

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

Christopher M. Murray, P.J., and Michael J. Talbot and Deborah A. Servitto, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-v-

RAYFIELD CLARY,

Defendant-Appellee.

Supreme Court No. 144696

Court of Appeals No. 301906

Circuit Court No. 10-6937-01

DEFENDANT-APPELLEE'S BRIEF ON APPEAL
(ORAL ARGUMENT REQUESTED)

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TABLE OF CONTENTS

INDEX OF AUTHORITIES..... i

STATEMENT OF JURISDICTION..... iv

COUNTER-STATEMENT OF QUESTIONS PRESENTED.....v

COUNTER-STATEMENT OF FACTS1

I. THE ADMISSION AND USE OF MR. CLARY’S POST-ARRAIGNMENT
AND FIRST-TRIAL SILENCE WAS IMPROPER AND A VIOLATION OF
DUE PROCESS.....4

II. THE COURT OF APPEALS CORRECTLY HELD THAT ADMITTING
SANTONYO BROWN’S PRIOR CONSISTENT STATEMENTS WAS
IMPROPER.....22

SUMMARY AND RELIEF.....30

APPENDIX

MLM*Clary Brief on appeal SC 26184.doc*26184*October 2, 2012
Rayfield Clary

INDEX OF AUTHORITIES

CASES

<i>Breneman v Kennecott Corp</i> , 799 F2d 470 (CA 9, 1986)	26
<i>Brooks v Tennessee</i> , 406 US 605, 609-611 (1972).....	12
<i>Chapman v California</i> , 386 US 18 (1967).....	20
<i>Commonwealth v Jones</i> , 327 A2d 638 (PA, 1974).....	8
<i>Doyle v Ohio</i> , 426 US 610 (1976)	passim
<i>Evans v Fischer</i> , 816 F2d 171 (EDNY 2011).....	25
<i>Fletcher v Weir</i> , 455 US 603 (1982).....	17, 18
<i>Florida v Nixon</i> , 543 US 175 (2004)	12
<i>Greer v Miller</i> , 483 US 756 (1987)	20
<i>Griffin v California</i> , 380 US 609 (1965)	4, 11, 15
<i>Grunewald v United States</i> , 353 US 391 (1953).....	passim
<i>In re Winship</i> , 397 US 358 (1970).....	9
<i>Jenkins v Anderson</i> , 447 US 231 (1980).....	7, 15, 18
<i>Johnson v United States</i> , 318 US 189 (1943)	13
<i>Koon v United States</i> , 518 US 81 (1996).....	24
<i>Middlebrooks v Wayne Co.</i> , 446 Mich 151 (1994).....	17
<i>Miranda v Arizona</i> , 384 US 436 (1966)	passim
<i>Mullaney v Wilbur</i> , 421 US 684 (1975).....	9
<i>People v Barrera</i> , 451 Mich 261 (1996).....	24
<i>People v Bigge</i> , 288 Mich 417 (1939)	10
<i>People v Blackmon</i> , 280 Mich App 253 (2008).....	4
<i>People v Bobo</i> , 390 Mich 355 (1973).....	10, 12

<i>People v Borgne</i> , 483 Mich 178 (2009).....	passim
<i>People v Burden</i> , 395 Mich 462 (1975).....	14
<i>People v Cetlinski</i> , 435 Mich 742 (1990)	10
<i>People v Darden</i> , 230 Mich App 597 (1998)	24
<i>People v Givens</i> , 59 Mich App 436 (1975).....	12
<i>People v Graham</i> , 386 Mich 452 (1971)	9
<i>People v Hackett</i> , 460 Mich 202 (1999)	10, 11, 17, 29
<i>People v Hallaway</i> , 389 Mich 265 (1973).....	24
<i>People v Harris</i> , 86 Mich App 301 (1978).....	24
<i>People v Jenkins</i> , 450 Mich 249 (1995).....	29
<i>People v Jones</i> , 240 Mich App 704 (2000).....	25
<i>People v Jordan</i> , 7 Mich App 28 (1967)	11, 14
<i>People v Lewis</i> , 160 Mich App 20 (1987)	24
<i>People v McReavy</i> , 436 Mich 197 (1990).....	10, 12
<i>People v Rodriguez (On Remand)</i> , 216 Mich App 329 (1996).....	28
<i>People v Rosales</i> , 160 Mich App 304 (1987)	24
<i>People v Shafier</i> , 483 Mich 205 (2009).....	9, 19, 20, 21
<i>People v Starr</i> , 457 Mich 490 (1998)	24
<i>People v Stricklin</i> , 162 Mich App 623 (1987).....	26
<i>Pickens v State</i> , 142 SE2d 427 (1965).....	11
<i>Raffel v United States</i> , 271 US 494 (1926).....	passim
<i>State v Raithel</i> , 404 A2d 264 (Md 1979)	11
<i>Stewart v United States</i> , 366 US 1 (1961)	passim
<i>Thomas v United States</i> , 41 F3d 1109 (CA 7, 1994)	26
<i>Tome v United States</i> , 513 US 150 (1995).....	25, 26, 28, 29

<i>Ullmann v United States</i> , 350 US 422 (1956).....	11
<i>United States v Bao</i> , 189 F3d 860 (CA 9, 1999)	25, 26
<i>United States v Bishop</i> , 264 F3d 535 (CA 5, 2001).....	25
<i>United States v Bowman</i> , 798 F2d 333 (CA 8, 1986).....	24
<i>United States v Forrester</i> , 60 F3d 52 (CA 2, 1995).....	26
<i>United States v Frazier</i> , 469 F3d 85 (CA 3, 2006).....	25
<i>United States v Hale</i> , 422 US 171 (1975).....	passim
<i>United States v Reliford</i> , 58 F3d 247 (CA 6, 1995).....	27, 28
<i>United States v Teague</i> , 953 F2d 1525	12
<i>United States v Zaccaria</i> , 240 F3d 75 (2001).....	8

CONSTITUTIONS, STATUTES, COURT RULES

US Const, Am V	4, 17
US Const, Am XIV	17
MCL 600.2159.....	5
FRE 801(d)(1)(B).....	25
MRE 103	4
MRE 801(d)(1)(B)	passim
MRE 802.....	24

MISCELLANEOUS

4 J. Weinstein & M. Berger, Weinstein's Evidence p 801(d)(1)(B)[01] at 801 117 to 801 118 (1981).....	24
4 Wigmore, Evidence (Chadbourn rev), § 1129, at 270–272	26
McCormick on Evidence § 34, p. 126 (5 th Ed).....	9, 13, 27
Timothy A. Baughman, Gillespie <i>Mich. Crim. L. & Proc. Prac. Deskbook</i> § 9:274.....	26, 28

STATEMENT OF JURISDICTION

Plaintiff-Appellant has not provided a jurisdictional statement. However, it appears the Court has jurisdiction pursuant to its June 6, 2012 order granting leave to appeal.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I.** WAS THE ADMISSION AND USE AT TRIAL OF MR. CLARY'S SILENCE AT HIS PRIOR TRIAL IMPROPER?

Court of Appeals answered, "Yes".

Defendant-Appellee answers, "Yes".

- II** WAS THE ADMISSION AND USE AT TRIAL OF MR. CLARY'S POST-ARRAIGNMENT SILENCE IMPROPER AND A VIOLATION OF DUE PROCESS?

Court of Appeals answered, "No".

Defendant-Appellee answers, "Yes".

- III.** DID THE COURT OF APPEALS CORRECTLY HOLD THAT ADMITTING SANTONYO BROWN'S PRIOR CONSISTENT STATEMENTS WAS IMPROPER?

Court of Appeals answered, "Yes".

Defendant-Appellee answers, "Yes".

COUNTER-STATEMENT OF FACTS

This Court granted leave to appeal the Court of Appeals' February 16, 2012 decision reversing Rayfield Clary's conviction for assault with intent to murder and felony firearm that followed a jury trial in Wayne County Circuit Court on November 16-18, 2010. A prior trial ended in a mistrial based on a hung jury. The prosecution alleged Mr. Clary shot Santonyo Brown from a car as Brown stood on the porch of a Detroit house. At both trials, the defense argued misidentification and contended Clary was not present when Brown was shot.

The Court of Appeals' opinion summarizes the incident as follows:

Defendant and the complainant, Santonyo Brown, were neighborhood acquaintances. According to Brown, he and defendant ran into each other at a corner store on May 31, 2010, and defendant indicated that he had some marijuana. At that time, Brown stated that he did not have any money for the marijuana. Throughout the day, Brown and defendant exchanged a series of phone calls and eventually agreed to meet at a house on Wyoming Street, where Brown's siblings lived, to smoke some marijuana together. Early in the morning on June 1, 2010, Brown walked to the house on Wyoming Street to meet defendant. As Brown knocked on the door, a car drove by and the passenger shot Brown.

9a; *People v Clary*, Unpublished Opinion, Court of Appeals No. 301906 (February 16, 2012).

In the moments after the shooting, Brown told his sister, brother, and a responding police officer that "muscle head," or "Tone", two alleged nicknames for Clary, had shot him. 24b, 29b. Brown described "Tone" as a black man in his 20's with a mohawk-style haircut. *Id.* at 31b-32b.

About 20 minutes after police arrived at the scene, Clary approached on foot from the direction of a gas station located near the corner of Grand River and Wyoming a few blocks away. 33b-36b, 39b. Officers questioned Clary, and he provided his name, address, and identification. 36b-38b, 41b. He was fully cooperative, and indicated that he had come from the gas station. 36b-37b, 41b, 43b-44b. Following questioning, Clary continued walking in the

direction of his listed address, which was two blocks away. 43b-44b. As Clary was leaving, Brown's brother exited the house and alerted officers that Clary was the man Brown had claimed was the shooter. 44b-45b. Officers followed the path Clary took, but did not find him. *Id.*

At the first trial, Clary did not testify and the defense argued that Brown had misidentified him as the shooter. 7b-15b. A mistrial was declared based on a hung jury. 9a.

At the second trial, Brown testified, as he did at the first trial, that he saw Clary shoot him from the passenger seat of the suspect car that drove up as he was knocking on the door. 46a-51a. While Brown denied being intoxicated or taking any drugs that night, he could not explain why his medical records showed he had numerous prescription and illicit drugs in his system, including benzodiazepine, xanax, valium, opiates, and marijuana. 61a-67a.

Additionally, Brown's cell phone records were admitted showing that calls between his and Clary's phones were made between 1:15 and 2:02 a.m. the morning of the shooting. 36a-39a; 51b. Although Brown denied speaking with anyone else after these calls, the phone records showed he had several phone conversations with other individuals during that period, including one lasting 18 minutes and another lasting three minutes. 44a; 51b.

The defense argued misidentification at the second trial. 21b-24b. Additionally, Clary testified, and while agreeing with Brown's account of events preceding the shooting, he denied being involved in it. 90a-91a, 99a-100a. After he ran into Brown at the store, Clary went with some friends to a music festival in downtown Detroit, and he was there when Brown called to ask about his marijuana. 90a-91a. He later called Brown back and they arranged to meet at the Wyoming Street house, after which he and his friends headed back to the neighborhood, stopping briefly at a restaurant in the area. 92a-93a. Clary was then dropped off at a gas station at Grand River and Wyoming, where he bought some cigars, after which he walked the short distance to

the Wyoming Street house. 93a-95a. As he approached the house, Clary spotted police officers responding to the shooting and, upon being questioned, he cooperated but did not stay around or offer much information since he had marijuana. 95a-97a. After talking with the officers, he walked to his cousin's house a short distance away. 97a-98a.

Clary conceded that at the first trial, his attorney had withdrawn an alibi notice, and that the people he was with at the music festival had not testified. 102a. Over defense objection, the prosecutor questioned him extensively about his failure to tell the police, prosecutors, or the jury in his first trial that he had not shot Brown, or about where he was before arriving at the Wyoming Street house. 106a-111a. The prosecutor referenced that prior silence in closing argument as well. 125a-126a, 152a.

In an unpublished opinion on February 16, 2012, the Court of Appeals reversed Mr. Clary's convictions, holding that his due process rights had been violated by the prosecutor's repeated references to his failure to testify at the first trial, and that the trial court abused its discretion in admitting Brown's prior consistent statements on redirect examination. 9a-19a.

On June 6, 2012, this Court granted the prosecutor's application for leave to appeal, ordering the parties to address: "(1) whether the prosecutor's impeachment of the defendant's testimony on the basis of the defendant's failure to testify at his earlier trial violated the defendant's Fifth Amendment right against self-incrimination; and (2) whether the prior consistent statements by the complainant were admissible under MRE 801(d)(1)(B)." 20a.

ARGUMENT

I. THE ADMISSION AND USE OF MR. CLARY'S SILENCE AT HIS ARRAIGNMENT AND AT HIS PRIOR TRIAL WAS IMPROPER AND A VIOLATION OF DUE PROCESS.

Issue Preservation/Standard of Review

The defense objected to the prosecutor's cross examination of Clary regarding his failure to testify at the first trial. 108a; 47b-50b. The *de novo* standard of review applies to this constitutional question. *People v Blackmon*, 280 Mich App 253, 259-261 (2008).

While the bulk of defense counsel's discussion of the objection focused on evidence of Clary's failure to testify at the first trial, she did indicate that Clary's silence "cannot be used against him." 48b. Appellee contends that this was broad enough to preserve his objection to the admission of evidence of his silence following arrest and arraignment too. MRE 103. Alternatively, in the event that this is deemed an insufficient objection to this aspect of the prosecutor's cross examination, the plain error standard of review would apply. *People v Borgne*, 483 Mich 178 (2009).

Argument

The Fifth Amendment guarantees that no person "shall be compelled in any criminal case to be a witness against himself." US Const, Am V. When a defendant exercises the right to remain silent, that silence normally may not be used against him, and evidence of such silence is, with limited exceptions, inadmissible. *Doyle v Ohio*, 426 US 610, 618-619 (1976). The Fifth Amendment also allows a defendant to rely on the presumption of innocence and elect not to testify at trial. To protect this right, the prosecutor may not reference or comment on the defendant's failure to testify at trial. *Griffin v California*, 380 US 609, 612-14 (1965).

In addition to these constitutional mandates, Michigan has codified a broad-reaching bar on any references to a criminal defendant's failure to testify. MCL 600.2159 applies to "the trial of any issue joined, or in any matter, suit or proceeding, in any court, or on any inquiry arising in any suit or proceeding in any court, or before any officer or person having by law, or by consent of parties, authority to hear, receive, and examine evidence," and provides in pertinent part:

. . . a defendant in **any criminal case or proceeding** shall only at his own request be deemed a competent witness, and his neglect to testify **shall not** create any presumption against him, nor **shall the court permit any reference or comment to be made to or upon such neglect.**

MCL 600.2159 (emphasis added).

Accordingly, it is readily apparent that when protected by the Fifth Amendment, a defendant's silence garners special attention and is afforded a high degree of protection at criminal trials. It is against this backdrop that the propriety of admitting and using Clary's failure to testify at his first trial and his post-arrest silence must be evaluated.

A. Admission and use of Clary's failure to testify at his first trial was improper.

On cross-examination at the second trial, the prosecutor asked Clary about his failure, after he was arrested and formally charged, to tell the police that he was innocent and about where he was when the shooting occurred. 107a-109a. At one point, the prosecutor asked "the last time **you** were in front of a jury **you** didn't use this alibi did you?" to which Clary answered, "I didn't get on the stand." (emphasis added) 107a.¹ After several questions, Clary answered: "I

¹ The prosecutor baselessly suggests Clary "volunteered" that he had failed to testify at the first trial. Appellant's Brief on Appeal, 3, 8. This claim is belied by the record. In fact, Clary's answer was a direct response to the prosecutor's question whether "you" – meaning Clary – didn't use this alibi the last time "you" – again meaning Clary – were "before a jury". 107a. Clearly, these questions pertained to what Clary himself had said or done, and a natural response was for him to explain that he did not take the stand. The information was neither unsolicited nor volunteered, but elicited by the cross examination.

exercised my Fifth Amendment Right” at arraignment. 109a. The prosecutor then continued to press Clary about his failure to testify at the first trial as follows:

Q. And in fact, isn't it true, sir, that now you've had a little strategy change, that now you're going to try to sell the alibi to this jury that you decided you didn't -- you weren't going to sell to the last jury, isn't that what's happening here, sir?

A. I'm not trying to sell nothing. I'm trying to state the truth.

Q. Well, if that was the truth and that was so important, why didn't you tell the last jury?

A. Why didn't I tell the last jury what?

Q. If that was the truth and that was so important, why didn't you tell the last jury?

A. Because I just didn't. I didn't think it would have mattered if I would have got on the stand last time so that's why I didn't get on the stand. [109a-111a].

The Court of Appeals correctly held that the introduction and use of the Clary's silence at his first trial was improper. The court's decision is based on the well-recognized principle that a defendant's prior silence, particularly when protected by the Fifth Amendment, rarely carries any relevance for the proper purpose of impeachment, and is highly prejudicial. Given the grave constitutional consequences of admitting evidence of the privilege, absent an inconsistency between Clary's prior silence and his testimony, admission and use of that silence was error.

In challenging the Court of Appeals' holding, the appellant relies exclusively on *Raffel v United States*, 271 US 494 (1926), which held over 86 years ago that it is not *per se* violative of the Fifth Amendment to impeach a defendant testifying at a second trial with his failure to testify at a prior trial. But while remnants of *Raffel's* central holding remain, its force and scope have

been significantly narrowed such that acceptable uses of a defendant's prior silence when protected by the Fifth Amendment has become the exception rather than the rule.²

The United States Supreme Court has since made clear that *Raffel* is far from a blanket rule permitting impeachment with a defendant's prior invocation of the Fifth Amendment privilege any time he subsequently takes the stand. Instead, such silence must be carefully scrutinized to discern if it is truly relevant for impeachment and whether it poses a danger for unfair prejudice by permitting the unacceptable inference that the defendant is guilty because he failed to offer his side of the charges. See *Grunewald v United States*, 353 US 391, 415-424 (1953) (cautioning that "[w]e do not think that *Raffel* is properly to be read either as dispensing with the need for such preliminary scrutiny by the judge [into the impeachment value of silence], or as establishing a matter of law that such a prior claim of privilege with reference to a question later answered at the trial is always to be deemed to be a prior inconsistent statement, irrespective of the circumstances under which the claim of privilege was made."); *Stewart v United States*, 366 US 1, 5 (1961) ("in no case has this Court intimated that there is such a basic inconsistency between silence at one trial and taking the stand at a subsequent trial that the fact of prior silence can be used to impeach any testimony which a defendant elects to give at a later trial."); *United States v Hale*, 422 US 171 (1975) (if prosecution fails to establish a "threshold inconsistency" between defendant's prior silence and testimony, "proof of silence lacks any significant probative value and must therefore be excluded."); Cf also *Jenkins*, *supra* at 240 ("prior silence cannot be used for impeachment where silence is not probative of a defendant's

² While the Supreme Court appeared to reaffirm *Raffel* in *Jenkins v Anderson*, 447 US 231 (1980), with regard to the admission of a defendant's prearrest silence, the Court made clear that each jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative.

credibility and where prejudice to the defendant might result.”); accord *Commonwealth v Jones*, 327 A2d 638, 642 (PA, 1974) (courts must ask “[w]hat is the evidentiary value of silence that is constitutionally sanctioned?”). The general consensus of decisions in the eight decades following *Raffel* teaches that the issue whether a defendant’s prior silence is admissible to impeach begins with the binary premise that: (1) silence when protected by the Fifth Amendment generally has little or no probative impeachment value; and (2) evidence of the invocation of this privilege is inherently prejudicial, and due to the grave constitutional ramification associated with the invocation of the right, such evidence should usually be excluded. *Grunewald, supra* at 424-425; *Hale, supra* at 180; *Stewart, supra* at 5-7; *Commonwealth v Jones, supra* at 642-46; *United States v Zaccaria*, 240 F3d 75, 79-80 (2001).

As to the threshold question of relevance, courts have answered for the most part, in the negative. See *Stewart, supra* at 5-7 (holding that defendant’s failure to testify at a prior trial irrelevant and inadmissible to impeach his testimony at a subsequent trial). As an evidentiary and constitutional matter, a defendant’s prior silence, particularly when protected by the Fifth Amendment, is inherently ambiguous and rarely relevant to impeach his general credibility. *Stewart, supra* at 5-6; *Jones, supra* at 245-246. “In most circumstances [a defendant’s prior] silence is so ambiguous that it is of little probative force,” *Hale, supra* at 176, as there is no “basic inconsistency” between that silence and subsequent testimony to make it relevant. *Stewart, supra*. A defendant’s prior silence is most often “insolubly ambiguous,” as it is unclear whether it is merely the result of reliance on the privilege or evidence of fabrication. *Doyle, supra* at 617. Additionally, following arrest, receipt of *Miranda*³ warnings, and the filing of formal charges, the defendant is impliedly-assured that his silence will not be penalized, and he

³ *Miranda v Arizona*, 384 US 436 (1966).

is entitled to rely on such assurances. See *Doyle, supra* at 618-619; *People v Shafier*, 483 Mich 205, 218 (2009).

Furthermore, the defendant has the absolute right to hold the State to its burden of proof at trial, and has no duty to present evidence, through himself or otherwise. *In re Winship*, 397 US 358, 364 (1970); *Mullaney v Wilbur*, 421 US 684 (1975). Absent additional circumstances, it is illogical and repugnant to basic principles of our criminal justice system to equate a defendant's exercise of those two core constitutional rights with either guilty knowledge or a lack of innocence. As the Pennsylvania Supreme Court aptly explained:

It would seem [from the Supreme Court's holding in *Grunewald, supra*] that cross examination regarding the prior failure to testify would invariably be error. The right of an accused not to testify is absolute; he may not even be called as a witness unless he so chooses. To view his decision not to testify as being inconsistent with a later exculpatory statement would be to presume that the exercise of a right that is inextricably linked to the presumption of innocence constitutes conduct that can be viewed as inconsistent with innocence. Although such cross-examination might not be unconstitutional, the constitutional context in which the privilege is initially asserted strips it of the evidentiary value it might otherwise be thought to have.

Commonwealth v Jones, supra at 245-246.

General evidentiary principles as well as Michigan decisional law further support the limited probative value of a defendant's prior silence. Impeachment by prior inconsistency is based on the concept that "talking one way on the stand and another way previously is blowing hot and cold, and raises a doubt as to the truthfulness of both statements." McCormick on Evidence § 34, p. 126 (5th Ed). A prerequisite to allowing such impeachment is a showing of inconsistency between prior conduct and later testimony. *Grunewald, supra* at 391; *People v Graham*, 386 Mich 452, 456 (1971). With a prior statement, it is easy to show a witness has blown "hot and cold" on a subject. Where prior silence is involved, however, the relevance is far less clear, as there is no statement to compare to the testimony, and unless the context establishes

otherwise, no inherent inconsistency. *See People v Cetlinski*, 435 Mich 742, 747-48 (1990) (distinguishing between prior complete silence and prior statements containing omissions).

This Court has recognized this in a variety of contexts. In *People v Bobo*, 390 Mich 355, 359-60 (1973), for instance, the Court stressed that “[n]on-utterances’ are not statements” and forbade the introduction of any pretrial silence by a defendant. *Accord, Borgne, supra*, at 187-188. Similarly, this Court has held that by itself, a defendant’s silence in the face of another’s accusatory statements is irrelevant as to the truth of what was asserted. *People v Bigge*, 288 Mich 417 (1939); *see also People v Hackett*, 460 Mich 202, 215 (1999) (“[a] criminal defendant’s failure to respond to an accusation is not probative evidence of the truth of the accusation.”); *Hale, supra* at 176 (“silence is commonly thought to lack probative value on the question of whether a person has expressed tacit agreement or disagreement with contemporaneous statements of others.”)

While both decisional lines have been narrowed in scope so that some prior silence may be used to impeach, limitations remain in place. A defendant’s prior silence is admissible for impeachment only if it would have been natural for him to have spoken under the circumstances. *Hackett, supra* at 213-214; *Cetlinski, supra* at 757. It would not be natural to speak when the defendant is protected by the Fifth Amendment privilege, and silence under such circumstances is not relevant. *People v McReavy*, 436 Mich 197, 201, 217-218 (1990). Thus, “where the record indicates that silence is attributable to an invocation of his Fifth Amendment right or a reliance on *Miranda* warnings, use of the silence is error.” *Id.*

Additionally, courts have recognized that admitting such silence is highly prejudicial due to the significant “danger that the jury is likely to assign much more weight to the defendant’s previous silence than is warranted.” *Hale, supra* at 180. Indeed, “[t]he danger that the jury [will

make] impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt is, in light of contemporary history, far from negligible.” *Grunewald, supra* at 424. As the United States Supreme Court lamented, “[t]oo many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege.” *Grunewald, supra* at 421, quoting *Ullmann v United States*, 350 US 422, 426 (1956); see also *People v Jordan*, 7 Mich App 28, 31 (1967) (noting high danger that lay jurors will mistakenly infer a defendant’s prior failure to testify “was evidence of guilt or of lack of credibility rather than an exercise of a statutory and a constitutional right.”) Thus, because of the grave constitutional overtones of admitting largely irrelevant Fifth Amendment-protected silence, courts have not hesitated to exercise their powers to forbid its admission. *Grunewald, supra* at 424; *Stewart, supra* at 6-7; *Jordan, supra* at 28.

Here, as the Court of Appeals held, there was nothing to rebut the basic premise that Clary’s silence at his first trial was simply not inconsistent with his latter testimony, and therefore was irrelevant to impeach. 16a. The trial setting is just the type of circumstance in which it would not have been “natural” for Clary to have spoken. *Hackett, supra* at 213-214; see also *State v Raithe*, 404 A2d 264, 269 (Md 1979) (defendant’s failure to testify at prior suppression hearing irrelevant to impeach subsequent testimony); *Jones, supra* at 245-246; *Pickens v State*, 142 SE2d 427, 428 (1965). Clary opted to hold the State to its burden of proof by declining to testify or present evidence. And while accusations were made in his presence, no one bothered to ask him any questions, knowing full well the constitutional impropriety of doing so. *Griffin, supra*. Clary’s act of not taking the stand, by itself, constituted the exercise of the privilege, and there was nothing about his passive non utterance in that setting that signaled

anything more than a desire to rest on that right. *See Brooks v Tennessee*, 406 US 605, 609-611 (1972) (noting the defendant's "unconditional" right not to testify "unless he chooses to speak in the unfettered exercise of his own will") (internal quotations omitted); *Cf also, Bobo, supra* at 359-360.

In fact, Clary made clear on cross that he had "exercised [his] Fifth Amendment Rights" when adversarial proceedings began at his June 19, 2010 arraignment. 109a. And it is now readily apparent that on that date, he received *Miranda* warnings from the district court. 3b-4b. As discussed below, Clary had a right to rely on the implied assurances those warnings conveyed that his silence would not later be used against him. *Doyle, supra*. "[T]here is an irrebuttable presumption of irrelevancy" of a defendant's post-*Miranda* silence "since there is no way to know after the fact whether it was due to the exercise of constitutional rights or to guilty knowledge." *McReavy, supra* at 218; *Doyle, supra* at 617. Clary's "insolubly ambiguous" silence at his first trial was thus irrelevant. *Id.*

Even if the arraignment *Miranda* warnings were not factored into the equation, Clary's silence occurred in an environment in which he likely received implicit if not explicit assurances that his failure to testify would have no negative evidentiary ramifications. It was presumed that Clary declined to testify after consulting with his lawyer, who had a duty to advise him of the risks and benefits of not testifying, and of the limitations on the use of his silence. *See People v Givens*, 59 Mich App 436 (1975) (defendant's failure to testify at trial is presumed to be the product of consultation with defense counsel); *Florida v Nixon*, 543 US 175, 187 (2004) (counsel has duty to consult with defendant regarding important decisions at trial); *United States v Teague*, 953 F2d 1525, 1533-1535 (CA 11, 1992) (counsel has the responsibility to advise the defendant "of his right to testify or not to testify, the strategic implications of each choice, and

that it is ultimately for the defendant himself to decide.”). And Clary was present when the judge and attorneys repeatedly admonished and reminded jurors at both the first and second trials that he had an absolute right to remain silent, and that no negative inferences could be drawn from his failure to testify. See 5b-6b, 15b-20b, 37b, 46b. Just as he could rely on the *Miranda* warning’s assurances, these repeated statements from the court provided a similar basis for him to reasonably believe that exercising the privilege at his first trial would not be penalized. See *Doyle, supra*. “When a trial judge grants the claim of privilege but [subsequently] allows it to be used against the accused to his prejudice,” the reviewing court should not sanction such misuse of this constitutional right. *Johnson v United States*, 318 US 189, 197 (1943).

Appellant relies on *Raffel v United States* to rationalize the nearly across-the-board admissibility of a defendant’s prior failure to testify whenever he later takes the stand. Appellant’s Brief at 10-13. This contention, however, fails to recognize the Supreme Court’s clear admonishment that there is no “basic inconsistency between silence at one trial and taking the stand at a subsequent trial that the fact of prior silence can be used to impeach any testimony which a defendant elects to give at a later trial.” *Stewart, supra* at 5. And *Raffel* is distinguishable, as the Court of Appeals noted. 16a. Clary’s prior silence was not inconsistent with his previous conduct, with his testimony at the second trial, nor relevant to the issues presented. He remained consistent in his lack of statements leading up to his second trial; he did not make incriminating statements, and then deny them later. This is in contrast to *Raffel*, where the defendant made an admission to police, sat silent in the face of testimony relaying that statement at his first trial, and then finally denied the statement and its substance in the second trial. *Raffel, supra* at 495. Indeed, the *Raffel* defendant had waived the Fifth Amendment by speaking to police, and then blew “hot and cold” on the subject in his subsequent alternating

silence and testimony. McCormick, *supra* at § 34. It was therefore natural for the Court to reason the defendant could be cross-examined about his behavior that was “inconsistent with this denial,” even though it revealed he had remained silent in the first trial. *Id.* at 498.

As the Court of Appeals found, Clary “did not contradict the testimony of a witness offered at both his first and second trial.” 16a. The appellant challenges this conclusion, arguing that Clary “contradicted” Brown’s testimony identifying him as the shooter, essentially advancing a nearly boundless definition of “contradiction” that would lead to a finding of inconsistency any time a defendant takes the stand. Appellant Brief at 12-13.⁴ But the appellant misunderstands the Court of Appeals’ reasoning. *Raffel* is distinguishable because the defendant made admissions to a law enforcement officer; it was his own words that were described at the first trial that he did not attempt to rebut. *Raffel, supra* at 495. In contrast, Clary remained silent and made no prior statements. His second-trial testimony agreed with nearly all of Brown’s account aside from Brown’s identification of the shooter. 15a-16a. While Clary’s testimony advanced an alibi of sorts, it was entirely consistent with the defense theory at the first trial – if Brown misidentified Clary as the shooter, it logically followed that Clary was somewhere else when the shooting occurred. *See People v Burden*, 395 Mich 462, 467 (1975) (noting overlap between lack of proof beyond a reasonable doubt and alibi theory, and admonishing that “if any reasonable doubt exists as to the presence of the defendant at the scene of the crime at the time the offense was committed. . . the defendant must also be acquitted.”) Clary’s testimony merely

⁴ In fact, appellant’s position would allow “impeachment” any time a defendant fails to testify at his preliminary examination and then takes the stand at trial. *Contra, People v Jordan, supra* at 31-32 (relying on *Stewart* and *Grunewald* to hold it was improper to impeach defendant’s trial testimony with his failure to testify at preliminary examination).

augmented his first-trial theory of misidentification by explaining where he was in the moments before arriving at the scene. 16a.

This is not a case where the defendant's testimony was conceptually inconsistent with his theory from the first trial, such as where he argued misidentification in the first and then claimed self defense at the second, or where he claimed "mere presence" at the first trial and then testified to an alibi at the second. Under such circumstances, it would have been more natural for the defendant to have spoken at the first trial and there could be some potential inconsistencies between prior silence and subsequent testimony. *Cf Jenkins, supra* at 234-235. Instead, Clary merely offered an exculpatory story at his second trial and his silence at the first trial was not inconsistent with that story. 16a; *Stewart, supra* at 4-10; *Hale, supra* at 177.

Moreover, the danger for unfair prejudice was significant, as it was highly likely that the jury misused Clary's failure to testify as substantive evidence of guilt. *Grunewald, supra; Hale, supra; Stewart supra; see also Griffin, supra*. While there may be some leeway for the admitting prior Fifth-Amendment-protected silence to impeach, there is no such license to use it as substantive evidence of guilt. *Griffin, supra; Grunewald, supra* at 421 (no implication of guilt could be drawn from prior invocation of the Fifth Amendment privilege); *Raffel, supra* at 497 (assuming that defendant's failure to testify at the first trial could not be used as evidence of guilt at second trial.) Here, absent any real inconsistency, it is readily apparent that the primary utility of introducing Clary's failure to testify was to "implicitly equat[e] the plea of the Fifth Amendment with guilt." *Grunewald, supra* at 424. This really is not impeachment at all.

In fact, the prosecutor's closing argument reveals she did just that by referring to Clary's prior silence, not just to highlight "inconsistencies" with his trial testimony, but to appeal to the

broader sentiment that he was guilty because any innocent person who is accused of a crime would and should tell his side of the story:

Well, ladies and gentlemen, if it's the truth, **if it's the truth and you're on trial, why wouldn't you tell the first jury?** Why wouldn't you tell everybody in the world after you were arrested? In fact, when he was arrested on June 18th, some, what, two weeks after, he doesn't come forward and tell the police. He doesn't contact the Prosecutor's Office. He doesn't come forward to anybody and say, Hey, wait a minute, you got the wrong guy and here's why. **He doesn't even tell his other jury.** But it's the truth.

* * *

Now, he keeps saying it's the truth. Well, if it's the truth, it's the truth all day long and it's the truth to the police, it's the truth to the other jury. So you've got to ask yourself is it really the truth or is it an attempt to avoid liability? Is it an attempt to avoid being held responsible for your actions with that weapon that night? [125a-126a].

* * *

And defense strategy is not the same as the truth, so let's not confuse that. The truth is the truth is the truth all day long. **If you weren't there and you didn't do this, you would have told everybody in the world.** So this isn't a matter of - matter of the truth. This is a matter of changing the defense strategy. And again, the truth is the truth. The defense strategy might change, call the witnesses, don't call the witnesses, call the defendant, don't call the defendant, that might change, but the truth is the truth all day long. **And I can tell you, ladies and gentlemen, if that was you, you would tell the truth, you would tell everybody in the world, I was here, I was there and here, I can tell you why. Again, there is no truth to that. That again is an attempt by the defendant to avoid being held responsible for his actions.** [152a] (Emphasis added).

This represents an improper, perverted view of the Fifth Amendment. As the Supreme Court has stressed, "one of the basic functions of the privilege is to protect innocent men. . . [t]he privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." *Grunewald, supra* at 421 (internal quotations and citations omitted). By arguing that Clary had used the Fifth Amendment as a "shelter" for his wrongdoing and was guilty because he previously claimed the privilege, the prosecutor improperly utilized and

exacerbated the prejudice of admitting his failure to testify. *Id.* Due to the “grave constitutional overtones” of this, the trial court erred in admitting Clary’s prior failure to testify. *Grunewald, supra* at 423-424; *Stewart, supra* at 5-7.

B. Reversal is required under *Doyle v Ohio*. Clary’s silence at the first trial and following his arraignment occurred after he received *Miranda* warnings. Therefore, admitting and using that silence violated Due Process.

In addition to cross examining Clary about his silence at the first trial, the prosecutor also focused on his post-arrest, post-arraignment silence. 107a-109a. This, along with the above-discussed cross examination, violated Due Process under *Doyle v Ohio*.

The Court of Appeals held that no *Doyle* violation had been shown since the available record at that time did not reveal whether Clary had received *Miranda* warnings beforehand. 13a-14a, citing *Fletcher v Weir*, 455 US 603, 607 (1982). But since then, Appellee has been able to obtain and file the transcript of Clary’s June 19, 2010 arraignment in district court. 1b-4b. That transcript makes it readily apparent that Clary in fact received his *Miranda* warnings from the judge. 3b-4b. Appellee has filed a motion to expand the grounds for review so that this Court may consider this record evidence and the constitutional violation it demonstrates. This error provides alternate grounds for affirming the Court of Appeals’ judgment. *See Hackett, supra* at 212, n. 3, quoting *Middlebrooks v Wayne Co.*, 446 Mich 151, 166, n. 41 (1994) (“[i]t is well established that an appellee who has taken no cross appeal may still urge in support of the judgment in its favor reasons that were rejected by the lower court.”)

As noted above, with few exceptions, a defendant’s post-arrest, post-*Miranda* silence cannot be used as substantive or impeachment evidence at trial. US Const, Ams V, XIV; *Doyle, supra* at 618-619; *Borgne, supra* at 187-188. This rule is based, not only on the “insoluble”

ambiguity of such silence, but also on the principle that it would be fundamentally unfair and contrary to due process to use such silence against the defendant after the *Miranda* warnings gave him implicit assurances that it would not. *Doyle, supra* at 618; *Borgne, supra* at 186-188.

Doyle and its progeny establish a bright-line test that applies when: (1) the prosecutor used the defendant's silence; (2) the defendant received *Miranda* warnings and invoked the right to remain silent; (3) and, the silence referenced was post-*Miranda*. *Fletcher, supra* at 605-607; *Jenkins, supra* at 239-240.

Each of these elements of the *Doyle* rule exists here. As discussed above, the prosecutor repeatedly referenced Clary's silence at the first trial. 109a-11a. Additionally, the prosecutor questioned Clary about his post-arrest silence as follows:

Q. Okay. Well, if it's the truth, sir, when you were arrested on June 18th, did you go to the police and say, 'Hey, let me tell you, I didn't do it,' did you give them that alibi then, sir?

A. After they told me what I was being charged with, I said whatever it is, I didn't do it.

Q. Okay. Well, then at some point you became aware, sir, of who you were accused of shooting, correct?

A. **Yes, at my arraignment.**

Q. But my question to you, sir, is at some point you became aware of who you were accused of shooting, correct?

A. Yes.

Q. And you became aware of the date that they accused you of shooting Mr. Brown, correct, sir?

A. Yes.

Q. So once you knew that date and that person, you then went to the police and told them what you're trying to tell this jury, didn't you, sir?

A. Huh?

Q. Well, as soon as you found out you were accused of shooting Mr. Brown on May 31st, you then went to the police and said, 'Wait a minute, I didn't do that because I was with these other people.' Didn't you tell the police that, sir?

A. Yes, I did.

Q. Well, when did you tell the police that, sir, and who did you speak to?

A. I wasn't interrogated so actually I didn't tell the police that. Like after I got arraigned, I – I think I told one of the – one of the – I can't – is it a sergeant – not a sergeant – a detective, a detective asked me did I have anything to say.

Q. And at that point did you tell them this long story about where you were downtown at the Technofest and stopping at the gas station and getting blunts and walking over to the house, did you tell them all that, sir?

A. No, I didn't.

Q. But now you're trying to tell this jury the same story but you didn't think it was important enough to tell the police?

A. **I exercised my Fifth Amendment Rights.** [Emphasis added] 107a-109a.

Later, the prosecutor returned to this theme in closing argument to repeatedly criticize Clary for remaining silent. 125a-126a, 152a.

Furthermore, as the Courts of Appeals found, much of the questions focused on Clary's silence after arraignment. 108a-109a. And importantly, that period was after Clary received his *Miranda* warnings from the district court at arraignment. 3b-4b.

Thus, the questions and argument fall squarely under *Doyle* and violate Due Process. These were far more than oblique or passing references. *Compare, Shafier, supra* at 214-215 (“[I]n some circumstances a single reference to a defendant's silence may not amount to a violation of *Doyle* if the reference is so minimal that ‘silence was not submitted to the jury as

evidence from which it was allowed to draw any permissible inference.”), quoting *Greer v Miller*, 483 US 756, 764–765 (1987). Instead, the prosecutor repeatedly referenced Clary’s post-*Miranda* silence, making it a major plank of her theory of guilt. 107a-111a, 125a-126a, 152a.

Appellee contends that this was preserved, constitutional error that requires reversal because the prosecutor cannot prove it was harmless beyond a reasonable doubt. *Chapman v California*, 386 US 18, 23 (1967); 47b-48b.

Alternatively, if the objection is found to be insufficient to preserve the *Doyle* issue with regard to his post-arraignment silence, reversal would still be required since the due process violation was plain constitutional error that affected the trial’s outcome. *Borgne, supra* at 196-197; *Shafter, supra* at 219-20. Additionally, the error “resulted in the conviction of an actually innocent defendant” and “seriously affected the fairness, integrity or public reputation of the judicial proceedings.” *Id.* (internal citations and quotations omitted). It is readily apparent that *Doyle* was violated and that the error was “plain” based on the record. *Shafter, supra* at 220.

Additionally, the error was prejudicial and outcome determinative. *Borgne, supra* at 197-198. Three factors support this conclusion. First, the *Doyle* violation was significant, as the prosecutor repeatedly referenced Clary’s post-*Miranda* silence on cross and in closing. 107a-111a, 125a-126a, 152a; see *Shafter, supra* at 221-222 (“the more extensive a prosecutor’s references to a defendant’s post-arrest, post-*Miranda* silence, the more likely it is that the references had a prejudicial effect.”)

Second, the prosecutor made substantial use of that silence to discredit Clary and to argue that it was substantive proof of his guilt. 125a-126a, 152a; *Shafter, supra* at 222.

And third, the State’s case was far from overwhelming, and the case hinged on whether to agree with Brown’s or Clary’s testimony. 17a. The reliability of Brown’s identification was

suspect, given that he viewed the shooter only momentarily, at night, while being shot at, and at a point when he was anticipating seeing Clary arrive. Evidence of numerous drugs in Brown's system and his possible intoxication (despite his denials) further degraded his ability to accurately perceive this traumatic incident. 63a-67a. Furthermore, Brown hardly presented as the picture of stability and reliability, as seen in the numerous inconsistencies in his various statements and testimonies, some of which he tried to explain away as his simply "blurted out" answers and then "brainstorming" later to come up with refined or additional versions of his story. 68a-73a. Notably, Brown admitted that he had routinely reported the first thing that popped into his head, regardless of its truth, just to get people "out of [his] face" because he was in pain. 70a.

The jury could easily have rejected Brown's testimony in favor of Clary's. The *Doyle* violation unfairly undermined Clary's credibility in a way that violated due process. "In light of the prosecutor's extensive references to defendant's silence, the extensive connection of that silence to defendant's guilt, the inconsistencies in the prosecutor's case. . . and the nature of defendant's defense—which hinged on his own credibility," the error was prejudicial. *Shafier, supra* at 223.

Finally, a *Doyle* violation like this is clearly the sort of error that compromises the fairness, integrity, and truth-seeking function of a jury trial. *Shafier, supra* at 223. The trial was rendered fundamentally unfair by the due process violation which "cast a shadow on the integrity of" the trial. *Id.* Reversal is required under the plain error standard.

II. THE COURT OF APPEALS CORRECTLY HELD THAT ADMITTING SANTONYO BROWN'S PRIOR CONSISTENT STATEMENTS WAS IMPROPER.

Issue Preservation/Standard of Review:

On cross examination, defense counsel impeached Brown using his prior inconsistent statements in several respects, including:

--Between Brown's preliminary examination testimony that he had gone to the Wyoming house to see his brother, and his testimony at his second trial that he went there to smoke marijuana with Clary, [68a];

--Between Brown's police statement that he had gone to the Wyoming house to "chill" with his friend Eric, and his testimony at the second trial regarding his arrangement to meet Clary there, [68a-69a];

--Between Brown's preliminary examination testimony that the first thing he saw was a gun when the suspect car stopped in front of the house, and his second trial testimony that he saw Clary lean forward first before seeing a gun, [71a];

--Between Brown's preliminary examination testimony that he thought nothing of the car driving down Wyoming when he first saw it and his testimony at the second trial that he immediately noticed it and was suspicious when he first spotted the car. [73a-74a]; and,

--Between Brown's testimony at the first trial that Clary told him he would meet him in thirty minutes and the testimony at the second trial that Clary did not actually say he would be there in thirty minutes. [75a-76a].

Then on redirect examination, the prosecutor read from Brown's prior police statement, and then asked him to confirm the substance of what was read as follows:

Q. . . . And let's finish reading that portion [of your police report] that you told the police. "As I was walking up to the porch, a car pulled up, the passenger side window went down. Tone was in the passenger's seat of the car. Tone pointed a gun at me and started shooting".

A. Yes.

Q. Is that what happened, sir?

A. Yes. [77a].

The prosecutor continued to read from Brown's testimony from the *first trial* as follows:

Q. In fact, did you previously testify under oath when asked this question, page 22, Question, "When the car comes to a stop, what happens?" Answer, "Um, he leans forward." Question, "Who leans forward?" Your answer, "Tone." Do you recall testifying to that, sir?

A. Yes.

Q. And is that what happened?

A. Yes.

* * *

Q. And, in fact, did you further answer the next page, Question, "When you see him lean forward in the passenger's seat, what happens then?" Answer, "He starts shooting." . . . Question, "How did you know that it was him that was shooting?" Answer, "I seen his face." Do you recall testifying to that, sir?

A. Yes.

Q. And is that what happened?

A. Yes. [77a-78a].

The prosecutor continued to question Brown about his first trial testimony as follows:

Q. And in fact, were you asked this question by defense counsel on page 35, talking about the car. Question, "You sure you didn't think anything of it?" Your answer, "If you -- your common sense would kick in. If you stayed on the block and you see the car turn the corner and it's on the curb, you know that people park there, so why is this car driving so fast for no odd reason at 2:00 o'clock in the morning?" . . . "You're going to stare at the car."

A. Yes. [79a-80a].

* * *

Q. And did you testify to the following on page 36: Question asked by defense counsel, "But at the time you didn't think anything of it?" Answer, "It's suspicion running through your head. It's obvious you're going to pay attention to a car that's flying." Question, "But you testified that you thought nothing of it?" And you said, "you're trying to make me seem like it ain't true."

Do you recall testifying to that, sir?"

A. Yes. [80a].

The trial court ruled all of Brown's prior statements were admissible on redirect in light of the defense impeachment of him with his prior inconsistent statements. 78a-80a; 26b-28b. The judge also explained that Brown's prior statements were admissible because they "predated" his second-trial testimony. 27b.

While a decision to admit evidence is generally reviewed for abuse of discretion, *see People v Starr*, 457 Mich 490, 494 (1998), the correct application of the hearsay rules is a question of law reviewed *de novo*. *People v Barrera*, 451 Mich 261, 268 (1996). A court "by definition abuses its discretion when it makes an error of law." *Koon v United States*, 518 US 81, 100 (1996).

Argument

A witness's prior consistent statements generally are inadmissible to bolster the witness's credibility, as they constitute improper hearsay. *People v Harris*, 86 Mich App 301, 305 (1978); *People v Rosales*, 160 Mich App 304, 308 (1987); MRE 801, 802. "Where the prior extra-judicial statement of a witness agrees with his testimony, the out-of-court remark is self-serving, and is not generally permitted under any established exception to the hearsay rule." *People v Hallaway*, 389 Mich 265, 276 (1973). Prior consistent statements generally are not probative of a witness' truthfulness, because the witness could have simply lied consistently. As the Court said in *United States v Bowman*, 798 F2d 333, 338 (CA 8, 1986), "mere repetition does not imply veracity." *quoting* 4 J. Weinstein & M. Berger, *Weinstein's Evidence* p 801(d)(1)(B)[01]

at 801 117 to 801 118 (1981), *see also People v Lewis*, 160 Mich App 20, 29 (1987); *People v Darden*, 230 Mich App 597, 605 n.11 (1998).

As a narrow exception to this prohibition, MRE 801(d)(1)(B) permits admission of a witness's prior consistent statement if "the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . ." The party offering a prior statement under MRE 801(d)(1)(B) must establish four elements:

(1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose.

People v Jones, 240 Mich App 704, 706-707 (2000), quoting *United States v Bao*, 189 F3d 860, 864 (CA 9, 1999).

MRE 801(d)(1)(B) is narrowly tailored and does not confer *carte blanche* to bolster a witness's testimony with any and all prior statements. As the United States Supreme Court admonished, "[p]rior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited. . . . The Rule speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told." *Tome v United States*, 513 US 150, 157-158 (1995) (interpreting the identically-phrased FRE 801(d)(1)(B)). The rule "cannot be construed to allow the admission of what would otherwise be hearsay every time a [witness's] credibility or memory is challenged; otherwise, cross-examination would always transform [the prior consistent statement] into admissible evidence." *United States v Frazier*, 469 F3d 85, 89 (CA 3, 2006), citing *United States v Bishop*, 264 F3d

535, 548 (CA 5, 2001); *see also Evans v Fischer*, 816 F2d 171, 192 (EDNY 2011). Instead, the rule's plain language provides a narrow avenue for rebutting a claim that a witness recently began providing information on an issue, and is fabricating due to some motive or bias. Thus, the question of admissibility turns on whether the prior statements rebut the alleged link between the motive to fabricate and the prior inconsistency. *Tome, supra* at 158.

Here, the second element of MRE 801(d)(1)(B) was not met because there was not an express or implied charge of recent fabrication or improper motive. 18a. "One may impeach for lack of credibility without going so far as to charge recent fabrication." *Thomas v United States*, 41 F3d 1109, 1119 (CA 7, 1994). Moreover, "[i]mpeachment with a prior inconsistent statement is not necessarily a claim of recent fabrication." Timothy A. Baughman, Gillespie *Mich. Crim. L. & Proc. Prac. Deskbook* § 9:274. Additionally, "[m]ere contradictory testimony cannot give rise to an implied charge of fabrication." *Bao*, 189 F3d at 865, quoting *Breneman v Kennecott Corp*, 799 F2d 470, 473 (CA 9, 1986). Rather, a charge of recent fabrication is a narrow type of impeachment that requires specification of the examination that suggested recent fabrication. *Thomas, supra* at 1119-1120; *Tome, supra* at 155-160; *United States v Forrester*, 60 F3d 52 (CA 2, 1995). The most common way of showing recent fabrication is through impeachment by prior silence or omission, which can be rebutted by showing the witness did in fact make statements on the topic consistently with his trial testimony. 4 Wigmore, *Evidence* (Chadbourn rev), § 1129, at 270-272; *accord, People v Stricklin*, 162 Mich App 623, 628-629 (1987).

Here, the defense did not impeach Brown with his prior silence and then imply that he had only recently made up his accusation against Clary. 4 Wigmore, *supra*. Rather, the defense theory was that Brown misidentified Clary and wrongly assumed it was him due to the coincidence of the shooting occurring around Clary's scheduled arrival time. 21b-23b; 136a-

138a, 144a. The defense elicited several inconsistencies in Brown's prior statements and testimony to show that he was an unreliable witness who could not keep details straight; he was intoxicated or inebriated; and he "blurted out" things regardless of their truth. 69a-72a, 74a-75a, 76a, 136a-142a. Even the trial judge conceded as much when he commented that Brown's prior consistent statements were admissible because the defense had attacked "[Brown's] perception and recollection of the events with prior testimony." 27a; see also 80a.

The Court of Appeals correctly found that the purpose of impeaching Brown was to "question the accuracy of his testimony, specifically his identification of defendant as the shooter" rather than to imply that he came up with his story about Clary because of some bias. 18a. The parties agreed the two men had been only casual acquaintances; there was no beef between them and no motive for Clary to shoot Brown. 18a. While defense counsel asked Brown whether he lied to the police, made up statements, and whether he told the truth in various instances, counsel was not implying that Brown had recently begun to lie, but rather was focusing on his *general* credibility and pattern of contradiction. 69a-70a, 72a, 74a. Rather than recent fabrication or improper motive, such questions and statements represent the more general category of impeachment by showing Brown talked "one way on the stand and another way previously" and was "blowing hot and cold" on various details. McCormick, *supra* at § 34, p. 126. Thus, most of Brown's prior consistent statements were inadmissible.

In challenging the Court of Appeals' holding, the appellant cites *United States v Reliford*, 58 F3d 247, 249 (CA 6, 1995) to support its position, and then cherry picks statements made by defense counsel referencing Brown's changing story and improving memory in an effort to provide controlling authority. Brief of Appellant 20. But unlike here, the prior statements in *Reliford* were given the day of and two days after the crime, and prior to when any motive to

fabricate would have arisen. *Id.* at 249. And to the extent the appellant cites *Reliford* for the proposition that challenging a witness's faulty memory and changing story is sufficient to invoke MRE 801(d)(1)(B), such interpretation directly conflicts with the United States Supreme Court's opinion in *Tome*. The *Tome* Court clearly admonished that admissibility under this rule "is confined to those statements offered to rebut a charge of 'recent fabrication or improper motive'...." *Tome, supra* at 157. As Justice Scalia stressed, "only the pre-motive-statement limitation makes it rational to admit a prior corroborating statement to rebut a charge of recent fabrication or improper motive, but not to rebut a charge that the witness' memory is playing tricks." *Id.* at 168 (Scalia, J, concurring). *Reliford* does not support the appellant's implied contention that a mere challenge to a witness's memory and changing story meets the "recent fabrication" requirement of MRE 801(d)(1)(B). See also Gillespie *supra* at § 9:274.

Even if there was some implication of recent fabrication, most of Brown's prior statements still were inadmissible because they did not predate any motive to lie. The defense had impeached Brown largely with his preliminary examination testimony and police statements. 68a-69a, 71a-74a. Thus, any hypothetical motive to fabricate would have arisen at that point or at some point before then. In fact, any motive to fabricate would have arisen on or before May 31, 2010, as Brown first pointed the finger at "musclehead" moments after the shooting. 24b-25b, 29b. Yet the trial court permitted the prosecutor to misuse Brown's prior consistent testimony from the *first* trial, made *after* the preliminary examination, and by deduction, *after* any motive to fabricate would have arisen. 77a-81a. In so doing, the judge exposed his misunderstanding of the rule by explaining that those statements were admissible because they "predated the inconsistent statement at the trial today." 27b. It is well established that a prior consistent statement made after the alleged fabrication, influence, or motive to lie came into

being does not fall within the common law or rule-based exception to the hearsay rules for prior consistent statements. *Tome, supra* at 156-158; *People v Rodriguez* (On Remand), 216 Mich App 329, 332 (1996). The trial court thus erred in allowing the prosecutor to bolster Brown's testimony with prior statements that postdated any motive to fabricate.⁵

The Court of Appeals correctly noted the significant impact of admitting Brown's prior consistent statements. 18a. Such statements are not hearsay and are admissible as substantive evidence. MRE 801(d)(1)(B); *Tome, supra* at 156-57. In contrast to the inconsistent statements referenced on cross examination, the jury was allowed to consider Brown's prior consistent statements for their truth, even when those statements included far more testimony than was allowable to rehabilitate. *Id; compare, People v Jenkins*, 450 Mich 249 (1995) (noting that prior inconsistent statement used to impeach is not admissible to prove the truth of the matter asserted, but only to show that the witness made inconsistent statements). The Court of Appeals correctly reversed on this issue because up until the point of the shooting Brown and Clary's testimony was almost identical and as such, the bolstering statements went "right to material aspect of the case" – Brown's credibility and reliability. 18a. Their admission was thus outcome determinative error. 18a.

⁵ Although the Court of Appeals did not address this issue in finding error, this too provides and alternative ground for affirming that court's decision. *Hackett, supra* at 212 n.3.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court affirm the Court of Appeals' decision granting him a new trial.

Respectfully submitted,

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