IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. RICHARD TOM, Defendant/Appellant. _____ IN RE RICHARD TOM, On Habeas Corpus. _____	**No. S202107**

First Appellate District Nos. A124765, A130151
San Mateo Sup. Ct. No. SC064912
The Honorable H. James Ellis

APPELLANT'S ANSWER BRIEF ON THE MERITS

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RICHARD TOM

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STATEMENT OF ISSUES

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VI. WHERE THE EVIDENCE OF GUILT IS WEAK AND OBJECTIVELY FAVORS ACQUITTAL, AND WHERE THE PROSECUTOR RELIES HEAVILY ON IMPROPER CLOSING ARGUMENTS THAT THE DEFENDANT'S SILENCE AND ASSERTIONS OF HIS CONSTITUTIONAL RIGHTS PROVE THAT HE DOES NOT CARE ABOUT THE CONSEQUENCES OF HIS ACTIONS–AN ELEMENT OF GROSS NEGLIGENCE–AND THAT HE IS A BAD PERSON IN GENERAL, CAN THE STATE PROVE THAT THESE FEDERAL CONSTITUTIONAL ERRORS ARE HARMLESS BEYOND A REASONABLE DOUBT?

INTRODUCTION

According to the Attorney General, if police contact a person at the scene of a fatal traffic collision (or other crime scene), *whatever the person might do proves his guilt of manslaughter.* If, after answering police questions, the person asks the police "am I required to remain, or am I free to leave," his inquiry proves consciousness of guilt. If, in response to a police request to transport him to the station for a blood test, the person inquires about how the test will be administered, whether transportation to the station is required, or whether a blood test is mandatory, this inquiry proves his guilt. If the person, aware of the constitutional right to remain silent, politely and cooperatively remains silent, the Attorney General argues that his silence also demonstrates his guilt, because a truly innocent person would surely protest his innocence. If the silent citizen fails to inquire about the welfare of a person injured during the traffic collision or crime, the Attorney General argues that this silence is also proof of

consciousness of guilt and of the type of indifference to the consequences of his actions that proves gross negligence, an element of felony vehicular manslaughter.

Moreover, if the detained person *does* inquire regarding the welfare of a person injured in the collision, nothing would prevent the prosecutor from arguing that the person's inquiry proves his guilt. If the person immediately protests his innocence, the Attorney General would no doubt argue that the protests of a guilty person cannot be trusted, or that a protest from a person who had not yet even been accused proves an overwhelming consciousness of guilt. If the police ask to search the person's home, and the person asserts the right to be free from warrantless searches, the Attorney General would no doubt contend that a prosecutor can argue that the invocation of the Fourth Amendment is proof of guilt. If the person asks if he can call his attorney, the Attorney General would no doubt contend that reliance on the right to counsel proves guilt.

In sum, under the Attorney General's dystopian view, neither the state nor the federal Constitution provide any protection to an innocent person in such encounters. Every question to police, statement, assertion of a constitutional right, or even silence proves guilt. The Attorney General's arguments render the privilege against self-incrimination, the right to remain silent, and the right to be free from unreasonable searches and

seizures, hollow promises. This Court must reject the Attorney General's arguments, lest these constitutional rights be vitiated by their assertion, and lest the innocent be too easily swept up in the zeal to prosecute the guilty.

In this case, the prosecutor relied heavily on Appellant Richard Tom's silence regarding the other vehicle's occupants, his inquiries about his constitutional rights, and other prosecutorial misconduct to convict him. Although immense sympathy is owed to Lorraine Wong, whose child was killed while in the backseat of her Nissan in her tragic collision with Appellant's Mercedes, a dispassionate view of the record favored acquittal. While Appellant was speeding, Wong was stopped at a stop sign on a small street and was required by law to yield to Appellant's vehicle on a through street (Veh. Code, § 21802a); yet, she entered the intersection while concluding a cell-phone call (holding the phone in one hand while steering with the other), and *without seeing Appellant's vehicle*, which was visible to her for at least 17 seconds before the collision.

The jury nonetheless convicted Appellant, and he has served more than three-and-a-half years of his seven-year sentence. Given the weak evidence of guilt, the convictions were largely due to the prejudicial constitutional errors. These included the prosecutor's impermissible argument that Appellant's silence and inquiries about his constitutional rights proved his guilt. Yet, the prosecutor also prevented substantial

evidence of innocence from being heard, and committed additional misconduct in closing argument when she urged the jury to convict Appellant based upon sympathy for the mother of the child killed in this tragic collision, even if the state had failed to prove Appellant was a substantial factor in the collision (an element of the offense), and when she falsely argued that there was "absolutely no evidence that the defendant had his headlights on" (11 Reporter's Transcript [hereafter: "RT"] 1901-02) when she knew from multiple sources that the headlights were on.

The First District, however, avoided reaching most of these thorny constitutional questions by properly deciding the case upon the narrowest of constitutional grounds raised–based only upon the prosecutor's improper argument that the jury could use Appellant's silence regarding the well-being of the occupants of the other car to prove his consciousness of guilt. The prosecutor's arguments in this case clearly violated Appellant's constitutional rights under settled United States Supreme Court precedents. (*See, e.g., Griffin v. California* (1965) 380 U.S. 609, 614 [prosecutor may not impose a "penalty . . . for exercising a constitutional privilege" by arguing that defendant's silence at trial proved his consciousness of guilt].)

Further, this Court settled the issue here more than a half-century ago in *People v. Cockrell* (1966) 63 Cal.2d 659, 669-670 and *In re Banks* (1971) 4 Cal.3d 337, 351-352, both of which held that *Griffin* precludes the state

from using the defendant's silence when he was arrested or detained to prove guilt, even if he had not been read his *Miranda*[1] rights. The majority of state and lower federal courts are in accord.

The Attorney General does not address this Court's controlling precedents and urges this Court to adopt the minority view. Yet, in so arguing, it contradicts itself. On the one hand, the state argues that a person confronted by police is *compelled* to protest her innocence before she is questioned or suffer a prosecutor's argument that her silence equals guilt; yet, on the other hand, the state contends that until the police ask a question, the person is under *no compulsion* to speak, and thus the Fifth Amendment provides her no protection. Moreover, the Attorney General's position creates a legal minefield for citizens involved in traffic collisions or at other crime scenes, which leaves them with no way to interact with police without subjecting themselves to an accusation that their silence, statements, actions or inactions prove their guilt.

This Court should reaffirm its prior holding in *Banks*. Moreover, because the evidence of guilt was far from overwhelming, the serious constitutional errors cannot be swept under the rug of harmless error.

Appellant's conviction must be reversed.

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

STATEMENT OF THE CASE AND FACTS

A. The Traffic Collision

Most of the key facts in this case were undisputed. On February 19, 2007, at approximately 8:19 pm, Appellant was driving in Redwood City on Woodside Road (State Route 84), a state highway with two lanes in each direction and a left-turn pocket at Santa Clara, and no traffic controls. Lorraine Wong was stopped at a stop sign on Santa Clara, a small side street which ends at the intersection with Woodside. She was on her cell-phone, holding it in one hand and steering with the other, when she pulled out from the stop sign and into the intersection of the four-lane state highway to make a left turn in front of Appellant without seeing his vehicle. (3RT 376-380, 491-500, 515-520.)

Because Appellant was on a through highway, he had the right-of-way, and Wong could only enter the intersection if she could proceed with reasonable safety. (Veh. Code, § 21802a.) Wong stated that she looked to the left before entering the intersection. But, she conceded that she never saw Appellant's vehicle, even though she could see nearly a half-mile in his direction. (3RT 491-500, 507, 514-517, 525, 534.) Even at higher speeds, Appellant's vehicle was visible to Wong for at least 17 seconds. (5RT 880-881.) Wong conceded that she initially hid from the police the fact that she was on the phone at the time of the crash. (3RT 533; 4RT 636-637.)

Wong's failure to see Appellant's vehicle may have been because she was actually looking *to the right* (away from his vehicle), as she said in all of her pretrial statements. (4RT 638-640, 5RT 638-640.) It may also have been due to her *cell-phone use*, which all experts agreed impairs driving ability and as much as being intoxicated. (8RT 1543-48, 1652.) Plainly, Wong never assured herself that she could enter the intersection with reasonable safety, as required by statute.

The collision injured Appellant, Wong and her daughter Kendall (age 10), and resulted in the death of Wong's daughter Sydney (age 8). (Typed Opn. at 1.)

B. The Traffic Investigation

Police arrived shortly after the accident. Both cars had major damage, and there was a large debris field. (3RT 381-383, 386, 428-431, 4RT 673-678.)

Appellant was behind the wheel of his Mercedes. He told the paramedics he did not want to go to the hospital because his insurance might not cover it. (4RT 679-681; 8RT 1485-87.) The paramedics and police checked Appellant for the odor of alcohol and any symptoms of intoxication, but found none. (3RT 432-434; 4RT 661-663, 676-678, 724-726; 8RT 1485-89.)

About 45 minutes after the accident, Appellant was seated in a black

Camry with his friend, Peter Gamino, and Appellant's girlfriend, Winnie Jiang. Appellant asked Officer Price if he could go to his home, which was only a block and a half away, but Price told him that he could not leave. (3RT 402-404, 444-445; 4RT 681-683; Pretrial Transcript [hereafter: "PRT"] 380-383; Typed Opn. at 7.)

At approximately 9:30 pm, officers detained Appellant in the back of a locked patrol car. (3RT 404-406.) The officers asked Appellant to go to the station for a voluntary blood test. (3RT 404-407, 432-434; 4RT 681-687, 728-729.) Appellant asked if he could give a sample at the scene. When told that the paramedics would only take a blood sample in a controlled setting, Appellant agreed to go to the station. (3RT 408-411, 451-453; 4RT 687-690.)

At the police station, the phlebotomist would not take Appellant's blood because his contract only permitted a blood draw for arrested persons, and Appellant had not been formally arrested. Sergeant Bailey and the paramedic agreed there was no cause to believe that Appellant was under the influence of alcohol or drugs. Appellant was cooperative. (3RT 412-414, 459-460; 4RT 657-663, 671-672, 690-692.)

The police asked Appellant to go to the hospital for a voluntary blood draw. Appellant asked if he could refuse. Sergeant Bailey told him it was in his interest to get a blood test to prove he had no alcohol in his

system. (3RT 463-467; 4RT 693-695.)

At that point, Appellant asked to go to the bathroom. Bailey accompanied him. (3RT 413-415.) Appellant asked for aspirin. He was in pain and limping from the accident. Bailey would not provide aspirin. (3RT 415-417; 4RT 694-696.) While in the bathroom, Bailey smelled alcohol. It was about 10:30 pm. Around that time, other officers also smelled alcohol. Bailey asked Officer Price to administer field sobriety tests ("FSTs".) (3RT 417-421; 4RT 696-697, 749-750, 753-759.) Price administered FSTs and formed the opinion that Appellant was under the influence of alcohol at the time of the collision and arrested Appellant. (4RT 700-706.)

The phlebotomist drew blood from Appellant at 11:13 pm. (4RT 663-668, 705-706.) The blood alcohol level was .04 percent. The tests found no evidence of any illicit drugs. (4RT 778-780.)

Appellant never asked about the welfare of the persons in the other car. (3RT 424; 4RT 707.)

C. Peter Gamino And Appellant's Statements

Retired San Francisco Police Officer Peter Gamino was visiting Appellant on the night of the collision. (5RT 927-932.) They ate dinner and drank one or two vodka and tonics. (5RT 933-936.)

They left to pick up a car at Appellant's son's house. When

returning home, Appellant drove his Mercedes back, while Gamino followed separately. Appellant's driving was fine; he was not speeding or swerving. (5RT 936-938, 969-970.)

Gamino witnessed the accident from about 200 yards behind. (5RT 939-940, 973-976.) A car pulled out in front of Appellant, when it should have waited for Appellant to pass. The other car pulled out going pretty fast. After the collision, Gamino stopped to check on Appellant. (5RT 941-944, 977-978.)

Gamino asked Appellant if he was OK. Appellant said, "I didn't even see it." Appellant was moaning and groaning in pain. (5RT 944-945, 980.) No one told them about the injuries to the persons in the other vehicle, nor that a child had died. (5RT 983.)

After the police took Appellant to the station, Gamino went back to Appellant's house. Around 11:30 pm, the police came to the house. (5RT 948-951, 982-985.) Sergeant Sheffield secretly recorded their conversation. (6RT 1121-23, 1129.) Gamino related that Appellant said, "He didn't see nothing until that car was right in front of him and he jammed on the brakes." (3 Clerk's Transcript [hereafter: "CT"] 849.) Gamino knew that Appellant's headlights were on. (3CT 849-850.)

D. Expert Testimony Regarding Blood Alcohol Level

Defense and prosecution experts disputed whether Appellant's blood

alcohol level was above the legal limit at the time of the accident, based upon a blood test of .04 given nearly 3 hours later. No one, however, observed Appellant exhibiting any symptoms of intoxication for two hours after the collision. The jury thus acquitted Appellant of all alcohol-related counts and allegations. (6RT 1033-35; 7RT 1331-39.)

E. Expert Testimony Regarding Appellant's Speed

1. Officer O'Gorman

Officer O'Gorman investigated the accident. Based upon Officer Fowler's inspection, O'Gorman knew that Appellant's headlights were on at the time of the collision. (4RT 601-602.) Appellant's headlights were in the "on" position. (5RT 924-925.) There was no evidence that either the Mercedes or the Nissan braked before impact. (3RT 554-555.)

O'Gorman calculated a post-impact speed for Appellant's vehicle of 35 mph. (3RT 560-563.) O'Gorman asked Officer Pace to calculate pre-impact speed. (3RT 566-567.) Pace confirmed that a 35 mph post-impact speed corresponds to a 52 mph pre-impact speed. (4RT 818-829.)

The posted speed limit on Woodside Road/Route 84 near Santa Clara Street is 35 mph, but the basic speed law permits driving at a speed safe for conditions, even if it exceeds the posted speed limit. On Woodside, cars routinely travel at higher speeds. The Police Department does not issue speeding tickets there for speeds below 50 mph; speeds above 50 mph are

unsafe. (4RT 601-604, 631.)

Although O'Gorman conceded that normally Appellant's vehicle would have right-of-way, she opined that Appellant's speed was the primary factor in the collision. (4RT 628-630, 652.)

2. Officer Pace

Officer Pace concluded that the primary cause of the collision was Appellant's speed, and opined that his minimum speed was between 52 and 67 mph. (5RT 794-801.)

Pace acknowledged that there was missing data, and that her calculations required assumptions. Appellant's vehicle did not have a constant drag factor (a measure of friction) because at different times the tires were rolling, in the air, skidding, or going through a slippery fuel spill. Given the variables, Pace used a 0.3 drag factor. Pace calculated a post-impact speed of 47 mph and a pre-impact speed of 67 mph. Pace acknowledged, however, that her report gave a range of 52 to 67 mph. For Wong's Nissan, Pace came up with a post-impact speed of 29 mph. (5RT 814-820, 841, 846-847, 852-855.)

Pace conceded, however, that even if Appellant was traveling at 67 mph, his vehicle would have been visible to Wong for 17 seconds before Appellant reached the collision site. (5RT 880-881.)

Pace agreed that to do the conservation of momentum analysis which

she had used to calculate Appellant's speed, the two vehicles needed to reach a common "separation velocity." (5RT 916-917.)

3. Kent Boots

Kent Boots, a former Orange County Sheriff, testified as an accident reconstructionist for the defense. (RT 1166-68.) Boots was critical of many aspects of the initial investigation and documenting of the scene. Given the complexities of the collision, it was inappropriate to assign a drag factor for Appellant's vehicle or to calculate a post-impact speed. (6RT 1201-05; 7RT 1271-73, 1283-84.)

Boots had written articles on right-of-way and explained that Appellant had the right-of-way because he was on a through street, and Wong had a stop sign. There is no speed at which a driver loses the right-of-way. (6RT 1205-08.) The right-of-way determination depends on whether the driver at the stop sign looked and *saw* the vehicle on the through street, and whether the driver at the stop sign had enough time to enter the intersection safely. (6RT 1208-10.)

4. Chris Kauderer

Chris Kauderer testified as a defense expert in accident reconstruction and investigation, and as an expert in human perception and reaction. (7RT 1370-79.) Kauderer went to the scene and did his own forensic mapping, reviewed the reports and testimony, and visually

inspected the vehicles. Kauderer was *not* permitted by the police, however, to do any mechanical inspection of the vehicles, or any physical manipulation of the vehicles. (7RT 1380-85, 1399-1403, 1420-22; 8RT 1572-73.)

Like Pace, Kauderer also used a conservation of momentum analysis. (7RT 1445-46.) Kauderer, however, did not believe it was reasonable to assign a drag factor to the Mercedes due to the complicated and uncertain path it followed, the lack of accurate documentation of its path, and the reasonable possibility of post-impact driver input by mistakenly putting his foot on the accelerator, or attempting to brake or steer the car. (7RT 1453-55; 8RT 1498-1500, 1567, 1597-99.)

The drag factor of the Nissan could be more easily calculated because its path was simpler. Kauderer computed the Nissan's speed as between 27 and 29 mph, similar to Pace's estimate of 24 to 29 mph. (7RT 1455-57; 8RT 1502-04.) Most critically, Kauderer *agreed* with Pace's testimony (5RT 916-917) that the two vehicles *reached a common separation velocity*. (8RT 1505-06, 1577-79; 9RT 1767.) Since Appellant and Wong's vehicles reached the same post-impact speed, Kauderer used Wong's post-impact speed of 27-29 mph to calculate Appellant's pre-impact speed. Kauderer calculated Appellant's pre-impact speed as between 49 and 52.5 mph; he considered Pace's calculation of 52 to 67 mph

to be unreliable due to the many unknown variables. (8RT 1516-18.)

Kauderer also opined that talking on a *cell-phone* impairs driving ability to a similar extent as being under the influence of alcohol. It increases the amount of time a driver needs to react to stimuli and decreases her field of vision to the sides. (8RT 1543-48.)

In Kauderer's opinion, the collision was caused by Wong entering the thoroughfare in front of Appellant, violating his right-of-way. Because of the short distance entering the thoroughfare, Wong did not leave Appellant sufficient time to react. (8RT 1559-60.)

5. Officer Johnson

Over objection, Officer David Johnson was permitted to testify in rebuttal as an expert in accident reconstruction. (8RT 1609-15.)

Unlike the defense experts who had been barred from inspecting the vehicle, Johnson was permitted to do a mechanical inspection. Johnson's inspection revealed several items which he believed could possibly limit the type of post-impact driver input that Kauderer believed might have influenced the speed calculations, including a wedged tire, and a fuel pump cut off that would have left only a few seconds of fuel in the system. (8RT 1616-20, 9RT 1697-99.)

Johnson agreed with Kauderer that the collision was complex, and that it is impossible to get a precise average drag factor for the Mercedes

after impact. (8RT 1626-28, 1641.)

Johnson disagreed with both Kauderer and Pace, and opined that conservation of momentum analysis does not require the vehicles to reach a common velocity. (8RT 1642-43; 9RT 1718-20, 1759-61, 1763-65.)

Johnson believed that Pace's estimate of 67 mph was the minimum pre-impact speed for the Mercedes. (8RT 1647-49; 9RT 1746.)

Johnson agreed that being on a cell-phone substantially impairs the ability to drive safely. (8RT 1652.)

F. The Verdict

The jury acquitted Appellant of all charges and enhancements related to intoxication, but convicted him of the lesser charge of vehicular manslaughter with gross negligence. (Penal Code, § 191, subd. (c)(2).) The jury found true the great bodily injury enhancement for Kendall Ng, but found the allegation not true for Wong. (4CT 1177-81, 1190-1200.)

G. The Post-Trial Inspection Of Appellant's Vehicle Which Revealed Material Exculpatory Evidence

After trial, new counsel was permitted access to the vehicle for an inspection for the first time. Counsel filed a new trial motion with a declaration from defense expert Kauderer. (5CT 1476-85.) Kauderer's declaration stated that his post-trial mechanical inspection of the vehicle demonstrated that "[t]he accelerator pedal was found wedged to the

floorboard in addition to being bent and twisted down and to the right." (5CT 1489.) The condition of the pedal "can only be explained by the fact that Tom's foot was on the accelerator pedal at, and after impact." This evidence "corroborates my opinion and refutes the prosecution theory," because it suggested that Appellant did not have time to react to Wong's vehicle and remove his foot from the accelerator, or that Appellant mistakenly stepped on the accelerator instead of the brake; either explanation completely undermines the prosecution experts's speed calculations. (5CT 1489-90.)

In opposition, the state offered no rebuttal evidence. Rather, the prosecutor told the trial court that counsel had not been diligent in discovering the condition of the accelerator pedal because it was "visible by the most casual of glances into the car." (5CT 1496.) The trial court denied the new trial motion, based upon the prosecutor's statement. (4/24/09 RT 2010.) Yet, the prosecutor's assurance to the trial court was *false*, because the view of the accelerator pedal was wholly obscured by the air bag and tinted windows. (Habeas Exhibit E, ¶4; Habeas Exhibit F, ¶4; *see* Habeas Exhibit E, Photos CK-02, CK-03, CK-04.)

H. Sentencing, Appeal And Habeas

The Court sentenced Appellant to a total of 7 years. (12RT 2048-50; 6CT 1660.)

Appellant filed a timely notice of appeal and an accompanying petition for writ of habeas corpus in the Court of Appeal to support some of his appellate claims, which the Attorney General had argued were not adequately reflected in the record.

The Court of Appeal held that the prosecutor's elicitation of evidence of Appellant's post-arrest silence and her argument that Appellant's silence proved his guilt impermissibly burdened his Fifth Amendment right to silence. (Typed Opn. at pp. 24-27.) Because the evidence was in "equipoise," and the prosecutor's arguments were extensive, the state had not demonstrated that the errors were harmless beyond a reasonable doubt. (*Id.* at pp. 24-27.) Given the Court's holding, the Court declined to resolve the other claims of misconduct and *Brady*[2] error, and dismissed the habeas petition as moot. (*Id.* at pp. 29, 32.)

ARGUMENT

I. THE U.S. SUPREME COURT AND THIS COURT HAVE HELD THAT THE CONSTITUTION PROHIBITS IMPOSING A PENALTY ON A PERSON'S ASSERTION OF, OR RELIANCE UPON, A CONSTITUTIONAL RIGHT.

As set forth below, the prosecutor violated Appellant's federal constitutional rights by evidence and argument that improperly penalized his reliance on his constitutional rights. Specifically, the state improperly

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

penalized (1) Appellant's reliance on his right to remain silent when he failed to inquire about the welfare of the occupants of the other vehicle. This constitutional error was inextricably intertwined with other constitutional error penalizing Appellant's assertion of, or reliance on, other constitutional rights, including: (2) Appellant's assertion of his Fourth Amendment rights when he twice asked whether he was being detained or was free to go home; (3) Appellant's assertion of his Fourth Amendment rights when he was in custody in the patrol car and asked whether he had to provide a blood sample, whether he had to go to the station to do so, and whether the police could take the blood sample at the scene; (4) Appellant's assertion of his Fourth Amendment rights when, at the station, he asked whether he had to go to the hospital to take a test and whether he could refuse to take a test. Additionally, (5) under *Miranda*, it was error to admit evidence and argument regarding Appellant's responses while in custody to police questions about whether he would be willing to be transported to the station and to the hospital for a blood test.

Resolution of these issues requires a review of the history of the Fifth Amendment, and the United States Supreme Court's and this Court's jurisprudence prohibiting penalizing assertion of constitutional rights.

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A. The Fifth Amendment Privilege Against Self-Incrimination And The Right To Remain Silent

1. The History Of The Privilege Against Self-Incrimination

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; *see* Cal. Const. art. I, § 15.) "[O]ne of the Fifth Amendment's 'basic functions . . . is to protect *innocent* men . . . who otherwise might be ensnared by ambiguous circumstances.'" (*Ohio v. Reiner* (2001) 532 U.S. 17, 20 [emphasis added], quoting *Grunewald v. United States* (1957) 353 U.S. 391, 421.)

Historically, the Founders included the Fifth Amendment as embodiment of the Latin maxim *nemo tenetur seipsum prodere* ("no man shall be compelled to criminate himself"). (*See* Wigmore, *Nemo Tenetur Seipsum Prodere* (1891) 5 Harv.L.Rev. 71, 75-88.)[3] It is "one of the oldest maxims of the common law." (*See, e.g., Ex parte Tahbel* (1920) 46 Cal.App. 755, 758.) It has been traced to the Magna Carta (*United States v. Gecas* (11th Cir. 1997) 120 F.3d 1419, 1439), and to thirteenth century Jewish scholar Maimonides. (*Miranda v. Arizona* (1966) 384 U.S. 436, 458-459, fn. 27.)

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[3] Alternatively phrased: "*Nemo tenetur seipsum accusare.*" (*People v. Loper* (1910) 159 Cal. 6, 19.)

The Supreme Court has repeatedly noted that, "[t]he privilege against compulsory self-incrimination was developed by painful opposition to a course of ecclesiastical inquisitions and Star Chamber proceedings occurring several centuries ago." (*Michigan v. Tucker* (1974) 417 U.S. 433, 440; *Miranda*, 384 U.S. at pp. 458-460.) The privilege has been repeatedly recognized as "one of the great landmarks in man's struggle to make himself civilized." (*Murphy v. Waterfront Commission* (1964) 378 U.S. 52, 55.) It "reflects many of our fundamental values and most noble aspirations: *our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt*[.]" (*Murphy*, 378 U.S. at p. 55 [emphasis added]; *see People v. Coleman* (1975) 13 Cal.3d 867, 875 fn. 5.)

After reviewing this history, the *Miranda* Court held "there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." (384 U.S. at p. 467.) In order to safeguard the right to remain silent, and to assure that there is no compulsion to speak, a person must be warned at the outset of detention of the right to remain silent, that any statement made can be used against them, and to have an attorney present during questioning, free of charge. (*Id.* at p. 468; *see*

Dickerson v. United States (2000) 530 U.S. 428, 443 ["*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture"]; *People v. Cockrell* (1966) 63 Cal.2d 659, 670 ["it is common knowledge that [a person] has a right to say nothing"] [internal quotations omitted].)[4]

Thus, the Supreme Court has held that the privilege against self-incrimination can be asserted in any investigatory or adjudicatory proceeding, (*Kastigar v. United States* (1972) 406 U.S. 441, 444) and "*at the time of arrest* and during custodial interrogation, innocent and guilty alike – perhaps particularly the innocent – may find the situation so intimidating that they may choose to stand mute." (*United States v. Hale* (1975) 422 U.S. 171, 177 [emphasis added].)

The right, moreover, has historically applied *before* arrest. Significantly, unlike the Sixth Amendment which uses the word "accused" (U.S. Const. Amend. VI), the Fifth Amendment and Fourth Amendments use the word "person." (U.S. Const. Amend. IV, V.) Thus, "the right to remain silent, unlike the right to counsel, attaches before the institution of

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[4] In *Dickerson*, the Court held that *Miranda* was a constitutional decision; the Court disapproved of the language suggesting *Miranda* was merely "prophylactic from *New York v. Quarles* and other cases, which the Attorney General nonetheless quotes at length. (*Dickerson*, 530 U.S. at pp. 437-438; *see* Respondent's Opening Brief ["ROB"] 32, quoting *New York v. Quarles* (1984) 467 U.S. 649, 654.)

formal adversary proceedings." (*Savory v. Lane* (7th Cir. 1987) 832 F.2d 1011, 1017.)[5]

The Supreme Court has thus repeatedly held that the constitution guarantees a right to remain silent *before* arrest, in consensual encounters and temporary detentions. In a consensual encounter, when approached by police: "The person approached . . . *need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way*. [citations]." (*Florida v. Royer* (1983) 460 U.S. 491, 497-498 [emphasis added].) Further, the person's refusal to listen, cooperate or speak to the police *does not furnish grounds for suspicion* justifying detention or seizure. (*Ibid.*; *see Florida v. Bostick* (1991) 501 U.S. 429, 437.)

Similarly, where a person is *detained*, "the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. *But the detainee is not obliged to respond.*" (*Berkemer v. McCarty* (1984) 468 U.S. 420, 439 [emphasis added]; *see also Miranda*, 384 U.S. at p. 468, fn. 37 [silence during police custodial interrogation cannot be penalized].)

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[5] Notably, one of the first assertions of the Fifth Amendment privilege was in a non-custodial setting by Attorney General Levi Lincoln in response to Chief Justice Marshall's inquiry in *Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137, 143-144.

Finally, based upon the fundamental importance of the privilege against self-incrimination, the Supreme Court has made clear that the privilege must be given a liberal construction. (*Miranda*, 384 U.S. at p. 461; *United States v. Hoffman* (1951) 341 U.S. 479, 486.) "To apply the privilege narrowly or begrudgingly–to treat it as an historical relic, at most merely to be tolerated–is to ignore its development and purpose." (*Quinn v. United States* (1955) 349 U.S. 155, 162.)

2. *The United States Supreme Court's Decision In Griffin And This Court's Decisions In Cockrell And Banks Prohibit Penalizing An Accused For Relying Upon His Fifth Amendment Right To Remain Silent.*

In *Griffin v. California* (1965) 380 U.S. 609, a prosecutor argued to the jury that the defendant's failure to take the stand demonstrated the defendant's inability to deny his guilt. The Supreme Court held the prosecutor's comment violated the defendant's Fifth Amendment privilege against self-incrimination because the prosecutor's comment imposed a "penalty . . . for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." (*Id.* at p. 614.)

In *Miranda*, moreover, the Court cited *Griffin* and made clear that *Griffin*'s holding applied to investigation by the police: "In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial

interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." (*Miranda*, 384 U.S. at p. 468, fn. 37.) At the heart of the privilege is "*the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence*." (*Malloy v. Hogan* (1964) 378 U.S. 1, 8; *see Miranda*, 384 U.S. at p. 460 [quoting same].)

The Supreme Court later extended *Griffin*'s holding to sentencing procedures, holding that a trial court could not make an adverse sentencing finding based upon the defendant's refusal to answer. (*Mitchell v. United States* (1999) 526 U.S. 314, 330.) "[T]here can be little doubt that the rule prohibiting an inference of guilt from a defendant's rightful silence has become an essential feature of our legal tradition." (*Ibid.*) The rule against adverse inferences from a defendant's silence, "is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights." (*Ibid.*)

In *People v. Cockrell* (1966) 63 Cal.2d 659, this Court unanimously applied *Griffin* to the defendant's silence when confronted by police, and thus unanimously decided the issue raised herein in Appellant's favor. In

Cockrell, the defendant was arrested for drug dealing. At the police station, an officer asked whether the defendant wanted to respond to a buyer's accusation about the defendant's role in a drug sale; the defendant remained silent. This Court held the prosecutor's comment on the defendant's silence was "'a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.'" (*Ibid.*, quoting *Griffin*, 380 U.S. at p. 614.) This Court held: "The rationale of *Griffin* implicitly proscribes drawing an inference adverse to the defendant from his failure to reply to an accusatory statement if the defendant was asserting his constitutional privilege against self-incrimination." (*Id.* at pp. 669-670.)

This Court further explained, "after the arrest and during an official examination, while respondent is in custody, it is common knowledge that he has a right to say nothing. Only under peculiar circumstances can there seem to be any duty then to speak. Lacking such circumstances, to draw a derogatory inference from mere silence is to compel the respondent to testify. . . ." (*Id.* at p. 670, quoting *United States v. Pearson* (6th Cir. 1965) 344 F.2d 430, 431, quoting *McCarthy v. United States* (6th Cir. 1928) 25 F.2d 298.) This Court then held that, even though there was no explicit invocation of the privilege against self-incrimination, the defendant "had a right to remain silent and an inference adverse to him may not be drawn

from his silence." (*Cockrell*, 63 Cal.2d at p. 670.)

Subsequently, this Court reaffirmed this holding in *In re Banks* (1971) 4 Cal.3d 337. In *Banks*, the police were investigating several liquor store robberies and found the defendant in another liquor store. The police told the defendant that he fit the descriptions of the robbery suspect, and the defendant remained silent. The police searched the defendant's pockets, and the defendant did nothing. (*Id.* at p. 345.) Later, at a line-up, a witness walked up to the defendant and identified him as the robber; again, the defendant said nothing. (*Id.* at p. 347.) The defendant did not testify. The prosecutor argued at trial that the defendant's silence in the face of these accusations constituted adoptive admissions, proving his guilt. (*Id.* at p. 348.)

The state *conceded the issue in this case*, namely, that *Cockrell* precluded the use of the defendant's silence after arrest, when he was at the line-up (*Banks*, 4 Cal.3d at pp. 351-352), but the state argued that *Cockrell's* holding should be limited to the "accusatory stage" of police investigations. (*Id.* at p. 352.) This Court felt no need to decide whether the holding applied before the "accusatory stage" because that stage had already been reached when the police confronted the defendant about the robberies and searched him. "The accusatory stage is certainly reached 'after a person has been taken into custody or otherwise deprived of his

freedom of action in any significant way.'" (*Ibid.*, quoting *Miranda*, 384 U.S. at p. 444.) Although the defendant had not "been formally arrested at the moment the police began to search him," he "had been significantly deprived of his freedom of action." (*Banks*, 4 Cal.3d at p. 352.) Therefore, *Cockrell* controlled, and this Court reversed. (*Ibid.*; *see also People v. Ridley* (1965) 63 Cal.2d 671, 676 [constitution forbids use of defendant's statement, in the face of accusation, that his lawyer had advised him to keep his mouth shut]; *People v. Abbott* (1956) 47 Cal.2d 362, 373 [prior to *Griffin*, holding it was error to admit evidence that upon being accused by police, the defendant stated he was refusing to speak on advice of counsel]; *People v. Maldonado* (1966) 240 Cal.App.2d 812, 817 [constitution forbids use of defendant's post-arrest silence in the face of police accusation where there were no *Miranda* warnings], *disapproved on other grounds People v. Triggs* (1973) 8 Cal.3d 884.)

Thus, *Banks* controls in this case and prohibits any comment on Appellant's silence for the entire encounter in this case. Even though Appellant had not "been formally arrested at the moment" when Officer Price told him he was not free to leave and had to be detained at the scene, Appellant "had been significantly deprived of his freedom of action." (*Banks*, 4 Cal.3d at p. 352, citing *Miranda*, 384 U.S. at p. 444.) Thus, the accusatory stage had been reached, and Appellant had the right to remain

silent; at this point, it was impermissible for the People to impose a penalty upon Appellant's silence by arguing his failure to speak proved his guilt. (*Banks*, 4 Cal.3d at p. 352.) Moreover, even if Appellant was not significantly deprived of freedom when he was told by police that he could not leave (as the Attorney General now contends),[6] the People *agreed* in the trial court that Appellant was under *de facto* arrest when he was placed in the locked patrol car, before he was asked to go to the station for a blood test. (1RT 15; *see* 3RT 404-406; 4RT 728-729.) Thus, *Banks* certainly controls for all the time after Appellant was placed in the locked patrol car, and the prosecutor's argument that his silence during this time proved his guilt improperly penalized his constitutional right to remain silent.

This Court's holdings in *Cockrell* and *Banks* have stood for more than half a century without question. The state never discusses these controlling holdings. The Court should "take this to be an implicit concession" that the circumstances of the precedent are indeed indistinguishable from the present case. (*Gonzalez-Servin v. Ford Motor Co.* (7th Cir. 2011) 662 F.3d 931, 933.)

Additionally, the fundamental doctrine of *stare decisis* requires the Court to follow its prior precedents, "even though the case, if considered

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[6] Appellant previously asked whether he was free to leave when he was in his own car being attend by paramedics. (1RT 16).

anew, might be decided differently by the current justices;" *stare decisis* serves the objectives of "certainty, predictability and stability in the law" by permitting people to "regulate their conduct" with reasonable assurance that the governing rules of law will not change. (*People v. Garcia* (2006) 39 Cal.4th 1070, 1080.) This Court should protect people who attempt to conform their conduct to the law by remaining silent when confronted by police based upon this Court's explicit holding in *Banks*, or based only on the general awareness that police tell people whenever they are detained on television that "you have the right to remain silent"–a warning that has "become part of our natural culture." (*Dickerson*, 530 U.S. at p. 443; *see Michigan v. Tucker* (1974) 417 U.S. 433, 439 ["virtually every schoolboy is familiar with the concept, if not the language" of the Fifth Amendment.) Indeed, retroactive judicial expansion of criminal liability violates the federal Due Process Clause. (*See Bouie v. City of Columbia* (1964) 378 U.S. 347, 353.)

"'[E]ven in constitutional cases, the doctrine [of *stare decisis*] carries such persuasive force that we have always required a departure from precedent to be supported by some "special justification."'" (*Golden Gateway Center v. Golden Gateway Tenants Assn.* (2001) 26 Cal.4th 1013, 1022, quoting *Dickerson*, 530 U.S. at p. 443.) The state has provided no justification for overruling these precedents.

3. *The Supreme Court's Decisions In Doyle, Jenkins And Fletcher, Regarding The Due Process Prohibition On Impeachment Of A Defendant With Prior Silence, Do Not Undermine The Court's Fifth Amendment Holding In Griffin.*

In *Harris v. New York* (1971) 401 U.S. 222, the Supreme Court held that a statement taken in violation of *Miranda* may nonetheless be used to impeach a defendant who testifies, even though it cannot be used in the prosecution's case in chief: "Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process." (*Id.* at pp. 225-226.)

In *Doyle v. Ohio* (1976) 426 U.S. 610, however, the Court considered whether, notwithstanding *Harris*, the Fourteenth Amendment Due Process Clause permitted the state to *impeach* a defendant's exculpatory testimony with his prior silence *after* he was advised of his *Miranda* rights. The Court held that it was fundamentally unfair to allow an arrested person's silence following *Miranda* warnings to be used to impeach an explanation subsequently offered at trial. "[I]t is not proper . . . for the prosecutor to ask the jury to draw a direct inference of guilt from silence–to argue, in effect, that silence is inconsistent with innocence." (*Id.* at pp. 634-635.) Moreover, "silence does not mean only muteness; it includes the statement of a desire to remain silent as well as of a desire to

remain silent until an attorney has been consulted." (*Wainwright v. Greenfield* (1986) 474 U.S. 284, 295, fn. 13.)

In two subsequent cases, the Supreme Court further considered the question of *impeachment* with silence. (*Fletcher v. Weir* (1982) 455 U.S. 603 (per curiam); *Jenkins v. Anderson* (1980) 447 U.S. 231.) The state relies heavily upon these cases here; yet, both are premised on a finding that by *testifying*, the defendant waived the privilege. (*Jenkins*, 447 U.S. at 238; *see Fletcher*, 455 U.S. at 606-607.) In *Jenkins*, the prosecutor used the defendant's pre-custody silence to impeach his claim of self-defense. The Court found that the Fifth Amendment did not protect the defendant because impeachment with pre-custody silence "follow[ed] the defendant's own decision to cast aside his cloak of silence and advance[d] the truth-finding function of the criminal trial." (*Jenkins*, 447 U.S. at p. 238.) In so ruling, the Court simply applied *Harris*'s holding that a statement taken in violation of *Miranda* may be used to *impeach* a defendant who testifies, even though it cannot be used to prove guilt in the prosecution's case in chief where a defendant does not testify. (*Jenkins*, 447 U.S. at pp. 237-238, quoting *Harris*, 401 U.S. at p. 225.)

Furthermore, because the police had not read the defendant his *Miranda* rights, *Doyle*'s Fourteenth Amendment estoppel theory did not apply. (*Id.* at pp. 239-240.) The Court noted, however, that it had exercised

its supervisory powers over federal courts to prohibit use of prior silence to impeach a defendant's credibility because such evidence has little if any relevance and a significant potential for prejudice. (*Id.* at p. 239, citing *United States v. Hale* (1975) 422 U.S. 171, 180-181 ["The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted."]; *Grunewald v. United States* (1957) 353 U.S. 391, 424 ["where such evidentiary matter has grave constitutional overtones . . . we feel justified in exercising this Court's supervisory control.'"].) The *Jenkins* Court expressly declined to address whether the use of pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment. (*Jenkins*, 447 U.S. at p. 236, fn. 2.)

Subsequently, in *Fletcher*, the Court considered whether the Fifth Amendment precluded the use of pre-*Miranda*, *post-arrest* silence for impeachment purposes. (*Fletcher*, 455 U.S. at pp. 603-604.) Again, the Court premised its ruling on the fact that the defendant had waived his privilege by testifying: "[W]e 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." (*Id.* at p. 607.) The Court again held such situations are unprotected by the Constitution and must be left to state legislatures and judges to deal with under their own evidentiary rules. (*Id.*)

Thus, while the Supreme Court has clearly limited its holding in

Doyle regarding *impeachment* with silence, the Court has never suggested that *Fletcher* or *Jenkins* limit the holding of *Griffin* that a state may not penalize the defendant's assertion of his Fifth Amendment right to remain silent where the defendant did not waive the privilege by taking the stand, and instead relied upon his privilege throughout trial, as Appellant did here. Indeed, the *Doyle* Court noted that "the State does not suggest petitioners' silence could be used as evidence of guilt," but only contended that it was necessary for cross-examination and impeachment of "petitioners' exculpatory story." (*Doyle*, 426 U.S. at p. 617.)[7]

The *Jenkins* and *Fletcher* cases, therefore provide no support for the Attorney General's position here, because Appellant did not "cast aside his cloak of silence" by testifying. (*Jenkins*, 447 U.S. at p. 238.)

B. The Constitutional Prohibition On Penalizing A Person's Exercise Of Her Fourth, Fifth Or Sixth Amendment Rights Support Application Of The *Griffin* Penalty Analysis To Pre-*Miranda* Silence.

As noted above, in *Griffin*, the Supreme Court held that a prosecutor may not impose a "penalty . . . for exercising a constitutional privilege" by

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[7] Because this case does *not* involve silence when confronted by a third-party, the Court need not reach that issue. (*Compare People v. Eshelman* (1990) 225 Cal.App.3d 1513, 1520-21 [*Doyle* applies to silence when accused by a private party, where silence was an exercise of his constitutional rights]; *with People v. Medina* (1990) 51 Cal.3d 870, 890 [no *Doyle* violation where the record did *not* suggest that silence was an invocation of the Fifth Amendment].)

arguing that his failure to testify proves his guilt. (*Griffin v. California* (1965) 380 U.S. 609, 614; *see also Malloy v. Hogan* (1964) 378 U.S. 1, 8 [Fifth Amendment guarantees "the right of a person to remain silent . . . and to suffer no penalty . . . for such silence"].)

This penalty concept applies broadly: "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort [citation], and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.' [Citations.]" (*Bordenkircher v. Hayes* (1978) 434 U.S. 357, 363 [no due process violation to indict on new charges where defendant did not accept plea bargain]; *see United States v. Jackson* (1968) 390 U.S. 570, 581 [unconstitutional to punish right to jury trial, by making defendants who exercise right to trial eligible for death penalty].)

Specifically, in the Fourth Amendment context, the U.S. Supreme Court has made clear that, like the Fifth Amendment privilege, the Fourth Amendment "guarantee of protection against unreasonable searches and seizures extends to the innocent and guilty alike." (*McDonald v. United States* (1948) 335 U.S. 451, 453.) Thus, the Court held that it is improper to impose a penalty on a person for refusing to consent to a warrantless search. (*Camara v. Municipal Court* (1967) 387 U.S. 523, 532-533; *District of*

Columbia v. Little (1950) 339 U.S. 1, 7.) Additionally, the Supreme Court has held it is "intolerable that one constitutional right should have to be surrendered in order to assert another." (*Simmons v. United States* (1968) 390 U.S. 377, 393-394 [testimony in Fourth Amendment suppression hearing may not be used against the accused in the guilt phase].)

California Courts and other state and federal courts have thus unanimously held, following *Griffin* and *Camara*, that the state may not penalize a person's reliance on his or her Fourth Amendment rights by arguing that the defendant's refusal to consent to a warrantless entry or other Fourth Amendment violation is proof of guilt. (*People v. Keener* (1983) 148 Cal.App.3d 73, 79 ["Presenting evidence of an individual's exercise of a right to refuse to consent to entry in order to demonstrate a consciousness of guilt merely serves to punish the exercise of the right to insist upon a warrant."]; *see People v. Wood* (2002) 103 Cal.App.4th 803, 808-809 [same].)

This Court has similarly recognized that refusal to permit warrantless entry into a home may not be considered as evidence that the defendant is guilty of a crime:

> There are many reasons other than guilt of a felony why an occupant of an apartment may not wish himself or others present exposed to the immediate view of a stranger, even if the stranger is a police officer. If refusal of permission to enter could convert mere

> suspicion of crime into probable cause to arrest the occupant and search his home, such suspicion alone would become the test of the right to enter, and *the right to be free from unreasonable police intrusions would be vitiated by its mere assertion.*

(*Tompkins v. Superior Court* (1963) 59 Cal.2d 65, 68 [emphasis added]; *People v. Cressey* (1970) 2 Cal.3d 836, 841 fn. 6 [quoting same].) Courts of other jurisdictions are in accord. In *State v. Stevens* (2012) 228 Ariz. 411, 267 P.3d 1203, the Arizona Supreme Court held it was "fundamental error" for the prosecutor to use the defendant's protest and refusal to consent to warrantless entry to her home to prove guilt, because it "deprived [the defendant] of her right to invoke the protection of the Fourth Amendment with impunity." (*Id.* at pp. 414-420; *see United States v. Thame* (3d Cir. 1988) 846 F.2d 200, 206 [error for the prosecutor to argue that defendant's refusal to consent to search of his bag constituted evidence of his guilt]; *United States v. Prescott* (9th Cir. 1978) 581 F.2d 1343, 1351 ["passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of wrongdoing"]; *United States v. Taxe* (9th Cir. 1976) 540 F.2d 961, 969 [prosecutor's comments on defendants' refusal to consent to a search of their trucks was "misconduct"]); *United States v. Rapanos* (E.D. Mich. 1995) 895 F.Supp. 165, 168 *revd. on other grounds* (6th Cir. 1997) 115 F.3d 367; *Padgett v. State* (Alaska 1979) 590 P.2d 432, 434 [right to refuse to consent to

warrantless search of car "would be effectively destroyed if, when exercised, it could be used as evidence of guilt"]; *Longshore v. State* (2007) 399 Md. 486, 924 A.2d 1129, 1159; *Reeves v. State* (Tex. Ct. App. 1998) 969 S.W.2d 471, 495.)

California Courts have similarly held that "[t]he penalty analysis employed in *Griffin* is equally applicable to the constitutional right to counsel." (*People v. Schindler* (1980) 114 Cal.App.3d 178, 188 [federal constitutional error for prosecutor to argue that the fact that defendant retained an attorney proved her guilt of murder]; *see People v. Lopez* (2005) 129 Cal.App.4th 1508, 1525-27 [federal constitutional error for prosecutor to argue that "colorful" invocation of right to counsel proved guilt].)

Federal courts are in accord. (*Macon v. Yeager* (3d Cir. 1973) 476 F.2d 613, 615-616 ["For the purpose of the [*Griffin*] 'penalty' analysis, . . . we perceive little, if any, valid distinction between the privilege against self-incrimination and the right to counsel."]; *see Combs v. Coyle* (6th Cir. 2000) 205 F.3d 269, 279-283 [constitution prohibits admission of defendant's pre-*Miranda* statement "talk to my lawyer" in state's case in chief]; *United States v. McDonald* (5th Cir. 1980) 620 F.2d 559, 564 [constitution prohibits argument that fact that defendant had attorney at his house before and during the search was evidence of his guilt]; *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027 (per curiam) [constitution violated by

argument that defendant's phone call to his attorney after his arrest indicated his guilt].) Several states have also generally held that a prosecutor cannot properly imply guilt from a defendant's request for counsel. (*See, e.g., People v. Kennedy* (1975) 33 Ill.App.3d 857, 338 N.E.2d 414, 417-418; *State v. Kyseth* (Iowa 1976) 240 N.W.2d 671, 674; *Mays v. State* (Tenn. Crim. 1972) 495 S.W.2d 833, 836.)

Finally, as noted above, this Court has specifically applied the penalty analysis of *Griffin* to invocation of the Fifth Amendment privilege to remain silent even before the defendant has received his *Miranda* warnings. (*In re Banks* (1971) 4 Cal.3d 337, 351-352; *People v. Cockrell* (1966) 63 Cal.2d 659, 669-670.)

Griffin's penalty analysis thus plainly applies broadly to prohibit the state from penalizing a defendant, by arguing that invocation of a right guaranteed by the federal Constitution proves her guilt; otherwise the right "would be vitiated by its mere assertion." (*Tompkins*, 59 Cal.2d at p. 68.)

C. The Minority View In The Split Of Lower Federal Court Authority Regarding Pre-*Miranda* Silence Improperly Extends *Fletcher* And *Jenkins* Beyond Their Logical Force, And Fails To Consider The Penalty Analysis Approved By The U.S. Supreme Court And This Court In *Griffin*, *Banks* And Other Cases.

While the Supreme Court has not explicitly extended its holding in *Griffin* to use of the defendant's pre-*Miranda*, out-of-court silence where

the defendant does not testify, neither has it stated that *Fletcher* and *Jenkins* extend to that context. As the Attorney General points out, there is a split of authority among lower courts. The state does its best to argue that this Court should adopt the *minority* position, but it does not discuss controlling authority from this Court that conclusively decides the issue in Appellant's favor. (*See, e.g., Banks*, 4 Cal.3d at pp. 351-352; *Cockrell*, 63 Cal.2d at pp. 669-670.) This failure should be taken as "an implicit concession" that the circumstances of the precedent are indeed indistinguishable from the present case. (*Gonzalez-Servin v. Ford Motor Co.* (7th Cir. 2011) 662 F.3d 931, 933.) Nor has the state given the Court the "special justification" that is required to dispense with *stare decisis*. (*Golden Gateway Center v. Golden Gateway Tenants Assn.* (2001) 26 Cal.4th 1013, 1022, quoting *Dickerson v. United States* (2000) 530 U.S. 428, 443.)

As seen above, the Supreme Court's other holdings repeatedly state that even before arrest, a person has a right to remain silent when confronted by police in consensual encounters or temporary detentions, and that silence cannot raise an inference of guilt. (*See, e.g., Florida v. Bostick* (1991) 501 U.S. 429, 437; *Florida v. Royer* (1983) 460 U.S. 491, 497-498.) Most state and lower federal courts agree with the First District's analysis below, that *Doyle* and *Griffin* apply where a defendant remains silent in custody even before *Miranda* warnings have been given. (*See, e.g., United*

States v. Velarde-Gomez (9th Cir. 2001) 269 F.3d 1023, 1026-29 (en banc); *United States v. Moore* (D.C. Cir. 1997) 104 F.3d 377, 384-385; *United States v. Burson* (10th Cir. 1991) 952 F.2d 1196, 1201; *Savory v. Lane* (7th Cir. 1987) 832 F.2d 1011, 1017; *Coppola v. Powell* (1st Cir. 1989) 878 F.2d 1562, 1568; *cf. United States v. Caro* (2d Cir. 1981) 637 F.2d 869, 876 ["we are not confident that *Jenkins* permits even evidence that a suspect remained silent before he was arrested or taken into custody to be used in the Government's case in chief."]; *but see United States v. Frazier* (8th Cir. 2005) 408 F.3d 1102, 1111; *United States v. Rivera* (11th Cir. 1991) 944 F.3d 1563, 1567-68; *United States v. Love* (4th Cir. 1985) 767 F.2d 1052, 1063; *cf. United States v. Zanabria* (5th Cir. 1996) 74 F.3d, 592-593 [finding no plain error].)

In *Combs v. Coyle* (6th Cir. 2000) 205 F.3d 269, the Sixth Circuit reviewed the federal split in authority as to whether pre-arrest silence could be used as affirmative evidence of a non-testifying defendant's guilt. Relying on *Griffin*, the Court joined the majority of circuits and held that the Fifth Amendment precluded use of a non-testifying defendant's pre-arrest silence as substantive evidence of guilt. (*Id.* at pp. 281-283, citing *Griffin*, 380 U.S. at p. 615.) "In a prearrest setting as well as in a post-arrest setting, it is clear that a potential defendant's comments could provide damaging evidence that might be used in a criminal prosecution; the

privilege should thus apply." (*Id.* at p. 283.)

Similarly in *United States v. Moore* (D.C. Cir 1997) 104 F.3d 377, the Court held that, even though "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 commencement of questioning as opposed to custody." (*Id.* at p. 385.) The Court held that such silence may not be used as evidence of guilt, reasoning in part that "any other holding would create an incentive for arresting officers to delay interrogation in order to create an intervening 'silence' that could be used against the defendants." (*Id.*; *see United States v. Whitehead* (9th Cir. 2000) 200 F.3d 634, 637-39; ["[W]hen the district court admitted evidence of Whitehead's post-arrest, pre-*Miranda* silence . . . it plainly infringed upon Whitehead's privilege against self incrimination."]; *United States v. Hernandez* (7th Cir. 1991) 948 F.2d 316, 321-24 [elicitation in prosecution's case-in-chief of evidence that defendant was momentarily silent when informed he was under arrest violated Fifth Amendment]; *see also Velarde-Gomez*, 269 F.3d at pp. 1028-29 [because the government cannot burden the right to remain silent, it is constitutional error for prosecutor to argue defendant's "lack of response" to search is "demeanor" evidence proving guilt].)

Further, in *United States v. Burson* (10th Cir. 1991) 952 F.2d 1196, IRS agents went to the defendant's home to question him about the taxes of

an associate. The agents left, however, when it became clear that the defendant would not speak with them. (*Id.* at pp. 1200-01.) The Tenth Circuit held that "the general rule of law is that once a defendant invokes his right to remain silent, it is impermissible for the prosecution to refer to any Fifth Amendment rights which defendant exercised." (*Id.* at p. 1201, citing *Griffin*, 380 U.S. at p. 615.) The Court found that in this non-custodial questioning, the defendant's silence was nonetheless made in reliance upon his Fifth Amendment right to silence. The constitutional violation was so clear it constituted plain error. (*Burson*, 952 F.2d at pp. 1201-02.)

Maryland's highest court surveyed the decisions of state courts and found that a clear majority also hold that pre-arrest evidence of silence is inadmissible. (*Weitzel v. State* (2004) 384 Md. 451, 863 A.2d 999, 1003, fn. 3, and cases cited therein; *see also State v. VanWinkle* (2012) 229 Ariz. 233, 273 P.3d 1148, 1150-52 [joining majority of courts in finding that admission of pre-arrest silence in government's case in chief violates Fifth Amendment].) The *Weitzel* Court noted that due to the "ubiquity" of the *Miranda* warnings in popular culture "the average citizen is almost certainly aware that any words spoken in police presence are uttered at one's peril. While silence in the presence of an accuser or non-threatening bystanders may indeed signify acquiescence in the truth of the accusation, a

defendant's reticence in police presence is ambiguous at best." (*Id.* at pp. 1104-05.) Thus, the Court held, as a matter of state law, that such evidence "is too ambiguous to be probative," thereby "join[ing] the increasing number of jurisdictions" that prohibit use of silence in the presence of police as proof of guilt. (*Id.* at pp. 1002, 1005; *see Ex parte Marek* (Ala. 1989) 556 So.2d 375, 382 [abolishing "tacit admission rule" which had permitted evidence of defendant's pre-arrest silence to be used as evidence of guilt]; *see also Doyle v. Ohio* (1976) 426 U.S. 610, 617 ["every post-arrest silence is insolubly ambiguous"]; *United States v. Hale* (1975) 422 U.S. 171, 180-181 [evidence of pre-arrest silence is excluded even for impeachment in federal cases because its "significant potential for prejudice" outweighs probative value].)

Thus, even setting aside that the issue here is controlled by the Court's holding in *Banks*, the Attorney General's attempt to convince the Court to join the minority view must fail because that view cannot withstand analysis. Almost without exception, the cases relied upon by the Attorney General in the minority view ignore Supreme Court's holding in *Griffin*, and most *have been subject to subsequent criticism by other panels of the Court.* Thus, in *United States v. Rivera* (11th Cir. 1991) 944 F.3d 1563, 1567-68, the Court stated (without analysis) that use of the defendant's pre-arrest silence to prove her guilt did not violate *Doyle*, citing

Fletcher. (*Id.* at pp. 1567-68.) Yet, *Fletcher* had held only that it was permissible to *impeach* a defendant with pre-arrest silence. The *Rivera* Court did not cite *Griffin* or consider whether *Griffin*'s prohibition on imposing a penalty for exercising a constitutional right would apply. The Eleventh Circuit has since acknowledged this flaw in the *Rivera* Court's holding. (*See United States v. Campbell* (11th Cir. 2000) 223 F.3d 1286, 1290 [declining to " sort out this confusion" because defendant did not object].)

Similarly, in *United States v. Love* (4th Cir. 1985) 767 F.2d 1052, the Court (without analysis) stated that use of the defendants' pre-arrest silence to prove their guilt did not violate *Doyle*, citing *Fletcher*. (*Id.* at p. 1063.) Yet, again the Court did not acknowledge that *Fletcher* dealt only with *impeachment*, nor did the *Love* Court cite *Griffin*. Because *Love* and *Rivera* do not consider *Griffin*, they should not be considered authority for the proposition advanced by the Attorney General. (*See People v. Brown* (2012) 54 Cal.4th 314, 330 ["cases are not authority for propositions not considered"].)

The state thus relies heavily upon *United States v. Frazier* (8th Cir. 2005) 408 F.3d 1102. (ROB 28-37.) Indeed, *Frazier* is the sole lower court

authority supporting its position that examines *Griffin* as well as *Doyle*.[8] The *Frazier* Court held that, because the defendant was not in custody and the police had not questioned him, there was no official government *compulsion* to speak; thus the use of his silence did not violate the Fifth Amendment. (*Id.* at p. 1111.) Yet, *Frazier*, has been criticized by the former Chief Judge of the Eighth Circuit, who has called for its overruling, because it is "contrary to the clear trend emerging from the circuits on this issue and, in my opinion, contrary to the Fifth Amendment of the Constitution." *United States v. Osuna-Zepeda* (8th Cir. 2005) 416 F.3d 838, 846-847 (Lay, J., concurring.) As in this case, at trial the government "relied on the premise that an innocent person would instinctively speak out when arrested;" yet, on appeal, the government contended that the defendant "deserves no protection under the Fifth Amendment because he did not face an official compulsion to speak." (*Id.* at pp. 846-847.) As Judge Lay wrote, "if an arrested person would feel an instinctive urge to protest his innocence, he has experienced an official compulsion to speak sufficient to trigger the right to remain silent." (*Id.* at p. 847; *see Cockrell*, 63 Cal.2d at p. 670 ["to draw a derogatory inference from mere silence is to

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[8] The state cites *State v. Johnson* (Minn. App. 2012) 811 N.W.3d 136, 146-148. *Johnson* merely adopts the holding of *Frazier* without citing *Griffin*.

compel the respondent to testify"] [internal quotations omitted].)

The minority view advanced by the Attorney General is unsound because it is based upon inherently contradictory principles that a person confronted by police is under no compulsion to protest her innocence, yet failure to make a statement before an accusation is proof of guilt. Indeed, the argument that the Fifth Amendment protects only against governmental compulsion to make a statement, is the same argument set forth by the dissenters in *Griffin*, and rejected by the *Griffin* Court. The dissenting Justices in *Griffin* argued that the Fifth Amendment only protects against compelled testimony, and that prosecutorial comment on failure to testify is not the same as compelling a defendant to testify. (*Griffin v. California* (1965) 380 U.S. 609, 620 [dissenting opn.].) The majority, however, rejected this analysis, holding instead that "the Fifth Amendment . . . forbids . . . comment by the prosecution [that] the accused's silence . . . is evidence of guilt." (*Id.* at p. 615; *see id.* at p. 614 [constitution forbids imposing penalty for exercising constitutional privilege to remain silent].)

Further, the Court would be required to suppress any statement made by a person confronted by police who reasonably felt that he was not free to terminate the encounter, if *Miranda* warnings were not given, and the statement responded to actions by police that were reasonably likely to elicit an incriminating response. (*Rhode Island v. Innis* (1980) 446 U.S. 291,

301; *People v. Gamache* (2010) 48 Cal.4th 347, 387-388.) Yet, the prosecutor argued at trial that the circumstances here, of being confronted by police and held for investigation, would reasonably elicit a response. (11RT 1904-06.)

The Attorney General offers no reason to give Appellant's silence *less protection* than a statement made by a suspect without *Miranda* warnings. (*See Moore*, 104 F.3d at p. 385 ["Any other holding would create an incentive for arresting officers to delay interrogation in order to create an intervening 'silence' that could be used against the defendants."].) Nor does the Attorney General explain how this view can be squared with the Supreme Court's repeated statements that, in consensual encounters with police, and when temporarily detained, a person has the constitutional right to remain silent, and that her silence is *not* proof of guilt. (*See, e.g., Royer*, 460 U.S. at pp. 497-498 [in consensual encounter, the person "need not answer any question put to him"]; *Berkemer*, 468 U.S. at p. 439 [a "detainee is not obliged to respond"].)

Moreover, the holdings of the majority of state and federal courts, that a defendant has the right to remain silent, at least when confronted by police, and that such silence cannot be penalized lest the Fifth Amendment protection evaporate, are consistent with the history of the privilege and its purpose as stated by the United States Supreme Court:

> It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him.

(*Wilson v. United States* (1893) 149 U.S. 60, 66.) If this is true even after a defendant with counsel has attempted to prepare to testify at trial, it is more true for an uncounseled defendant, detained at a crime scene by police. How can we require such an innocent defendant to declare his innocence immediately to police, when–due to an uncontrollable stutter, or out of common nervousness in the presence of police–he might understandably fear that he will misspeak or use the wrong tone of voice? Indeed, a trained lawyer or distinguished jurist might be *more* likely to ask the type of questions asked by Appellant here–whether he is being detained or arrested, or whether he is the focus of a criminal investigation, or whether he is required to be transported, or to take a particular test; yet, the Attorney General contends these questions would prove his guilt.

In essence, the minority view espoused by the Attorney General offers the citizen no safe harbor from the "cruel trilemma" of self-accusation, perjury or guilt by silence (*see Murphy v. Waterfront Commission* (1964) 378 U.S. 52, 55), because, in the Attorney General's

view, when police confront a person at the scene of a fatal accident, *every action or reaction of the person proves guilt*–a statement, a question about the investigation or his constitutional rights, or silence.

At the trial in this case, the prosecutor argued vigorously that Appellant's failure to ask about the welfare of the occupants of the other vehicle proved his guilt. Yet, an expression of sorrow, regret or concern would certainly be used as proof that Appellant was driving the vehicle–an element of the offense. Moreover, nothing would prevent a prosecutor from arguing that a statement expressing sorrow or sympathy for the occupants was *also* proof of consciousness of guilt, particularly if the detained person phrased his expression inartfully due to nervousness, a speech impediment or because English is his second language. (*See Wilson*, 149 U.S. at p. 66.)[9] Nor does the state guarantee that the police and prosecutor will not use a protestation of innocence as proof of guilt. Had Appellant protested his innocence to police at the outset–"I had the right of way; she came away from the stop sign into the intersection without looking while she was talking on the phone; she didn't give me time to stop"–the state again would have used Appellant's statement to prove he was the driver, and could well

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[9] The prosecutor could have argued, "he said he hoped no one else was hurt, because he knew he was going too fast and he was worried about going to jail."

have argued that Appellant's vigorous protests even before being formally arrested demonstrated his guilt.[10]

Although the Attorney General contends that, until a person is arrested and her *Miranda* rights are recited by police, she is under no *compulsion* to declare her innocence, the state contends that she remains silent under the threat her silence will later be treated as proof of guilt. But this type of threat–speak or be convicted–is not only the type condemned repeatedly by the Supreme Court (*see, e.g.*, *Miranda*, 384 U.S. at p. 462; *Cockrell*, 63 Cal.2d at p. 670.) This also violates the *nemo tenetur* principle at the core of the Fifth Amendment privilege, and which always assured that a person had the right *not* to be required to come forward *before* an accusation. (*See, e.g, United States v. Gecas* (11th Cir. 1997) 120 F.3d 1419, 1437.)

In short, the Attorney General argues, contrary to the holdings of the Supreme Court and the history of the privilege against self-incrimination, that the Fifth Amendment provides no safe harbor for the innocent to remain silent. (*United States v. Nobles* (1975) 422 U.S. 225, 233, quoting *Couch v. United States* (1973) 409 U.S. 322, 327 [Fifth Amendment

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[10] Gertrude's protest of innocence was considered proof of her guilt of murder: "The lady doth protest too much, methinks." (Shakespeare, *Hamlet*, Act III, Scene ii.)

protects a "private inner sanctum of individual feeling and thought"].) According to the Attorney General's argument, contrary to the *Malloy* Court's holding, the Fifth Amendment does not protect "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will," nor does it guarantee that a person will "suffer no penalty . . . for such silence." (*Malloy*, 378 U.S. at p. 8; *see Griffin*, 380 U.S. at pp. 614-615.) The state argues that until police formally arrest a person and recite the *Miranda* warnings, every encounter with the police places a person in a "damned-if-you-do-damned-if-you-don't" position, stuck between the proverbial rock and a hard place. "Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States." (*Ullman v. United States* (1956) 350 U.S. 422, 426.) The Attorney General's arguments must be rejected.

II. UNDER THE HOLDINGS OF *GRIFFIN*, *BANKS* AND *COCKRELL*, THE PROSECUTOR COMMITTED REVERSIBLE CONSTITUTIONAL ERROR BY ARGUING APPELLANT'S SILENCE REGARDING THE OCCUPANTS OF THE OTHER CAR, AND HIS QUERIES AND INVOCATIONS OF HIS FOURTH AMENDMENT RIGHTS PROVED HIS GUILT.

The prosecutor violated Appellant's federal constitutional rights by evidence and argument that Appellant's guilt was proven by his reliance on his constitutional rights, thereby improperly penalizing his assertion of, or

reliance on, those rights. Specifically, the state improperly penalized: (1) Appellant's assertion of his Fourth Amendment rights when he twice asked whether he was being detained or was free to go home; (2) Appellant's assertion of his Fourth Amendment rights when he was in custody in the patrol car and asked whether he had to provide a blood sample, whether he had to go to the station to do so, and whether the police could take the blood sample at the scene; (3) Appellant's assertion of his Fourth Amendment rights when, at the station, he asked whether he had to go to the hospital to take a test and whether he could refuse to take a test; and (4) Appellant's reliance on his right to remain silent when he failed to inquire about the welfare of the occupants of the other vehicle. Additionally, (5) admission of evidence and argument regarding Appellant's responses to police questions about whether he would be willing to be transported to the station and to the hospital, when he was in custody in the patrol car and at the station, violated Appellant's *Miranda* rights.

A. Evidence And Argument That Appellant's Guilt Was Proven By His Silence Regarding The Welfare Of The Other Vehicle's Occupants Unconstitutionally Penalized His Reliance On His Right To Remain Silent.

The Attorney General argues that the Court of Appeal erred in holding that Appellant's Fifth Amendment right to silence was

unconstitutionally penalized by evidence and argument that Appellant's failure to inquire about the occupants of the other vehicle proved his guilt.

The prosecutor asked Officer Price about his interaction with Appellant when he was sitting in Gamino's car. Price stated that Appellant asked if he could walk home. The prosecutor then asked whether Appellant had asked about the condition of the occupants of the Nissan, to which Price replied, "No." (4RT 685.)

The prosecutor questioned Price further about what happened when the police asked Appellant to come to the station. Price testified that Appellant seemed "irritated," and that he asked why the test could not be given at the scene. (4RT 688-689.) After asking about Appellant's responses to the officers questions while Appellant was in the patrol car and at the station regarding taking a blood test, the prosecutor then asked whether, during the entire evening, from the time of the accident at 8:20 pm until 11:30 pm, "did the defendant ever ask you about the condition of the occupants of the Nissan?" Price answered, "No." (4RT 706-707.)

The prosecutor similarly asked Officer Bailey if, "during any of this time" prior to the defendant's formal arrest, did "the defendant ever ask you about the occupants of the other vehicle." An objection was overruled when the prosecutor proffered that the answer would be relevant to "consciousness of guilt." Bailey answered, "No, he did not." At the

prosecutor's request, the answer was repeated. (3RT 424.)

In closing, the prosecutor stated that, although the jury could not consider Appellant's failure to testify,

> what *you should and can absolutely consider* is how he acted the night of the collision. And there's so much evidence about this. And all of it points to one thing; his *consciousness of his own guilt.*

(RT 1904 [emphasis added].) The prosecutor continued:

> The next one I think is particularly offensive, he never, ever asked, hey how are the people in the other car doing? Not once. All right. Now, you step on somebody's toe or you bump into someone accidentally, what is the first thing out of your mouth? Whoops. I'm sorry. I'm not saying that he has to say sorry as an expression of guilt or as some kind of confession, but simply as an expression of his regret. Look, I'm sorry those people were hurt.
>
> Not once. Do you know how many officers that he had contact with that evening? Not a single one said that, hey, the defendant asked me how those people were doing. Why is that? *Because he had done a very, very, very bad thing, and he was scared.*
>
> He was scared or – either that or *too drunk to care.* But he was scared. And *he was obsessed with only one thing, that is, saving his own skin. That's why he said, hey, can I just go home.*
>
> Look at the magnitude of that collision, and ask yourselves, what reasonable person would say, *hey, can I just go home now?*
>
> And that – you know, I'm sorry, Mr. Tom, if we *irritated you* with the request for a blood draw at the scene. I'm sorry. But what are you so afraid? [sic] *Why are you so afraid to give blood?* We now know why, because it would

have shown that he was at [.]10 at the scene.

(RT 1905-06 [emphasis added].)

In argument, the prosecutor explicitly asked the jury to base its verdict of guilt upon Appellant's silence regarding the welfare of the Nissan occupants during the evening. Yet, the entirety of this period was *after* the "accusatory stage" of the investigation had been reached, after Appellant was told he could not leave and was thus "'deprived of his freedom of action in any significant way.'" (*In re Banks* (1971) 4 Cal.3d 337, 325, quoting *Miranda*, 384 U.S. at p. 444.)[11] The Court's holding in *Banks* reaches the entire period of time covered by the prosecutor's questions herein.

Indeed, almost the entirety of this period was after Appellant's *de facto* arrest–when Appellant was told he could not leave while he was sitting in Gamino's car (Appellant's second request to leave the scene)–as found by the trial court. (*See* Typed Opn. at p. 15, fn. 9; 1RT 14-16; CT 511, 514.) The Attorney General agreed with this finding on direct appeal. (Respondent's Appeal Brief [hereafter: "RAB"] 54-55.) The Attorney General has waived or forfeited, or is estopped from asserting, any claim

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[11] Even if Appellant was not formally arrested, Appellant was at least detained when Price told Appellant he could not leave. (*See, e.g., Brendlin v. California* (2007) 551 U.S. 249, 256-257.)

that Appellant was not under *de facto* arrest at the time Price told Appellant he could not go home. (*See* Rule of Court 8.500(c)(1); *People v. Castillo* (2010) 49 Cal.4th 145, 155 [judicial estoppel prevents a party from gaining an advantage by taking incompatible positions].) Moreover, much of the period covered by the prosecutor's questions came after Appellant was moved to the rear compartment of the locked patrol car–the point at which the People "agree[d]" Appellant was under *de facto* arrest in the trial court (1RT 15; 4RT 728-729); for similar reasons, the Attorney General has waived or forfeited or is estopped from asserting that Appellant was not under *de facto* arrest at this time. Finally, the questions extended to a period after 10:30 pm when Appellant had explicitly invoked his Sixth Amendment right to counsel.

The state contends that, even if the Court holds that pre-arrest silence may not be used against an accused, it should not apply here because "Appellant was largely cooperative," voluntarily spoke to Officer Price, asking if he could walk home, voluntarily agreed to go to the station for a blood draw, after asking whether the test could be done at the scene, and expressed his desire not to go to the hospital for a blood test. (ROB 39.) While Appellant agrees that he was largely cooperative with the police, the Attorney General's argument is essentially the opposite of the trial prosecutor's argument. At trial, the prosecutor argued that Appellant was

not cooperative with the police investigation, but rather was seeking to avoid the police by going home, and to avoid a possibly incriminating blood test, because "he was obsessed with only one thing, that is, saving his own skin." (11RT 1905-06.) Suffice it to say, if the trial prosecutor, instead of portraying Appellant as "irritated" by police requests, reluctant to accompany the police, and "afraid" to comply with police requests, intent on "delay" of all contact with law enforcement (11RT 1904-06), had portrayed Appellant's interactions as *voluntary* and *cooperative*, as the Attorney General does now, Appellant would have been quickly acquitted.

Moreover, the Attorney General's assertion, that "[t]he first suggestion of any invocation by appellant of his rights prior to arrest occurred after he went to the bathroom in the station" (ROB 40), is utterly meritless and flatly contradicted by the record. Indeed, except for asking for medical assistance, *every single thing that Tom stated to the officers that evening was an assertion of, or inquiry regarding, his rights.* The repeated questions about whether he was free to leave or go home were assertions of his Fourth Amendment right to be free of detention without cause. (*See, e.g., Terry v. Ohio* (1968) 392 U.S. 1, 8-9.) The repeated questions about whether he had to be transported to the station or to the hospital were also assertions of his Fourth Amendment right not to be transported if he was not under arrest. (*See, e.g., Dunaway v. New York* (1979) 442 U.S. 200,

206-216.) The repeated inquiries about taking a blood test were also assertions of his Fourth Amendment and Fourteenth Amendment, and statutory rights not to be forced to give a blood test without probable cause and if not lawfully arrested. (*See, e.g., Schmerber v. California* (1966) 384 U.S. 757; Veh. Code, § 23612, subd. (a)(1)(A).) After visiting the bathroom, he later explicitly invoked his right to counsel. Appellant's only statements that did *not* assert a right were his requests for ice and aspirin and to use the bathroom. Surely, requests for medical assistance do not waive the right to remain silent. Nor can a person be deemed to waive the right to remain silent by speaking only to assert his Fourth Amendment rights. (*Simmons v. United States* (1968) 390 U.S. 377, 393-394 ["we find it intolerable that one constitutional right should have to be surrendered in order to assert another"].)

Under this Court's holding in *Banks*, and as held by the majority of federal and state courts, the evidence and argument that Appellant's silence about the occupants of the other vehicle violated his right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, *and to suffer no penalty . . . for such silence*." (*Malloy v. Hogan* (1964) 378 U.S. 1, 8 [emphasis added]; *see Miranda*, 384 U.S. at p. 460; *see also Griffin*, 380 U.S. at pp. 614-615; *Banks*, 4 Cal.3d at pp. 351-352; *Cockrell*, 63 Cal.2d at pp. 669-670.)

B. Evidence And Argument That Appellant's Guilt Was Proven By His Requests To Go Home, By His Inquiries Whether He Was Required To Be Transported To The Police Station And The Hospital, And Whether He Was Required To Take A Blood Test, Improperly Penalized Appellant For His Assertion Of His Fourth Amendment Rights And Also Violated *Miranda*.

Additionally, the state violated Appellant's Fourth and Fourteenth Amendment rights by repeatedly penalizing his assertion and inquiries to the police regarding his Fourth Amendment rights. Because these statements and inquiries were in response to police questioning while Appellant was in custody, moreover, each was also admitted in violation of *Miranda*.

1. The Improper Penalty Placed Upon Appellant's Assertion Of His Fourth Amendment Rights.

As described above, Appellant repeatedly asserted his Fourth Amendment rights. First, while seated in Gamino's car, he asked Officer Price if he was being detained or was free to leave to go home. (4RT 684-686.) Second, after he was placed in the locked patrol car, the police asked Appellant if he would go to the police station for a blood test and a statement. Appellant asked *again* if he could go home, asked if the test could be given at the scene, and expressed "irritation" at the request to go to the station. (4RT 688-689, 728-729.) Third, after the phlebotomist told the police that he could perform a blood test at the station, the police asked

Appellant if he would go to the hospital for a test. Appellant again responded with "irritation" and "asked if he could refuse to provide a blood sample." (4RT 693-694.)

Yet, Appellant had a right to leave if he was not being detained. (*See, e.g., Royer*, 460 U.S. at pp. 497-498.) Further, the police repeatedly made clear that Appellant had not been formally arrested and insisted that he was *not* under arrest. Yet, a person who is not under arrest has a Fourth Amendment right not to be transported to the police station in order to give a statement. (*See, e.g., Dunaway*, 442 U.S. at pp. 206-216.) Similarly, the Fourth Amendment prevents taking of a blood sample without probable cause and without a lawful arrest for driving under the influence. (*See, e.g., United States v. Dionisio* (1973) 410 U.S. 1, 8; *see also* Veh. Code, § 23612, subd. (a)(1)(A).)

Given that police had not formally arrested Appellant, but had indicated that he was not under arrest, Appellant's questions about whether he had the right to refuse transportation to the station and to the hospital, and about his rights regarding the blood test were again protected under the Fourth Amendment. Again, while Appellant did not cite the Fourth Amendment by name, his questions were clear invocations of his Fourth Amendment rights. (*See Quinn*, 349 U.S. at p. 162 [invocation of constitutional right "does not require any special combination of words;"

person "need not have the skill of a lawyer to invoke" constitutional rights].) The state could not *penalize* Appellant's assertion of his Fourth Amendment right to be free from unreasonable seizures by using it to prove consciousness of guilt, otherwise his Fourth Amendment rights "would be vitiated." (*Tompkins*, 59 Cal.2d at p. 68; *see, e.g., Camara v. Municipal Court* (1967) 387 U.S. 523; *Wood*, 103 Cal.App.4th at pp. 808-809; *Prescott*, 581 F.2d at p. 1351; *see also People v. Zavala* (1966) 239 Cal.App.2d 732, 740-741 [error to instruct that refusal to take test demonstrated consciousness of guilt where statute gave right to refuse test].)

Elicitation of evidence of Appellant's queries regarding his Fourth Amendment rights, and the prosecutor's explicit argument that these queries proved Appellant's guilt, thus impermissibly imposed a penalty for assertion of his constitutional rights.

2. *Admission Of Appellant's Responses To The Officer's Questions Violated His Miranda Rights.*

Second, each of Appellant's responses to the officers' questions above was admitted, even though he had not been advised of his *Miranda* rights and was clearly in custody. This was a plain *Miranda* violation.

Even if Appellant was not in custody for *Miranda* purposes when he was told he could not leave the scene while he was seated in Gamino's car,

he was certainly in custody when he was *moved to, and detained in*, the locked police car. (4RT 728-729.) He was never told that he could leave the scene. Indeed, when the police asked him to go to the station for a statement and a blood test, Appellant asked again if he could just go home, and again was refused permission to leave. (4RT 729.) Certainly, his freedom of movement was substantially curtailed at that point, in a manner that was objectively more serious and lengthier than a brief roadside traffic stop. (*See, e.g., Berkemer v. McCarty* (1984) 468 U.S. 420, 436-440 [custody for *Miranda* purposes is based upon whether a reasonable person would believe he was free to leave and terminate the encounter, but routine traffic stop where detention is "temporary and brief" is not *Miranda* custody].) The trial prosecutor agreed Appellant was under *de facto* arrest at this point. (1RT 15). The Court of Appeal found these circumstances "increasingly coercive." (Typed Opn. at p. 17.) Indeed, the prosecutor argued at trial: "Look at the magnitude of that collision, and ask yourselves, what reasonable person would say, hey, can I just go home now?" (11RT 1905-06.) Given the state's own argument that a reasonable person would not feel free to leave and given the objective circumstances, it cannot be seriously disputed that Appellant was under *de facto* arrest, when placed in the locked patrol car.

Additionally, because Appellant was in custody in the police vehicle,

the police could not expressly *question* him without advising him of his *Miranda* rights. (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301; *People v. Gamache* (2010) 48 Cal.4th 347, 387-388.) Yet, the police did not advise Appellant of his *Miranda* rights before asking whether he would agree to a give a blood test, go to the station for a test,[12] or go to the hospital for a test. (4RT 693-695, 728-729; *see* ROB 43.)[13] Thus, Appellant's responses to the police questions were plainly admitted in violation of his *Miranda* rights, a separate federal constitutional error.

III. GIVEN THE WEAKNESS OF THE STATE'S ADMISSIBLE EVIDENCE, AND THE MULTIPLE INSTANCES OF MISCONDUCT, THE ERROR CANNOT BE HARMLESS BEYOND A REASONABLE DOUBT.

Finally, the state contends that the constitutional error in this case was harmless beyond a reasonable doubt. The Attorney General's argument is remarkable in a case in which the trial prosecutor emphasized the improper evidence in argument to obtain a conviction, and where the admissible evidence objectively favored acquittal. Plainly, the constitutional errors were not harmless beyond a reasonable doubt.

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[12] The implied consent law (Veh. Code, § 23612, subd. (a)(1)(A)) does not apply because the police had not arrested Appellant for an alcohol related offense.

[13] Whether Price told Appellant he had to go to the station for a blood test, or asked him to do so, as the Attorney General argues (4RT 726-729; ROB 43), it was at least the functional equivalent of interrogation. (*See Innis*, 446 U.S. at p. 301; *Gamache*, 48 Cal.4th at pp. 387-388.)

Although it would be impossible not to feel immense sympathy for Lorraine Wong, whose child was killed in this tragic collision, a dispassionate view of the record favored acquittal. The evidence of Appellant's guilt was at best in "equipoise," as the Court of Appeal found. (Typed Opn. at p. 27.) While Appellant had consumed an amount of alcohol that was below the legal limit, and was exceeding the posted speed limit, the expert testimony regarding speed was hotly disputed, and the police conceded that, despite a posted speed limit of 35 mph, speeds up to 50 mph were not considered so unsafe as to warrant a speeding ticket on this major thoroughfare. Further, as the Attorney General argued below, "the testimony of Peter Gamino supported an inference that [Appellant] was traveling at about [the posted speed limit of 35 miles-per-hour]." (Habeas Opposition at p. 42, citing 5RT 940-941, 974.)

By contrast, Wong was stopped at a stop sign on a small street and was required by law to yield to Appellant's vehicle, which had the right-of-way on the four-lane thoroughfare (Veh. Code, § 21802a); yet, Wong entered the intersection while concluding a cell-phone conversation *without seeing Appellant's vehicle*. Wong had no explanation for how she failed to see Appellant's vehicle. (3RT 376-380, 491-500.) Her testimony that she looked both ways before entering the intersection, without seeing Appellant, was conclusively disproven by testimony that Appellant's

vehicle was visible to her for at least 17 seconds before the collision, by Wong's prior statement that she entered the intersection looking away from Appellant's vehicle, and by Wong's concession that she was ending a cell-phone call and steering with her one free hand as she entered the intersection. (3RT 527-531, 4RT 638-640, 5RT 880-881.) All experts agreed that cell-phone use impairs driving ability even more than being intoxicated. (8RT 1543-48, 1652; *see People v. Nelson* (2011) 200 Cal.App.4th 1083, 1101-1102 [describing safety concerns that caused Legislature to subsequently pass Veh. Code, § 23123 prohibiting cell-phone use while driving].)

The testimony regarding speed, upon which the Attorney General now relies, was hotly contested. Moreover, the prosecution experts' testimony was undermined when, after trial, it was discovered that the accelerator pedal of Appellant's car was bent and twisted to the right which indicated that Appellant had his foot on the accelerator because Wong did not leave him enough time to brake, or because he mistakenly stepped on the accelerator instead of the brake; Appellant's post-impact acceleration wholly discredited the state's expert calculation of speed which assumed no such post-impact driver input, and supported the defense expert testimony. (5CT 1489-90.) The state did not contest Kauderer's opinion regarding the bent accelerator pedal in the trial court.

Rather, the convictions were largely due to the numerous and substantial constitutional errors, which not only prevented substantial evidence of innocence from being heard, but prejudicially urged the jury to convict based upon impermissible arguments: the argument that Appellant's silence and explicit invocations and inquiries about his constitutional rights were proof he was guilty; the false argument that there was "absolutely no evidence that the defendant had his headlights on" (RT 1901-02) when the prosecutor well-knew from multiple sources that the headlights were on; and the improper pleas to jurors to base a conviction on sympathy for the suffering of the mother of the child killed in this tragic collision, even if one of the elements of the offense was not proven.[14]

As the Court of Appeal found, "[t]he evidence against defendant in this case . . . was essentially in equipoise, and the prosecutor placed great emphasis upon the erroneously admitted evidence in closing argument." (Typed Opn. at p. 27.) Indeed, the evidence objectively favored acquittal. Thus, the state cannot meet its heavy burden of demonstrating that the

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[14] Given the reversal on the improper arguments regarding silence, the Court of Appeal declined to resolve other claims of prosecutorial misconduct. (Typed Opn. at pp. 29, 32.) They are addressed here to demonstrate that, at minimum, the cumulative prejudicial effect of multiple instances of misconduct requires reversal (*People v. Hill* (1998) 17 Cal.4th 800, 844-847), and that the convictions were not based upon evidence of guilt.

constitutional errors were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 23-24; *see People v. Neal* (2003) 31 Cal.4th 63, 86 [state has burden of showing that the verdict "was surely unattributable to the error"].)

In fact, the Supreme Court's decision in *Chapman* is controlling. In *Chapman*, the prosecutor made improper comments on the defendant's silence. The Court noted that the prosecutors arguments, like those in this case, argued that the defendants, "by their silence. . . had served as irrefutable witnesses against themselves." (*Id.* at p. 25.) Although the Court noted that the state had "presented a reasonably strong circumstantial web of evidence against petitioners," "it was also a case in which, absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts." (*Id.* at pp. 25-26 [internal quotation omitted].) The Court held that the state had not demonstrated harmlessness beyond a reasonable doubt; "the machine-gun repetition of a denial of constitutional rights, designed and calculated to make petitioners' version of the evidence worthless" cannot be considered harmless. (*Id.* at p. 26.)

The state's argument for harmlessness is even less convincing in this case, where the evidence of guilt was weak and objectively favored acquittal. Because proper argument from admissible evidence did not prove

guilt, the prosecutor resorted to multiple improper arguments from inadmissible evidence. The prosecutor repeatedly used Appellant's silence about the occupants of the other vehicle, not only to suggest "consciousness of guilt," but also to allege one critical element the evidence could not prove–that Appellant had a "conscious indifference or 'I don't care' attitude" regarding the consequences of his actions to other people. (5CT 1401 [defining gross negligence].) The prosecutor argued that Appellant's silence toward the Nissan occupants was "particularly offensive," demonstrating that he did not "regret" his actions, that he showed no compassion when he sought to leave the scene, but instead was "obsessed" with "saving his own skin." (11RT 1905-06.) This argument not only punished Appellant's silence but was the type of impermissible bad character argument that this Court has elsewhere condemned as highly prejudicial. (*See People v. Alverson* (1964) 60 Cal.2d 803, 810 ["the guilt of a defendant of a particularly charged offense cannot be proved by evidence of general bad character. . ."]; Evid. Code, § 1101.) In short, the prosecutor argued that Appellant's silence proved (in a way that the admissible evidence could not) that Appellant was the sort of heartless monster who did not "care" about a dead child or her mother and demonstrated "indifference" to how his actions affected others, thus improperly filling an evidentiary gap in her case on the critical element of

gross negligence.

The prosecutor coupled this highly prejudicial argument about Appellant's silence with prejudicial, unconstitutional arguments suggesting that there was "absolutely no evidence that the defendant had his headlights on" (RT 1901-02), when she knew that numerous sources had confirmed that the headlights were indeed on. (3CT 849-850; 4RT 601-602; 5RT 924-925; Habeas Exhibits, B, C, Exhibit D; Exhibit E, Photo CK-08.) Again, the prosecutor used improper argument to fill a critical evidentiary gap in the state's case–the fact that Wong entered the intersection without seeing Appellant's vehicle, even though his vehicle was visible for at least 17 seconds–a clear violation of Appellant's right-of-way. (*See, e.g., Miller v. Pate* (1966) 386 U.S. 1, 6-7 [argument prosecutor knew to be false based upon unadmitted evidence violated federal constitution]; *People v. Castain* (1981) 122 Cal.App.3d 138, 146 ["obvious misconduct"].) Finally, the prosecutor committed additional misconduct with her transparent appeal to the jury's natural sympathy for Wong, arguing that the jury should convict Appellant even if the state had not proven he "was a substantial factor in this collision" (11RT 1906), because Wong had lost her child and thus had paid the "ultimate price." (*See, e.g., People v. Hill* (1998) 17 Cal.4th 800, 829-830 [federal constitutional misconduct for "prosecutor . . . to absolve the prosecution from its prima facie obligation to overcome reasonable

doubt on all elements"]; *People v. Fields* (1983) 35 Cal.3d 329, 362 [misconduct to urge jury to convict out of sympathy for victim].) It is difficult to conceive of any arguments that would be more prejudicial than these.

These palpably prejudicial arguments cannot be swept under the rug of harmless error, as the state seeks to do here. "[C]losing argument matters; statements from the prosecutor matter a great deal." (*United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323-24.) By emphasizing the improper testimony in closing argument, "the prosecutor herself destroyed any chance that the jury forgot about the error or viewed it as an unimportant, isolated incident." (*United States v. Combs* (9th Cir. 2004) 379 F.3d 564, 574.)

The state's reliance on *United States v. Lopez* (9th Cir. 2007) 500 F.3d 840, 845-846 (ROB 47-50) is wholly misplaced. That case involved a *Doyle* error because the defendant *testified* and was *impeached* by his prior silence, both before and after *Miranda* warnings. Impeachment with the pre-*Miranda* silence was proper under *Jenkins v. Anderson* (1980) 447 U.S. 231, 238 because the defendant had "cast aside his cloak of silence" by testifying, even if admission of the post-*Miranda* silence was *Doyle* error. The Court found the evidence of guilt overwhelming, the pre-*Miranda* silence highly probative, and the additional evidence of post-*Miranda*

silence not prejudicial because it was not emphasized to the jury. (*Lopez*, 500 F.3d at pp. 845-846.) By contrast, the Ninth Circuit reached the opposition conclusion in a case in which a defendant was impeached with both his pre- and post-*Miranda* silence, where the evidence was "far from overwhelming." (*United States v. Negrete-Gonzales* (9th Cir. 1992) 966 F.2d 1277, 1280-81.)

Because *Lopez* concerned impeachment, it is inapposite here, where Appellant did not cast aside his cloak of silence, and he had the constitutional right to remain silent in a consensual encounter with police or during any temporary detention. (*See Royer*, 460 U.S. at pp. 497-498; *Berkemer*, 468 U.S. at p. 439.) Additionally, because the defendant testified in *Lopez*, the Court found his failure to initially tell anyone that he came to the border under duress was highly relevant. Yet, as the state *now* concedes, Appellant's pre-*Miranda* silence had "weak" probative value, and the inference of consciousness of guilt from silence, was "tangential" and "marginal[]." (ROB 50, 52.)

Further, contrary to the Attorney General's argument that the improper comments on post-arrest silence were harmless because they were cumulative to properly admitted silence before arrest (ROB 47-50), there was no period of time in this case, when Appellant's silence could be properly admitted against him. The prosecutor only asked about

Appellant's contacts with *police*, at a time when the prosecutor argued it was unreasonable to believe Appellant was free to leave. The entire encounter fits within the "accusatory phase," as defined by this Court in *Banks*. (*In re Banks* (1971) 4 Cal.3d 337, 325.)

Moreover, the Attorney General now argues that the evidence was essentially irrelevant. (ROB 50, 52.) Thus, even if the constitution did not prohibit its admission, the Evidence Code did because of its "significant potential for prejudice." (*United States v. Hale* (1975) 422 U.S. 171, 180-181; *see* Evid. Code, §§ 352, 1101; *see also* Evid. Code, § 913 [prohibiting comment upon exercise of a privilege]; ROB 37, fn. 10 [conceding that silence is excludable under Evid. Code, § 352].) Any post-arrest silence cannot be deemed harmless on the basis that it was cumulative to allegedly admissible evidence of pre-arrest silence, where the pre-arrest silence was itself admitted in violation of the Constitution[15] and the Evidence Code.

Lopez is further distinguishable, because the prosecutor's arguments in that case did not focus on the post-arrest period. (*Lopez*, 500 F.3d at pp.

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[15] Even if the "accusatory stage" was not reached when police told Appellant he could not leave, most courts extend *Griffin*'s penalty analysis to pre-custody silence. (*See Coppola v. Powell* (1st Cir. 1989) 878 F.2d 1562, 1567-68; *Combs v. Coyle* (6th Cir. 2000) 205 F.3d 269, 280-283; *United States v. Burson* (10th Cir. 1991) 952 F.2d 1196, 1201.)

845-846.) Here, by contrast, the prosecutor repeatedly elicited evidence about Appellant's failure to inquire about the occupants of the other vehicle over the *entire* evening (3RT 423-424, 4RT 706-707), and argued that it was "particularly offensive" that Appellant "never, ever asked" about the occupants of the other car; "[n]ot once. Do you know how many officers that he had contact with that evening? Not a single one said that, hey, the defendant asked me how those people were doing." (11RT 1905-06.) The clear impact of the prosecutor's prejudicial argument was not remotely limited to the initial hour after the collision.

Finally, in contrast to *Lopez,* the evidence of Appellant's guilt here was "far from overwhelming" as it was in *Negrete-Gonzales*. Thus, *Negrete-Gonzalez* is more on point; the error was not harmless and the convictions must be reversed. (*Negrete-Gonzales*, 966 F.2d at pp. 1280-81; *see also United States v. Baker* (9th Cir.1993) 999 F.2d 412, 416.)

Moreover, the state is *particularly* wrong to argue that the evidence of pre-arrest silence is weak compared to the *other* "specific examples identified by the prosecutor as showing consciousness of guilt, that preceded the reference to his failure to inquire" about the other car's occupants. (ROB 50, fn.12, citing 11RT 1904-06.) These "specific examples" of other evidence allegedly demonstrating consciousness of guilt are the prosecutor's *other instances of misconduct*, where the prosecutor

improperly penalized Appellant's constitutionally protected invocations and inquiries regarding his Fourth Amendment rights, in violation of his federal constitutional rights, as described above. (11RT 1904-06.)

Finally, although the Attorney General now argues that the evidence was so lacking in probative value that it was not prejudicial, the Attorney General *previously* argued that the fact that Appellant "managed to suppress any expression of sympathy for the persons who died and were seriously injured in the crash by not asking about their condition" demonstrated "Appellant's guilty state of mind," and the prosecutor properly attributed this to Appellant's "knowledge that he had done a very bad thing and was scared or was too drunk to care." (RAB 61.) Similarly, the trial prosecutor stressed the improper inference to the jury as a fact that the jury "should and can absolutely consider." (11RT 1104-06.) Moreover, despite the Attorney General's new position that the evidence was not particularly prejudicial, the U.S. Supreme Court has emphatically disagreed. (*Hale*, 422 U.S. at pp. 180-181.)

Given the multiple instances of misconduct,[16] including multiple improper arguments penalizing Appellant's silence and assertion of his constitutional rights, false arguments to the jury, improper pleas to the jury

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[16] (*See Hill*, 17 Cal.4th at pp. 844-847 [cumulative prejudicial effect of multiple instances of misconduct and other errors requires reversal].)

to base their verdict on sympathy for the mother of the victim, even if an element of the offense was unproven, and the prosecutor's misleading argument to the trial judge about the visibility of the accelerator pedal which prevented the court from granting a new trial motion,[17] the state cannot meet its heavy burden of proving that these serious constitutional errors were harmless beyond a reasonable doubt.

CONCLUSION

This case is controlled by this Court's decision in *In re Banks* which should be reaffirmed. The convictions herein were largely due to the multiple federal constitutional errors asserting that Appellant's silence and inquiries regarding, and invocations of, his constitutional rights proved his guilt. Contrary to the Constitution's history and purpose, the prosecutor argued essentially that only the guilty would seek the protection of the fundamental rights inscribed therein. Appellant's convictions must be

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[17] The court credited the false argument that the accelerator pedal was "visible by the most casual of glances into the car." (5CT 1496; *see* 4/24/09RT 2010.) Yet, it was wholly hidden by the air bag. (Habeas Exhibit E, ¶4; Habeas Exhibit F, ¶4; *see* Habeas Exhibit E, Photos CK-02, CK-03, CK-04; *see* Bus. & Prof. Code, § 6068, subd. (d) [Attorneys may not "mislead the judge . . . by . . . false statement of fact . . ."].)

reversed, lest these constitutional rights "be vitiated by [their] mere assertion." (*Tompkins*, 59 Cal.2d at p. 68.)

Dated: November 15, 2012

Respectfully submitted,

MARC J. ZILVERSMIT
Attorney for Appellant
RICHARD TOM

CERTIFICATE OF COMPLIANCE

I, Marc J. Zilversmit, hereby certify that the attached Appellant's Answer to Petition for Review is proportionately spaced, has a typeface of 13 points, and contains 17,217 words.

Dated: November 15, 2012

Marc J. Zilversmit

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

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

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

APPELLANT'S ANSWER BRIEF

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

ATTN Jeffrey M. Laurence, Esq.*
Attorney General's Office
455 Golden Gate Avenue, Suite 11000
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Clerk of the Superior Court
County of San Mateo
400 County Center
Redwood City, CA 94063

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

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

Richard Tom
(Appellant)

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

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

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

Executed on November 15, 2012 at San Francisco, California.

Marc J. Zilversmit