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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **RICHARD TOM,** **Defendant and Appellant.**	Case No. S202107
In re **RICHARD TOM,** **On Habeas Corpus.**	

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

REPLY BRIEF

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ARGUMENT

I. COMMENT ON APPELLANT'S PRE-*MIRANDA* SILENCE DID NOT VIOLATE HIS FIFTH AMENDMENT RIGHT

Respondent's opening brief laid out the foundational requirements for protection under the Fifth Amendment, of the United States Constitution, as interpreted by the United States Supreme Court. We explained that the core function of the Fifth Amendment is to protect individuals from governmental compulsion employed to extract testimonial statements from a person for use in a criminal case. (See, e.g., *Colorado v. Connelly* (1986) 479 U.S. 157, 170 ["The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion"]; *Oregon v. Elstad* (1985) 470 U.S. 298, 306-307 ["The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony"]; OBM at pp. 28-30.)

The opening brief also detailed how *Miranda v. Arizona* (1966) 384 U.S. 436 extended the reach of the Fifth Amendment by substituting custodial interrogation as a constitutional surrogate for actual compulsion. After *Miranda*, defendants subject to custodial interrogation must be informed of and waive their right to silence and to counsel before they can be questioned and their answers admitted at trial, regardless of whether the answers are actually compelled or involuntary. (*Id.* at pp. 476-477.) *Miranda*, however, requires both custody and interrogation before the Fifth Amendment's protections apply. Accordingly, in the absence of either compulsion or custodial interrogation, a defendant's postarrest, pre-*Miranda* silence is not protected by the Fifth Amendment.[1]

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[1] On January 11, 2013, the United States Supreme Court granted the petition for writ of certiorari in *Salinas v. Texas* (12-246) to address this precise issue by the end of the current term. (*Salinas v. Texas* (Jan. 11, (continued...)

Appellant counters that *Griffin v. California* (1965) 380 U.S. 609 necessarily precludes substantive use of a defendant's silence. He also asserts this Court already "settled the issue more than a half-century ago" in *People v. Cockrell* (1965) 63 Cal.2d 659 and *In re Banks* (1971) 4 Cal.3d 337. (ABM at pp. 5, 25-31.) Appellant further contends that using his prearrest silence against him penalized his assertion of his Fourth Amendment rights. (ABM at p. 61.) Appellant's claims are unavailing. The Supreme Court has not extended *Griffin* beyond the trial context. Nor do *Cockrell* or *Banks* resolve the issue here regarding the admission of noncustodial pre-*Miranda* silence. Finally, comment on appellant's pre-*Miranda* silence did not conflict with any Fourth Amendment right.

A. The Supreme Court Has Not Extended the Reach of *Griffin* Beyond the Trial Context

Appellant contends first that *Griffin* precludes the use of prearrest or postarrest silence. He points out that "in *Griffin*, the Supreme Court held that a prosecutor may not impose a 'penalty . . . for exercising a constitutional privilege' by arguing that [the defendant's] failure to testify proves his guilt." (ABM at p. 36, quoting *Griffin*, *supra*, 380 U.S. at p. 614.) Appellant's focus on the "penalty" language, however, ignores the predicate requirement that the defendant must be exercising a constitutional privilege. Indeed, appellant's argument fails to provide any meaningful analysis of the *Griffin* decision. A review of the *Griffin*, and the constitutional foundation identified by the Court as the basis for that

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2013, No. 12-246) ___ S.Ct. ___ [2013 WL 135534].) The petition presented the following question: "Whether or under what circumstances the Fifth Amendment's Self-Incrimination Clause protects a defendant's refusal to answer law enforcement questioning before he has been arrested or read his *Miranda* rights."

decision, demonstrates that its rule pertains only to a defendant's silence at trial.

As detailed in our opening brief, the "constitutional privilege" ordinarily safeguarded by the Fifth Amendment is the protection against *compelled* testimony. *Griffin*, however, did not involve compulsion in the traditional sense of being forced to testify under oath or face contempt charges, as was the case, for example, in *Murphy v. Waterfront Comm'n* (1964) 378 U.S. 52, 55 [noting "the cruel trilemma of self-accusation, perjury or contempt"].) Rather, *Griffin* presented a challenge to California's rule permitting comment on a defendant's decision not to testify. In finding a Fifth Amendment violation, *Griffin* identified the source of constitutional protection as arising from a particular historical role of the Fifth Amendment, which was applicable solely to silence at trial.

Griffin began its analysis by noting that a federal statute had long barred comment on a defendant's failure to testify in federal courts. (380 U.S. at p. 612, citing 18 U.S.C. § 3481.) Recognizing that the federal statute was inapplicable to a state proceeding, *Griffin* held that the Fifth Amendment provided an equivalent protection at state trials, and identified a single constitutional basis for this protection. After quoting *Wilson v. United States* (1893) 149 U.S. 60, which explained the reason for the federal statutory rule against comment on the failure to testify, the Court observed, "If the words 'Fifth Amendment' are substituted for 'act' and for 'statute' the spirit of the Self-Incrimination Clause is reflected." (*Id.* at pp. 613-614.) Accordingly, when the Court articulated the constitutional rule in *Griffin*, it did so in a manner rendering it coextensive with the federal statute barring such comment. The federal statute applies solely to comment on the decision not to testify at trial and has no application outside of trial.

Although the constitutional basis for equating the Fifth Amendment with the federal statute was not made explicit in *Griffin*, the historical context for the enactment of section 3481 provides the necessary guidance. At common law, a defendant was precluded both from being compelled to testify and from testifying in his own defense. (*Wilson v. United States* (1893) 149 U.S. 60, 65-66; see generally *Ferguson v. Georgia* (1961) 365 U.S. 570, 572-583 [discussing history of bar against defendant testifying due to status as an interested party].) "Disqualification for interest was thus extensive in the common law when this Nation was formed." (*Ferguson v. Georgia*, *supra*, 365 U.S. at p. 574.) The bar against a defendant testifying remained firm until 1864, when Maine passed the first general competency statute for criminal defendants, and other states soon followed. (*Id.* at p. 577.) In 1878, Congress enacted the federal competency statute, 18 United States Code section 3481, (*id.* at p. 574), the same statue involved in *Griffin*.

As explained by the Supreme Court in *Ferguson*, the historical reluctance to granting competency to criminal defendants was largely attributable to the widespread view

> that such a grant threatened erosion of the privilege against self-incrimination and the presumption of innocence. "[I]f we were to hold that a prisoner offering to make a statement must be sworn in the cause as a witness, it would be difficult to protect his constitutional rights in spite of every caution, and would often lay innocent parties under unjust suspicion where they were honestly silent, and embarrassed and overwhelmed by the shame of a false accusation. . . . [It would result in] . . . the degradation of our criminal jurisprudence by converting it into an inquisitory system, from which we have thus far been happily delivered." [Citation.]

(365 U.S. at pp. 578-579.)

This precise concern—the erosion of the privilege against compelled self-incrimination as a consequence of the jury drawing an inference of

guilt from the failure to take the stand—animated the protections exemplified by 18 United States Code section 3481. The high court observed, "This controversy left its mark on the laws of many jurisdictions which enacted competency. The majority of the competency statutes of the States forbid comment by the prosecution on the failure of an accused to testify, and provide that no presumption of guilt should arise from his failure to take the stand. The early cases particularly emphasized the importance of such limitations." (*Ferguson v. Georgia*, *supra*, 365 U.S. at p. 579.)

Staples v. State (Tenn. 1890) 14 S.W. 603, one of these "early cases" cited in *Ferguson*, best articulates this point:

> The act further provides "that the failure of the . . . defendant to make such request, and to testify in his own behalf, shall not create any presumption against him." This provision is in accord with the bill of rights, wherein it is provided that in all criminal prosecutions the defendant "shall not be compelled to give evidence against himself." No inferences of guilt can be drawn from the failure of a defendant to testify for himself. Were it otherwise, a defendant on trial might be put in the awful situation of being required to commit perjury to avoid the consequence of his failure to avail himself of the privilege extended him by the statute. The statute might thus become an ingenious machine to compel a conscientious defendant to testify against himself.

(*Id.* at p. 603.)

In sum, courts recognized that granting a defendant competency to testify at trial could ultimately become an ingenious form of *compulsion* under the Fifth Amendment *forcing* a defendant to testify—due to the potential for comment on the failure to testify and concomitant inference of guilt. That was the animating force underlying the prohibition against such comment and inference contained in the 1878 federal statute. More importantly, that potential for compulsion based on negative commentary was the precise reason *Griffin* found the federal statute recapitulated the

Fifth Amendment's protection and was therefore applicable to the states under the Fourteenth Amendment.

The express legal basis identified for the constitutional rule in *Griffin* was thus cabined to the trial context. The Fifth Amendment applied because "comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55, which the Fifth Amendment outlaws." (*Griffin*, *supra*, 380 U.S. at p. 614.) In other words, the principle undergirding the constitutional rule in *Griffin* was the same as that undergirding the federal statutory bar—that comment on silence at trial was one of the evils of the inquisitorial system that the Fifth Amendment was intended to eradicate. (*Id.* at pp. 612-614.) Indeed, *Griffin*'s general reference to protection against the inquisitorial system harkens directly to the specter of the inquisitorial system expressly referenced in *Ferguson v. Georgia*, *supra*, 365 U.S. at pages 578 to 579, surrounding the debate on granting competency to defendants. Critically, these constitutional concerns underlying *Griffin* are specifically directed at protecting silence during trial, rather than during street encounters with the police, in the absence of custodial interrogation.

The Supreme Court later reaffirmed that it was the precise circumstances of *Griffin* that contained the requisite compulsion, even without the cruel trilemma identified in *Murphy*. It stated in *Lakeside v. Oregon* (1978) 435 U.S. 333, 339: "By definition, 'a necessary element of compulsory self-incrimination is some kind of compulsion.' *Hoffa v. United States*, 385 U.S. 293, 304. The Court concluded in *Griffin* that unconstitutional compulsion was inherent in a trial where prosecutor and judge were free to ask the jury to draw adverse inferences from a defendant's failure to take the witness stand." The compulsion necessary to trigger the Fifth Amendment protection in *Griffin* was provided by the trial setting.

Thus, when viewed within the context of the origin of the *Griffin* rule, as an express recognition of the constitutional principle that gave rise to the federal statutory ban on comment, it is apparent the *Griffin* rule is specifically directed at the decision not to testify at trial. The Supreme Court noted this very point in *Portuondo v. Agard* (2000) 529 U.S. 61, 72, footnote 3, observing that *Griffin* "relied almost exclusively on the [federal statute] in defining the contours of the Fifth Amendment right prohibiting comment on the failure to testify." As noted, the federal statute, on which *Griffin* relied to set the constitutional contours of the rule the case announced, was limited to silence at trial.

Similarly, in *Schmerber v. California* (1966) 384 U.S. 757, the Supreme Court indicated that *Griffin* was not applicable outside the silence-at-trial context, deferring instead to the rule announced in *Miranda* for Fifth Amendment claims based on police encounters. In response to the claim that the prosecutor's comment on the defendant's refusal to take a breathalyzer test violated *Griffin*, the Court observed:

> He argues that the introduction of this evidence and a comment by the prosecutor in closing argument upon his refusal is ground for reversal under *Griffin* v. *State of California*, 380 U.S. 609. We think general Fifth Amendment principles, rather than the particular holding of *Griffin*, would be applicable in these circumstances, see *Miranda* v. *Arizona*, [384 U.S.] at p. 468, n. 37.

(*Id.* at p. 765, fn. 9.)

In sum, *Griffin* arose in the context of silence at trial, and its rule is generally limited to trial silence. *Griffin* does not answer the question raised in this case, and appellant's reliance on *Griffin*'s exhortation against imposing a "penalty . . . for exercising a constitutional privilege" merely begs the question whether appellant had a constitutional privilege to exercise. As detailed in our opening brief, he did not.

B. *Cockrell* and *Banks* Do Not Address Pre-*Miranda* Silence

Appellant next contends this Court has already addressed and resolved the issue presented in *People v. Cockrell*, *supra*, 63 Cal.2d 659 and *In re Banks*, *supra*, 4 Cal.3d 337. Appellant, however, reads too much into those cases. *Cockrell* and *Banks* involved silence during custodial interrogation and merely anticipated and applied the rule articulated in *Miranda*. Neither case purported to address, let alone resolve, the constitutionality of the use of pre-*Miranda* silence at issue in this case.

In *Cockrell*, several codefendants were prosecuted for conspiracy to sell marijuana. (*People v. Cockrell*, *supra*, 63 Cal.2d at pp. 662-665.) One defendant, Leroy Cockrell, was arrested and brought to the police station, where officers confronted him with one of his coconspirators, Ms. Phillips. (*Id.* at pp. 664, 669.) Phillips gave a full account of the conspiracy, implicating Cockrell as the main distributor. (*Id.* at p. 669.) At the conclusion of Phillips's account, an officer "asked Cockrell what he had to say about 'that,'" to which Cockrell refused to respond. (*Ibid.*) This exchange was introduced in the prosecution's case-in-chief, and its admission was challenged on appeal. (*Ibid.*)

This Court pointed out that 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." (*People v. Cockrell*, *supra*, 63 Cal.2d at pp. 669-670.) It then turned to the question whether Cockrell had a constitutional privilege to remain silent at that point. This Court noted that several federal appellate courts "have recognized the defendant's right to remain silent when under arrest without an express claim of his privilege against self-incrimination. [Citations.] [*United States v.*] *Pearson* [(1965) 344 F.2d 430, 431] and *McCarthy* [*v. United*

States (1928) 25 F.2d 298, 299] stated, that '*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, italics added.)

Thus, while *Cockrell* was decided in 1965, six months before *Miranda*, it relied on federal appellate court cases anticipating *Miranda*'s prohibition on using a defendant's silence in the face of custodial interrogation.

Five years later, this Court applied *Cockrell* in *In re Banks*, *supra*, 4 Cal.3d 337.[2] After finding a meritorious claim of true *Griffin* error based on the prosecution's comment on Banks's failure to testify, the Court, in dictum, turned to the defendant's challenge to the use of his postarrest silence as an adoptive admission. The prosecution had elicited two instances of Banks's silence at trial. First, Banks said nothing when the arresting officer accused Banks of being the perpetrator sought for several robberies and immediately began searching his person. (*Id.* at p. 345.) Later, at a stationhouse lineup, when one of the victims walked up to Banks and identified him as the robber, Banks again said nothing. (*Id.* at pp. 346-347.)

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[2] The *Banks* case had a long and convoluted procedural history. The defendant was convicted in 1962 and his conviction was initially affirmed on appeal, but Banks successfully obtained a writ of certiorari and remand from the United States Supreme Court in light of the newly announced *Griffin* decision, based on the prosecution's comment on the defendant's silence at trial. Appellate counsel then failed to adequately pursue the *Griffin* claim on remand, and the defendant filed a habeas petition on ineffective assistance of appellate counsel. (*In re Banks*, *supra*, 4 Cal.3d at pp. 340-342.)

This Court noted that the issue in *Cockrell* was the use of silence in the face of an accusation as an adoptive admission, which it found "related to" *Griffin* error, and also connected to *Miranda*. (*In re Banks*, *supra*, 4 Cal.3d at pp. 351-352.) In *Banks*, the People conceded error with respect to the custodial lineup silence, but argued that *Cockrell* did not apply to the earlier adoptive admission because it did not occur during the "'accusatory stage' of police investigations." (*Id.* at p. 352.) This Court acknowledged that it had not articulated the scope of its holding *Cockrell*, but found error regardless because Banks's silence was in the face of a custodial interrogation.

> Even if *Cockrell* were so limited, upon which we indicate no opinion in this proceeding, it would apply here. 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." (*Miranda v. Arizona*, *supra*, 384 U.S. 436, 444.) Petitioner may not have been formally arrested at the moment the police began to search him, but had been significantly deprived of his freedom of action. [Citation.]

(*Id.* at p. 352.)

Thus, neither *Cockrell* nor *Banks* extended the Fifth Amendment beyond the protection for a defendant's silence afforded in *Miranda*, namely that a defendant's silence in the face of custodial interrogation is protected by the Fifth Amendment and may not be used against him in the prosecution's case-in-chief.[3] This is the reason the court below observed

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[3] The analysis in *Banks* must also be understood in its jurisprudential context. *Miranda* was nonretroactive, and the defendant in *Banks* was tried before *Miranda*. (See generally *Johnson v. New Jersey* (1966) 384 U.S. 719, 726-734; *People v. Rollins* (1967) 65 Cal.2d 681, 684-687.) Hence, *Cockrell* served as a surrogate for *Miranda*. Moreover, to the extent California cases adopted a broader protection under state law, they were abrogated by the passage of Proposition 8 (Cal. Const., art. I, § 28, subd. (continued...)

that neither the United States Supreme Court nor this Court "has directly addressed the issue of whether the government can admit, in its case-in-chief, evidence of a defendant's post-arrest, pre-*Miranda* silence." (Typed Opn. at p. 17.)

C. Appellant's Reliance on *Griffin*'s Penalty Construct Begs the Question

Apart from *Cockrell* and *Banks*, appellant's argument rests squarely on *Griffin*'s general statement regarding the impropriety of imposing a penalty on the exercise of a constitutional right. From this, appellant argues that *any* silence constitutes a per se assertion of the Fifth Amendment that cannot be burdened by use of the silence at trial. The problem with appellant's argument is that it lacks a constitutional foundation. Outside the trial testimony context, to invoke *Griffin*'s penalty analysis, the defendant must have a valid Fifth Amendment privilege that is being penalized. As noted in our opening brief, the Fifth Amendment safeguards against *compelled* testimonial statements or silence. Only silence in response to compulsion is protected by the Fifth Amendment, and only the use of that silence at trial penalizes a defendant's assertion of Fifth Amendment protection. (See generally *Berkemer v. McCarty* (1984) 468 U.S. 420, 437 ["Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated"].)

Compulsion is present when a person is subpoenaed to testify under penalty of perjury or contempt, or when his confession to police is not "free and voluntary," but instead extracted by threat, violence, or exertion of improper influence. (*Malloy v. Hogan* (1964) 378 U.S. 1, 7-11; *Murphy v.*

(...continued)
(d)). (See *People v. May* (1988) 44 Cal.3d 309, 315-320; *People v. O'Sullivan* (1990) 217 Cal.App.3d 237, 244-245.)

Waterfront Comm'n, supra, 378 U.S. 52.) The Supreme Court has extended the constitutional protection against compulsion to include custodial interrogations as defined in *Miranda*. However, the Court has also made clear that the Fifth Amendment is not applicable in the absence of compulsion (*Williams v. Florida* (1970) 399 U.S. 78, 84-85), or, for *Miranda* purposes, in the absence of either custody (*Oregon v. Mathiason* (1977) 429 U.S. 492, 494-495) or interrogation (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301). A consensual street encounter between a defendant and the police simply does not trigger the Fifth Amendment's protection due to the absence of the triggering requirement of compulsion or custodial interrogation. The same is true for an arrest prior to interrogation. *Griffin*'s penalty analysis does not apply because there is no valid constitutional protection being exercised. Accordingly, a defendant's silence prior to custodial interrogation or receipt of *Miranda* warnings may be used in the prosecution's case-in-chief without offending the Fifth Amendment or due process. (*United States v. Frazier* (8th Cir. 2005) 408 F.3d 1102, 1109-1111.)

Appellant argues that Fifth Amendment protection should extend beyond *post*arrest silence to all *pre*arrest silence. Appellant's approach is flawed, however, because he fails to identify a limiting principle for the application of the Fifth Amendment's protection. Under appellant's view, the Fifth Amendment provides constant and continuous immunity for silence, regardless of the presence of compulsion or even governmental action. Such an overexpansive approach, untethered to compulsion, would seemingly extend the Fifth Amendment's protection to adoptive admissions of questions posed by civilian witnesses, without any governmental action.

Appellant urges this Court to follow the path endorsed by those circuits that bar the use of prearrest silence in the prosecution's case-in-chief. (ABM at pp. 41-43 [discussing *Coppola v. Powell* (1st Cir. 1989)

878 F.2d 1562, 1568; *Combs v. Coyle* (6th Cir. 2000) 205 F.3d 269, 283; and *United States v. Burson* (10th Cir. 1991) 952 F.2d 1196, 1200-1201].) As explained, this approach cannot be reconciled with the Fifth Amendment's requirement of compulsion or custodial interrogation. Moreover, a careful analysis of these cases demonstrates that they do not support appellant's claim.

In *Coppola v. Powell*, the First Circuit derived its rule barring use of prearrest silence from three principles. (878 F.2d at p. 1565.) The first was that the Fifth Amendment privilege should be interpreted broadly, and the second that no talismanic phrasing is required for a defendant to invoke the privilege. (*Ibid.*) The third principle was that "application of the privilege is not limited to persons in custody or charged with a crime; it may also be asserted by a suspect who is questioned during the investigation of a crime." (*Ibid.*) This founding "principle" was not predicated on Supreme Court authority. It is, in fact, the end point of the analysis, rather than the starting point. Regardless, central to the court's extension of the Fifth Amendment was that the defendant was actually "*questioned* during the investigation of a crime." (Italics added.) Thus, although the court eliminated the custody component of *Miranda*, it maintained the interrogation requirement. (See *id.* at p. 1568 [characterizing case as involving a defendant's prearrest assertion of his right to silence "during police interrogation"].)[4]

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[4] The First Circuit has subsequently indicated that, even within that Circuit, "the law concerning a prosecutor's use of a defendant's pre-arrest, pre-*Miranda* silence is, to say the least, unsettled." (*United States v. Rodriguez* (1st Cir. 2012) 675 F.3d 48, 62, fn. 17; see also *United States v. McCann* (1st Cir. 2004) 366 F.3d 46, 56-57 [noting that the issue of a prosecutor's use of a defendant's prearrest, pre-*Miranda* silence has not been definitely resolved in the circuit], vacated and remanded on other grounds by *McCann v. United States* (2005) 543 U.S. 1104.)

Combs v. Coyle embraced the First Circuit's extension of the Fifth Amendment to "'a suspect who is questioned during the investigation of a crime.'" (205 F.3d at p. 283, quoting *Coppola*, *supra*, 878 F.2d at p. 1565.) The Tenth Circuit's decision in *Burson* is in accord: "Mr. Burson's silence was exhibited in a non-custodial *interrogation* by two criminal investigators during the regular course of a criminal investigation." (*United States v. Burson*, *supra*, 952 F.2d at p. 1200, italics added.)[5] The central theme running through these cases is that the defendant asserted a right to silence in the face of governmental questioning. By contrast, the police in this case did not interrogate appellant, and appellant did not assert a Fifth Amendment right to silence.

Appellant next argues that "[t]he Attorney General offers no reason to give Appellant's silence *less protection* than a statement made by a suspect with *Miranda* warnings." (ABM at p. 49.) Appellant's argument is a straw man, as we have never espoused that view. Our position has always been that a defendant's silence is entitled to precisely the *same* protection under the Fifth Amendment as a defendant's statement, no less and no more. Just as a defendant's uncompelled statement—made before *Miranda* warnings are administered and under circumstances not amounting to custodial interrogation—is not rendered inadmissible by the Fifth Amendment

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[5] The Tenth Circuit's approach to pre-*Miranda* silence has not been consistent. Unlike *Burson*, in *United States v. Harrold* (10th Cir. 1986) 796 F.2d 1275, 1279, the court held that the Fifth Amendment did not preclude the prosecution from presenting the defendant's silence to preindictment questioning by tax inspectors. *Harrold* observed that "comment on a defendant's silence is error only when the defendant remained silent in reliance on government action, i.e., a *Miranda* warning. [Citations.] Because defendant's refusal to respond to certain of Randolph's questions was not based on a *Miranda* warning or any other government action, the testimony concerning defendant's pre-*Miranda* reliance on the Fifth Amendment was proper . . . ." (*Ibid.*)

(*Rhode Island v. Innis*, *supra*, 446 U.S. at pp. 300-301), so too any uncompelled silence.

That does not mean that a defendant's pre-*Miranda* silence is necessarily admissible at trial. As an evidentiary matter, the silence must be sufficiently probative of guilt, and its probative value not outweighed by the potential for undue prejudice. (Evid. Code, §§ 210, 350, 352.) The Constitution, however, does not bar admissibility.

Appellant offers examples of people who may be silent when encountering police, such as individuals who have "an uncontrollable stutter," or a fear of misspeaking, or for whom English is a second language, to support his constitutional claim. (ABM at pp. 50-51.) These concerns are directed at the probative value of a defendant's silence under the circumstances, and are properly evaluated under traditional rules of evidence, rather than the Constitution's protection. The courts are fully capable of evaluating the relevance and admissibility of a defendant's silence and adoptive admissions presented through civilian witnesses. (See, e.g., *People v. Riggs* (2008) 44 Cal.4th 248, 288-291 [evaluating admissibility of defendant's adoptive admission]; *People v. Davis* (2005) 36 Cal.4th 510, 534-538 [same]; *People v. Rogers* (2009) 46 Cal.4th 1136, 1161-1162 [admissibility of defendant's silence].) Appellant offers no reason why the courts are not equally able to evaluate silence following a police encounter. (Cf. *People v. Tully* (2012) 54 Cal.4th 952, 991 [explaining that "'[w]hether the suspect has indeed invoked that right, however, is a question of fact to be decided in the light of all the circumstances'"]; see generally *Berghuis v. Thompkins* (2010) 560 U.S. ___ [130 S.Ct. 2250, 2260] [mere extended silence in response to *Miranda* warnings is not sufficient to invoke right to silence; invocation must be clear and unambiguous].)

Appellant's concern about the probative value of silence in certain situations is not a constitutional claim. The Fifth Amendment's protection is no more triggered by a consensual encounter with the police than it is by a consensual encounter with a civilian, and a defendant's silence is entitled to no greater protection in the former situation than the latter. The Fifth Amendment is a safeguard against governmental compulsion, not the potential misinterpretation of a defendant's uncompelled silence. (Cf. *Perry v. New Hampshire* (2012) 565 U.S. ___ [132 S.Ct. 716, 728] [observing in eyewitness identification context, that "without the taint of improper state conduct," due process does not require "a trial court to screen evidence for reliability before allowing the jury to assess its creditworthiness"].)

II. USE OF APPELLANT'S SILENCE PRESENTS NO CONFLICT WITH THE FOURTH AMENDMENT

Appellant next looks to Fourth Amendment cases to bolster his claim. His argument is twofold. First, he contends that in the Fourth Amendment context, mere silence cannot be used to establish probable cause, which he argues is equivalent to using silence for guilt under the Fifth Amendment. Second, he argues that using his silence in this case would impose a penalty on his assertion of his Fourth Amendment rights. Appellant's reliance on Fourth Amendment jurisprudence is misplaced.

Appellant points to the Supreme Court's conclusion in Fourth Amendment cases involving consensual encounters or temporary detentions that suspects are free to ignore an officer's questions. (AOB at p. 24, citing *Florida v. Royer* (1983) 460 U.S. 491, 497-498, *Florida v. Bostick* (1991) 501 U.S. 429, 437, and *Berkemer v. McCarty*, *supra*, 468 U.S. at pp. 436-440.) Appellant's argument improperly conflates the role of the Fourth and Fifth Amendments.

The Fourth Amendment is designed to protect individuals outside of the trial context, safeguarding them from unreasonable searches and seizures, regardless of whether the individual is ultimately prosecuted. The Fifth Amendment is, at its core, a trial right, safeguarding against the use at trial of compelled testimonial statements. (See *Maldonado v. Superior Court* (2012) 53 Cal.4th 1112, 1128.) While there may be overlap in the protective functions of the two Amendments, their role and application is distinct. *Berkemer* exemplifies this distinction. *Berkemer* held that, although a traffic stop is a "seizure" within the meaning of the Fourth Amendment (468 U.S. at pp. 436-437), roadside questioning during such a detention does not constitute a custodial interrogation triggering the Fifth Amendment's protection of *Miranda* warnings (*id.* at pp. 437-441). Accordingly, the question whether silence supports a finding of probable cause under the Fourth Amendment is distinct from, and inapposite to, whether silence is the result of coercive pressures triggering the Fifth Amendment's protections.[6]

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[6]*Royer*'s observation that during a consensual encounter, the individual is free to decline to answer and walk away (*Florida v. Royer*, *supra*, 460 U.S. at pp. 497-498) similarly reflects that such an encounter is not coercive; thus, questioning during such an encounter does not trigger any Fifth Amendment protections. Indeed, *Royer* stated that a defendant's voluntary answers are admissible. (*Id.* at p. 497.)

Appellant relies on *Royer*'s observation that refusing to answer an officer's questions does not, without more provide probable cause for arrest. (*See* 460 U.S. at p. 498.) However, reasonable suspicion and probable cause are evaluated under the totality of the circumstances, and some forms of refusal are appropriate to consider. (See, e.g., *United States v. Brignoni-Ponce* (1975) 422 U.S. 873, 885 [obvious evasion may support reasonable suspicion]; *Illinois v. Wardlow* (2000) 528 U.S. 119, 124 ["headlong flight" supports probable cause].) More to the point, *Royer*'s observation is not predicated on any Fifth Amendment protection for that refusal, but rather on the fact that, in general, such refusal is not sufficiently

(continued...)

Appellant also invokes *Griffin*'s penalty construct indirectly by asserting that using his silence at trial penalized his assertion of his Fourth Amendment rights. Appellant points to cases in which the Court of Appeal held improper a prosecutor's comment at trial on a defendant's refusal to voluntarily allow a warrantless search of his home (*People v. Wood* (2002) 103 Cal.App.4th 803, 808-809), or refusal to submit to a "Nalline test" for narcotics addiction (*People v. Zavala* (1966) 239 Cal.App.2d 732, 740-741). (AOB at pp. 61-63.) We need not address the soundness of appellant's claim that comment at trial on an assertion of a Fourth Amendment right somehow violates the Fifth Amendment privilege because the line of authority upon which appellant relies is inapplicable. Appellant has not met the threshold requirement of having a protected right which he is entitled to assert.

In *Wood*, officers arrived at the defendant's property to investigate a claim of animal abuse. Lacking a warrant, the officers asked the defendant for permission to enter and search his property, and the defendant refused. (*People v. Wood*, *supra*, 103 Cal.App.4th at pp. 805, 807.) Because appellant had a valid Fourth Amendment right to refuse the police entry without a warrant, *Wood* held the introduction of his refusal as evidence of guilt impermissibly penalized his assertion of that right. (*Id.* at pp. 808-809.)

By contrast, this Court explained in *People v. Farnam* (2002) 28 Cal.4th 107, 165, that when a defendant asserts the Fourth and Fifth Amendments as a basis for a refusal when he has no such right, comment at trial on the refusal is entirely proper.

(...continued)
probative of guilt to establish probable cause under the Fourth Amendment. This is equivalent to the threshold evidentiary evaluation discussed above.

> Defendant next claims the instruction [on refusal as showing consciousness of guilt] improperly invited the jury to penalize him for mistakenly asserting his rights "as he believed them to be." This claim is premised on evidence that defendant refused to provide the blood and hair samples on the stated basis that it was "a violation of [his] rights." Because defendant fails to establish that his refusal was protected by law, we cannot conclude that the challenged instruction was in error or that it violated constitutional prohibitions.

(*Ibid.*; see also *People v. Roberts* (1992) 2 Cal.4th 271, 311 ["The Fourth Amendment claim might require more scrutiny on a better record, but the record does not explain whether defendant refused to take the blood test for reasons within the scope of the Fourth Amendment. [Citations.] Defendant fails to establish that he exercised a protected right, and we must therefore reject his claim"]; see generally *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.* (2005) 542 U.S. 177, 180-189 [holding that defendant's refusal to provide name to officer during lawful detention may be punished criminally].)[7]

In this case, appellant had no constitutionally protected Fourth Amendment right to assert. Prior to trial, the court denied appellant's suppression motion, finding the officers had reasonable suspicion to detain (and indeed probable cause to arrest) when they told appellant he could not leave—a ruling not challenged on appeal. (2 CT 511-514.) Accordingly,

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[7] Appellant's reliance on *Zavala* is wholly misplaced. *Zavala* found no constitutional flaw from comment on the defendant's refusal to submit to a Nalline test when officers had probable cause to request such a test, but found a state law violation because a state statute expressly permitted the defendant to refuse the test. (*People v. Zavala*, *supra*, 239 Cal.App.2d at pp. 741-742; compare *People v. Jackson* (2010) 189 Cal.App.4th 1461, 1466-1470 [state law error to admit defendant's refusal to take PAS test where statute permits refusal notwithstanding reasonable suspicion] with *Marvin v. Department of Motor Vehicles* (1984) 161 Cal.App.3d 717, 719-720 [refusal to perform FST's properly used to show consciousness of guilt where request supported by reasonable suspicion].)

introduction of appellant's statements did not impose any penalty on his Fourth Amendment rights. (*People v. Farnam*, *supra*, 28 Cal.4th at p. 165; *People v. Roberts*, *supra*, 2 Cal.4th at p. 311; *Marvin v. Department of Motor Vehicles*, *supra*, 161 Cal.App.3d at pp. 719-720; *Hiibel*, *supra*, 542 U.S. at pp. 180-189; cf. *State v. Bussart-Savaloja* (Kan.Ct.App. 2008) 198 P.3d 163, 172 ["There simply is no constitutional right to avoid a search conducted upon probable cause. 'Therefore, refusal to consent to such a search has absolutely no constitutional significance regarding the reasonableness of the subsequent search, and is not an invocation of any right whatsoever'"].)[8]

Although appellant's reliance on the Fourth Amendment line of cases is unavailing because he had no constitutionally protected Fourth Amendment right to assert, those cases highlight a key factor missing from appellant's Fifth Amendment claim. *Wood* and *Zavala* involved an actual assertion of a constitutional right to be free from search or seizure. In this case, appellant never asserted any Fifth Amendment right to silence. (See OBM at pp. 37-40.) Appellant spoke freely with the officers throughout the investigation. (4 RT 678, 684-686, 688-689, 693-694715, 724-725.) His only assertion of silence occurred at the stationhouse when he informed the officers that his attorney advised him not to make any statement without the attorney present (6 SRT 353-354), a fact not elicited at trial. Unlike the cases cited in the answering brief, appellant was not silent in the face of governmental questioning; he did not assert any right to silence; and his

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[8] This case does not present the "Hobson's choice" between maintaining a Fifth Amendment privilege during a pretrial suppression motions at the expense of foregoing an assertion of standing under the Fourth Amendment, or vice versa, which served as the impetus for the Supreme Court's decision in *Simmons v. United States* (1968) 390 U.S. 377, 389-394.

failure to ask about the condition of the victims was not an actual invocation of any Fifth Amendment right. (See *People v. Preston* (1973) 9 Cal.3d 308, 315; accord, *People v. Medina* (1990) 51 Cal.3d 870, 890; *People v. Tully*, *supra*, 54 Cal.4th 952, 991; see generally *Minnesota v. Murphy* (1984) 465 U.S. 420, 427-428 [defendant who fails to claim the privilege loses the benefit of the privilege]; *Berghuis v. Thompkins*, *supra*, 130 S.Ct. at p. 2260; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1238 [whether a defendant has invoked his right to remain silent is to be determined from the facts and circumstances].)

III. APPELLANT'S PREJUDICE ARGUMENT IS FLAWED AND UNAVAILING

Our opening brief explained any error in admitting appellant's failure to inquire about the health of victims was harmless beyond a reasonable doubt because it pertained to a tangential issue and played a minimal role in the trial in relation to evidence of appellant's guilt. (OBM at pp. 47-52; see generally *United States v. Bushyhead* (9th Cir. 2001) 270 F.3d 905, 913 [explaining that when deciding if a prosecutor's reference to a defendant's postarrest silence was prejudicial, the court considers "the extent of comments made by the witness, whether an inference of guilt from silence was stressed to the jury, and the extent of other evidence suggesting defendant's guilt"].) Appellant challenges our assessment. He does not, however, limit his prejudice claim to the Fifth Amendment error found by the Court of Appeal below, which is the only issue on which this Court granted review. Appellant invokes other purported claims of error he raised below—claims which the Court of Appeal did not reach in light of its ruling on the Fifth Amendment claim—as if they were already established as errors. He offers these allegations in support of his assertion that, if the constitutional claim is not prejudicial on its own, it may still be deemed prejudicial when cumulated with other purported errors. (ABM at pp. 68,

71-72; see also *id.* at p. 68, fn. 14 [acknowledging that the other claims were not resolved, but nevertheless asserting them "to demonstrate that, at a minimum, the cumulative prejudicial effect of multiple instances of misconduct requires reversal"].)

A claim of cumulative prejudice cannot be advanced absent a finding of cumulative errors. The additional allegations of error were hotly contested below and will be an appropriate subject for the Court of Appeal to address on remand. They should not be considered by this Court in the first instance. (Cf. Cal. Rules of Court, rules 8.516, 8.552(a) & (c).) Unsubstantiated claims of error are not a basis for finding cumulative prejudice here.

Appellant also alludes to facts not before the jury, in the form of materials offered in support of his unsuccessful new trial motion and a declaration by a defense expert included as an exhibit in support of his petition for writ of habeas corpus. (ABM at pp. 18, 67, 77.) The Court of Appeal consolidated the habeas petition with the direct appeal but deferred consideration of the former until after resolution of the issues on appeal. (Typed Opn. at p. 2.) The court ultimately dismissed the petition as moot in light of its ruling on the Fifth Amendment claim. (Typed Opn. at p. 2.) While the habeas petition was technically included on review due to the consolidation order by the Court of Appeal, the issues raised in the habeas petition are not encompassed in the questions on review. Assuming the People prevail here, appellant can reassert his habeas claims on remand. However, extrarecord material never considered by the Court of Appeal is not a valid basis for asserting prejudice, let alone a claim of "cumulative" prejudice, on review. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 307-308 [explaining that, unlike structural errors, constitutional errors of this type amount to "'trial error'—error which occurred during the presentation of the case to the jury, and which may therefore be

quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt"]; *Yates v. Evatt* (1991) 500 U.S. 391, 403 ["To say that an error did not contribute to the ensuing verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record"]; *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Waidla* (2000) 22 Cal.4th 690, 703, fn. 1 [rejecting contention that consolidation of habeas petition with pending appeal was "necessary for consideration of [the] appeal and [the] habeas corpus petition *inter se*," and stating that an "appeal is 'limited to the four corners of the [underlying] record on appeal'"].)[9]

Setting aside his "cumulative" prejudice claim, appellant's remaining challenges to our discussion of absence of prejudice are unavailing. Appellant contends that *Chapman v. California*, *supra*, 386 U.S. 18 itself is factually on point. (ABM at p. 69.) *Chapman*, however, is not analogous in kind or degree.

Unlike the present case, *Chapman* involved true *Griffin* error, based on California's former practice of both permitting comment on a defendant's failure to take the stand and expressly instructing the jury to consider that failure as evidence of guilt. (*Chapman*, *supra*, 386 U.S. at pp. 19-20.) *Chapman* observed that the defendants "chose not to testify at their

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[9] Appellant's reference to facts not before the jury in support of his prejudice argument also suffers from the flaw of failing to present a full factual account. Appellant cites to defense declarations and argument regarding the state of the gas pedal to suggest appellant could have continued to accelerate after the crash as speculated by appellant's expert at trial. He does not mention the pretrial testimony of the Mercedes expert that the crash forced the engine back into the crank shaft, which displaced the crank shaft sensor causing the engine to stop operating. (1 RT 150-153.) While this testimony was not presented to the jury, it is quite relevant to the habeas claims.

trial, and the State's attorney prosecuting them took full advantage of his right under the State Constitution to comment upon their failure to testify, filling his argument to the jury from beginning to end with numerous references to their silence and inferences of their guilt resulting therefrom. The trial court also charged the jury that it could draw adverse inferences from petitioners' failure to testify." (*Id.* at p. 19, fns. omitted.) The prosecutor's argument in *Chapman* is simply not comparable to the present case. In paragraph after paragraph, the prosecutor's argument hammered away at the defendants' failure to take the stand. (*Id.* at pp. 26-42.) In finding the error prejudicial, *Chapman* observed, "To reach this conclusion one need only glance at the prosecutorial comments compiled from the record . . . ." (*Id.* at p. 24; see also *id.* at p. 26 [characterizing the argument as "a machine-gun repetition of a denial of constitutional rights, designed and calculated to make petitioners' version of the evidence worthless"].)

The record in this case stands in sharp contrast. The challenged references in closing argument were brief and constituted a very minor point in the prosecutor's presentation. (11 RT 1905-1906.) The central issue of gross negligence turned on the expert testimony regarding appellant's speed at the time of the crash, and the prosecution experts were compelling and their testimony conclusive, whereas the lone defense expert based his analysis on a faulty premise. (OBM at pp. 50-52.) By contrast, the inference of consciousness of guilt from appellant's failure to inquire about the status of the victims was weak and indirect, and largely tangential to the main issues. Thus, the challenged inquiry could not have had any meaningful influence on the jury's evaluation of the expert testimony or resolution of the issues in the case. (See, e.g., *United States v. Bushyhead*, *supra*, 270 F.3d at p. 914 ["If Bushyhead's statement to agent Olsen had been a powerful piece of evidence, or one of the few pieces of evidence, showing that Bushyhead had the required mens rea for first-degree murder,

we would have no hesitation in finding the district court's error not harmless. But the statement was not a particularly powerful piece of evidence, and the government's evidence, even without the statement, was very strong"]; *Fencl v. Abrahamson* (7th Cir. 1988) 841 F.2d 760, 768-769 [finding error harmless beyond a reasonable doubt where the references to prearrest silence played a "rather minor role" in the government's case in relation to the entire record, and where the references "did not . . . directly establish any element of the charged offense"].)

Appellant counters that the admission of this evidence was prejudicial because it was improperly used to impugn his character rather than show consciousness of guilt. (ABM at p. 70.) Appellant's argument is a back-door assertion of an entirely separate claim of prosecutorial misconduct, distinct from the issue on review. Appellant made no objection on this ground at trial (11 RT 1904-1906), and cannot be heard to raise it indirectly to support a claim of prejudice regarding the admission of his silence. Moreover, the jury was properly instructed to decide the case on the facts and not be influenced by bias, sympathy, or prejudice (11 RT 1837; CALCRIM No. 200), and the jury is presumed to follow the court's instructions (*People v. Holt* (1997) 15 Cal.4th 619, 662). Any error in admitting appellant's pre-*Miranda* silence was harmless beyond a reasonable doubt.

CONCLUSION

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

Dated: January 14, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF uses a 13 point Times New Roman font and contains 7,775 words.

Dated: January 14, 2013

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DECLARATION OF SERVICE BY U.S. MAIL

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

No.: **S202107**

I declare:

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

On January 14, 2013, I served the attached **REPLY BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 14, 2013, at San Francisco, California.

J. Wong
Declarant

J Wong
Signature