

**STATE OF MICHIGAN
IN THE SUPREME COURT**

Appeal from the Michigan Court of Appeals
Jane E. Markey, P.J., and David H. Sawyer and Kurtis T. Wilder, J.J.

PEOPLE OF THE STATE OF MICHIGAN	Supreme Court Case No. 149917
Plaintiff-Appellee,	Court of Appeals Case No. 314315
v.	
JOHN OLIVER WOOTEN,	Wayne Circuit Case No. 11-012794-FC
Defendant-Appellant.	

**BRIEF OPPOSING DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL BY
THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS *AMICUS
CURIAE* IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN**

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SUMMARY OF ARGUMENT

Pursuant to MCR 7.306(D)(2), the Prosecuting Attorneys Association of Michigan (the “PAAM”) has filed the instant Brief as *Amicus Curiae* in support of the People and the arguments asserted by the Wayne County Prosecutor’s Office in their Answer and Supplemental Answer in opposition to Defendant’s Application for Leave to Appeal. The PAAM writes separately to note that neither the history, nor the text, of the Constitution provides a basis for this Court to bar the admission of pre-arrest silence as substantive evidence. A decision to the contrary would not only deprive the lower courts of valuable and probative evidence, but it would also severely undermine the reliability of our criminal process. An evidentiary approach will adequately protect these interests, rather than a blanket preclusion that has no constitutional basis.

In sum, and in support of the People, the PAAM urges this Court to conclude that: (1) nothing in the Constitution prohibits the prosecution from introducing evidence through a police witness in its case-in-chief of a defendant’s pre-arrest silence or failure to come forward and explain a claim of self-defense; (2) such evidence is admissible both to impeach the defendant’s anticipated theory of defense and as substantive evidence of the defendant’s guilt; and (3) the trial court in the instant case clearly erred by ruling to the contrary and subsequently granting a mistrial when the prosecution had merely elicited constitutionally admissible evidence without any intent to goad the mistrial. Accordingly, the PAAM respectfully urges this Honorable Court to deny Defendant’s Application for Leave to Appeal.

STATEMENT OF QUESTIONS PRESENTED

QUESTION I

IS THE PROSECUTION PERMITTED TO ELICIT FROM A POLICE WITNESS DURING ITS CASE-IN-CHIEF, EITHER AS SUBSTANTIVE PROOF OF GUILT OR FOR IMPEACHMENT, EVIDENCE OF A DEFENDANT’S PRE-ARREST SILENCE OR FAILURE TO COME FORWARD TO EXPLAIN A CLAIM OF SELF-DEFENSE?

Defendant’s Answer: “No”

People’s Answer: “Yes”

Trial Court’s Answer: “No”

Court of Appeals’ Answer: “Yes”

Amicus Curiae’s Answer: “Yes”

STATEMENT OF FACTS

The PAAM accepts and adopts the non-argumentative facts provided by the parties in their Supplemental Briefs on Defendant's Application for Leave to Appeal.

QUESTION I

NOTHING IN THE CONSTITUTION PROHIBITS THE PROSECUTION FROM ELICITING, DURING ITS CASE-IN-CHIEF, AND AS BOTH SUBSTANTIVE PROOF OF GUILT AND IMPEACHMENT, EVIDENCE OF A DEFENDANT'S PRE-ARREST SILENCE OR FAILURE TO COME FORWARD TO EXPLAIN A CLAIM OF SELF-DEFENSE.

STANDARD OF REVIEW

This Court reviews de novo whether a defendant's constitutional rights were violated by the admission of pre-arrest silence. *People v Borgne*, 483 Mich 178, 184; 768 NW2d 290 (2009).

ARGUMENT

Both the Michigan and United State's Constitutions prohibit the deprivation of life, liberty, or property without due process, and protect a criminal defendant against compelled self-incrimination. US Const, Am V; Const 1963, art 1, § 17; *People v Clary*, 494 Mich 260, 265; 833 NW2d 308 (2013). However, both the United States Supreme Court and this Court have made it abundantly clear that there are no constitutional bars to using a defendant's pre-arrest, pre-*Miranda* silence for impeachment purposes. See *Jenkins v Anderson*, 447 US 231, 240; 100 S Ct 2124; 65 L Ed 2d 86 (1980); *People v Cetlinski*, 435 Mich 742, 759; 460 NW2d 534 (1990). And although neither of these Courts has addressed the substantive use of a defendant's silence in such circumstances, our Court of Appeals, as well as several federal circuits, have also found no constitutional barriers to the admission of pre-

arrest silence evidence as substantive evidence of guilt. See *People v Schollaert*, 194 Mich App 158, 166-167; 486 NW2d 312 (1992); *People v Solmonson*, 261 Mich App 657, 665; 683 NW2d 761 (2004); *United States v Love*, 767 F2d 1052, 1063 (CA 4, 1985); *United States v Oplinger*, 150 F3d 1061, 1066 (CA 9, 1998), overruled on other grounds in *United States v Contreras*, 593 F3d 1135 (CA 9, 2010).

In *Solmonson*, our Court of Appeals explained that, where a defendant has received no *Miranda* warnings, no constitutional difficulties arise from using the defendant's silence before or after his arrest as substantive evidence, unless there is reason to conclude that his silence was attributable to the invocation of his Fifth Amendment privilege. *Solmonson*, 261 Mich App at 665. This holding sets forth the correct statement of the law regarding the constitutional implications of the substantive use of a defendant's silence in a pre-arrest, non-custodial interview. See *People v Redd*, 486 Mich 966, 968; 783 NW2d 93 (2010) (Markman, J., concurring). Given the absence of governmental coercion or compulsion to speak in non-custodial, pre-*Miranda* settings, the Fifth Amendment is simply inapplicable. *Id.* (citing *Jenkins*, 447 US at 243-244 (Stevens, J., concurring) ("When a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment.")). As such, an "evidentiary approach to the use of a defendant's pre-arrest, pre-*Miranda* statements, including omissions, will

adequately protect the policy interest in foreclosing the factfinder from unfair inferences of guilt.” *Id.* (quoting *Cetlinski*, 435 Mich at 759).

Additionally, the Fifth Amendment guarantees the right to be free of *governmentally* compelled self-incrimination, and where there is no governmental action that induced a defendant’s pre-arrest silence, there no basis to preclude the use of that silence. *People v Collier*, 426 Mich 23; 393 NW2d 346 (1986) (Boyle, J., concurring). But in order to even assert the Fifth Amendment privilege against self-incrimination, a defendant must expressly invoke that privilege, and the United States Supreme Court has recognized only two exceptions to this requirement, neither of which is applicable to the instant case. *Salinas v Texas*, ___ US ___; 133 S Ct 2174, 2178; 186 L Ed 2d 376 (2013) (citing *Griffin v California*, 380 US 609, 613-615; 85 S Ct 1229; 14 L Ed 2d 106 (1965) (holding that a defendant need not take the stand to assert the privilege at his own trial) and *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966) (holding that the failure to invoke the privilege is excused when governmental coercion renders that failure involuntary)). In light the *Salinas* decision, it is now surely evident that the Constitution does not prohibit the prosecution from eliciting testimony in its case-in-chief of a defendant’s pre-arrest silence or failure to come forward to explain a claim of self-defense.

It is true that the Fourteenth Amendment prohibits the prosecution from using a defendant’s post-arrest, post-*Miranda* silence as impeachment or substantive evidence. *People v Shafier*, 483 Mich 205, 214-215; 768 NW2d 305

(2009) (citing *Doyle v Ohio*, 426 US 610, 611; 96 S Ct 2240; 49 L Ed 2d 91 (1976) and *Wainwright v Greenfield*, 474 US 284, 290-291; 106 S Ct 634; 88 L Ed 2d 623 (1986)). But “[w]hat is impermissible is the evidentiary use of an individual’s exercise of his constitutional rights *after* the State’s assurance that the invocation of those rights will not be penalized.” *Id.* at 214-215 (citing *Wainwright*, 474 US at 295) (emphasis added). Thus, only post-*Miranda* silence is constitutionally barred. “The admission for substantive purposes of evidence of the defendant’s demeanor and statements . . . prior to invoking the right to remain silent is neither error of constitutional dimension nor a violation of the Michigan Rules of Evidence.” *Id.* (citing *People v McReavy*, 436 Mich 197, 218; 462 NW2d 1 (1990)).

Finally, a defendant’s pre-arrest silence constitutes relevant and probative evidence in a criminal case, and the trier of fact is entitled to hear that evidence as long as its admission is not barred by the Rules of Evidence. Our trial courts have always been tasked with applying those Rules, and must be trusted to determine whether the potential for prejudice outweighs otherwise relevant evidence’s probative value. A ruling by this Court barring the admission of pre-arrest silence as substantive evidence of guilt would deprive the lower courts of valuable evidence and undermine the reliability of the criminal process. Such a result has no basis in the text or history of the Constitution.

RELIEF REQUESTED

In sum, and in support of the People, the PAAM urges this Court to conclude that: (1) nothing in the Constitution prohibits the prosecution from introducing evidence through a police witness in its case-in-chief of a defendant's pre-arrest silence or failure to come forward and explain a claim of self-defense; (2) such evidence is admissible both to impeach the defendant's anticipated theory of defense and as substantive evidence of the defendant's guilt; and (3) the trial court in the instant case clearly erred by ruling to the contrary and subsequently granting a mistrial when the prosecution had merely elicited constitutionally admissible evidence without any intent to goad the mistrial. For the reasons set forth herein, and for those in the People's Answer and Supplemental Answer, the PAAM respectfully urges this Honorable Court to **DENY** the Defendant's Application for Leave to Appeal.

Respectfully Submitted,

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