h. (8 RT 1580-1582.)

Kenneth Mark testified as an expert in forensic toxicology. He opined that using a standard alcohol elimination rate of .02 percent per hour was insufficiently precise to determine BAC at the time of the crash. The actual elimination rate can vary in individuals from .01 percent to .028 percent per hour. Using the former number, appellant's BAC could have been as low as .07 percent at the time of the crash. (7 RT 1316-1337, 1332-1333.) He opined that, if appellant's BAC was .10 percent at the time of the crash, he would have displayed more objective signs of intoxication, such as slurred speech and an unsteady gait. (7 RT 1336-1337.)

E. Rebuttal Expert

The prosecution called San Jose Police Officer David Johnson, a long-time expert in collision reconstruction, in rebuttal. (8 RT 1609-1615.) Officer Johnson rejected Mr. Kauderer's assumption that the Mercedes and Nissan had the same velocity at separation. (8 RT 1629.) The cars did not collide along the axis of their center of mass, but rather hit off center and spun without achieving the same velocity at maximum engagement. (8 RT 1629-1631.) The damage to the Nissan showed the Mercedes slid along the side of the Nissan as it hit and caused the Nissan to rotate. The Mercedes caught the wheel well and ripped the suspension off the unibody, triggering the front airbag of the Nissan. The damage pattern refuted the assumption

that the cars achieved the same velocity. (8 RT 1631, 1634-1636.) Also, Mercedes designs the fuel pump to shut off in the event of a crash like this, which precluded positive acceleration after the collision. (8 RT 1619; 9 RT 1699.) Officer Johnson concluded that Mr. Kauderer substantially underestimated the postcollision speed of the Mercedes, which resulted in an artificially low precollision speed estimate. (8 RT 1644.)

Officer Johnson also criticized Mr. Kauderer's refusal to assign any drag factor for the Mercedes. (8 RT 1625-1628; 9 RT 1702.) He noted that, without acceleration, Mr. Kauderer's pre- and postcollision speed estimates required an average drag factor of .12 to achieve the distance traveled by the Mercedes. That drag factor is equivalent to skidding across ice with locked tires, which is unreasonable for this crash. (9 RT 1750-1751.)

Officer Johnson understood Officer Pace used a generously low drag factor of .3 to give appellant the benefit of the doubt, but he would have used a more realistic drag factor of .35, which results in an even higher precollision speed. (9 RT 1705, 1745-1746.) He agreed that the amount of damage was consistent with a precrash speed estimate of 67 m.p.h. (9 RT 1684, 1647.)

Officer Johnson's examination of the front left tire of the Mercedes revealed it was trapped in the wheel well in a right turn position by a frame structure that was pushed back during the collision. (9 RT 1638-1641.) As a result, the left wheel was impeded; it could still rotate, but not freely. (8 RT 1696.) Officer Johnson opined that appellant's speed was the primary factor in the collision. (9 RT 1754.)

F. Criminal Proceedings

The jury convicted appellant of vehicular manslaughter with gross negligence in violation of Penal Code section 192, subdivision (c)(1), acquitting him of the greater charged offense of vehicular manslaughter

with gross negligence while intoxicated and all other charged and lesser included alcohol-related driving offenses. (4 CT 1177-1180, 1191-1197.)[3] The jury found that appellant personally inflicted great bodily injury on Kendall Ng, but not with respect to Loraine Wong. (4 CT 1177-1180, 1198-1199.)

On April 24, 2009. the trial court sentenced defendant to four years for vehicular manslaughter with gross negligence and an additional three years for the personal infliction of great bodily injury upon Kendall Ng. (6 CT 1660-1661; 12 RT 2048-2049.)

G. Appellate Court Decision

On appeal, the First District Court of Appeal concluded the prosecution violated appellant's Fifth Amendment privilege against self-incrimination by introducing his postarrest, pre-*Miranda* silence as proof of guilt. (Typed Opn. at p. 2.) The court focused on three questions in the prosecution's case-in-chief. (Typed Opn. at pp. 13-14.) When Officer Price testified about his conversation with appellant while the latter sat in the black Camry, the prosecutor asked, "when he made his request to go home, had he asked you any questions about the condition of the occupants in the Nissan?" Officer Price answered, "No." (4 RT 685.) The prosecutor later asked whether, during the contact with appellant from about 8:20 p.m. to approximately 11:30 p.m., appellant ever asked Officer Price "about the condition of the occupants of the Nissan," and the officer again answered, "No." (4 RT 707.) The prosecutor elicited a similar response from Sergeant Bailey, asking, "So, during any of this time [prior to appellant's arrest at the police station], did the defendant ever ask you about the

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[3] Appellant had been charged with driving and causing death while intoxicated or with a BAC of .08 percent or greater (Veh. Code § 23153, subds. (a) & (b)). (3 CT 769-773; counts 2 & 3).

occupants of the other vehicle?" Sergeant Bailey replied, "No, he did not." (3 RT 424.)

The Court of Appeal held that "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.)

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 and *United States v. Velarde-Gomez* (9th Cir. 2001) 269 F.3d 1023, 1028-1029 (en banc) with *United States v. Frazier* (8th Cir. 2005) 408 F.3d 1102, 1111].)

The court decided 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." (Typed Opn. at pp. 23-24 [citing *Moore*, *supra*, 104 F.3d at p. 385].)"

The court said its holding—that *Miranda* rights are triggered by the inherently coercive circumstances attendant to a de facto arrest—is "coextensive with constitutional guarantees of the Fifth Amendment" and protected 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.)[4]

Summarizing its ruling, the lower court said the "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." (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 viewed the evidence to be in "equipoise," and found the prosecutor placed "great emphasis" on the erroneously admitted evidence in closing argument. (Typed Opn. at pp. 27-29.)

SUMMARY OF THE ARGUMENT

The Fifth Amendment does not bar the prosecution's substantive use at trial of a defendant's postarrest silence that occurs before receiving *Miranda* warnings. The Court of Appeal erroneously concluded that custody alone is sufficient to trigger Fifth Amendment protection, thereby barring admission of such silence. The Fifth Amendment requires more than mere custody.

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[4] The Court of Appeal also endorsed and applied the Ninth and D.C Circuits' approach of drawing the line at arrest, allowing substantive use of prearrest silence, but not postarrest silence. (Typed Opn. at p. 24 [citing *Moore*, *supra*, 104 F.3d at p. 389].)

The Fifth Amendment to the United States Constitution provides that "[n]o person. . . shall be compelled in any criminal case to be a witness against himself." The core function of the Fifth Amendment is preventing governmental compulsion used to extract testimonial statements from a defendant. (*Colorado v. Connelly* (1986) 479 U.S. 157, 170.) *Miranda v. Arizona* (1966) 384 U.S. 436, extended the reach of that protection by substituting custodial interrogation as a surrogate for actual compulsion. After *Miranda*, defendants subject to custodial interrogation must be informed of and waive their right to silence and to counsel before they can be questioned and their answers admitted at trial, regardless of whether the answers are actually compelled or involuntary. (*Id.* at pp. 476-477.) Because the *Miranda* warnings imply silence in response to interrogation will not be used at trial, the due process clause bars substantive use of a defendant's post-*Miranda* silence. (*Doyle v. Ohio* (1976) 426 U.S. 610, 618.)

Miranda's extension of the Fifth Amendment, however, requires both custody and interrogation. Mere custody is insufficient to trigger *Miranda*'s protections. (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301.) Moreover, *Doyle*'s additional due process protection is predicated on the promise contained in the *Miranda* warnings themselves and is therefore unavailable until *Miranda* warnings are actually given. (*Fletcher v. Weir* (1982) 455 U.S. 603, 607 (per curiam).) Thus, in the absence of either actual compulsion or custodial interrogation, neither the Fifth Amendment nor the due process clause protects a defendant's postarrest, pre-*Miranda* silence.

At the very least, before postarrest silence is entitled to Fifth Amendment protection against substantive use at trial, that silence must constitute an assertion of the privilege. Mere silence that is not an assertion of the constitutional privilege in the face of an exertion of

governmental authority is not entitled to constitutional protection. Under the circumstances of this case, appellant's failure to inquire about the condition of the victims did not constitute an assertion of his Fifth Amendment privilege, and thus the prosecutor was not barred from introducing that failure and using it to show consciousness of guilt.

Finally, even if appellant's postarrest silence was protected, appellant was not prejudiced by its introduction in this case. Appellant's prearrest failure to ask about the victims was still properly admissible to show consciousness of guilt. The additional evidence of his continued failure to inquire after his de facto arrest did not introduce any new or different damaging facts that materially changed the nature or strength of that inference. The marginal increase in prejudice to appellant from the addition of this continued silence was de minimis.

ARGUMENT

I. THE FIFTH AMENDMENT DID NOT PRECLUDE THE PROSECUTION'S USE OF APPELLANT'S POSTARREST, PRE-*MIRANDA* SILENCE IN ITS CASE-IN-CHIEF

Custody alone was insufficient to trigger Fifth Amendment protection prior to appellant receiving *Miranda* warnings. The decision below ignores that the Fifth Amendment protects against governmental compulsion, not custodial silence. *Miranda*, which extends the reach of the Fifth Amendment beyond actual compulsion, requires custodial interrogation in lieu of compulsion. Consequently, mere silence that is not in response to either compulsion or custodial interrogation is not constitutionally protected.

A. Constitutional Landscape

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness

against himself." (U.S. Const., 5th Amend.) The core protection provided by the Fifth Amendment is a prohibition on compelling a criminal defendant to testify against himself at trial. (See, e.g., *Chavez v. Martinez* (2003) 538 U.S. 760, 767 (plurality opinion); *Maldonado v. Superior Court* (2012) 53 Cal.4th 1112, 1127-1129.) The touchstone of the right is governmental compulsion. (*Colorado v. Connelly* (1986) 479 U.S. 157, 170 ["The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion"].)

The United States Supreme Court first applied to the states a constitutional restriction against commenting on a defendant's trial silence in *Griffin v. California* (1965) 380 U.S. 609. *Griffin* held with respect to a defendant's decision not to testify at trial, 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." *Griffin* 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 by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." (*Id.* at p. 614.)[5]

Griffin did not address a prosecutor's comment on a defendant's *pretrial* silence. (*United States v. Frazier* (8th Cir. 2005) 408 F.3d 1102, 1109, fn. 3.) Indeed, *Griffin* simply identified a constitutional analog to a

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[5] Prior to *Griffin*, the Supreme Court had analyzed comment on a defendant's decision not to testify only within the context of a federal statutory bar. (See *Griffin*, *supra*, 380 U.S. at p. 612; *Bruno v. United States* (1939) 308 U.S. 287; *Wilson v. United States* (1893) 149 U.S. 60.) The Court had previously declined to reach the constitutional question in two state cases, holding the Fifth Amendment did not apply to the States. (*Adamson v. California* (1947) 332 U.S. 46; *Twining v. New Jersey* (1908) 211 U.S. 78.) However, the year before the *Griffin* decision, the Court held in *Malloy v. Hogan* (1964) 378 U.S. 1 that the Fourteenth Amendment incorporated the Fifth Amendment's protection against self-incrimination.

federal statute that had long barred comment on a defendant's failure to testify in federal trials. (*Griffin v. California*, *supra*, 380 U.S. at pp. 613-614; accord, *Portuondo v. Agard* (2000) 529 U.S. 61, 72, fn. 3 [*Griffin* "relied almost exclusively on the [federal statute] in defining the contours of the Fifth Amendment right prohibiting comment on the failure to testify"].)

The Court turned to the question of pretrial silence and statements the following year in *Miranda v. Arizona* (1966) 384 U.S. 436. *Miranda* extended the reach of the Fifth Amendment's protection beyond governmentally compelled or involuntary statements to include statements during custodial interrogation, regardless of voluntariness.

In *Miranda*, the Court expressed concern that the pressures brought to bear on a suspect during a custodial interrogation could be sufficiently coercive to threaten the suspect's Fifth Amendment rights even if the resulting statements were not involuntary under the due process clause. (384 U.S. at pp. 445-458; *Dickerson v. United States* (2000) 530 U.S. 428, 434-435 ["We concluded [in *Miranda*] that the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be 'accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself.'"].) To safeguard a suspect's core Fifth Amendment trial right, the Court "laid down 'concrete constitutional guidelines for law enforcement agencies and courts to follow.'" (*Dickerson*, *supra*, 530 U.S. at p. 435 [quoting *Miranda*].) "Those guidelines established that the admissibility in evidence of any statement given during custodial interrogation of a suspect would depend on whether the police provided the suspect with four warnings," known colloquially as "*Miranda* rights." (*Ibid.*) Any statements obtained during custodial

interrogation without *Miranda* warnings may not be used substantively at trial. (*Miranda*, *supra*, 384 U.S. at pp. 476-477.)

The Supreme Court later made clear that *Miranda*'s extension of the Fifth Amendment's protection beyond compelled statements is limited to statements during *custodial interrogation*. *Miranda*'s protections are not implicated by mere custody without interrogation (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301), or by interrogation in the absence of custody (*Oregon v. Mathiason* (1977) 429 U.S. 492, 494-495 (per curiam)). The court also clarified that statements taken in violation of *Miranda* could be used to impeach a testifying defendant, provided the statements were voluntary. (*Harris v. New York* (1971) 401 U.S. 222, 224-226; *Oregon v. Hass* (1975) 420 U.S. 714, 722-724; see also *Michigan v. Tucker* (1974) 417 U.S. 433, 444 [fruit-of-the-poisonous-tree doctrine does not apply for *Miranda* violations]; *Oregon v. Elstad* (1985) 470 U.S. 298, 306-309 [same].)

The Supreme Court addressed in *Doyle v. Ohio* (1976) 426 U.S. 610 whether the Constitution bars the use of a defendant's postarrest silence after *Miranda* warnings. In *Doyle*, the defendants testified an informant who participated in a narcotics purchase framed them to cover his own narcotics dealing. (*Id.* at pp. 612-613.) The prosecutor impeached their testimony through cross-examination showing they never mentioned a frame-up to the police following their arrest. (*Id.* at pp. 613-614.) This use of post-*Miranda* silence for impeachment was constitutionally impermissible.

Doyle began by noting, "Silence in the wake of [*Miranda*] 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." (426 U.S. at p. 617.) However, more important than this potential ambiguity was the implicit

guarantee contained in the *Miranda* warnings that a suspect's silence would not be used. *Doyle* explained, "while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." (*Id.* at p. 618.)[6]

The fundamental unfairness of violating *Miranda*'s promise underlies the rule against using a defendant's post-*Miranda* silence against him at trial.[7] Notably, *Doyle* did not identify the Fifth Amendment right to silence as the basis for finding constitutional error, but rather held the violation sounded in the due process clause. (*Doyle*, *supra*, 426 U.S. at p. 619 ["We hold 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."]; see also *Wainwright v. Greenfield*, *supra*, 474 U.S. at p. 294 [likewise barring use of post-*Miranda* silence as substantive evidence of guilt based on due process].)

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[6] The Supreme Court later clarified that *Doyle*'s discussion of the ambiguity inherent in post-*Miranda* silence was secondary and "merely added weight to the Court's principal rationale" of *Miranda*'s implied promise of nonuse. (*Wainwright v. Greenfield* (1986) 474 U.S. 284, 293-294 & fn.12.)

[7] This approach was consonant with the Court's earlier jurisprudence in *Johnson v. United States* (1943) 318 U.S. 189, in which the Court, invoking its supervisory authority, found it unfair to allow the prosecutor to comment on a defendant's decision to answer certain questions after the trial judge permitted the defendant to invoke his right to silence as to those questions, even though the judge's ruling permitting the invocation was itself erroneous. *Johnson* explained that the promise of a right to silence, even if erroneously given, renders subsequent comment on that silence unfair. (*Id.* at pp. 196-197.)

Two subsequent cases, *Jenkins v. Anderson* (1980) 447 U.S. 231 and *Fletcher v. Weir* (1982) 455 U.S. 603 (per curiam), declined to extend *Doyle*'s due-process-based protection where the defendant had not received the *Miranda* admonitions or any concomitant promise of nonuse of silence.

In *Jenkins*, the defendant stabbed the victim and turned himself in two weeks later. At his murder trial, the defendant testified the victim attacked him with a knife, which he turned against the victim in self-defense. (*Jenkins*, *supra*, 447 U.S. at pp. 232-233.) Cross-examination elicited the fact that the defendant had not contacted the police or mentioned self-defense before turning himself in. (*Id.* at p. 233.)

Jenkins rejected the claim that the use of a defendant's prearrest silence to impeach his testimony violated the Constitution. The Court first found no Fifth Amendment violation, explaining: "The Fifth Amendment guarantees an accused the right to remain silent during his criminal trial and prevents the prosecution from commenting on the silence of a defendant who asserts the right. *Griffin v. California*, 380 U.S. 609, 614, 85 S.Ct. 1229, 1232, 14 L.Ed.2d 106 (1965). In this case, of course, the petitioner did not remain silent throughout the criminal proceedings. Instead, he voluntarily took the witness stand in his own defense." (*Jenkins*, *supra*, 447 U.S. at p. 235.) The Court observed that, while it "can be argued that a person facing arrest will not remain silent if his failure to speak later can be used to impeach him," "the Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.'" (*Id.* at p. 236, citations omitted.)

Jenkins also found no due process violation by the use of prearrest silence to impeach the defendant. The Court noted that the due process protection set out in *Doyle* was predicated on the promise inherent in the *Miranda* warnings that a defendant's silence would not be used against him

at trial. (*Jenkins*, *supra*, at pp. 239-240.) No such promise exists, however, in the absence of *Miranda* warnings. "In this case, no governmental action induced petitioner to remain silent before arrest. The failure to speak occurred before the petitioner was taken into custody and given *Miranda* warnings. Consequently, the fundamental unfairness present in *Doyle* is not present in this case. We hold that impeachment by use of prearrest silence does not violate the Fourteenth Amendment." (*Id.* at p. 240.)

Jenkins essentially avoided resolution of the Fifth Amendment claim by finding the defendant necessarily waived the Fifth Amendment's protections when he took the stand and thereby opened himself to impeachment. However, Justice Stevens pointed out in his concurring opinion that the Fifth Amendment simply did not apply to prearrest statements because of the absence of governmental compulsion. (*Jenkins*, *supra*, 447 U.S. at pp. 242-244 (conc. opn. of Stevens, J.).)

> In the trial context it is appropriate to presume that a defendant's silence is an exercise of his constitutional privilege and to prohibit any official comment that might deter him from exercising that privilege. For the central purpose of the Fifth Amendment privilege is to protect the defendant from being compelled to testify against himself at his own trial. Moreover, since a defendant's decision whether to testify is typically based on the advice of his counsel, it often could not be explained without revealing privileged communications between attorney and client.
>
> These reasons have no application in a prearrest context. 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. We need not hold that every citizen has a duty to report every infraction of law that he witnesses in order to justify the drawing of a reasonable inference from silence in a situation in which the ordinary citizen would normally speak out. When a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why his 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. . . . Consequently, I would simply hold that the admissibility of petitioner's failure to come forward with the excuse of self-defense shortly after the stabbing raised a routine evidentiary question that turns on the probative significance of that evidence and presented no issue under the Federal Constitution.

(*Ibid.*, footnotes omitted.)

Fifteen months after *Jenkins*, the Supreme Court in *Fletcher v. Weir*, *supra*, 455 U.S. 603, authorized impeachment of a defendant's testimony with postarrest, pre-*Miranda* silence. The defendant in *Fletcher*, as in *Jenkins*, claimed for the first time on the stand that he had stabbed the victim in self-defense and was impeached with his failure to have informed the authorities of his self-defense claim at the time of his arrest. (*Id.* at pp. 603-604.) In a brief, per curiam opinion, the Court rejected the constitutional challenge to the use of postarrest, un-*Mirandized* statements for impeachment. The Court explained,

> 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.)

Fletcher rejected the notion that arrest is sufficient compulsion to dispense with *Doyle*'s foundational requirement of an implied promise. The Court noted that the appellate court below recognized that the defendant in *Doyle* received *Miranda* warnings, whereas Weir had not, "but sought to extend *Doyle* to cover Weir's situation by stating that '[w]e think

an arrest, by itself, is governmental action which implicitly induces a defendant to remain silent.' [Citation.] We think that this broadening of *Doyle* is unsupported by the reasoning of that case and contrary to our post-*Doyle* decisions." (*Fletcher v. Weir*, *supra*, 455 U.S. at p. 606.)

In sum, the Supreme Court has expressly barred the use of post-*Miranda* silence as substantive evidence and for impeachment and expressly permitted the use of pre-*Miranda* silence for impeachment. It has not addressed the constitutionality of the use of pre-*Miranda* silence as substantive evidence of guilt.

In the absence of Supreme Court guidance, the federal circuits split into three camps regarding the substantive use of pre-*Miranda* silence. One group holds that the Fifth Amendment places no limitation on the substantive use of pre-*Miranda* silence. (See, e.g., *United States v. Frazier*, *supra*, 408 F.3d at pp. 1109-1111 [8th Circuit]; *United States v. Rivera* (11th Cir. 1991) 944 F.2d 1563, 1567-1568; *United States v. Love* (4th Cir. 1985) 767 F.2d 1052, 1063; cf. *United States v. Zanabria* (5th Cir. 1996) 74 F.3d 590, 592-593 [holding a prosecutor's reference to a nontestifying defendant's prearrest silence does not violate the privilege against self-incrimination if the silence is not induced by the actions of a government agent].) Another group holds substantive use of pre-*Miranda* silence permissible for silence before arrest, but not after. (See, e.g., *United States v. Oplinger* (9th Cir. 1998) 150 F.3d 1061, 1066-1067; *United States v. Moore*, *supra*, 104 F.3d at pp. 384-385 [D.C. Cir.].) The third group extends Fifth Amendment protection to pre-*Miranda* silence, regardless of custodial status. (See, e.g., *Coppola v. Powell* (1st Cir 1989) 878 F.2d 1562, 1568; *Combs v. Coyle* (6th Cir. 2000) 205 F.3d 269, 283; *United States ex rel. Savory v. Lane* (7th Cir. 1987) 832 F.2d 1011, 1018; *United States v. Burson* (10th Cir. 1991) 952 F.2d 1196, 1200-1201; cf. *United States v. Caro* (2d Cir. 1981) 637 F.2d 869, 876 [dicta observing "we have

found no decision permitting the use of silence, even the silence of a suspect who has been given no *Miranda* warnings and is entitled to none, as part of the Government's direct case"].)

The Court of Appeal adopted the D.C. Circuit's and Ninth Circuit's approach, extending Fifth Amendment protection to postarrest, pre-*Miranda* silence, but not prearrest silence. (Typed Opn. at p. 24.) That approach misapprehends the nature and scope of the Fifth Amendment and *Miranda*. The proper approach is that employed by the Eighth Circuit in *Frazier*, namely, that neither the Fifth Amendment nor the due process clause bars the substantive use of a defendant's silence prior to *Miranda* admonitions.

B. Neither the Fifth Amendment nor Due Process Bars Admissibility of a Defendant's Pre-*Miranda* Silence

The only potential grounds for extending protection to pre-*Miranda* silence are the right to due process articulated in *Doyle*, and the Fifth Amendment right to silence as extended by *Miranda*. Neither affords the protection provided by the Court of Appeal below.

1. *Doyle* is inapplicable absent *Miranda* warnings

First, *Doyle* and its progeny make clear that substantive use of pre-*Miranda* silence does not infringe on a defendant's due process right to a fair trial. As detailed above, *Doyle*'s invocation of fundamental fairness was predicated on the implied promise inherent in the *Miranda* warnings themselves that a defendant's silence will not be used against him at trial. (*Doyle*, *supra*, 426 U.S. at p. 619.) *Wainwright v. Greenfield*, *supra*, explained:

> That this "fundamental unfairness" derives from the implicit assurances of the *Miranda* warnings is supported by our holdings that due process is not violated by the impeachment use of pre-*Miranda* warnings silence, either before arrest, *Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980),

> or after arrest, *Fletcher v. Weir*, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982), or of post-*Miranda* warnings statements, *Anderson v. Charles*, 447 U.S. 404, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1980); nor is it violated by the use of a refusal to take a state test that does not involve *Miranda*-like warnings, [*South Dakota v.*] *Neville* [(1983) 459 U.S. 553, 565].

(474 U.S. at p. 291 fn. 6.)

Absent such a warning there is no implied promise that a defendant's silence will not be used, either for impeachment or as substantive evidence of guilt. Accordingly, due process provides no protection for a defendant's statements or silence prior to the administration of *Miranda* advisements. (See *Combs v. Coyle*, *supra*, 205 F.3d at p. 280 ["[T]he *Doyle* rationale is still inapplicable. As we have explained, the *Doyle* line of cases clearly rests on the theory that *Miranda* warnings themselves carry an implicit assurance that silence will not be penalized; actual receipt of the warnings is key. Therefore, the comment on Combs's pre-*Miranda* silence did not violate due process."].)

2. The Fifth Amendment does not provide protection for pre-*Miranda* silence in the absence of governmental compulsion or custodial interrogation

As noted, the core protection of the Fifth Amendment is preventing governmental compulsion used to extract testimonial statements from a defendant. (*Colorado v. Connelly*, *supra*, 479 U.S. at p. 170 ["The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion"]; *New Jersey v. Portash* (1979) 440 U.S. 450, 457-458 ["[The Fifth Amendment's] sole concern is to afford protection against being forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts," citations and quotation marks omitted]; *Lakeside v. Oregon* (1978) 435 U.S. 333, 339 ["By definition, 'a necessary element of compulsory self-incrimination is some kind of compulsion'"]; *Murphy v.*

Waterfront Comm'n (1964) 378 U.S. 52, 57 ["The constitutional privilege against self-incrimination has two primary interrelated facets: The Government may not use compulsion to elicit self-incriminating statements [citation], and the Government may not permit the use in a criminal trial of self-incriminating statements elicited by compulsion"].)

> It is consistent with the history of and the policies underlying the Self-Incrimination Clause to hold that the privilege may be asserted only to resist compelled explicit or implicit disclosures of incriminating information. Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him. Such was the process of the ecclesiastical courts and the Star Chamber—the inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source. *See Andresen v. Maryland*, 427 U.S. 463, 470-471, 96 S.Ct. 2737, 2743-2744, 49 L.Ed.2d 627 (1976); 8 Wigmore § 2250; E. Griswold, The Fifth Amendment Today 2-3 (1955). The major thrust of the policies undergirding the privilege is to prevent such compulsion.

(*Doe v. United States* (1988) 487 U.S. 201, 212.)

Thus, the essential question under the Fifth Amendment is not whether the silence precedes or follows arrest, but rather whether the silence was the product of governmental compulsion. (See *Oregon v. Elstad* (1985) 470 U.S. 298, 306-307 ["The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony."].) As the Eighth Circuit observed in *Frazier*, "The crux of our inquiry today is 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." (408 F.3d at p. 1110; see also *Jenkins*, *supra*, 447 U.S. at pp. 242-244 (conc. opn. of Stevens, J.) ["When a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why his 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"].)

Applying this standard, *Frazier* correctly found no constitutional violation for the use of the defendant's postarrest, pre-*Miranda* silence, explaining

> the more precise issue is whether Frazier was under any compulsion to speak at the time of his silence. He was not. Although Frazier was under arrest, there was no governmental action at that point inducing his silence. Thus he was under no government-imposed compulsion to speak. It is not as if Frazier refused to answer questions in the face of interrogation. We are speaking in this case only of the defendant's silence during and just after his arrest. As noted earlier, an arrest by itself is not governmental action that implicitly induces a defendant to remain silent. *Fletcher*, 455 U.S. at 606, 102 S.Ct. 1309. Therefore, on these facts, the use of Frazier's silence in the government's case-in-chief as evidence of guilt did not violate his Fifth Amendment rights.

(*United States v. Frazier*, *supra*, 408 F.3d at p. 1111; accord, *State v. Johnson* (Minn.Ct.App. 2012) 811 N.W.2d 136, 146-148 [same].)

The Court of Appeal did not limit its analysis to whether appellant was subject to governmental compulsion at the time he was silent. Rather, it focused on whether he was subject to arrest for purposes of triggering *Miranda*'s protections. The court below believed "that the right of pretrial silence under *Miranda* is triggered by the inherently coercive circumstances attendant to a de facto arrest." (Typed Opn. at p. 23.) It therefore concluded

> 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* "].) 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, 86 S.Ct. 1602.) 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, 86 S.Ct. 1602 ["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.

(Typed Opn. at pp. 23-24, fn. omitted.)

The Court of Appeal ignores that *two* critical components must exist before *Miranda* triggers broadened protection of the Fifth Amendment, namely, custody *and interrogation*. As noted, *Miranda* raised concerns that the rigors of custodial *interrogation* may be so subtly coercive that a defendant's right to silence and to counsel may be infringed even when the defendant's statements are in fact voluntary. (*Miranda*, *supra*, 384 U.S. at pp. 445-458; *Dickerson v. United States*, *supra*, 530 U.S. at pp. 434-435.) Thus, to protect the Fifth Amendment's core function, *Miranda* required the prophylactic measures of advising a defendant subject to custodial interrogation that he has the right to silence and to counsel before a defendant's statements made in response to that interrogation could be

admitted at trial. (*Miranda*, *supra*, 384 U.S. at pp. 442, 479; *Dickerson*, *supra*, 530 U.S. at p. 435.)[8]

> In *Miranda* this Court for the first time extended the Fifth Amendment privilege against compulsory self-incrimination to individuals subjected to custodial interrogation by the police. [Citation.] The Fifth Amendment itself does not prohibit all incriminating admissions; "[a]bsent some officially *coerced* self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions." [Citation.] The *Miranda* Court, however, presumed that interrogation in certain custodial circumstances is inherently coercive and held that statements made under those circumstances are inadmissible unless the suspect is specifically informed of his *Miranda* rights and freely decides to forgo those rights. The prophylactic *Miranda* warnings therefore are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected." [Citations.] Requiring *Miranda* warnings before custodial interrogation provides "practical reinforcement" for the Fifth Amendment right.

(*New York v. Quarles* (1984) 467 U.S. 649, 654, footnote omitted.)

In essence, *Miranda* identified custodial interrogation as a constitutional surrogate for coercion in extending the limits of the Fifth Amendment's protection. (*Oregon v. Elstad*, *supra*, 470 U.S. at p. 306, fn. 1 ["A *Miranda* violation does not *constitute* coercion but rather affords a bright-line, legal presumption of coercion, requiring suppression of all unwarned statements."].)

In the absence of governmental compulsion, *Miranda*'s extension of Fifth Amendment protections is strictly limited to custodial *interrogation*. The Supreme Court in *Innis* rejected the contention that custody alone was

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[8] *Miranda*'s per se rule also extended the relevant inquiry beyond the traditional due process approach which prevailed prior to incorporation of the Fifth Amendment to the states, which looked to whether the defendant's statement was involuntary under the totality of the circumstances. (*Dickerson*, *supra*, 530 U.S. at pp. 433-435.)

sufficient to trigger *Miranda*'s categorical extension of the Fifth Amendment. "It is clear therefore that the special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. 'Interrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." (*Rhode Island v. Innis*, *supra*, 446 U.S. at p. 300; see also *Fletcher v. Weir*, *supra*, 455 U.S. at p. 606 [rejecting lower court's suggestion that "an arrest, by itself, is governmental action which implicitly induces a defendant to remain silent"]; cf. *Illinois v. Perkins* (1990) 496 U.S. 292, 296-300 [explaining that the "essential ingredients" for *Miranda*'s protections are a "'police-dominated atmosphere' and compulsion"].)[9]

Accordingly, the appellate court's focus is misplaced because custody alone does not trigger either the Fifth Amendment's protections, or *Miranda*'s extension of those protections. Absent governmental coercion or custodial interrogation, the Constitution does not protect a defendant's pre-*Miranda* statements or silence.

United States v. Moore, *supra*, 104 F.3d 377, and *United States v. Velarde-Gomez*, *supra*, 269 F.3d 1023, upon which the Court of Appeal relies, likewise err in suggesting the Fifth Amendment creates a freestanding right to silence despite the absence of governmental compulsion or custodial interrogation.

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[9] Indeed, *Miranda*'s protections, which derive from the Fifth Amendment, are not as rigorous as those flowing directly from the Fifth Amendment itself. (Compare *Harris v. New York*, *supra*, 401 U.S. at pp. 224-226 and *Oregon v. Hass*, *supra*, 420 U.S. at pp. 722-724, with *New Jersey v. Portash*, *supra*, 440 U.S. at pp. 457-460; see also *Michigan v. Tucker*, *supra*, 417 U.S. at p. 444 [fruit-of-the-poisonous-tree doctrine inapplicable]; *Oregon v. Elstad* , *supra*, 470 U.S. at pp. 306-309 [same].)

The Fifth Amendment does not assure that silence in and of itself, will carry no penalty, only silence in the face of compulsion. Indeed, by its plain language, the Fifth Amendment does not directly address silence, let alone safeguard silence in the abstract. Of course, the logical corollary of shielding a defendant from compelled self-incrimination is that the defendant is privileged to remain silent in the face of such governmental compulsion and cannot be penalized for silence under those circumstances. Thus, comment on a defendant's silence when the government is attempting to compel him to be a witness against himself amounts to a penalty for the assertion of the Fifth Amendment right. By contrast, just as the Fifth Amendment does not apply to self-incrimination that is not compelled, it does not apply to silence that is not in response to attempted governmental compulsion. As explained above, the same holds true for *Miranda*'s requirement of custodial interrogation. The federal circuit decisions are therefore unpersuasive.

For example, *Moore* held, "[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." (*United States v. Moore*, *supra*, 104 F.3d at p. 385.) To the contrary, the Supreme Court explained in *Rhode Island v. Innis*, that *Miranda*'s protections do not attach until interrogation, custody alone is insufficient. (446 U.S. at p. 300; see also *Fletcher v. Weir*, *supra*, 455 U.S. at p. 606; *Arizona v. Mauro* (1987) 481 U.S. 520, 527-530 [custodial questioning by wife rather than officers was not interrogation under *Miranda*].)

Innis made clear voluntary statements while in custody that are not in response to interrogation are unprotected. Yet, *Moore* decided that custodial silence that is likewise not in response to interrogation is protected. Thus, *Moore* appears to suggest that silence is entitled to greater

protection than speech. However, *Moore* fails to identify any constitutional basis for that approach. The Fifth Amendment speaks directly to speech, i.e. "be a witness against himself," and only indirectly to silence, namely when silence is used as a form of admission such that by his silence the defendant is "a witness against himself." Under those circumstances, the silence at issue operates in the same manner as speech and is entitled to no greater protection than speech. Silence, like speech, is protected when in response to compulsion or custodial interrogation.

Silence may be viewed as an assertion of the Fifth Amendment right or *Miranda*'s protections, and thus protected indirectly so as not to penalize the exercise of a constitutional right. However, for protection to arise, the predicates to the underlying right actually must be operative at the time. (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 182, fn. 3 ["We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation' . . . . Most rights must be asserted when the government seeks to take the action they protect against. The fact that we have allowed the *Miranda* right to counsel, once asserted, to be effective with respect to future custodial interrogation does not necessarily mean that we will allow it to be asserted initially outside the context of custodial interrogation, with similar future effect."].) Neither aspect of the Fifth Amendment was operative here for lack of compulsion or interrogation, nor was it in *Moore*. (Accord, *United States v. Moore*, *supra*, 104 F.3d at pp. 392-396 (conc. opn. of Silberman, J.).) *Moore* therefore lacks a constitutional foundation.

The Ninth Circuit's analysis has the same flaw. *Velarde-Gomez* begins by observing: "The Fifth Amendment provides that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself.' U.S. Const. amend. V. This right to remain silent carries an 'implicit . . .

assurance' that silence will carry no penalty." (269 F.3d at p. 1028.) Once again, this statement severs silence from the requisite governmental action.

Velarde-Gomez initially recognizes the necessary linkage between the disputed silence and the presence of compulsion or custodial interrogation, observing that "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." (269 F.3d at p. 1029, italics added.) However, the court jettisons that critical linkage when it identifies the constitutional rule to be applied: "[B]ecause the right to remain silent derives from the Constitution and not from the *Miranda* warnings themselves, regardless of whether the warnings are given, absent waiver, comment on the defendant's exercise of his right to silence violates the Fifth Amendment." (*Ibid.*)

The error in the Ninth Circuit's approach is traceable to its earlier decision in *Douglas v. Cupp* (9th Cir. 1978) 578 F.2d 266, 267. *Douglas* observed that, in *Miranda*, "the United States Supreme Court indicated that '(t)he prosecution may not . . . use at trial the fact that (a defendant) stood mute or claimed his privilege *in the face of accusation*.' 384 U.S. at 468 n. 37, 86 S.Ct. at 1625." (*Ibid.*, italics added.) It added that *Doyle* barred comment on post-*Miranda* silence. (*Ibid.*) *Douglas* concluded, "In the instant case, the state prosecutor elicited just that kind of testimony forbidden by the Supreme Court in *Miranda v. Arizona* and *Doyle v. Ohio*. While there was no reference to *Miranda* warnings, there was purposefully elicited the fact of silence in the face of arrest. The introduction of such testimony acted as an impermissible penalty on the exercise of the petitioner's right to remain silent." (*Ibid.*)

Douglas's cursory analysis does not withstand scrutiny. First, *Doyle* is inapposite to pre-*Miranda* silence. As explained above, *Doyle* was predicated on due process, not the Fifth Amendment, and derived from the

implied promise in the *Miranda* warnings themselves, not any freestanding right to silence. Second, *Douglas* misapplied *Miranda*, by altering its language. Without any legal justification, *Douglas* transformed *Miranda*'s footnote barring use of a defendant's silence "in the face of *government questioning*," into a prohibition on the use of a defendant's "silence in the face of *arrest*." In so doing, *Douglas* erroneously omitted *Miranda*'s interrogation requirement.

For these reasons, the Court of Appeal erred in finding the right to silence attached upon a finding of custody in the absence of compulsion or custodial interrogation. (*United States v. Frazier*, *supra*, 408 F.3d at pp. 1109-1111; *United States v. Rivera*, *supra*, 944 F.2d at p. 1567-1568; *United States v. Love*, *supra*, 767 F.2d at p. 1063; see generally Romantz, "You Have The Right To Remain Silent": A Case For The Use Of Silence As Substantive Proof Of The Criminal Defendant's Guilt (2005) 38 Ind. L. Rev. 1.)[10]

II. ANY PRE-*MIRANDA* PROTECTION APPLIES ONLY TO SILENCE INVOKING THE FIFTH AMENDMENT

Should this Court find postarrest, pre-*Miranda* silence entitled to protection, it must determine whether appellant's silence was in fact an assertion of the Fifth Amendment. As this Court pointed out in the context

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[10] This does not mean such silence is always admissible. It is subject to evidentiary limitations, including a balancing of probative value and potential for undue prejudice pursuant to Evidence Code section 352. If, under the circumstances, the nature of the silence is ambiguous, it could still be subject to exclusion on evidentiary grounds, just not constitutional grounds. (See *Moore*, *supra* 104 F.3d at p. 394, fn. 3 (conc. opn. of Silberman, J.) ["Evidentiary rules, of course, may limit the use of silence via prohibitions against hearsay and unfairly prejudicial information [citations], but the constitutional bar against using silence suggested by the majority simply does not exist"].)

of adoptive admissions, "The Fifth Amendment privilege against self-incrimination does not on its face apply 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." (*People v. Preston* (1973) 9 Cal.3d 308, 315; accord, *People v. Medina* (1990) 51 Cal.3d 870, 890 ["The record does not suggest that defendant believed his conversation with his sister was being monitored, or that his silence was intended as an invocation of any constitutional right."].) Indeed, it is well established that not all silence constitutes an invocation of the Fifth Amendment, even after a *Miranda* advisement. (See, e.g., *People v. Tully* (2012) 54 Cal.4th 952, 991 [explaining that "'[w]hether the suspect has indeed invoked that right, however, is a question of fact to be decided in the light of all the circumstances,'" after concluding "that defendant's momentary silence . . . at the beginning of the March 30 interrogation was not an invocation of his right to remain silent"]; see generally *Berghuis v. Thompkins* (2010) ___ U.S. ___ [130 S.Ct. 2250, 2260] [mere extended silence in response to *Miranda* warnings is not sufficient to invoke right to silence, invocation must be clear and unambiguous].)

Most federal circuit cases finding a constitutional violation for substantive use of the defendant's pre-*Miranda* silence are predicated on challenged silence that was indeed an assertion of the defendant's constitutional rights. In *Coppola v. Powell*, *supra*, 878 F.2d 1562, the prosecution elicited from the arresting officer at trial that, in response to officers asking if the defendant would talk to them about the crime, the defendant stated, "'Let me tell you something. I'm not one of your country bumpkins. I grew up on the streets of Providence, Rhode Island. And if you think I'm going to confess to you, you're crazy.'" (*Id.* at p. 1564.) The First Circuit ruled this refusal constituted a clear invocation of the right to

silence, and the prosecutor's use of it penalized the defendant. (*Id.* at pp. 1567-1568.)

In *Combs v. Coyle*, *supra*, 205 F.3d 269, the officer testified that, upon finding the defendant holding a shotgun and asking him what happened, the defendant told the officer "to talk to his lawyer." (*Id.* at pp. 278-279.) The court found "Combs clearly invoked the privilege against self-incrimination by telling the officer to talk to his lawyer, thus conveying his desire to remain silent without a lawyer present." (*Id.* at p. 286.)

In *United States ex rel. Savory v. Lane*, *supra*, 832 F.2d 1011, 1115 the prosecution elicited that the defendant told the officers who asked to interview him that "he didn't want to talk about it, he didn't want to make any statements." In *United States v. Burson*, *supra*, 952 F.2d 1196, 1200-1201, the officers testified that they terminated their efforts to interview the defendant "as they felt 'it was apparent that he would not cooperate or answer any of [their] questions,'" which the court held was an invocation of his rights. Thus, in all of these cases, the defendants asserted a right to silence in direct response to a show of governmental authority.

The facts of this case stand in sharp contrast. Here, the prosecution did not comment on appellant's invocation of any right to silence. Unlike the cited cases, appellant was largely cooperative. He voluntarily spoke to Officer Price when the officer first arrived at the scene, and again after the paramedics finished treating him. (4 RT 678, 715, 724-725.) He spoke further with Officer Price after he moved to the black Camry, asking if he could walk home, and later asking for ice for his ankle. (4 RT 684-686.) Appellant voluntarily agreed to go to the station for a blood draw after asking whether it could be done at the scene. (4 RT 688-689.) At the station, appellant expressed his desire not to go to the hospital for a blood draw. (4 RT 693-694.)

The first suggestion of any invocation by appellant of his rights prior to arrest occurred after he went to the bathroom in the station. While sitting alone in the interview room, appellant called his attorney and then relayed to the officers that his attorney advised him not to make any statement without the attorney present. (6 SRT 353-354.)[11] Notably, that exchange was not elicited at trial nor commented on by the prosecution. Unlike the federal cases, appellant was not silent in general, and his failure to ask about the condition of the victims was not an invocation of his Fifth Amendment rights. Accordingly, it was permissible for the prosecution to elicit that fact in the case-in-chief and comment on it in closing. (Accord, *United States v. Zanabria*, *supra*, 74 F.3d at pp. 592-593 [explaining that a prosecutor's reference to a nontestifying defendant's prearrest silence does not violate the privilege against self-incrimination if the silence is not induced by the actions of a government agent].)

III. EVEN IF POSTARREST SILENCE IS PROTECTED, THE COURT OF APPEAL ERRED IN FINDING APPELLANT WAS UNDER DE FACTO ARREST PRIOR TO ACTUAL ARREST

If this Court concludes postarrest, pre-*Miranda* silence is inadmissible in the prosecution's case-in-chief even if the defendant was not invoking any right to silence, the lower court still erred in finding a constitutional violation. Here, appellant was not under arrest when he was silent.

The relevant facts underlying the question of when appellant's detention ripened into an arrest were fully litigated below. The trial court concluded that appellant was under a de facto arrest when Officer Price denied appellant's request to walk home, while appellant was still seated

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[11] Citations to "SRT" refer to the supplemental reporter's transcript of the hearing on the earlier suppression motion which the trial court also relied on in deciding the question of custody. (1 RT 10.)

with Mr. Gamino in the black Camry. (1 RT 15-16.) The appellate court conducted an independent review of the legal question under the established facts and concluded appellant was "under de facto arrest when he was driven from the scene of the accident in a patrol car." (Typed Opn. at p. 26.)

Now this Court on review must likewise independently analyze the legal issue of when the detention rose to the level of custody thereby invoking *Miranda*'s protections, to determine how much of appellant's silence was used impermissibly. (See *Thompson v. Keohane* (1995) 516 U.S. 99, 111-113 [explaining that "custody" is a legal question subject to independent review].)

"Because these measures protect the individual against the coercive nature of custodial interrogation, they are required '"only where there has been such a restriction on a person's freedom as to render him 'in custody.'"' [Citations.]" (*J.D.B. v. North Carolina* (2011) ___ U.S. ___ [131 S.Ct. 2394, 2402].) For *Miranda*, "'custody' is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion." (*Howes v. Fields* (2012) ___ U.S. ___ [132 S.Ct. 1181, 1189].) "[W]hether a suspect is 'in custody' is an objective inquiry." (*J.D.B. v. North Carolina*, *supra*, 131 S.Ct. at p. 2402.)

> Rather than demarcate a limited set of relevant circumstances, we have required police officers and courts to "examine all of the circumstances surrounding the interrogation," [citation,] including any circumstance that "would have affected how a reasonable person" in the suspect's position "would perceive his or her freedom to leave," [citation]. On the other hand, the "subjective views harbored by either the interrogating officers or the person being questioned" are irrelevant. [Citation.] The test, in other words, involves no consideration of the "actual mindset" of the particular suspect subjected to police questioning.

(*Ibid.*; *Berkemer v. McCarty* (1984) 468 U.S. 420, 436-440.)

The relevant inquiry looks objectively to whether "a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" (*Berkemer v. McCarty*, *supra*, 468 U.S. at p. 440.)

> Determining whether an individual's freedom of movement was curtailed, however, is simply the first step in the analysis, not the last. Not all restraints on freedom of movement amount to custody for purposes of *Miranda*. We have "decline[d] to accord talismanic power" to the freedom-of-movement inquiry, [citation], and have instead asked the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*. "Our cases make clear . . . that the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody." [Citation.]

(*Howes v. Fields*, *supra*, 132 S.Ct. at pp. 1189-1190; *Berkemer*, *supra*, 468 U.S. at pp. 436-438.)

Some of the relevant circumstances for this evaluation identified by the Supreme Court include the location and duration of the questioning, statements made during the interview, the presence or absence of physical restraints during questioning, and whether the interviewee is released at the end of the questioning. (*Howes v. Fields*, *supra*, 132 S.Ct. at p. 1189.)

Turning to the present case, under the totality of the circumstances test, appellant was not in custody for *Miranda* purposes until he was formally placed under arrest. Appellant's interactions with the police over the course of the evening were voluntary and consensual. The sole exception was Officer Price's statement to appellant that he could not leave the scene because of the ongoing investigation. (4 RT 685; see also 6 SRT 339.) As the Court of Appeal recognized, that directive alone merely constituted a detention and did not rise to an arrest.

First, the refusal to allow appellant to walk home, shortly before 9:00 p.m. (6 SRT 338), did not place a signification restriction on appellant.

Appellant was under a statutory obligation to remain at the scene and be prepared to render assistance to the occupants of the other car. (Veh. Code §§ 20001 & 20003 [explaining duties imposed on driver involved in injury accident to stop, provide information, and render assistance to any injured party in other vehicle].) The officer's order that appellant remain while the investigation was ongoing was not excessive or unreasonable, particularly given appellant's disabled car in the street was blocking a lane.

Second, although the officer denied appellant's request to leave, he did not place appellant under actual restraints. He did not handcuff appellant or order him out of the Camry, where he sat with his friend, Mr. Gamino, and his girlfriend, Ms. Jiang. (4 RT 684-687, 728-729; 6 SRT 338-339.) Officer Price continued to have consensual and noncoercive exchanges with appellant, including locating a paramedic to get appellant an icepack for his ankle. (4 RT 684-686.) During the encounter, Officer Price repeatedly left appellant to speak to Sergeant Bailey, and no other officers stayed with appellant when Officer Price was absent. (4 RT 680-681; 6 SRT 334-336.) While appellant was still by the Camry, Officer Price asked appellant if he would mind giving a blood sample, and appellant agreed. (4 RT 726, 728-729; 6 SRT 341-342, 385.) The officers radioed a request for a phlebotomist to come to the scene to draw appellant's blood. They were subsequently informed that the phlebotomist would only draw blood in a controlled environment, such as the police station. (6 SRT 340, 385-386.)

Officer Price went back to appellant and asked if he would accompany them to the station for the blood draw. (6 SRT 341-342, 385, 388.) Appellant was irritated that they could not draw his blood at the scene, but agreed to go after Officer Price explained the phlebotomist's policy. (3 RT 449-451; 4 RT 688-689, 729; 6 SRT 341-342.) Appellant was moved to Officer Felker's patrol car to be driven to the station. He sat

in the backseat with his girlfriend, Ms. Jiang. Appellant was not cuffed in the patrol car. (4 SRT 98-99; 3 RT 444-447; 4 RT 687.) Officer Felker explained that the rear doors, which could not be opened from the inside, were closed because of the cold nighttime temperature. However, the Plexiglas shield that separates the front seats from the back was lowered so there was no barrier between the rear and the driver's area. (4 SRT 110-111.) That barrier remained down for the drive to the station. (4 SRT 111.)

Officer Felker left with appellant and Ms. Jiang for the station at 9:48 p.m., and arrived about 10 minutes later. (4 SRT 96, 98; 4 RT 690.) At the station, appellant and Ms. Jiang were taken to an open waiting area with some couches, then appellant was moved to an open interview room. (4 SRT 100; 6 SRT 345; 3 RT 454-455; 4 RT 691.) Appellant was not cuffed and still had his personal effects, including his cell phone. (4 SRT 100; 6 SRT 345; 4 RT 697.)

The phlebotomist came to the interview room to speak with Sergeant Bailey and Officer Price. While standing in the doorway of the interview room, within direct earshot of appellant, the phlebotomist asked if appellant was under arrest. The officers responded that appellant was not under arrest, to which the phlebotomist replied that he could not draw appellant's blood. His company's policy requires the subject be under arrest before blood is drawn. (3 RT 458-459; 4 RT 692-693; 5 SCT 175; 6 SRT 346, 388.) The phlebotomist suggested that they take appellant to the hospital for a voluntary blood draw. (5 SCT 175.) The officers, in turn, asked appellant if he would mind going to the hospital. Appellant was annoyed by the request, and asked if he could refuse to take the test. (6 SRT 4 RT 694.) The officers did not say he was obligated to take the test. Instead, they offered their opinion that it would be to his benefit to have a blood test to rule out drugs and alcohol in his system. (3 RT 463-465; 4 RT 695; 6 SRT 347, 393.)

Appellant then asked to use the bathroom. Sergeant Bailey showed appellant to the bathroom, and accompanied him inside. Inside the bathroom, appellant asked the sergeant for aspirin. At that point, Sergeant Bailey smelled the odor of alcohol. (3 RT 416-420.) After leaving the bathroom, Sergeant Bailey requested Officer Price and Officer Gomez to conduct field sobriety tests on appellant. (6 SRT 352.) While the officers were talking, appellant called his attorney on his cell phone who told him not to give a statement without his attorney present. (6 SRT 353.) Appellant then agreed to perform the field sobriety tests at around 10:30 p.m. (5 SRT 178; 6 SRT 357, 399.) At the conclusion of the FSTs, about 10:47 p.m., Officer Price formally placed appellant under arrest, *Mirandized* him, and arranged to have his blood drawn. (5 SRT 219; 6 SRT 243, 367-368.)

Under the totality of the circumstances, appellant was not in custody for *Miranda* purposes until he was formally arrested. Although appellant was told while he was seated in the Camry that he could not leave the scene, the remainder of his interactions with the officers were voluntary and did not rise to the level where "a reasonable person in the suspect's position would have felt that he or she was in custody." (*Yarborough v. Alvarado* (2004) 541 U.S. 652, 662.) The delays following that detention were not unduly prolonged under the circumstances—given the chaotic scene, with a handful of officers responsible for multiple duties. Once appellant voluntarily agreed to the blood test, it was still necessary for the police to arrange for the phlebotomist and transportation to the station.

The factors identified by the Supreme Court likewise militate against any finding of formal custody. (*Howes v. Fields*, *supra*, 132 S.Ct. at p. 1189.) Appellant was never placed in physical restraints and was asked for his consent for the blood test prior to being taken to the station. Appellant was moved to the patrol car only after he agreed to the voluntary blood test.

Although before being transported, he had to wait for several minutes in the back of a patrol car with doors that could not be opened from the inside, the doors were only closed due to the cold weather, and the delay was largely attributable to the chaotic scene and confusion over whether the phlebotomist could take blood at the scene. Moreover, the patrol car security screen was down, and appellant was accompanied by his girlfriend in the back seat, who obviously was not in custody given her lack of involvement in the accident. A reasonable person would not have viewed himself as subject to police restraints under the circumstances.

Moreover, given the officers' open discussion of appellant's non-custodial status with the phlebotomist, even though that candid admission went against the officers' interest in obtaining a blood sample, along with Ms. Jiang's continued presence, a reasonable person would not have felt he or she was under arrest at the station. (See *Stansbury v. California* (1994) 511 U.S. 318, 325 ["An officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned. [Citations.] Those beliefs are relevant only to the extent they would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her '"freedom of action."'"].)

Appellant was not subject to meaningful questioning, let alone extended questioning, either in the patrol car or the stationhouse. (*Howes v. Fields*, *supra*, 132 S.Ct. at p. 1189.) The only questioning occurred in conjunction with the field sobriety tests, which are narrow in scope and generally constitutionally permissible. (*Pennsylvania v. Muniz* (1990) 496 U.S. 582, 601-605.)

Furthermore, the setting was not coercive. While at the stationhouse, appellant was first led to an open waiting area with Ms. Jiang, and later moved to an open interview room. Appellant was never deprived of his personal effects, including his cell phone, which he used at the station.

Even though appellant was ultimately arrested, that was only as a result of failing the field sobriety tests. Under the totality of the circumstances, a reasonable person in appellant's position would not have perceived his freedom to be so restrained as to constitute being in custody for *Miranda* purposes, until appellant was formally arrested after failing the field sobriety tests. As a result, the testimony did not implicate appellant's postarrest silence and did not violate his Fifth Amendment rights.

IV. APPELLANT WAS NOT PREJUDICED BY THE TESTIMONY AND COMMENT ON HIS POSTARREST SILENCE

Even under the appellate court's conclusion that appellant was in "custody" for *Miranda* purposes when he was placed in the patrol car around 9:30 p.m., the court erred in finding appellant suffered prejudice from the challenged comments. Specifically, the Court of Appeal failed to consider two key points minimizing the possibility of prejudice from the comments. First, the testimony and argument regarding appellant's pre-*Miranda* silence was not impermissible in toto; it was only incrementally improper to the extent it included appellant's postarrest silence in addition to prearrest silence. Second, the testimony and argument went to a tangential matter that had little impact on the issue of guilt. Once these factors are taken into account, along with the strength of the prosecution's case, any error from the Fifth Amendment violation was necessarily harmless beyond a reasonable doubt under the facts of this case. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

A. Any Incremental Increase in Prejudice from Testimony and Comments on Postarrest Silence was De Minimis

Assuming appellant was under de facto arrest in the patrol car, the prosecution was free to ask about and argue appellant's failure to inquire about the condition of the victims for the hour prior to his arrest.

Consequently, the prejudice inquiry must separate out and focus on the marginal *increase* in damage arising from adding the improper referential time period, apart from the otherwise legally proper comment on appellant's prearrest silence. This marginal addition of improper comment caused de minimis prejudice. The essential point was validly made based on appellant's prearrest silence. (See *United States v. Lopez* (9th Cir. 2007) 500 F.3d 840, 845-846 [where prosecutor elicited pre- and postarrest silence, court examined quantitative and qualitative extent of the impermissible portion of questioning and argument, and found error harmless].)

Specifically, only the second question to Officer Price and the question to Sergeant Bailey implicated appellant's Fifth Amendment rights. The first question of Officer Price, asking about appellant's failure to inquire of the victims before he asked if he could leave was entirely proper because it concerned silence prior to any arrest or detention and was not silence in response to governmental questioning or action. Appellant was speaking to the officer on other topics and was not invoking any right to silence. The prosecution's elicitation of appellant's failure to ask about the status of the victims up to that point was permissible, and was a topic upon which the prosecution could freely comment in closing.

The second question of Officer Price included both pre- and postarrest silence. To the extent the query asked about appellant's failure to inquire after being placed in the patrol car, it revealed postarrest silence, as did the question of Sergeant Bailey, which referred solely to appellant's silence at the police station. However, appellant's silence about the status of the victims after he was in the patrol car and taken to the station added little to the possible inference of guilt above and beyond that arising from his failure to ask about the victims for the hour before he got into the patrol car.

Likewise, the prosecutor's argument addressing postarrest silence, rather than just prearrest silence, had minimal additional impact. The prosecutor's entire discussion of appellant's failure to ask about the victims covered three paragraphs out of an opening argument spanning 29 pages of reporter's transcripts. (Compare 11 RT 1905-1906, with 11 RT 1879-1907.) She pointed out that appellant "[n]ot once" asked about the condition of the people in the car. (11 RT 1905.) She observed that if someone accidentally bumps or hurts another person, "what is [the] first thing out of your mouth? Whoops. I'm sorry," but appellant never asked any officer about the victims. She argued, "Why is that? Because he knew he had done a very, very, very bad thing, and he was scared." (11 RT 1905-1906.)

This portion of the prosecutor's comment constituted a small and relatively minor point, which would have had an equivalent impact had it been limited to appellant's failure to inquire over just the first hour after the crash. Notably, the prosecutor's argument that this question should have been the first thing out of appellant's mouth if he did not know he was responsible squarely focused the force of the argument on the prearrest period. The inclusion of the time frame after appellant was placed in the car and taken to the station added virtually nothing to the force of the prosecutor's argument, which was itself a tangential point for guilt. (*United States v. Lopez*, *supra*, 500 F.3d at p. 845 [noting "the same inference would follow if the post-*Miranda* questions were eliminated from consideration"].) Indeed, the minor role of this point was demonstrated by the fact that the prosecutor did not mention it in rebuttal even after defense

counsel singled it out for criticism in his argument. (11 RT 1942-1943, 1966-1979.)[12]

B. The Testimony and Comment on Postarrest Silence were Harmless

The probative force of appellant's failure to ask about the victims as showing consciousness of guilt was also weak and thus not particularly damaging to appellant. This was not a case involving silence in the face of a direct accusation resulting in a damning tacit admission of guilt. Moreover, the inference of consciousness of guilt was tangential to the resolution of the case, which focused almost exclusively on the expert testimony regarding appellant's speed prior to the crash.

The court below suggested that the evidence "was essentially at equipoise." (Typed Opn. at p. 27.) We disagree. While there was a dispute between the experts, that dispute was hardly in equipoise.

Sergeant Bailey opined, based on his observations of the scene and debris field and his extensive experience in traffic accidents, that appellant was traveling at a very high rate of speed, not even close to the posted

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[12] The appellate court's characterization of the prosecutor's argument strings together excerpted passages stripped of context. (Compare Typed Opn. at pp. 28-29, with 11 RT 1901-1906.) The court excerpted the prosecutor's argument that appellant was speeding drunk through a residential neighborhood, as showing he was driving "without a care of what was going to happen"—i.e., an "I don't care" attitude based on his *driving*—and linked it to excerpts of her argument about appellant's failure to ask about the victims which came four pages later (11 RT 1901, 1905), notwithstanding that the two comments were not connected in the prosecutor's argument. Furthermore, in pointing to the prosecutor's argument to consider how appellant acted after the collision, the court elided other specific examples identified by the prosecutor as showing consciousness of guilt, that preceded the reference to his failure to inquire, thereby elevating the failure to inquire to a seemingly more significant role in the prosecutor's argument. (11 RT 1904-1906.) A review of the entire argument shows the minimal role played by the failure to inquire.

speed limit. (3 RT 395-397.) Officer O'Gorman opined that the collision was caused by appellant's excessive speed. She also noted that the traffic engineering report determined the "critical" speed for that roadway was 39.7 m.p.h. (4 RT 650-652.)

Officer Jincy Pace, the prosecution accident reconstructionist, determined that appellant's precrash speed was a minimum of 67 m.p.h., even with artificially low drag coefficient numbers. (5 RT 817-819.) She noted the nature of the damage to the vehicles was consistent with a crash at that speed. (5 RT 821.) She also noted that the defense expert never calculated a drag factor for his speeds, but that his results necessitated a drag factor of around .1 to achieve the final stopping point of the Mercedes, equivalent to sliding on ice—a figure divorced from reality. (5 RT 897.) Officer Johnson fully and independently endorsed her conclusions and likewise criticized the defense expert's conclusions which reflected an untenable drag factor. (8 RT 1643-1647; 9 RT 1749-1751.)

The defense expert opined that appellant's preimpact speed was 49 to 52.5 m.p.h. (8 RT 1515-1516.) He acknowledged that he did not determine any drag factor (8 RT 1567), and if he inputted a standard drag factor for wet asphalt of .4 to .6, he would obtain a precollision speed of 60 to 70 m.p.h. (8 RT 1580-1582). He also acknowledged that his lower speed results were dependent on appellant's Mercedes accelerating after the crash. (8 R T1567-1569.) However, Officer O'Gorman testified that the Mercedes's engine was "demolished" (3 RT 563), and Officer Johnson testified that the fuel pump would have shut off upon impact. (8 RT 1619;

9 RT 1699.) In sum, appellant's expert testimony was neither credible nor convincing.[13]

More to the point, any additional inference of consciousness of guilt by reference to postarrest silence was wholly unconnected to the expert testimony and would not have had any impact on the jury's evaluation of that testimony, which was the only real issue at trial. We fail to see how that reference was "highly prejudicial" (Typed Opn. at p. 29) under the facts of this case. To the contrary, appellant's postarrest failure to ask about the condition of the victims, even if marginally indicative of increased consciousness of guilt, was altogether tangential to appellant's speeding prior to the collision. (See 11 RT 1837 [jury instructed pursuant to CALCRIM No. 200 to decide case on the facts and not be influenced by bias, sympathy, or prejudice]; *People v. Holt* (1997) 15 Cal.4th 619, 662 [noting presumption that the jury understood and followed instructions].) Consequently, any error in eliciting and commenting on that postarrest silence would not have impacted the verdict and was harmless beyond a reasonable doubt.

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[13] Even Mr. Kauderer's figure of 49 to 52 m.p.h. was well over the critical speed of 39.7 m.p.h. for that road, let alone the posted speed limit, which in itself warranted a finding of gross negligence. (4 RT 650.)

CONCLUSION

Accordingly, respondent respectfully requests that the Court of Appeal's decision be reversed.

Dated: September 18, 2012

Respectfully submitted,

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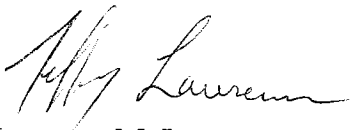

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CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 16,213 words.

Dated: September 18, 2012

KAMALA D. HARRIS
Attorney General of California

JEFFREY M. LAURENCE
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DECLARATION OF SERVICE BY U.S. MAIL

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

No.: **S202107**

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 September 18, 2012, I served the attached **OPENING BRIEF ON THE MERITS** 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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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 September 18, 2012, at San Francisco, California.

S. Chiang
Declarant

Signature

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