

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Patrick M. Meter, PJ, Donald S. Owens and Michael J. Talbot, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

MICHAEL J. BORGNE,

Defendant-Appellee.

Supreme Court No. 134967

Court of Appeals No. 269572

Circuit Court No. 05-173-01

BRIEF ON APPEAL – APPELLEE

(ORAL ARGUMENT REQUESTED)

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STATEMENT OF JURISDICTION

Defendant-Appellee does not contest that this Honorable Court has jurisdiction in this matter. MCR 7.301(A)(2).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I. DID THE PROSECUTOR'S EXTENSIVE CROSS-EXAMINATION AND COMMENTS ABOUT MR. BORGNE'S POST-MIRANDA SILENCE VIOLATE HIS CONSTITUTIONAL RIGHTS UNDER *DOYLE V OHIO* AND IS MR. BORGNE ENTITLED TO A NEW TRIAL? WAS DEFENSE COUNSEL INEFFECTIVE WHEN HE FAILED TO OBJECT TO THE USE OF MR. BORGNE'S POST-MIRANDA SILENCE AND IS MR. BORGNE ENTITLED TO A NEW TRIAL?**

Court of Appeals answered "Yes" to the first question, and thus did not reach the second question.

Defendant-Appellee answers "Yes" to the questions.

STATEMENT OF FACTS

Defendant-Appellee Michael Borgne was convicted, as charged, of armed robbery and felony firearm by a jury, before the Honorable Cynthia Gray Hathaway, in the Wayne County Circuit, on December 15, 2005. (T II 228; 105b).¹ The Court sentenced Mr. Borgne to mandatory consecutive sentences, imprisonment for 27 months to 84 months on the robbery count and 2 years on the felony firearm count. (S 8; 106b).

The complainant, Caroline Kessler, was robbed of her purse at gunpoint outside of a gas station on Fort St. near Livernois St., around 11 pm, on December 14, 2004, as she walked from the station building back towards her van parked at one of the pumps. (T II 6-14, 18; 1b-9b, 12b). Ms. Kessler viewed her assailant face-to-face from an arm's length away. (T II 12, 15; 7b, 10b). The robber took her purse and ran parallel to Fort, across Livernois, and down an alley. (T II 18-19; 12b-13b). Ms. Kessler chased the robber just across Livernois and then saw a Mexican man chase him down the alley on Fort before she lost sight of them. (T II 20-22, 51; 14b-16b, 38b).

Ms. Kessler ran back to the gas station, told the attendant to call the police, and called her brother Carl Cooper, who lived only 4 blocks away. (T II 22-23, 93; 16b-17b, 52b). Mr. Cooper² called the police and then came to the gas station in a car. (T II 23-24, 101-103; 17b-18b, 53b-55b). A friend of Mr. Cooper's, Mike Davis, also drove up in another car and the three of them split up in their different vehicles to look for the robber. (T II 24-25; 18b-19b). Mr.

¹ Transcript references for the third trial will be as follows: "T I" refers to the first day of trial, December 14, 2005 and "T II" refers to the second day of trial, December 15, 2005. "S" refers to the transcript of the sentencing held on January 27, 2006. **"b" = Appellee's Appendix**

² At the time of trial, Mr. Cooper was incarcerated for a conviction of Breaking and Entering a Motor Vehicle. (T II 109; 58b).

Cooper had a gun. (T II 25; 19b). Ms. Kessler told Mr. Cooper that the robber was wearing a jacket that was red, black, and white. (T II 104; 56b).

Ms. Kessler and Mr. Cooper saw the Mexican man outside of a large old abandoned store and based on their conversation with him they believed that the robber was inside. (T II 26-27, 105; 20b-21b). Mr. Cooper knew the Mexican man as “Tito” and had known him for about 10 years because Tito often visited one of Mr. Cooper’s neighbors. (T II 110, 113; 59b-60b). Mr. Cooper went inside the building to look, but came out asking for a flashlight. (T II 52, 69; 39b, 41b). When Mr. Cooper came out of the building, he threw his gun in Ms. Kessler’s van because he was not supposed to be in possession of a gun. (T II 25-26, 68; 19b-20b, 40b).

The police arrived at the abandoned building about 3 minutes later in response to a call about a person shot. (T II 27-28, 107, 121, 142; 21b-22b, 57b, 61b, 75b). An officer testified that it is common for 9-1-1 callers to report a shooting when there has really been no shooting, in order to get the police to respond faster. (T II 143-144; 76b-77b). Mr. Cooper denied that he had reported a shooting when he called the police. (T II 109; 58b). The identity of the caller who reported a shooting was unknown. (T II 144; 77b). The police never spoke with Tito, the Mexican man. (T II 133-134, 154-155, 158; 71b-72b, 80b-81b, 84b).

Ms. Kessler described the robber to the responding police officers as having hair like hers, but testified that she was thinking of her hair color before she dyed it rather than her sandy/dirty blonde dyed color. She further described him as being clean shaven, medium height, medium build, baby-faced, and brown eyed. (T II 28-29, 123; 22b-23b, 62b). She described the jacket worn by the robber as blue and red, with white lettering. She said he also had a black hooded sweatshirt underneath the jacket and wore a pair of blue jeans. (T II 29, 123; 23b-62b).

The police went inside the building for a few minutes and came out with Mr. Borgne in handcuffs. (T II 29-30, 125, 130; 23b-24b, 63b, 68b). Officer Fawaz testified that he found Mr. Borgne crouching in a fetal position against a wall near a corner. (T II 126-127, 64b-65b). When the officers identified themselves as police and shined their flashlights on him, Mr. Borgne was cooperative. (T II 140-141; 73b-74b). Ms. Kessler and Officer Fawaz testified that Mr. Borgne was wearing clothing consistent with Ms. Kessler's description. Ms. Kessler identified him as the robber. (T II 30, 127, 131; 24b, 65b, 69b).

Later, back at the gas station, Ms. Kessler spoke with a police detective about the incident. (T II 31, 44; 25b, 37b). Ms. Kessler, who is 5' 2", told the detective that the robber was a few inches taller. (T II 44; 37b). The detective testified that Ms. Kessler described the robber as a 5' 2" to 5' 3", white male, of medium build, and with brown hair. (T II 154; 80b). The detective testified that she described the clothing as a blue jacket with red strips or red lettering, a hoodie underneath, and blue jean pants. (T II 154, 157; 80b, 83b).

At trial, Ms. Kessler described the robber as a white male, clean shaven, young, and brown haired. (T II 15; 10b). She testified that the robber wore a blue jacket with red strips and on the back it had white lettering. (T II 13; 8b). Underneath the jacket, he wore a black sweatshirt with a hood, with the hood pulled up on his head but not covering his face. (T II 14; 9b).

Ms. Kessler identified Mr. Borgne as the robber at trial. (T II 13; 8b). She testified that presently Mr. Borgne's hair appeared "[d]ark brown, black" and he had a mustache and goatee. (T II 15-16; 10b-11b). The police detective testified that at the time of his arrest Mr. Borgne had the same trim mustache and goatee, which were clearly visible. (T II 152, 156; 78b, 82b). The

detective thought he might be a little heavier now and his hair might be a little darker. (T II 153; 79b).

Neither Ms. Kessler's purse nor any gun was ever found. (T II 31, 129-131, 160; 25b, 67b-69b, 85b). Ms. Kessler, her brother, and his friend returned the next day to the building to look and did not find them. (T II 42-43; 35b-36b). By all accounts, the building was filled with trash and debris about 1 foot high. (T II 42, 125-126, 132, 163, 174; 35b, 63b-64b, 70b, 86b, 97b).

A few weeks after the robbery, on December 31, 2004, around 10 or 11 AM, Ms. Kessler was driving her van, which had distinctive yellow lettering on it, when she was involved in a traffic accident on Livernois about a ½ mile from the crime scene. (T II 6, 33-34, 40; 1b, 26b-27b, 33b). She and the driver of the other vehicle, Vanessa Jackson, pulled over to exchange information and wait for the police. (T II 34-36, 71-72; 27b-29b, 42b-43b). Ms. Kessler testified that while she was standing by her van and Ms. Jackson was in her own car, Mr. Borgne drove a blue car up, with a female passenger, slowed to a stop and yelled out at her that he was the one who robbed her and laughed before driving off. (T II 37-39; 30b-32b). Ms. Kessler told Ms. Jackson about this and later, when Ms. Jackson's father, Ira Jackson arrived, she told him about it too. (T II 41, 88; 34b, 51b). The Detroit Police never came and Mr. Jackson, a lieutenant in the Ecorse Police Department, assisted them in filing an accident report. (T II 74, 87-88; 44b, 50b-51b). Ms. Jackson and Mr. Jackson both testified that Ms. Kessler reported this drive by incident to them and was visibly upset about it. (T II 75-79, 88; 45b-49b, 51b).

Mr. Borgne testified that the night of the robbery he was across the street from the gas station waiting for a cab outside of a fast food restaurant. (T II 164-165, 171; 87b-88b, 94b). He heard gun shots coming towards him, so he ran eastbound on Fort Street. (T II 165, 172; 88b,

95b). He saw an African-American woman as he was running and he yelled for help. (T II 165, 177; 88b, 98b). Mr. Borgne ran into the abandoned building and hid in a corner. (T II 165-166, 172-174; 87b-88b, 95b-97b). He then heard gun shots being fired into the building. (T II 166; 89b). Eventually police officers entered the building. (T II 166-167; 89b-90b). Mr. Borgne waited for the officers to give him commands so he would not get shot. (T II 167; 90b). As he was being taken out, he told the officers that someone had been shooting at him. (T II 183; 102b). The officers walked him past a female, Ms. Kessler, as they came out of the building and she pointed at him and said that he was the man who robbed her. (T II 168, 170; 91b, 93b). Mr. Borgne acknowledged that he was wearing the red and blue jacket and black hooded sweatshirt that were admitted into evidence. (T II 167; 90b). Mr. Borgne denied being at the gas station at all. (T II 168; 91b).

On cross-examination, the Prosecutor elicited from Mr. Borgne that when Sergeant Dunbeck wanted to question him at the police station following his arrest he was informed of and chose to invoke his constitutional rights to silence and to counsel rather than tell the sergeant what he had just testified to about the night of the robbery. (T II 181-182; 100b-101b). The Prosecutor also elicited that after being appointed counsel, Mr. Borgne never waived his constitutional right to silence until he testified at trial. (T II 182-184; 101b-103b). So that trial was the first time that he was presenting his version of events. (T II 182; 101b).

Mr. Borgne denied seeing and harassing Ms. Kessler on New Year's Eve day as she had testified. (T II 169; 92b). He had not seen her since the police walked him past her outside the abandoned building on the night she was robbed. (T II 168-169; 91b-92b). Mr. Borgne testified that he has no license, does not drive, and did not have access to a blue vehicle, such as Ms. Kessler had described driving by her. (T II 169; 92b).

Mr. Borgne did not agree that he met Ms. Kessler's description of the robber. (T II 185-186; 104b-105b). He is 5' 9" tall, not 5' 4", and he weighs 200 lbs. (T II 186; 105b). He testified that her description of eye and hair color did not match. (T II 186; 105b). He also noted that she described the robber as clean shaven, which he had not been. (T II 186; 105b). Mr. Borgne noted that in one of her descriptions, Ms. Kessler had described red lettering on the jacket, while his jacket had white lettering. (T II 187; 106b). The jacket that Mr. Borgne was wearing when he was arrested had the words "U-D M Titans" in white lettering written on the back, but none of Ms. Kessler's descriptions identified what the lettering spelled out. (T II 30, 128; 24b, 66b). Mr. Borgne noted that his jacket did not have red strips as described, except on the cuffs, but rather had red sleeves. (T II 187; 106b).

Mr. Borgne appealed by right. The Court of Appeals, 2-1, found a violation of *Doyle v Ohio*, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976), reversed his conviction and remanded for a new trial. *People v Michael J Borgne*, unpublished per curiam opinion of the Court of Appeals, issued August 9, 2007 (Docket No. 269572); 9a-17a.

On April 30, 2008, the Michigan Supreme Court granted the prosecution's application for leave to appeal the August 9, 2007, judgment of the Court of Appeals. *People v Borgne*, Order of the Supreme Court, issued April 30, 2008 (Docket No. 134967); 18a. The parties were ordered to address four issues: (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. *Id.*

Additional facts may be discussed where pertinent to the issues raised below.

I. THE PROSECUTOR'S EXTENSIVE CROSS-EXAMINATION AND COMMENTS ABOUT MR. BORGNE'S POST-MIRANDA SILENCE VIOLATED HIS CONSTITUTIONAL RIGHTS UNDER *DOYLE V OHIO* AND MR. BORGNE IS ENTITLED TO A NEW TRIAL. DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO OBJECT TO THE USE OF MR. BORGNE'S POST-MIRANDA SILENCE AND MR. BORGNE IS ENTITLED TO A NEW TRIAL.

Background

During his cross-examination of Mr. Borgne, the prosecutor focused extensively on Mr. Borgne's exercise of his post-arrest, post-*Miranda*³ rights to silence and counsel:

Prosecutor: Caroline Kessler did point you out and say that's the man that robbed me, basically in those words?

Defendant: Basically.

Prosecutor: And then you had the opportunity to sit down with Sargent [sic] Dunbeck here when you were under arrest?

Defendant: Yes.

Prosecutor: That was at the precinct, correct?

Defendant: Yes.

Prosecutor: Okay.

You never told Sargent Dunbeck any of this, did you?

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

Prosecutor: You were advised of your constitutional rights, correct?

Defendant: Yes, sir.

Prosecutor: No question that you were under arrest and you didn't have to give a statement?

³ *Miranda v Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966).

Defendant: Yes, sir.

Prosecutor: You could have a lawyer there if you wanted to?

Defendant: Yes, sir.

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

Defendant: Yes, sir.

Prosecutor: You could stop answering questions at any time?

Defendant: Yes, sir.

Prosecutor: That was no surprise to you?

Defendant: Yes, sir.

Prosecutor: She was polite to you, she wasn't beating you over the head with a phone book or anything like that?

Defendant: No.

Prosecutor: No problems with Sargent Dunbeck?

Defendant: No.

Prosecutor: But you never made a statement did you?

Defendant: No, I did not want to make a statement without a[n] attorney present.

Prosecutor: Okay.

If you were arrested and you knew you were being arrested for armed robbery, somebody was accusing you of robbing them at gunpoint.

Defendant: I was going to wait for an attorney to help me address the matter.

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

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

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

Defendant: Yes, sir.

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

Defendant: Yes, sir.

Prosecutor: Were you concerned about finding the person that was shooting at you that night?

Defendant: Yes, I was.

* * *

Prosecutor: And then when you had the chance to sit down with Sargent Dunbeck you didn't say anything [sic] that?

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

Prosecutor: You never gave a statement ever in this case?

Defendant: No, I did not. After that I had retained a lawyer and was advised not to give a statement.

Prosecutor: Well, you didn't retain a lawyer until after the preliminary examination in this case, right?

Defendant: Yes, sir.

Prosecutor: So when you were arrested that night on the early morning hours of now December 15, 2004 you didn't have a specific lawyer in mind, did you?

Defendant: No.

Prosecutor: And it wasn't like you were in the process of consulting with the attorney, correct?

Defendant: No, I wasn't.

Prosecutor: And then about two weeks later or so you go to the preliminary examination you still haven't retained an attorney.

Defendant: I had a State appointed attorney.

Prosecutor: Correct. And you never gave a statement at that point with the State appointed attorney did you?

Defendant: Never had a chance to.

Prosecutor: You didn't do it in court did you?

Defendant: Never had a chance to. I was never allowed to talk while I was in the courtroom. The lawyer advised me not to. That's when we fired the lawyer and retained Jonathan Jones.

Prosecutor: And up until today you still have [not] given a statement in this case, not until the 11th hour of the trial, correct?

Defendant: No, sir.

Prosecutor: This is basically the end of the trial right here.

Defendant: Yes, sir. I wanted everybody to hear my side. [T II 180-184; 99b-103b (Emphasis added).]

The Prosecutor used Mr. Borgne's post-arrest, post-*Miranda* silence against him in closing argument:

Mr. Borgne out that night and he sits down with Sargent [sic] Dunbeck in the police station, you're under arrest for Armed Robbery, someone's saying you robbed 'em. **What's your side of the story? Well, nothing. Let me think about it. A year goes by there's no statement ever given. If somebody was trying to kill Mr. Borgne he never mentions it. No concern over whose trying to kill him. There's no statement at all. Is that going to make sense, ladies and gentleman? It defies logic.**

Forget whether he robbed somebody. **If someone's trying to kill you and the police were there and had you in custody, you might want to at least mention it. You might want to say I'm gonna [sic] put it down and sign my name and here, for all eternity I said it. Somebody tried to kill me. Nothing like that. Nothing like that until today, a year and a day later.** It defies logic. [T II 198-199; 107b-108b (emphasis added).]

In his rebuttal, the prosecutor mocked Mr. Borgne's exercise of his constitutional rights to silence when he argued, "And then he wanted to explain himself but never had the chance." (T II 211; 109b).

1. Were Mr. Borgne's constitutional rights under *Doyle v Ohio* violated?

Because Miranda warnings carry the implicit assurance that a defendant's silence will not be penalized, the prosecutor is generally barred from using a defendant's post-*Miranda* silence. US Const, Ams V, XIV; *Doyle v Ohio*, 426 US 610, 618-619; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v Dennis*, 464 Mich 567; 628 NW2d 501 (2001).⁴ Post-*Miranda* silence has no probative value because "[s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights." *Doyle, supra* at 617. "In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.*; see also *Dennis, supra* at 574. In a series of federal and Michigan cases, courts have circumscribed *Doyle's* protections and carved out certain exceptions to the general bar against exploiting a defendant's post-*Miranda* silence.

As a threshold matter, in order to violate a defendant's constitutional rights under *Doyle*, the prosecutor must affirmatively use the defendant's post-*Miranda* silence by specifically asking about or commenting on the silence. *Greer v Miller*, 483 US 756, 764; 107 S Ct 3102; 97 L Ed 2d 618 (1987); *Dennis, supra* at 579. When a witness did not answer the prosecutor's question about a defendant's post-*Miranda* silence and the prosecutor did not comment on it, *Doyle* was not violated. *Greer, supra* at 764-765. There was also no *Doyle* violation when a witness answered an open-ended prosecutor question by briefly describing a defendant's post-

Miranda silence and the prosecutor never mentioned that testimony to the jury. *Dennis, supra* at 579. Thus, where a defendant's post-*Miranda* silence was not submitted to a jury, through testimony or comments, *Doyle* is not violated because the silence is not *used* by the prosecutor. *Greer, supra* at 764-765; *Dennis, supra* at 579.

In addition, *Doyle* bars the prosecutor from using a defendant's choice to exercise post-*Miranda* silence only. *Doyle, supra*. *Doyle's* due process protections against impeachment with silence do not apply unless the defendant was advised of his or her rights under *Miranda*. Thus, due process is not violated when the prosecutor impeaches with a defendant's pre-*Miranda* silence before arrest, *Jenkins v Anderson*, 447 US 231; 100 S Ct 2124; 65 L Ed 2d 86 (1980); *People v Cetlinski*, 435 Mich 742; 460 NW2d 534 (1990), or after arrest, *Fletcher v Weir*, 455 US 603, 607; 102 S Ct 1309; 71 L Ed 2d 490 (1982). Pre-*Miranda* silence is probative and does not rest on an implied assurance by the government that it will not be used against the defendant. *Brecht v Abrahamson*, 507 US 619, 628-629; 113 S Ct 1710; 123 L Ed 2d 353 (1993); see also *Combs v Coyle*, 205 F3d 269, 281-83 (CA 6, 2000)(holding that although the prosecution may use pre-arrest silence to impeach a defendant, it is prohibited from using pre-arrest silence as substantive evidence of guilt).⁵

Doyle also does not apply when a defendant waives, or claims to have waived, his or her post-*Miranda* right to remain silent. "[A] defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent," and the prosecutor may impeach with the defendant's prior inconsistent statements or silence. *Anderson v Charles*, 447 US 404, 408;

⁴ The Court later extended this protection to post-*Miranda* invocations of the right to counsel. *Wainwright v Greenfield*, 474 US 284, 295; 88 L Ed 2d 623; 106 S Ct 634 (1986).

⁵ There is a split among the federal circuits regarding whether a prosecutor's use of a defendant's pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination. See *United States v Salinas*, 480 F3d 750, 758 (CA5, 2007)(citing cases).

100 S Ct 2180; 65 L Ed 2d 222 (1980); see also *People v Sutton*, 436 Mich 575, 592; 464 NW2d 276 (1990). In *Charles*, because the defendant's post-*Miranda* exculpatory statement was inconsistent with his trial testimony, the prosecutor properly impeached the defendant with questions about why he previously told the police a different story. *Id.* at 405. In *Sutton*, because the defendant claimed that he had made a post-*Miranda* exculpatory statement, the prosecutor was entitled to impeach with police testimony that he had remained silent. *Sutton, supra* at 592.

Finally, the prosecutor may use evidence of a defendant's post-*Miranda* silence to rebut certain defense assertions. The prosecutor is entitled to use a defendant's post-*Miranda* silence to rebut the defendant's assertion that the government never gave him or her an opportunity to make an exculpatory statement. *People v Allen*, 201 Mich App 98, 103; 505 NW2d 869 (1993). *Doyle* and its progeny may also permit a prosecutor to comment on a defendant's post-*Miranda* silence to rebut a defense assertion that the defendant cooperated with authorities after being *Mirandized*. *Delaney v Bartee*, 522 F3d 100, 104 (CA1, 2008); *Killian v Poole*, 282 F3d 1204, 1211 (CA9, 2002). However, the prosecutor may not use evidence of a defendant's apparent ability to understand and invoke the post-*Miranda* right to silence to rebut a claim that the defendant was insane at the time of arrest. *Wainwright v Greenfield*, 474 US 284, 289-295; 106 S Ct 634; 88 L Ed 2d 623 (1986).

In sum, *Doyle* applies when (a) the prosecutor used the defendant's silence; (b) the defendant received *Miranda* warnings and invoked the right to remain silent; (c) the silence at issue was post-*Miranda*; and (d) the prosecutor's use of post-*Miranda* silence was not permitted by a *Doyle* exception.

(a) The prosecutor used Mr. Borgne’s silence.

There is no dispute that the prosecutor used Mr. Borgne’s silence within the meaning of *Greer, supra* at 764 and *Dennis, supra* at 579. In response to the prosecutor’s extensive questioning about his post-*Miranda* actions, Mr. Borgne repeatedly testified that he never made a statement. (T II 180-181; 100b-103b.) The prosecutor argued during closing arguments that Mr. Borgne’s silence was probative of his guilt by implying that Mr. Borgne must be lying at trial because he remained silent until the day that he testified at his trial (T II 198-199; 107b-108b). Because the jury heard the answers to the prosecutor questions about Mr. Borgne’s silence and heard the prosecutor’s comments about the silence during closing arguments, the silence was submitted to the jury and, therefore, used by the prosecutor. See *Greer, supra* at 764; *Dennis, supra* at 579.

(b) The police advised Mr. Borgne of his rights under *Miranda*, and he did not waive his right to remain silent.

There is no dispute that Sergeant Dunbeck advised Mr. Borgne of his *Miranda* rights.⁶ It is also clear from the record that Mr. Borgne invoked his right to remain silent. The prosecutor does not argue that Mr. Borgne ever waived his right to post-*Miranda* silence. See *Charles, supra* at 408; *Sutton, supra* at 592. Mr. Borgne testified repeatedly on cross-examination that he never made a post-*Miranda* statement. He stated that he remained silent at first because he wanted to speak with an attorney before making a statement and then the attorney advised him to remain silent. (T II 180-184; 99b-103b)

⁶ During cross-examination the prosecution asked, “You were advised of your constitutional rights, correct?” Mr. Borgne responded, “Yes, sir.” (T II 181; 100b)

(c) The silence at issue was post-*Miranda*.

Because the due process rights afforded by *Doyle* are premised on the implicit assurances of *Miranda*, the timing of the silence at issue is critical when determining whether the prosecutor's references to a defendant's silence constituted error. See *People v Hackett*, 460 Mich 202, 209; 596 NW2d 107 (2003). The government may impeach with pre-*Miranda* silence. *Doyle, supra* at 617; see also *Dennis, supra* at 574.

It is clear from the record that the prosecutor intentionally limited his questions and comments to the period after Sergeant Dunbeck read Mr. Borgne his *Miranda* rights (T II 181-184, 198-199; 100b-103b, 107b-108b). Specifically referring to events from the time Mr. Borgne initially sat down with Sergeant Dunbeck and the day he testified, the prosecutor asked Mr. Borgne *nine times* whether he had made a statement. Each time, Mr. Borgne denied that he made a statement and stated *five times* that he had exercised his right to silence because he wanted his lawyer present or had been advised to remain silent. (T II 181-184; 100b-103b.) The prosecutor never questioned Mr. Borgne, the arresting officers, or Sergeant Dunbeck about Mr. Borgne's pre-*Miranda* statements or silence.

Further, the prosecutor's comments about Mr. Borgne's silence during closing arguments were limited to the period after Sergeant Dunbeck advised him of his *Miranda* rights. The prosecutor argued that Mr. Borgne "sits down with Sargent [*sic*] Dunbeck in the police station . . . What's your side of the story? Well, nothing." And, "You might want to say I'm gonna [*sic*] put it down and sign my name . . . Nothing like that until today, a year and a day later." (T II 198-199; 107b-108b) The sole focus of the prosecution's comments and questions was Mr. Borgne's post-*Miranda* silence.

(d) The prosecutor’s use of post-*Miranda* silence was not excused by any *Doyle* exception

The prosecutor’s questions and comments about Mr. Borgne’s post-*Miranda* silence did not fall under any exception to *Doyle*. On appeal, the prosecutor argues that the use of Mr. Borgne’s silence was permissible because of two exceptions to the general bar on using post-*Miranda* silence: (i) that the silence could be used to rebut the claim that Mr. Borgne told the police an exculpatory version of events; and (ii) that Mr. Borgne claimed that the police did not afford him the opportunity to make a post-*Miranda* statement. Neither of these arguments have merit.

(i) The prosecutor did not permissibly use Mr. Borgne’s post-*Miranda* silence to rebut a defense claim that he made an exculpatory statement at the time of his arrest.

Plaintiff-Appellant argues on appeal that Mr. Borgne opened the door to using his post-*Miranda* silence when he testified that he tried to make an exculpatory statement at the time of his arrest about the shooting:

Defense Counsel: Did anyone else speak that you remember?

Defendant: 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.** [T II 170; 93b, emphasis added.]

Mr. Borgne also testified during cross-examination, before the prosecutor asked him about being advised of his *Miranda* rights, that he “may have said I was being shot at.” (T II 180; 100b) Additionally, he reiterated that he “told the arresting officers as they pulled me out of the building that somebody has been shooting at me, help me.” (T II 183; 102b). This testimony

clearly shows that any claimed exculpatory statement occurred *before* Mr. Borgne was given his *Miranda* rights.

Mr. Borgne's claim that he made a pre-*Miranda* exculpatory statement did not open the door to impeachment with his post-*Miranda* decision to remain silent. The prosecutor, of course, could have impeached Mr. Borgne with his claim about the post-arrest, pre-*Miranda* exculpatory statement by providing evidence that Mr. Borgne did not make a pre-*Miranda* statement. *Weir, supra* at 607. The prosecutor chose not to try to impeach Mr. Borgne by calling police officers to rebut the claim of a pre-*Miranda* exculpatory statement and never asked Mr. Borgne any questions about the pre-*Miranda* statement.

Mr. Borgne steadfastly testified that he never made a statement after he sat down with Sergeant Dunbeck and had received *Miranda* warnings:

Prosecutor: And up until today you still have [not] given a statement in this case, not until the 11th hour of the trial, correct?

Defendant: No, sir. [T II 184; 103b]

Thus, Mr. Borgne did not open the door to use of his post-*Miranda* silence by claiming that he had waived his *Miranda* rights and told the police his version of events.

This case is distinguishable from *Sutton*, where the defendant claimed at trial that he had given a post-arrest, post-custody exculpatory statement. In that case, the prosecutor rebutted that assertion by asking the officer a carefully worded question that did not reference the defendant's right to silence. *Sutton, supra* at 589-590. In contrast, Mr. Borgne insisted over and over at trial that he had maintained post-*Miranda* silence. The prosecutor did not disagree with that claim. On the contrary, the prosecutor was intent on establishing to the jury that Mr. Borgne maintained

his post-*Miranda* silence by first establishing that he knew his *Miranda* rights and then badgering him about his choice to remain silent (T II 181-184; 100b-103b).

(ii) Mr. Borgne did not claim that the *government* failed to give him a chance to tell his version of events.

A defendant's post-arrest behavior is admissible to rebut a defense assertion that the police did not give the defendant an opportunity to tell his or her version of events. *Allen, supra* at 103-104. In this case, the Court of Appeals dissent argued that the comments by the prosecutor were properly "aimed at rebutting the impression that defendant did not have an opportunity to tell his version of the events." *People v Borgne*, unpublished dissent of the Michigan Court of Appeals (Talbot, J., dissenting), issued August 9, 2007 (Docket No. 269572) at *2, quoting *Allen, supra* at 104; 16a. However, Mr. Borgne never contended that the *government* did not afford him the opportunity to tell his version of events.

In fact, Mr. Borgne readily agreed that the police gave him the opportunity to give his version of events:

Prosecutor: No question that you were under arrest and you didn't have to give a statement?

Defendant: Yes, sir.

Prosecutor: You could have a lawyer there if you wanted to?

Defendant: Yes, sir.

Prosecutor: You had the opportunity to give your version of the events?

Defendant: Yes, sir.

* * *

Prosecutor: But you never made a statement did you?

Defendant: No, I did not want to make a statement without a[n] attorney present.

Prosecutor: Okay.

If you were arrested and you knew you were being arrested for an armed robbery, somebody was accusing you of robbing them at gunpoint.

Defendant: I was going to wait for a lawyer to help me address the matter.

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

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

[T II 181-182; 100b-101b, emphasis added.]

Mr. Borgne stated that he “[n]ever had a chance” to make a statement only after the prosecutor had asked Mr. Borgne *nine times* about his post-*Miranda* failure to make a statement and inquired about Mr. Borgne’s process for retaining counsel:

Prosecutor: And then when you had the chance to sit down with Sargent [*sic*] Dunbeck you didn’t say anything that?

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

Prosecutor: You never gave a statement in this case?

Defendant: No, I did not. After that I had retained a lawyer and was advised not to give a statement.

Prosecutor: So when you were arrested that night on the early morning hours of now December 15, 2004, you didn’t have a specific lawyer in mind, did you?

Defendant: No.

Prosecutor: And it wasn’t like you were in the process of consulting with the attorney, correct?

Defendant: No, I wasn’t.

Prosecutor: And then about two weeks later or so you go to the preliminary examination you still haven't retained an attorney.

Defendant: I had a State appointed attorney.

Prosecutor: Correct. And you never gave a statement at that point with the State appointed attorney, did you?

Defendant: Never had a chance to.

Prosecutor: You didn't do it in court did you?

Defendant: **Never had a chance to. I was never allowed to talk while I was in the courtroom. The lawyer advised me not to.** That's when we fired the lawyer and retained Johnathan Jones.

[T II 183-184; 102b-103b (emphasis added.)]

It is clear from his testimony that Mr. Borgne maintained his silence at first because he wanted to consult with an attorney and then because his attorney advised him not to make any statement. (T II 180-184; 99b-103b). Because he never claimed that the police did not give him the opportunity to make a statement, Mr. Borgne's post-arrest behavior was not admissible under the *Allen* exception.

The prosecutor argues on appeal that "the majority below perversely gives defendant's [*sic*] an incentive to fabricate testimony because that defendant will know that fabricated testimony cannot be challenged because it would 'impeach his credibility.'" (Plaintiff-Appellant's Brief on Appeal at 10.) Of course fabricated testimony may be attacked through permissible avenues of cross-examination. A skillful prosecutor can demonstrate weaknesses and inconsistencies in a defendant's version of events through close questioning. A prosecutor is permitted to ask the jury to use its common sense when deciding whether to find a defendant's version of events credible in light of all the evidence, but not post-*Miranda* silence. In this case, the prosecutor could have tried to impeach Mr. Borgne's assertion that he made pre-*Miranda*

statements by asking him about the statements or by calling Sergeant Dunbeck or the arresting officers to testify in rebuttal about Mr. Borgne's alleged pre-*Miranda* silence. In violation of *Doyle*, the prosecutor chose to rely on impermissible impeachment with post-*Miranda* silence.

The Court of Appeals majority rightly determined that the prosecutor violated Mr. Borgne's constitutional rights under *Doyle* by using his post-*Miranda* silence to suggest that "his account was fabricated long after the incident for purposes of the trial." *People v Borgne*, unpublished opinion per curiam of the Michigan Court of Appeals, issued August 9, 2007 (Docket No. 269572) at *2; 10a. The Court's reversal of Mr. Borgne's convictions should be affirmed.

2. Was the claim of error under *Doyle* properly preserved?

Because defense counsel failed to object to the prosecutor's impermissible use of Mr. Borgne's post-*Miranda* silence against him, this issue is unpreserved. No objection was made to any of these statements by trial counsel, nor did the trial judge instruct the jury in any way regarding these statements.

3. What is the resulting appropriate standard of review on appeal?

Because the prosecutor violated Mr. Borgne's Fourteenth Amendment due process rights by extensively cross-examining him about his post-*Miranda* silence and deliberately drawing the jury's attention to that silence, the error was constitutional. US Const, Am XIV; *Dennis, supra* at 579-580; *People v Alexander*, 188 Mich App 96, 104-105; 469 NW2d 10 (1991). Unpreserved claims of constitutional error are reviewed for plain error affecting substantial rights. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). The defendant must establish prejudice and show that the error affected the outcome of the lower court proceeding.

People v Carines, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is warranted if the error resulted in the conviction of an actually innocent person or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763-764.

The prosecutor's extensive and deliberate use of Mr. Borgne's post-*Miranda* silence was a clear violation of *Doyle*. Thus, it was plain error. See *People v Russell*, 266 Mich App 307, 314; 703 NW2d 107 (2005).

The flagrant, extensive, and deliberate nature of the violation seriously affects the integrity and public reputation of judicial proceedings, and it should not be tolerated by this Court. Prosecutors are only emboldened to cross the line further when trial courts and appellate courts acquiesce to their misconduct.

Further, the prosecutor's egregious breach of Mr. Borgne's constitutional rights seriously affected the fairness of the trial, and the convictions should be reversed. See *People v Alexander*, 188 Mich App 96, 104-105, 469 NW2d 10 (1991); *People v Gallon*, 121 Mich App 183, 188-189; 328 NW2d 615 (1982)(reversing even where a cautionary instruction had been given). See harmless error analysis below.

4. Harmless error analysis

This case was essentially a credibility contest between the complainant and Mr. Borgne. There were weaknesses and discrepancies in the prosecutor's case. In the absence of the tainted evidence, jurors may have found Mr. Borgne's version plausible and sufficient to raise a reasonable doubt. The cross-examination by the prosecutor regarding Mr. Borgne's post-*Miranda* silence was extensive. The prosecutor used the post-*Miranda* silence to suggest that the jury infer that Mr. Borgne fabricated his testimony after the event.

Because eyewitness identification evidence is the leading cause of wrongful conviction in the United States,⁷ weaknesses in identification testimony should be carefully considered as part of the harmless error analysis. In this case, there were numerous discrepancies between the complainant's physical description of the perpetrator and Mr. Borgne, e.g. facial hair, height, eye color, hair coloring (T II 44, 152, 154, 1456, 186; 37b, 78b, 80b, 82b, 105b). Further, the Mexican man, Tito, who supposedly chased the perpetrator into the abandoned building, was never questioned for a description of who he chased, where exactly he chased him, under what circumstances, or to attempt to identify Mr. Borgne. (T II 26-27, 105, 110, 113, 133-134, 154-155, 158; 20b-21b, 105, 59b, 60, 71b-72b, 80b-81b, 84b.)

There were also discrepancies in the complainant's description of the perpetrator's jacket to some people and Mr. Borgne's jacket. For example, Mr. Cooper testified that the complainant told him the jacket was red, black, and white, and Sergeant Dunbeck testified that the complainant described red lettering. Mr. Borgne's jacket was red and blue with white lettering on the back. (T II 104, 154, 157; 56b, 80b, 83b) Mr. Borgne's jacket was a local college jacket, i.e. it had the words "U-D M Titans"⁸ on the back in white lettering (T II 30, 128; 24b, 66b).

Additionally, police officers were responding to a call about a person being shot, which is consistent with Mr. Borgne's testimony that he hid in the building because he heard gunfire. (T II 23, 93, 109, 121, 142, 144; 17b, 52b, 58b, 61b, 75b, 77b) Mr. Cooper, Complainant's brother, who hid a gun in the complainant's van before the police arrived, was in the vicinity of these gunshots (T II 25-26, 68; 19b-20b, 40b).

⁷ Of the more than 200 people exonerated by way of DNA evidence in the US, over 75% were wrongfully convicted on the basis of erroneous eyewitness identification evidence. See <http://innocenceproject.org/understand/Eyewitness-Misidentification.php>.

⁸ University of Detroit - Mercy

Without this *Doyle* violation, the jury may have found that Mr. Borgne was in the wrong place at the wrong time, wearing the wrong jacket, and running in a panic from gunshots to hide in a vacant building. The prosecutor's improper use of Mr. Borgne's right to remain silent undercut his testimony and his whole defense, leading the fact-finder to infer that Mr. Borgne would have given a statement to explain himself if he really was innocent.

Because this case turned on witness credibility, the prosecutor's denigration of Mr. Borgne's choice to exercise post-*Miranda* silence was crucial. In violation of the principles of *Doyle*, the prosecutor insinuated to the jury that they could infer Mr. Borgne's guilt from the fact that he remained silent. The improper questions and statements were so extensive that reversal is warranted despite trial counsel's failure to object.

Ineffective Assistance of Counsel

Alternatively, if this Court determines that the Court of Appeals opinion should be reversed, this Court should decide Mr. Borgne's related remaining issue, whether he received ineffective assistance of counsel, or remand to the Court of Appeals to make that determination. Because the Court of Appeals reversed under the more stringent standard for unpreserved plain error, the Court did not reach Mr. Borgne's alternative argument that trial counsel rendered ineffective assistance of counsel by failing to object to the prosecutor's misconduct. (See e.g. Questions Presented, Defendant-Appellant's Court of Appeals Brief, p iii; 112b.)

Trial counsel rendered ineffective assistance of counsel by failing to object when the prosecutor elicited extensive testimony regarding Mr. Borgne's post-*Miranda* silence and impermissibly commented on that silence during closing arguments. US Const, Amend. VI, XIV; Const 1963, art 1, §20; *Strickland v Washington*, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984). There is at least a reasonable probability that had trial counsel objected, as he should

have, the outcome of the trial would have been different.⁹ *Strickland, supra* at 694; *People v Pickens*, 446 Mich 298, 302-303, 521 NW2d 797 (1994)(adopting the federal *Strickland* standard). A reasonable probability is less than a preponderance standard or a more likely than not standard; it is simply a probability sufficient to undermine confidence in the outcome. *Strickland, supra* at 694. An action is not objectively reasonable unless it is considered a sound trial strategy. *Strickland, supra* at 687-688.

In *Girts v Yanai*, 501 F3d 743 (CA 6, 2007) (petition for cert pending), the Court ordered a new trial for a defendant when the prosecutor used the defendant's pre-trial silence and failure to testify. The Court found that trial counsel's failure to object to the prosecutor's comments constituted ineffective assistance of counsel. *Id.* at 757-758. In *Combs, supra* at 286, the Court determined:

Defense counsel's failure to object to the unconstitutional use of Combs's "talk to my lawyer statement" clearly fell below an objective standard of reasonableness. . . . Combs's counsel should have realized that the use of Combs's pre-arrest silence against him was at least constitutionally suspect and should have lodged an objection on that basis. Counsel's failure to have objected at any point is inexplicable, and we can perceive no possible strategic reason for such failure. Not only did the failure to object ensure that the jury could use Combs's protected silence against him, but it also guaranteed that both the admission of the statement and the trial court's instruction would be analyzed on review only for plain error. Counsel's performance with respect to this issue was constitutionally deficient under the *Strickland* standard.

⁹ To prevail on an ineffective assistance of counsel claim, the defendant must establish that counsel's performance fell below an objective standard of reasonableness and the deficiency prejudiced the defense. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish prejudice, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A defendant need not show that counsel's error more likely than not affected the outcome. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. A reasonable probability is simply a probability sufficient to undermine confidence in the outcome. *Id.* at 694.

This case is analogous to *Combs* and *Girt*. In this case, because the principle of law that forbids use of post-*Miranda* silence is well established, *Doyle, supra; Dennis, supra*, any reasonable counsel would have objected to the constitutionally defective questions and comments. There was no conceivable benefit from failing to challenge the improper questions and remarks. Trial counsel's failure to object allowed the jury to hear prosecutor's prejudicial questioning and comments. If trial counsel had objected, the impermissible line of questioning would have stopped, and the trial court would not have permitted the prosecutor to continue to overstep. The jury would have heard the trial court's admonishment that the questions were impermissible and must not be considered. The prosecutor would not have made the improper comments during closing argument. Thus, trial counsel's failure to object exacerbated the effect of the prosecutor's impermissible questions and comments. As discussed, *supra*, because this case was a credibility contest, the error was extremely prejudicial and there is at least a reasonable probability that the outcome of the trial would have been different in the absence of the flagrant *Doyle* violation.

Mr. Borgne is entitled to a new trial.

SUMMARY AND REQUEST FOR RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellee **MICHAEL J. BORGNE** asks that this Honorable Court affirm the Court of Appeals' decision reversing his convictions and remanding for new trial. If he fails in that request, he asks this Court to remand to the Court of Appeals for consideration of his ineffective assistance of counsel claim.

Respectfully submitted,

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