

STATE OF MICHIGAN  
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MICHAEL J BORGNE,

Defendant-Appellee.

Michigan Supreme Court No 134967

Court of Appeals No. 269572

Circuit Court No. 05-000173-01

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**BRIEF ON APPEAL**

ORAL ARGUMENT REQUESTED

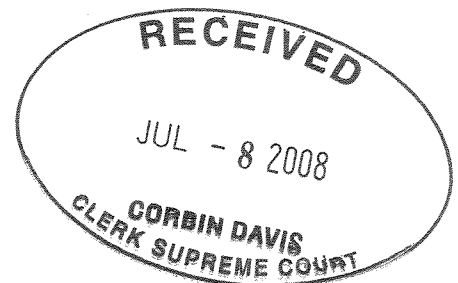
Michael A. Cox  
Attorney General

Thomas L. Casey (P24215)  
Solicitor General  
Counsel of Record

Mark G. Sands (P67801)  
Assistant Attorney General

Attorneys for the People of the State of Michigan  
Plaintiff-Appellant  
P.O. Box 30217  
Lansing, MI 48909  
(517) 373-4875

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## QUESTION PRESENTED FOR REVIEW

In an order dated April 30, 2008, this Court granted the People's application for leave to appeal and ordered the parties to address the following questions:

- (1) whether the defendant's constitutional rights under *Doyle v Ohio*, 426 US 610, 619; 96 S Ct 2240; 49 L Ed 2d 91 (1976), were violated;
- (2) whether the claim of error under *Doyle* was properly preserved at trial;
- (3) the resulting appropriate standard of review on appeal; and
- (4) whether any error was harmless under the applicable standard of review.

## INTRODUCTION

This Court should reverse a Court of Appeals opinion which turns a defendant's constitutional right to remain silent in the face of custodial interrogation into a license to fabricate testimony. In this case, defendant claimed on direct examination that he attempted to inform the police that he was being shot at, and that was the reason he was hiding in an abandoned building at the time he was arrested. Based on this false assertion, an uninformed jury could conclude that the police did not conduct a diligent investigation. In order to refute this false assertion, and in a manner consistent with *Doyle v Ohio*, the prosecutor introduced evidence on cross-examination that defendant had the opportunity to speak with the investigating officer after his arrest, but failed to do so *by his own choice*. Defendant was ultimately convicted of armed robbery and felony firearm.

In reviewing the conviction, the Court of Appeals majority adopted defendant's argument – raised for the first time on appeal – that the prosecutor's use of defendant's post-arrest, post-*Miranda* silence was improperly introduced to impeach defendant and, therefore, violated his constitutional rights. The Court of Appeals majority's reasoning impedes the truth-seeking function of the judiciary by keeping from the jury the entire picture of the police's investigation of a crime – including their willingness to investigate any claims made by a defendant which calls his guilt into question – and thereby hinders public confidence in the integrity of the judicial process. This Court should reverse the Court of Appeals and reinstate defendant's conviction.

In an order dated April 30, 2008, this Court granted the People's application for leave to appeal.<sup>1</sup> Without restating the arguments from the brief in the application, the People have supplemented the analysis in response to this Court's questions.

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<sup>1</sup> *People v Borgne*, 480 Mich 1193; 747 NW2d 545 (2008).

## ARGUMENT

I. In *Doyle v Ohio*, the United States Supreme Court held that the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings violates the federal constitution. But an exception exists where a defendant testifies to an exculpatory version of events and claims to have told police about that version upon arrest. Under those circumstances, a defendant's post-arrest, post-*Miranda* silence may be used to challenge a defendant's testimony regarding his behavior following the arrest. In this case, defendant testified that he tried to describe his version of events to the arresting officer, but that the officer only put him in the back of the police car. Under the exception to *Doyle*, defendant's testimony opened the door to the use of post-arrest, post-*Miranda* silence to challenge his testimony that the arresting officer would not listen to his version of events. Defendant's constitutional rights were not violated.

A. The federal constitution generally forbids the use of post-*Miranda* silence.

US Const Am V states in relevant part that "no person . . . shall be compelled in any criminal case to be a witness against himself." One of those rights encompassed within the right against self-incrimination is the right to remain silent in the face of custodial interrogation.<sup>2</sup> In *Doyle v Ohio*, the United States Supreme Court concluded that that right to silence under *Miranda* would be rendered meaningless if the prosecutor would be allowed to turn around at trial and use that silence for impeachment purposes.<sup>3</sup> Since the police are required to inform defendants of their right to remain silent, a defendant's post-*Miranda* decision to remain silent is "insolubly ambiguous."<sup>4</sup> In other words, once a defendant is advised of his *Miranda* rights, it becomes impossible to determine whether his choosing to remain silent constitutes evidence that his theory of defense at trial was fabricated or whether he was simply exercising his constitutional rights. Thus, the "right to remain silent" loses all meaning if the prosecutor can turn around and "call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable

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<sup>2</sup> *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 2240; 16 L Ed 2d 694 (1966).

<sup>3</sup> *Doyle v Ohio*, 426 US 610, 619; 96 S Ct 2240; 49 L Ed 2d 91 (1976).

<sup>4</sup> *Doyle*, 426 US at 618.

inference might be drawn as to the truth of his trial testimony."<sup>5</sup> Accordingly, the United States Supreme Court concluded that to allow post-*Miranda* silence to be used at trial would deny defendants due process.<sup>6</sup>

Thus, *Doyle* does not speak to the use of silence generally, but rather is narrowly tailored to bar the use of silence that may have been induced by a defendant's reliance on *Miranda*. In other words, if the State advises a defendant that he has the right to remain silent, a defendant's invocation of that right could explain his failure to give an exculpatory account of his actions until trial. Thus, elemental notions of due process generally preclude the State's use of such silence to impeach his trial testimony under those limited circumstances. But the United States Supreme Court has made clear that its reasoning applies only on that narrow point – where a defendant's silence may or may not have been induced by *Miranda*.<sup>7</sup>

**B. Doyle does not apply where a defendant testifies that he told police of an exculpatory version of events at the time of his arrest.**

The United States Supreme Court has also made clear that *Doyle* does not give defendants a license to lie about their interactions with arresting officers in order to artificially call into question the thoroughness of the investigation. Rather, *Doyle* carves out an exception where "a defendant [] testifies to an exculpatory version of events and claims to have told the police the same version upon arrest."<sup>8</sup> Under that circumstance, the use of the defendant's post-

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<sup>5</sup> *Doyle*, 426 US at 619, quoting *United States v Hale*, 422 US 171, 182-183; 95 S Ct 2133; 45 L Ed 2d 99 (1975) (White, J., concurring).

<sup>6</sup> *Doyle*, 426 US at 619.

<sup>7</sup> See *Jenkins v Anderson*, 447 US 231; 100 S Ct 2124; 65 L Ed 2d 86 (1980).

<sup>8</sup> *Doyle*, 426 US at 620, citing *United States v Fairchild*, 505 F2d 1378, 1383 (CA 5,1975). See also *People v Sutton (After Remand)*, 436 Mich 575, 579; 464 NW2d 276 (1990) ("Where a defendant claims that he gave an exculpatory statement to the police after arrest and warnings, neither *Bobo* nor any federal constitutional authority would preclude impeachment with prior inconsistent conduct, including silence").

arrest silence is not for impeachment purposes, but for the purpose of rebutting the defendant's claims about his behavior following his arrest.<sup>9</sup>

**C. Under Michigan law, post-Miranda silence is admissible to challenge a defendant's testimony at trial that he gave a statement or that he informed police of an exculpatory version of events.**

This Court has likewise placed significance on the constitutional right to remain silent when analyzing whether or when silence can be used against a defendant.<sup>10</sup> In *People v Bobo*, the prosecutor used evidence of the defendant's assertion of his right to remain silent to rebut his assertion at trial that he observed the "real suspects" run past him just prior to his arrest. This Court, however, concluded that it was improper to use the defendant's "nonutterance" in this manner, because to do so would render his "right to remain silent" a nullity.<sup>11</sup> In other words, it was impossible to determine whether defendant's assertion of the right to silence was evidence that his testimony at trial was fabricated or whether defendant was simply asserting a constitutional right.

But if this rule was applied without exception, it would provide a powerful incentive to defendants to fabricate testimony at trial, naming false alternative suspects and calling the police investigation into question – fabricated statements that could never be countered by the prosecutor. This Court implicitly recognized the impact such a rule would have on the truth-seeking function of our judicial system, and, therefore, included an exception to the rule set forth in *Bobo*, allowing the prosecutor to use evidence of defendant's assertion of the right to remain silent to contradict a later claim that he did make a statement.<sup>12</sup> In *People v Boyd*, this Court recognized that if a defendant were to claim on the witness stand that he gave an exculpatory

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<sup>9</sup> *Doyle*, 426 US at 620, citing *United States v Fairchild*, 505 F2d 1378, 1383 (CA 5, 1975).

<sup>10</sup> See *People v Bobo*, 390 Mich 355, 359; 212 N.W.2d 190 (1973).

<sup>11</sup> *Bobo*, 390 Mich at 361.

<sup>12</sup> *Bobo*, 390 Mich at 359.

story to the police when he was interrogated, the prosecutor could admit testimony from the arresting officers that defendant told them he was "taking the Fifth" in response to police questioning.<sup>13</sup> By the same token, in *People v Allen*, the Court of Appeals noted that where a defendant claims that his first opportunity to tell his version of the events was at trial, the *Doyle* exception applies which allows the prosecution to attempt to discredit the defendant's testimony by showing the defendant did have an opportunity before trial to tell his side of the story<sup>14</sup>:

[H]is claim on redirect examination was that the trial was his first opportunity to tell his version of the events. We believe that this case falls within the exception permitting impeachment of a defendant's version of his postarrest behavior.

When a defendant raises the issue of his opportunity to give his version of the events, he "open[s] the door to a full and not just a selective development of that subject."<sup>15</sup>

**D. Defendant opened the door to the use of post-Miranda silence when he testified to giving police an exculpatory version of events at the time of his arrest.**

Here, defendant's theory of defense was that he was innocently waiting for a cab in the area of the robbery, when he "heard gunshots" and "determined that the gunshots were heading towards me." (Appendix, p 39a). Defendant testified that he fled towards the gas station where the robbery occurred, yelled to an African-American female for help, and continued until hiding in an abandoned building. (Appendix, pp 39a-40a). Then, according to defendant, someone shot into the building. Had defendant's testimony stopped there, his post-*Miranda* silence would have been inadmissible because it would have been impossible to tell whether that silence was evidence that his theory of defense was fabricated or whether that silence was just an indication

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<sup>13</sup> *People v Boyd*, 470 Mich 363, 375; 682 NW2d 459 (2004) ("If defendant had offered exculpatory testimony at trial and claimed to have told his exculpatory story to the police in response to questioning, his silence would have been admissible for impeachment purposes").

<sup>14</sup> *People v Allen*, 201 Mich App 98, 103; 505 NW2d 869 (1993) (footnote omitted).

<sup>15</sup> *Allen*, 201 Mich App at 103, citing *Fairchild*, 505 F2d at 1383.

that defendant was exercising his constitutional rights. But defendant went on to testify on direct that he tried to tell the police what "really happened" but that he was ignored:

Q: When you came out of the building with the two officers did anyone make any comments or gestures towards you?

A: Yes, sir.

Q: And who was that?

A: Caroline Kessler [the victim].

Q: Okay.

A: She made a comment that I – she said that's the man, that's the man that robbed me.

Q: Did anyone else speak that you remember?

A: The officer asked me where the purse was and where the gun was. I didn't have any idea what he was talking about. *I tried to describe the shooting to him* and he put me in the back seat of the police car. [Appendix, p 41a (emphasis supplied).]

Thus, defendant's testimony can be summarized as follows: (1) he was "glad to see the officers," (Appendix, p 42a) when they arrived, presumably because he knew he was now safe from the persons who were allegedly shooting at him; (2) he cooperated with the officers at all times; (3) he tried to give a statement – i.e., to tell the arresting officer that someone was shooting at him, but (4) the officer just would not listen. In other words, defendant offered testimony that he tried to make a statement, this statement was ignored, and as a result the wrong person was on trial. Based on that testimony, defendant's silence is no longer relegated to the murky depths of *Doyle* and *Bobo* – where it can never be clear if the invocation of silence is evidence of fabrication or evidence of the assertion of a constitutional right. Rather, under the exception to *Doyle* articulated both by this Court and by the United State Supreme Court, the prosecutor was justified in using defendant's post-arrest, post-*Miranda* silence to refute his claim

that he *did* try to make a statement. As correctly noted by the dissent below, once defendant so testified, the prosecutor was permitted "to attempt to discredit defendant's testimony by showing that defendant did have the opportunity before the trial to tell his side of the story. Having raised the issue of his opportunity to explain his version of events, he 'opened the door to a full and not just selective development of that subject."<sup>16</sup> And the prosecutor's questions on cross-examination did just that – make clear that defendant's claim that he made a statement was at odds with the facts:

Q: And then you had the opportunity to sit down with Sergeant Dunbeck here when you were under arrest?

A: Yes.

Q: That was at the precinct, correct?

A: Yes.

Q: Okay.

Q: You never told Sergeant Dunbeck any of this, did you?

A: I believe I may have said I was being shot at.

\* \* \* \*

Q: You had the opportunity to give your version of the event?

A: Yes, sir.

Q: You could stop answering questions at any time?

A: Yes, sir.

Q: That was no surprise to you?

A: Yes, sir.

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<sup>16</sup> *People v Borgne*, unpublished opinion per curiam of the Court of Appeals, decided August 9, 2007 (Docket No. 269572), slip op at 2 (Talbot, J., dissenting); quoting *Allen*, 201 Mich App at 104.

Q: [Sergeant Dunbeck] was polite to you, she wasn't beating you over the head with a phone book or anything like that?

A: No.

Q: No problems with Sergeant Dunbeck?

A: No.

Q: But you never made a statement, did you?

A: No, I did not want to make a statement without an attorney present.  
[Appendix, pp 43a-45a.]

The prosecutor's initial questions on cross-examination demonstrated that defendant's own choices – and not the actions of the arresting officers – were the cause of his alleged inability to tell his side of the story. Likewise, the prosecutor's continuing questions on cross-examination made clear that it even after he had access to an attorney; it was *defendant's choices* to refrain from talking with the police:

Q: You never gave a statement after the fact though, did you?

A: No, I did not. I was advised not to.

Q: This is the first time you're giving a statement?

A: Yes, sir.

Q: First time anyone has heard this version of events from you?

A: Yes, sir.

Q: You were concerned about finding the person who was shooting at you that night?

A: Yes, I was.

\* \* \* \*

Q: [But] when you had the chance to sit down with Sergeant Dunbeck, you didn't say anything about that?

A: I wanted a lawyer present for any statement given.

Q: You never gave a statement ever in this case.

A: No, I did not. After that I retained a lawyer and was advised not to give a statement. [Appendix, pp 45a-46a.]

**E. If allowed to stand, the Court of Appeals decision below would eviscerate the Doyle exception and would provide a strong incentive for defendants to fabricate testimony.**

According to the majority below, these questions went beyond the scope of the *Doyle* exception because they were focused on attacking defendant's credibility. But *of course* such questions attack a defendant's credibility – by its very nature evidence admitted under the *Doyle* exception is probative on a defendant's credibility because it is admissible only for the limited purpose of "challenging the defendant's testimony as to his behavior following arrest."<sup>17</sup> But a prosecutor is "entitled to fairly contest evidence presented by a defendant,"<sup>18</sup> and is also entitled to comment on the weakness of a defendant's case and his lack of credibility as demonstrated by the evidence.<sup>19</sup> This is precisely what the prosecutor did in this case – highlighting the improbable implications of defendant's claim that he was not afforded an opportunity to tell police his version of events and that this discrepancy should be considered by the jury in determining whether defendant was credible.

The majority's opinion below plunges the *Doyle* exception into a Serbonian Bog from which it cannot escape.<sup>20</sup> Its reasoning declares questions designed to challenge a defendant's assertion that he made a statement to police are constitutionally impermissible because such questions obviously also impeach a defendant's credibility.<sup>21</sup> The new rule articulated by the

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<sup>17</sup> *People v Sutton*, 436 Mich 575, 593; 464 NW2d 276 (1990); citing *Doyle*, 426 US at 619-620 n 11.

<sup>18</sup> *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999).

<sup>19</sup> *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995).

<sup>20</sup> See *Landress v Phoenix Mutual Life Ins*, 291 US 491, 499; 54 S Ct 461; 78 L Ed 934 (1934) (Cardozo, J., dissenting).

<sup>21</sup> *Bobo*, 390 Mich at 359; *Boyd*, 470 Mich at 375.

majority below eviscerates the *Doyle* exception by holding that evidence that by its very nature impeaches a defendant's credibility is inadmissible *because* it does so. Moreover, that rule is inconsistent with the "truth-seeking function" of the judiciary by keeping from the jury the entire picture of the police's investigation of a crime – including their willingness to investigate any claims made by a defendant which calls his guilt into question – and "thereby hinders public confidence in the integrity of the judicial process."<sup>22</sup> Instead, the majority below perversely gives defendant's an incentive to fabricate testimony because that defendant will know that fabricated testimony cannot be challenged because it would "impeach his credibility."

But this Court and the United States Supreme Court have illuminated a path out of the bog, by holding that evidence of post-*Miranda* silence is admissible in limited circumstances, where "a defendant [] testifies to an exculpatory version of events and claims to have told the police the same version upon arrest."<sup>23</sup> In this case, the use of post-*Miranda* silence falls well within that path. The cross-examination questions were offered for the proper purpose of refuting defendant's claim that the police would not allow him to explain his version of events. The comments in closing simply highlight the obvious implications of that evidence – that defendant's false claim that he never had an opportunity to talk to the police should be considered by the jury in assessing his overall credibility. It cannot be that *Doyle* allows the use of silence to challenge a defendant's testimony, but that a prosecutor commits reversible error by *commenting* on that obvious fact in closing. Rather, as noted by the dissent, the prosecutor's comments "merely comprised an argument that defendant's explanation of events was neither credible nor consistent with the testimony of other witnesses."<sup>24</sup> Accordingly, the use of

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<sup>22</sup> *People v Goldston*, 470 Mich 523, 540 n 9; 682 NW2d 479 (2004)

<sup>23</sup> *Doyle*, 426 US at 620.

<sup>24</sup> *Borgne*, slip op at 2 (Talbot, J., dissenting).

defendant's silence in this case is consistent with *Doyle*, *Bobo*, *Boyd*, and *Allen* and, therefore, did not violate defendant's constitutional rights.

**II. To preserve an evidentiary issue for appellate review, a party must object timely at trial and specify the same ground for objection as is asserted on appeal. In this case, trial counsel failed to object either to the prosecutor's questions on cross-examination or to the challenged statements during closing argument. Accordingly, this issue is not preserved.**

"To preserve an evidentiary issue for appellate review, a party must object timely at trial and specify the same ground for objection as is asserted on appeal."<sup>25</sup> Requiring a contemporaneous objection provides the trial court an opportunity to correct the error, which could thereby obviate the necessity of further legal proceedings and would be by far the best time to address a defendant's constitutional and nonconstitutional rights.<sup>26</sup>

In this case, defense counsel did not object during the challenged questions, and only lodged one objection during cross-examination; specifically that the prosecutor was "shift[ing] the burden" by asking defendant why he did not call the cab company who allegedly was dispatching a cab to pick him up at the time of the incident. (Appendix, p 48a). Defendant counsel failed to even mention *Doyle*, let alone provide any basis on which the trial court would be aware of the claimed error and allow it to potentially correct any error. In fact, the trial court was *never* put on notice of the grounds for objecting to the prosecutor's questions. Rather, defendant raised his *Doyle* objection for the first time on appeal. The issue is not preserved.

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<sup>25</sup> *People v Toma*, 462 Mich 281, 323; 613 NW2d 694(2000); quoting *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992).

<sup>26</sup> *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999) (quotations omitted).

**III. As noted above, defendant failed to preserve his objection to the use of post-Miranda silence. Unpreserved, constitutional errors are reviewed for plain error affecting substantial rights.**

Constitutional questions, such as the right to remain silent in the face of custodial interrogation, are reviewed de novo.<sup>27</sup> The effect of an unpreserved claim of constitutional error is reviewed for plain error affecting substantial rights.<sup>28</sup> To avoid forfeiture under the plain error rule, a defendant must show actual prejudice.<sup>29</sup> Under the plain error rule, reversal is only warranted if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial.<sup>30</sup> Here, defendant is claiming that the prosecutor's use of post-*Miranda* silence violated due process and, therefore, this issue should be reviewed as a constitutional question.

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<sup>27</sup> *People v Hickman*, 470 Mich 602, 605; 684 NW2d 267 (2004).

<sup>28</sup> *Carines*, 460 Mich at 764.

<sup>29</sup> *People v Pipes*, 475 Mich 267, 270; 715 NW2d 290 (2006).

<sup>30</sup> *Cairnes*, 460 Mich at 774.

**IV. Under the plain error rule, reversal is warranted only if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial. In this case, any error in mentioning post-Miranda silence was harmless in light of the overwhelming evidence against defendant – including the victim's eyewitness testimony, the description of the clothes defendant was wearing; the discovery of defendant hiding in a nearby building; and the victim's testimony that defendant drove past her two weeks after the robbery and hollered out the window "I'm the motherfucker who robbed you, ha, ha, ha."**

Even if this Court were to agree with the majority below that the use of pre-*Miranda* silence was constitutionally impermissible because of its collateral effect of impeaching defendant's testimony, the Court of Appeals should still be reversed because any error was harmless. Because the claimed error is an unpreserved, constitutional error, it is reviewed for plain error that affected the defendant's substantial rights.<sup>31</sup> Reversal is only required where "the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial process."<sup>32</sup> Merely mentioning the fact that defendant chose to remain silent did not "seriously affect" the fairness of the trial, because it did nothing to either bolster the evidence against defendant or bolster the credibility of the complaining witness – a witness the jury must have believed in order to render a guilty verdict. The evidence adduced at trial – including the victim's eye-witness testimony, the identification of defendant and his clothing; and the fact of defendant's arrest within blocks of the crime scene cowering in an abandoned building; and defendant's subsequent statement to the victim – is more than sufficient to support the jury's verdict. Given the substantial amount of evidence supporting the jury's determination of guilt, merely having revealed that defendant did not make a statement to police or exercised his right to silence following arrest had a negligible impact on the verdict.

The prosecutor's evidence against defendant included eyewitness testimony from the victim Caroline Kessler – who had the opportunity to observe defendant two different times.

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<sup>31</sup> *Carines*, 460 Mich at 774.

<sup>32</sup> *Cairnes*, 460 Mich at 774.

Caroline testified that she was at a gas station filling her vehicle when someone with a male voice put their arm around her and told her to give them her purse. (Appendix, pp 19a-20a). When Caroline turned around, she saw defendant standing in front of her with a handgun, wearing a blue jacket with red stripes. (Appendix, p 22a). Caroline was also able to describe defendant as being clean-shaven with "light brown" hair. (Appendix, p 24a). Caroline identified defendant as her assailant when police arrested him moments later at a nearby abandoned building. (Appendix, p 25a).

Not only was Caroline able to identify defendant, but defendant incredibly implicated himself just two weeks later. Caroline testified that she was in a car accident on December 31, 2004, and was on the side of the road exchanging insurance information when defendant drove up to her, put his window down, and yelled "I'm the motherfucker who robbed you, ha, ha, ha:"

Q: When [defendant's] car is driving up to you do you pay it any mind?

A: No.

Q: Where does it slow down at?

A: Right next to me and it stops.

Q: Stops. Windows up or down in that car?

A: Windows down.

Q: When it stops in front of you do you pay attention to that?

A: Not Really. You know, I was more worried about the accident.

Q: Do you start paying attention to that car?

A: Yes.

Q: Why is that?

A: Because the male driver hollered, I'm the –

Q: Go ahead, exactly what the person said.

A: I'm the motherfucker who robbed you, ha, ha, ha.

Q: Did you get a good look at the person? And was laughing?

A: Yes, I got a good look at him.

\* \* \*

Q: Who was that person?

A: The same guy who robbed me.

Q: Is that the defendant right here?

A: Yes. [Appendix, p 29a.]

Officer Anthony Fawaz testified that when he arrested defendant, he matched the description given by Caroline. Caroline described defendant as a "white male, clean shaven, dirty blonde hair. He was wearing a blue and red coat and he had a black hooded sweatshirt underneath the coat and blue jeans." (Appendix, pp 32a-33a). When defendant was arrested in a nearby abandoned building, "he was wearing a blue and red coat with a black hooded sweater and blue jeans." (Appendix, p 34a). Moreover, when Officer Fawaz took defendant out of the abandoned building, Caroline was on the scene and exclaimed – without prompting – "that's him, that's the man who robbed me." (Appendix, p 38a).

Given the overwhelming evidence of defendant's guilt, even if this Court were to agree with the majority below, it still should re-instate defendant's conviction. This is because even if mentioning defendant's post-*Miranda* silence was error, it did not affect the outcome of the trial. In other words, defendant would have been found guilty independent of the prosecutor's questions regarding defendant's post-*Miranda* silence.

**CONCLUSION AND RELIEF SOUGHT**

This Court should reject the Court of Appeals majority's improper narrowing of the *Doyle* exception and should reverse the Court of Appeals for the reasons set forth above.

Respectfully submitted,

Michael A. Cox  
Attorney General

Thomas L. Casey (P24215)  
Solicitor General  
Counsel of Record



Mark G. Sands (P67801)  
Assistant Attorney General

People of the State of Michigan  
Plaintiff-Appellant  
P.O. Box 30217  
Lansing, Michigan 48909  
(517) 373-4875

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