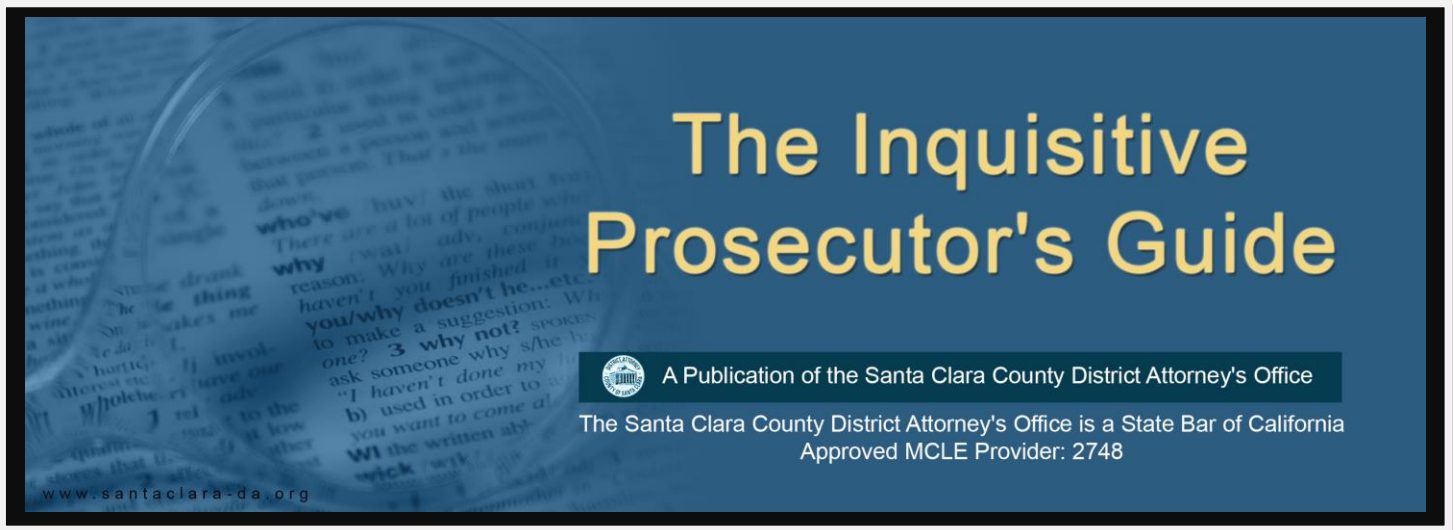

March 1, 2022

2022-IPG-53 (THE *DOYLE* & *GRIFFIN* ERROR OUTLINE)

PROSECUTORIAL USE OF, AND COMMENT UPON, A DEFENDANT'S SILENCE OR FAILURE TO TESTIFY

(THE *DOYLE* & *GRIFFIN* ERROR OUTLINE)

[March 1, 2022 Edition]*

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I. POST-ARREST/POST-*MIRANDA* SILENCE (*DOYLE* ERROR)

In ***Doyle* v. *Ohio*** (1976) 426 U.S. 610, the United States Supreme Court held that "the use for impeachment purposes of petitioner's silence, at the time of arrest and after receiving ***Miranda*** warnings, violated the Due Process Clause of the Fourteenth Amendment." (***Id***. at p. 619.) Thus, the Court concluded it was error for the state prosecutor to "seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving ***Miranda*** warnings at the time of his arrest." (***Id***. at p. 611.)

The ***Doyle*** court held "that use of the defendant's post-arrest silence in this manner violates due process." (***Id***. at p. 611, emphasis added by IPG; **but see** this IPG sections I-8 at pp. 11-18 [explaining that not all "use" of silence after invocation is the type of "use" prohibited under ***Doyle***].)

Doyle's prohibition on use of defendant's post-arrest/post-***Miranda*** silence has been consistently explained as stemming from the fact that "the government had induced silence by implicitly assuring the defendant that his silence would not be used against him." (***Portuondo* v. *Agard*** (2000) 529 U.S. 61, 74; ***Fletcher* v. *Weir*** (1982) 455 U.S. 603, 606.)

Although ***Doyle*** error involves commenting upon a defendant's silence/invocation following a ***Miranda*** admonishment informing defendant of his ***Fifth Amendment*** right to silence and to counsel, the use of that silence or invocation by the prosecution is treated as a ***due process*** violation. When **no** ***Miranda*** warnings are given, commenting upon a defendant's invocation of his Fifth Amendment rights to silence and counsel is, in some ways, more akin to ***Griffin*** error. (**See *Salinas* v. *Texas*** (2013) 570 U.S. 178, 188, fn. 3 [stating the ***Doyle*** rule "does not apply where a suspect has not received the warnings' implicit promise that any silence will not be used against him" and concurring and dissenting opinions]; **see also *People* v. *O'Sullivan*** (1990) 217 Cal.App.3d 237, 244-245 [noting California cases that issued before the effective date of Proposition 8 (and even one case after that date – ***People* v. *Jacobs*** (1984) 158 Cal.App.3d 740) are no longer valid insofar as they applied the ***Doyle*** rule to prevent the use of post-arrest silence where no ***Miranda*** warnings were given].)

* **Editor's note:** Although prosecutorial use and comment upon *pre*-***Miranda*** silence has sometimes been viewed as an error in the nature of ***Doyle*** error and sometimes an error in the nature of ***Griffin*** error), we have divided up this outline into four separate sections: (i) prosecutorial use or comment upon post-arrest/post-***Miranda*** silence (***Doyle*** error); (ii) prosecutorial use or comment upon post-arrest/pre-***Miranda*** silence; (iii) prosecutorial use or comment upon pre-arrest/pre-*Miranda* silence; and (iv) prosecutorial use or comment upon a defendant's failure to testify (***Griffin*** error). An additional three sections involve related errors, but which are not technically either ***Doyle*** or ***Griffin*** error.

1. Can a Prosecutor Elicit the Fact the Defendant Remained Silent After Being Given the *Miranda* Warnings by the Police in the People's *Case-in-Chief*? No. Doing so is *Doyle* Error.

Although ***Doyle* v. *Ohio*** (1976) 426 U.S. 610 addressed whether a prosecutor could use a defendant's silence for impeachment purposes, a prosecutor, naturally, is also prohibited from bringing out the fact that a defendant invoked his ***Miranda*** rights in the People's case-in-chief. (**See *People* v. *Clark*** (2011) 52 Cal.4th 856, 959 [citing to ***Doyle***]; ***People* v. *Coffman and Marlow*** (2004) 34 Cal.4th 1, 118 [same]; **see also *People* v. *Lopez*** (2005) 129 Cal.App.4th 1508, 1526 [noting the doctrine of adoptive admissions does not apply when an arrestee is advised of his right to remain silent and he exercises that right in response to an official accusation].)

2. Can a Prosecutor Bring Out the Fact the Defendant Remained Silent After Being Given the *Miranda* Warnings by the Police to *Impeach* the Defendant? No. Doing so is *Doyle* Error.

As noted above, because the ***Miranda*** warnings carry an implicit assurance that silence will carry no penalty, the prosecution **may not impeach** a defendant with his post-***Miranda*** silence. To do so is a violation of the Due Process Clause of the Fourteenth Amendment. (***Doyle* v. *Ohio*** (1976) 426 U.S. 610, 617-618; **accord *Salinas* v. *Texas*** (2013) 570 U.S. 178, 188, fn. 3; ***People* v. *Thomas*** (2012) 54 Cal.4th 908, 963.) The rule in ***Doyle*** means that when a defendant (who invoked his ***Miranda*** rights at the time of arrest) gets up on the stand and comes up with a story to explain his behavior which you haven't heard before, don't ask: "Why didn't you tell this story to anybody when you got arrested?" (**See *Greer* v. *Miller*** (1987) 483 U.S. 756, 765.)

3. Does the *Doyle* Rule Protect Both Silence *and* the Invocation of the *Miranda* Rights? Yes.

With respect to post-***Miranda*** warnings silence, "silence" does not mean only muteness; "it includes ***the statement of a desire to remain silent***, as well as of a desire to remain silent until an attorney has been consulted." (***Wainwright* v. *Greenfield*** (1986) 474 U.S. 284, 295 fn. 13, emphasis added.)

4. Does the *Doyle* Rule Prohibit Use of Either an Invocation of the Right to Silence *or* the *Right to Counsel*? Yes.

The prosecution cannot use a defendant's invocation of the right to remain silent against the defendant. (***People* v. *Lopez*** (2005) 129 Cal.App.4th 1508, 1525. Similarly, the fact a defendant asked for counsel may not be used against the defendant. (***People* v. *Huggins*** (2006) 38 Cal.4th 175, 198 [the reasoning of ***Doyle*** extends to comments on a defendant's exercise of his right to counsel]; ***People* v.**

Crandell (1988) 46 Cal.3d 833, 878 [same]; **accord *People* v. *Coffman* and *Marlow*** (2004) 34 Cal.4th 1, 65 [error for prosecutor to ask if defendant has asked for a lawyer when the police talked to him]; ***People* v. *Lopez*** (2005) 129 Cal.App.4th 1508, 1526.) Note that, sometimes, a request for counsel is treated as a constructive invocation of the Fifth Amendment privilege to remain silent. (**See** this IPG, section VI-1-A at p. 88.)

5. Can the *Doyle* Rule be Violated by Passing Reference to the Fact Defendant Invoked His Right to Silence? Yes, but . . .

The ***Doyle*** rule can be violated by "a mere reference" or "virtually any description of a defendant's silence following arrest and a ***Miranda*** warning." (***People* v. *Evans*** (1994) 25 Cal.App.4th 358, 370; **see also *United States* v. *Elkins*** (1st Cir.1985) 774 F.2d 530, 538 [officer's testimony that the defendants expressed no surprise when they were placed under arrest and read their *Miranda* rights was improper comment on their right to remain silent].)

However, assuming a prosecutor's reference to the defendant's invocation was error, the fact the reference was brief can be a factor in determining whether the error was harmless. (**See *People* v. *Hughes*** (2002) 27 Cal.4th 287, 332; this IPG, section I-24 at pp. 36-37 [standards on review].)

Moreover, a "***Doyle*** violation does not occur unless the prosecutor ***is permitted to use a defendant's postarrest silence against him at trial***...." (***People* v. *Thomas*** (2012) 54 Cal.4th 908, 936; ***People* v. *Clark*** (2011) 52 Cal.4th 856, 959, emphasis added; **see** this outline, section I-1 at p. 1.

6. Is *Doyle* Error Committed Where the Witness Does Not Answer a Question Designed to Elicit the Fact Defendant Invoked His *Miranda* Rights? It Depends.

Whether ***Doyle*** error occurred depends on two components: First, the prosecution must make use of defendant's post-arrest silence for impeachment purposes and second, the trial court must permit that use. (***Greer* v. *Miller*** (1987) 483 U.S. 756, 764-766; ***People* v. *Clark*** (2011) 52 Cal.4th 856, 959; ***People* v. *Evans*** (1994) 25 Cal.App.4th 358, 365-370.)

Doyle error can occur where a trial court ***overrules*** a defendant's objection to a prosecutor's question directed to impeaching defendant with his post-***Miranda*** silence. Where a court gives approval of such an improper inquiry by overruling objection, it transforms attempted ***Doyle*** error into actual ***Doyle*** error. (***People* v. *Champion*** (2005) 134 Cal.App.4th 1440, 1448; ***People* v. *Evans*** (1994) 25 Cal.App.4th 358, 365-370.) This holds true even when the defendant doesn't *directly* answer the objectionable question as a "single unanswered question may constitute ***Doyle*** error if the question

improperly refers to the defendant's silence and a defense objection to the question is erroneously overruled. (***People* v. *Lewis*** (2004) 117 Cal.App.4th 246, 256, citing to ***People* v. *Evans*** (1994) 25 Cal.App.4th 358, 369.)

However, if the court does not permit the "use" of defendant's silence, then no ***Doyle*** error will be deemed to have occurred. For example, in ***Greer* v. *Miller*** (1987) 483 U.S. 756 the prosecution sought to impeach the defendant by asking why he didn't tell his story to anybody after he was arrested. An objection to the question was sustained and the trial court admonished the jury to disregard questions to which an objection was sustained. No further mention of the defendant's silence was ever made. The ***Greer*** court held the attempted violation of the ***Doyle*** rule did not materialize into an actual violation of the ***Doyle*** rule. (***Id***. at pp. 764-765; **see also *People* v. *Clark*** (2011) 52 Cal.4th 856, 959 [no error where trial court struck evidence of defendant's silence and said no inference could be drawn from it].)

Also, the ***Doyle*** rule is not violated when "the evidence of defendant's invocation of the right to counsel was received without objection and the remarks of the prosecutor did not invite the jury to draw any adverse inference from either the *fact* or the *timing* of defendant's exercise of his constitutional right." (***People* v. *Thomas*** (2012) 54 Cal.4th 908, 936; ***People* v. *Huggins*** (2006) 38 Cal.4th 175, 199; **see** this IPG, section I-8 at pp. 11-18.)

7. Can a Prosecutor Cross-Examine a Defendant About His Invocation of His *Miranda* Rights Where the Invocation is Initially Brought Out by Defense Counsel? It Depends.

Whether the ***Doyle*** rule will be deemed to apply where the **defense** initially raises the issue of defendant's choice to remain silent after receiving ***Miranda*** warnings may depend on the manner in which the defense raises the issue.

In ***People* v. *Evans*** (1994) 25 Cal.App.4th 358, the defendant, on direct examination, stated that the investigating officer had advised him of his ***Miranda*** rights, but that he told the officer that he did not want to talk to her. The defendant then said he asked the officer what he was being charged with, but the officer walked away after telling him to ask the booking officers. On cross-examination, the prosecutor began to explore that area, asking, inter alia, "you didn't want to tell [the officer] when given the opportunity to tell her . . ." The defense interposed an objection that the prosecutor was erroneously attempting to ask why the defendant invoked his right to silence. The judge overruled the objection and the prosecutor asked: "When the officers had you in custody initially did you say anything to them that you did nothing wrong?" The defendant responded, "Yes, I did say that." The prosecutor then moved on to other matters. (***Id***. at pp. 365-367.) The ***Evans*** court held that since the trial court

clearly gave its approval to the prosecutor's *improper* inquiry by overruling the defense objection, there was ***Doyle*** error – albeit it was not reversible error. The ***Evans*** court rejected the idea that because the defendant had initially brought up his invocation, ***Doyle*** error was waived. (***Id***. at pp. 369-370.)

However, in ***People* v. *Matthews*** (1980) 108 Cal.App.3d 793, the court found no ***Doyle*** error where a defendant charged with murder and assault committed during a barroom brawl, *on direct examination*, stated that he had been cut by a knife during the fracas but said he did not tell the authorities about it upon being booked, for the reason that the injury, not serious, appeared to be healing and he did not need any medical attention. The People were allowed to cross-examine the defendant – presumably to test whether his stated rationale for failing to disclose his injuries upon arrest was true. The cross-examination elicited the fact the defendant had invoked his ***Miranda*** rights. Nevertheless, the court held the "questioning and comments of the People, following [defendant's] invitation to explore the subject, were proper." (***Id***. at p. 795 [albeit also noting there was no objection to the questioning and citing to ***Jenkins* v. *Anderson*** (1980) 447 U.S. 231 - a case involving impeachment with *pre-arrest* silence].)

Editor's note: Comment upon a defendant's invocation, however, may be proper where it is considered a "fair response" to various assertions by the defendant. **See** this outline, I-8-B, C, & D at pp. 13-17.

8. When Will the General Rule of *Doyle Not* Prevent Comment Upon, or Cross-Examination About, Post-Arrest/Post-*Miranda* Silence?

There is some question whether the ***Doyle*** rule prevents commenting on defendant's post-arrest/post-***Miranda*** silence in closing argument as opposed to eliciting the fact that defendant was silent during examination of a witness. (**See *People* v. *Seumanu*** (2015) 61 Cal.4th 1293, 1334, fn. 10 [noting the People's contention that the ***Doyle*** rule "applies to the impeachment of a testifying witness only, and is inapplicable to a prosecutor's closing argument" but declining to resolve issue].) However, because the issue is unresolved, *it should be assumed* that ***Doyle*** error can be committed by commenting upon defendant's silence following a post-arrest ***Miranda*** admonition in closing argument.

A. Is the *Doyle* Rule Violated if Evidence of Defendant's Invocation is Used for a Purpose *Other Than* as an Admission or Consciousness of Guilt?

California courts accept the premise that if a defendant's invocation is being used in a way that does not ask the jury to infer guilt simply from the fact defendant invoked his ***Miranda*** rights, there is not violation of the ***Doyle*** rule.

For example, in ***People* v. *Huggins*** (2006) 38 Cal.4th 175, the California Supreme Court declined to find ***Doyle*** error in a case where the defendant spontaneously made some incriminating statements before the officers had a chance to read him his ***Miranda*** rights. The prosecutor referred to the fact that defendant asked for an attorney, but only to show that the interview ended after defendant denied any involvement in the victim's death. (***Id***. at p. 199.) The ***Huggins*** court cited to ***People* v. *Crandell*** (1988) 46 Cal.3d 833 [discussed in this outline at section I-14 at p. 25] for the proposition that the ***Doyle*** rule is not implicated by a defendant's invocation of the right to counsel where it is "received without objection and the remarks of the prosecutor [do] not invite the jury to draw any adverse inference from either the ***fact*** or the ***timing*** of defendant's exercise of his constitutional right." (***Huggins*** at p. 199, emphasis in the original; **see also *People* v. *Thomas*** (2012) 54 Cal.4th 908, 936.) The ***Huggins*** court also cited to the case of ***People* v. *Hughes*** (2002) 27 Cal.4th 287, 332, fn. 4 [discussed in this IPG, section I-8-D at pp. 16-17] for the proposition that there is no ***Doyle*** error if "the evidence of defendant's assertion of his right [to counsel was not] offered to penalize defendant by illustrating consciousness of guilt, but instead ... to demonstrate a plan to destroy evidence[.]" (***Huggins*** at p. 199; **see also *People* v. *Wang*** (2020) 46 Cal.App.5th 1055, 1082–1083 ["no ***Doyle*** violation occurs when the prosecutor's cross-examination does ""not invite the jury to draw any adverse inference from either the fact or the timing of defendant's exercise of his constitutional right.""]; ***People* v. *Hollinquest*** (2012) 190 Cal.App.4th 1534, 1556 [noting in assessing ***Doyle*** error, the question is whether "the prosecutor referred to the defendant's post-arrest silence *so that the jury would draw 'inferences of guilt* from [the] defendant's decision to remain silent after ... arrest'"]; ***People* v. *Jones*** (1997) 15 Cal.4th 119, 174 [prosecutor's use of defendant's invocation of right to counsel was proper because, inter alia, "[u]nlike the prosecution's action in ***Doyle***, the prosecution . . . did not use defendant's silence at the time of his arrest to show that his testimony at trial was recently fabricated"]; ***Grancorvitz* v. *Franklin*** (7th Cir.1989) 890 F.2d 34, 42-44 [explaining how the purpose for which the silence is used may take such use outside the scope of the ***Doyle*** rule and finding prosecutor's reference to defendant's post-invocation failure to seek medical attention after arrest and argument that such failure contradicted defendant's testimony that he had been attacked by victim's fists and possibly a bottle in victim's possession did *not* violate ***Doyle*** rule]; ***State* v. *Cabral*** (Conn. 2005) 881 A.2d 247, 253-254 [state has some leeway in adducing evidence of the defendant's assertion of the Fifth Amendment for purposes of demonstrating "the investigative effort made by the police and the sequence of events as they unfolded"]; ***State* v. *Casey*** (1986) 513 A.2d 1183, 1188].)

A word of caution when it comes to whether an invocation/silence is being used in a manner not encompassed by the rationale in *Doyle*: Figuring out exactly when the ***Doyle*** case can be distinguished on the basis that the purpose for which defendant's invocation of ***Miranda*** rights is offered is not encompassed by ***Doyle*** gets pretty tricky. An argument can be made, for example, that some of the reasons given by the California Supreme Court for *not* applying the ***Doyle*** rule in the above

circumstances could apply equally to using a defendant's invocation to show defendant was not insane. Yet in ***Wainwright* v. *Greenfield*** (1986) 474 U.S. 284, the United States Supreme Court ruled the use of post- ***Miranda*** silence to disprove insanity still unfairly penalized the defendant in contravention of the Due Process Clause of the Fourteenth Amendment. (***Id***. at 293; **see also *State* v. *Hull*** (Conn. 1989) 556 A.2d 154, 160 [improper to elicit testimony or comment upon defendant's invocation of his Fifth Amendment rights in order to rebut a defense of lack of intent to commit murder because of intoxication or "extreme emotional disturbance"]; ***People* v. *Schindler*** (1980) 114 Cal.App.3d 178, 186 [improper to comment on fact defendant said she did not want to make a statement until she talked with an attorney where statement was admitted to rebut defendant's diminished capacity defense]; ***People* v. *Fabert*** (1982) 127 Cal.App.3d 604, 609 [evidence defendant exercised her ***Miranda*** rights cannot be used to rebut the defense of unconsciousness and diminished capacity]; this IPG, sections I-21 and I- 22 at pp. 32-35.)

B. Let's Say a Defendant Gets Up on the Stand and Claims He *Gave a Statement* After Being Mirandized When, In Reality, He Invoked His Right to Remain Silent. Can the Defendant's Invocation Be Brought Out in This Circumstance? Yes.

The fact of post-arrest silence ***can*** be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his ***behavior*** following arrest. (***Doyle* v. *Ohio*** (1976) 426 U.S. 610, 620 fn. 11.)

C. Can a Prosecutor Bring Out the Fact that a Defendant Remained Silent Where a Defendant Seeks to Create the Impression He Was Not Given the Opportunity to Explain His Side of the Story or Had Cooperated With the Police? Yes.

"A violation of due process does not occur where the prosecutor's reference to defendant's postarrest silence constitutes a fair response to defendant's claim or a fair comment on the evidence." (***People* v. *Delgado*** (2010) 181 Cal.App.4th 839, 853; ***People* v. *Champion*** (2005) 134 Cal.App.4th 1440, 1448; **see also *People* v. *Wang*** (2020) 46 Cal.App.5th 1055, 1083 ["a prosecutor may refer to the defendant's postarrest silence in fair response to an exculpatory claim or in fair comment on the evidence without violating the defendant's due process rights"]; ***People* v. *Smith*** (2021) 70 Cal.App.5th 298, 325 (discussed in this IPG, section I-21-C at pp. 33-35) ["The fundamental fairness concerns animating ***Doyle*** and its progeny do not prohibit a prosecutor from cross-examining a

defense expert about whether there are statements to support his opinion in the documents on which the defense expert has expressly stated that he relied"].)

A defendant's "right to remain silent is a shield. It cannot be used as a sword to cut off the prosecution's 'fair response' to the evidence or argument of the defendant." (***People* v. *Campbell*** (2017) 12 Cal.App.5th 666, 672; ***People* v. *Delgado*** (2010) 181 Cal.App.4th 839, 853; ***People* v. *Champion*** (2005) 134 Cal.App.4th 1440, 1448; ***People* v. *Lewis*** (2004) 117 Cal.App.4th 246, 257; ***People* v. *Austin*** (1994) 23 Cal.App.4th 1596, 1610, 1612; **accord *People* v. *Wang*** (2020) 46 Cal.App.5th 1055, 1083; **see also *People* v. *Jones*** (1997) 15 Cal.4th 119, 174.)

Where the defense seeks to create the impression that defendant fully cooperated with police and answered any questions they asked or was denied an opportunity to tell his side of the story, the prosecution is entitled to rebut that impression by showing the defendant declined to give a statement after being given the ***Miranda*** warnings.

For example, in ***People* v. *Austin*** (1994) 23 Cal.App.4th 1596, the defense, during cross-examination of an officer, suggested that the officer had denied the defendant an opportunity to explain a damaging statement. The court held the prosecutor could establish on redirect that the defendant declined to give a statement after being given the ***Miranda*** warnings. (***People* v. *Austin*** (1994) 23 Cal.App.4th 1596, 1610, 1612.) And in ***People* v. *Champion*** (2005) 134 Cal.App.4th 1440, the court allowed the prosecution to question defendant regarding the assertion of his right to silence after defendant's attorney elicited testimony from the witnesses that no one would listen to his side of the story and defendant himself testified that no one gave him the opportunity to give his side of the story. (***Id***. at pp. 1448-1453 [albeit noting that, in such a circumstance an instruction to the jury should be given as to how they must not consider the invocation as evidence of guilt]; **see also *People* v. *Jones*** (1997) 15 Cal.4th 119, 174.)

The prosecution may also use a defendant's post-***Miranda*** silence to ***rebut testimony by the defendant that he fully cooperated with (i.e., told his story to) the police at the time of his arrest***. Several of the following cases illustrate that principle:

In ***People* v. *Wang*** (2020) 46 Cal.App.5th 1055, the defendant was charged with the murder of both his in-laws. On direct examination, he testified that police responded to defendant's home after receiving a report of gunshots. (***Id***. at p. 1063.) On direct examination, the defendant claimed he spoke with law enforcement and was cooperative with them. He claimed that when the police arrived at his door, he told them it was great timing for them to show up since someone had tried to kill him. The defendant also stated he told the police he was scared and had to defend himself. (***Id***. at p. 1081.) On cross-examination, the prosecutor elicited the fact that defendant invoked his right to silence and

counsel and that the detectives respected his request. The prosecutor then elicited from the defendant that: (i) he never told the police that "he was sorry that his in-laws died"; (ii) he never "requested to talk with his children or asked the police to check on them"; (iii) he never "requested to talk to his wife"; and (iv) he never said, "there was an accidental shooting." (***Id***. at pp. 1081-1082.) The court held there was no ***Doyle*** error because the defendant "was not entitled to leave the jury with the impression he had been completely forthcoming with police, and that any omissions were due to the fact that the police had simply not asked 'too many things.'" (***Id***. at p. 1083.)

In ***People* v. *Delgado*** (2010) 181 Cal.App.4th 839, the defendant claimed he answered any questions asked of him by the police and he was "absolutely cooperative" with the officers from both agencies that interviewed him. In light of this claim, the court held that it was proper for the prosecution to elicit the fact that, at a certain point during one interview, the defendant was no longer willing to answer his questions. The defendant then admitted that he told the police if he "was gonna go any further, I would rather have an attorney with me." (***Id***. at pp. 852-853.) The ***Delgado*** court held the prosecution's comment on defendant's invocation was proper as a fair response to defendant's claim of full cooperation with the authorities. (***Id***. at pp. 853-854; **accord *United States* v. *Salinas*** (5th Cir. 2007) 480 F.3d 750, 756, fn. 4; ***United States* v. *Rodriguez*** (5th Cir.2001) 260 F.3d 416, 421.)

In ***People* v. *Campbell*** (2017) 12 Cal.App.5th 666, the court allowed such rebuttal testimony even where the defendant did not *expressly* state he fully cooperated. In ***Campbell***, the defendant waived his ***Miranda*** rights and spoke with several officers but when homicide detectives approached him after a blood draw, he refused to answer any more questions and invoked his right to silence. (***Id***. at p. 670.) During his trial testimony defendant said he turned himself in, answered the questions of five officers, and "to the best of [his] ability ... tried to explain" what happened. (***Id***. at pp. 671-672.) Moreover, defendant indicated that after he asked for an attorney, the officers never tried to talk to him again – something he assumed they would do. (***Id***. at pp. 670-671.) The trial court allowed the prosecutor to ask the defendant several questions revealing his refusal to answer further questions. (***Ibid***.) Even though the defendant did not expressly testify he cooperated "fully" or answered all questions, the court of appeal concluded use of defendant's post-***Miranda*** silence was a fair response because defendant erroneously portrayed himself as truly forthcoming with the police and had suggested he did not have a fair chance to explain his side of the story. (***Id***. at p. 672.)

D. Can a Prosecutor Bring Out the Fact that a Defendant Invoked His Right to Counsel Where a Defense Has Created the Impression the Police Acted Negligently or Failed to Allow Defendant an Opportunity to Consult with Counsel in a Timely Manner? Maybe.

The prosecution may be able to point out that defendant failed to talk to the police where the ***defense implies there is a lack of evidence because of police negligence***, but the lack of evidence is really due to the defendant's failure to talk to the police. For example, in ***United States* v. *Norwood*** (9th Cir. 2010) 603 F.3d 1063, the defendant was charged with possession of cocaine with intent to distribute. During closing argument, the defense attorney argued that the cocaine found in defendant's apartment was for personal use and suggested that defendant had been smoking the cocaine through the marijuana blunts that were found on the scene, but he could not establish this because the blunts had not been seized or tested. The prosecutor responded to the defense's comments by pointing out it would have been nice to have obtained the blunts but the police did not seize those blunts because the defendant did not tell them that he was smoking the marijuana with the crack cocaine. (***Id***. at p. 1067.) The Ninth Circuit, drawing an analogy to the holding in ***United States* v. *Robinson*** (1988) 485 U.S. 25 (a ***Griffin*** error case -**see** this IPG, section IV-3 at p. 62), found the prosecutor did not use defendant's silence as evidence of guilt but merely to respond to the defense's implication of investigative misconduct and defend the police officers' decision not to test the marijuana blunts. Accordingly, the court indicated there was no error and if any existed, it was harmless. (***Id***. at p. 1070.)

A prosecutor **<u>may</u>** be also able to elicit the fact a defendant invoked his right to counsel *at a particular time* in order to dispel the impression the police did not give the defendant an opportunity to obtain counsel prior to that time. For example, in ***People* v. *Hughes*** (2002) 27 Cal.4th 287, a detective advised a defendant arrested for a murder and sexual assault that he need to undergo a "rape kit examination." The detective described what such an examination would entail. At some point, the detective testified that defendant asked for counsel, and while the detective was out of the room arranging for counsel, defendant washed his hands and trimmed his fingernails, removing matter that had been under his nails. On cross-examination, defense counsel elicited the fact that defendant had been in custody for several days before the hand-cleaning incident. Defense counsel then asked questions that arguably suggested that defendant has not been permitted to talk to a lawyer prior to that time. The prosecutor then asked to introduce evidence that defendant *first* made his request for counsel immediately after being informed of the rape-kit examination. Defense counsel conceded that he "may have in fact opened the door" on this point, stating that he "had no objection that he could think of" to the prosecutor's proposal. The prosecutor was then allowed to elicit testimony to the effect that defendant requested counsel "right after" he had been informed of the rape-kit examination. The

California Supreme Court stated it did not perceive [***Doyle***] error on these facts" and interjected a footnote stating: "Even assuming that ***Doyle*** and [***Wainwright* v.**]***Greenfield*** [(1986) 474 U.S. 284] are not distinguishable, we agree with the People's observation that the fact and timing of defendan"s request may have been relevant to establish that the request was part of a ruse on his part to remove [the detective] from defendant's presence in order to allow defendant to destroy any evidence that was under his fingernails. Were that the situation, the evidence of defendant's assertion of his right would not have been offered to penalize defendant by illustrating consciousness of guilt, but instead would have been relevant to demonstrate a plan to destroy evidence." (***Id***. at p. 332 and then citing to ***People* v. *Crandell*** (1988) 46 Cal.3d 833, 878 and ***Wainwright* v. *Greenfield*** (1986) 474 U.S. 284 for the proposition that "a prosecutor may legitimately inquire into and comment upon 'purely "demeanor" or 'behavior' evidence""].)

Editor's note: It is not entirely clear whether ***Hughes*** stands for the proposition that there was no ***Doyle*** error because (i) the defense created a false impression that needed to be dispelled; (ii) ***Doyle*** does not apply to references to invocations when evidence of the invocation is not offered to show consciousness of guilt; (iii) the invocation itself constituted "behavior" evidence or, at least was so intertwined with behavior evidence that it should be treated as "behavior" evidence which is not subject to the ***Doyle*** rule; or (iv) all of the above. It gets complicated, especially since the invocation *was* actually being used as "consciousness of guilt" just not in the sense that is contemplated under ***Doyle***. That is, the invocation was introduced to help show how defendant carried out a *ruse* which showed consciousness of guilt that defendant had committed the sexual assault. It was **not** elicited to show defendant knew he was guilty under the theory that the exercise of the right to counsel itself reflects consciousness of guilt – which is what the court in ***Doyle*** wanted to prevent.

E. Can a Prosecutor Bring Out Inconsistencies Between the Defendant's Testimony and What Defendant Told or Did Not Tell the Police *Before* He Invoked His *Miranda* Rights?

In ***People* v. *Wang*** (2020) 46 Cal.App.5th 1055, a defendant charged with murder claimed he spoke with law enforcement and was cooperative with them when they arrived at his door. Defendant claimed he told the police someone had tried to kill him, that he was scared, and that had to defend himself. (***Id***. at p. 1081.) On cross-examination, the prosecutor elicited the fact that defendant invoked his right to silence and counsel and that the detectives respected his request. The prosecutor *then* elicited from the defendant that: (i) he never told the police that "he was sorry that his in-laws died"; (ii) he never "requested to talk with his children or asked the police to check on them"; (iii) he never "requested to talk to his wife"; and (iv) he never said, "there was an accidental shooting." (***Id***. at pp. 1081-1082.) The ***Wang*** court held the prosecutor was not only entitled to correct the false impression that the defendant had related the entire substance of his testimony to police, but that the prosecutor was

entitled to "*expose the inconsistencies between [defendant's] trial testimony and the information he had given to the police.*" (***Ibid***; **cf**. this IPG, section I-9 at p. 18 [describing when prosecutors may use "omissions" from a defendant's post-***Miranda*** statement to contradict defendant's trial testimony if defendant subsequently invoked after initially waiving his ***Miranda*** rights].)

9. Is the *Doyle* Rule Implicated When the Prosecution Uses or Comments Upon a Defendant's Silence Where the Silence Occurs After the Defendant Was Arrested and Mirandized, *But the Defendant Later Gave a Statement?*

The ***Doyle*** rule does <u>not</u> prevent a prosecutor from cross-examining a defendant about inconsistencies between a defendant's statement to the police and defendant's testimony on the stand where the defendant was arrested, Mirandized, and **<u>gave a statement</u>**. (***Anderson* v. *Charles*** (1980) 447 U.S. 404, 408; ***People* v. *Collins*** (2010) 49 Cal.4th 175, 203; ***People* v. *Bowman*** (2011) 202 Cal.App.4th 353, 363-364.)

In ***Anderson* v. *Charles*** (1980) 447 U.S. 404, a murder defendant waived his ***Miranda*** rights and said that he had stolen the victim's car from a particular location. At trial, he testified that he stole the car from a different location. The prosecutor, after questioning the defendant about his opportunity to change the facts, asked: "Don't you think it's rather odd that if it were the truth[,] that you didn't come forward and tell anybody at the time you were arrested, where you got the car?" (***Id***. at p. 406.) The ***Anderson*** court held that "***Doyle*** bars the use against a criminal defendant of silence maintained after receipt of governmental assurances. But ***Doyle*** does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving ***Miranda*** warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all." (***Anderson*** at p. 408; **accord *People* v. *Smith*** (2021) 70 Cal.App.5th 298, 324.)

In ***People* v. *Collins*** (2010) 49 Cal.4th 175, the California Supreme Court held there was nothing wrong with a prosecutor cross-examining a defendant about the defendant's failure to tell the police or the prosecutor about the alibi the defendant presented at trial (and later using the answers in closing argument) where the defendant had given inconsistent accounts of his alibi in two interviews with a police officer and the prosecutor asked questions in the context of those interview statements. (***Id***. at pp. 203-204 [and rejecting the idea each of the "inconsistent descriptions of events may be said to involve 'silence' insofar as it omits facts included in the other version"]; **but see *United States* v. *Caruto*** (9th Cir. 2008) 532 F.3d 822, 831 [stating, in dicta, that "the differences between the post-arrest statement and the trial testimony must be 'arguably inconsistent'; mere omissions are not enough to justify cross-examination or argument regarding what was not said at the time of arrest"].)

10. If a Defendant *Agrees* to Give a Statement After Being Mirandized, Can the Prosecution Introduce Evidence (Either in the Prosecution's Case-in-Chief or for Impeachment Purposes) That Defendant Did Not Answer *Some* Questions During the Police Interrogation? Maybe.

The ***Doyle*** rule does not prevent a prosecutor from cross-examining a defendant about inconsistencies between defendant's prior statements and his testimony on the stand. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks **after** receiving ***Miranda*** warnings has not been induced to remain silent. (***Anderson* v. *Charles*** (1980) 447 U.S. 404, 408; ***People* v. *Collins*** (2010) 49 Cal.4th 175, 203; ***People* v. *Bowman*** (2011) 202 Cal.App.4th 353, 363-364.)

However, "***Doyle*** did not involve, and neither the United States Supreme Court nor the California Supreme Court has directly addressed, the question of whether the ***Doyle*** rule applies to 'selective silence' or 'partial silence' cases . . . where a defendant was advised of his ***Miranda*** rights, elected to speak with a police detective, and then responded to some of the officer's questions, but not others." (***People* v. *Bowman*** (2011) 202 Cal.App.4th 353, 364; **see also *People* v. *Coffman and Marlow*** (2004) 34 Cal.4th 1, 110 [expressly declining to offer an opinion on the issue].)

California Cases

In ***People* v. *Bowman*** (2011) 202 Cal.App.4th 353, the court held that the ***Doyle*** rule does **not** bar use of or comment upon defendant's selective silence following a waiver of his ***Miranda*** rights. Thus, it was proper for a prosecutor to elicit and comment upon the fact that defendant simply looked at a detective without responding when asked about evidence suggesting his guilt and also finding it was proper to treat such lack of response as an adoptive admission. (***Id***. at p. 364-365.)

Similarly, in ***People* v. *Hurd*** (1998) 62 Cal.App.4th 1084, the court held that once a defendant elects to speak after receiving a ***Miranda*** warning, his or her refusal to answer *certain* questions may be used against the defendant in the absence of any indication that the refusal was an invocation of ***Miranda*** rights. (***Id***. at pp. 1092-1094.) Thus, it was fair to bring out the fact defendant refused to "re-enact" how a shooting occurred. (***Id***. at pp. 1093-1094.) The ***Hurd*** court rejected the principle that the ***Doyle*** rule is violated when a prosecutor comments upon the fact a defendant was "partially silent" where defendant waived ***Miranda*** but refused to answer some of the questions. (***Id***. at p. 1093; **accord *People* v. *Jennings*** (2010) 50 Cal.4th 616, 664; **see also *People* v. *Crayon*** (unpublished) 2011 WL 711845; **but see *Hurd* v. *Terhune*** (9th Cir.2010) 619 F.3d 1080, 1087 [discussed in this IPG immediately below, section I-10 at p. 20].)

Ninth Circuit Cases

The ***Hurd*** case made its way to the Ninth Circuit, which disagreed with the holding of the California court of appeal. The Ninth Circuit held the right to silence was not an all or nothing proposition. The court found a defendant ***could*** remain selectively silent by answering some questions and then refusing to answer others and it was ***Doyle*** error for the prosecution to comment on defendant's refusal to answer some of the questions. (***Hurd* v. *Terhune*** (9th Cir.2010) 619 F.3d 1080, 1087; **see also *United States* v. *Garcia-Morales*** (9th Cir. 2019) 942 F.3d 474, 476 [finding defendant was not silent]; ***United States* v. *Lorenzo*** (9th Cir. 1978) 570 F.2d 294, 297-298 [recognizing a suspect may selectively waive his Fifth Amendment rights by indicating that he will respond to some questions, but not to others but finding defendant's failure to respond to one question did not constitute either a total or a selective revocation of his earlier waiver]; **but see *People* v. *Velarde*** (unreported) 2016 WL 859246, at *10, fn. 7 [declining to follow Ninth Circuit rule]; ***People* v. *Crayon*** 2011 WL 711845 [same and distinguishing reasoning of the Ninth Circuit in ***Hurd* v. *Terhune***].)

Editor's note: Neither the California appellate courts nor the Ninth Circuit indicated it would have made a difference to their holding if the statement had only been used to impeach instead of in the case-in-chief.

Other Jurisdictions

The split on the law in this regard is not just between California and the Ninth Circuit, there is also a split among other jurisdictions regarding whether a defendant may selectively invoke his right to remain silent after he has waived his ***Miranda*** rights (as well as on the corollary of that right, i.e., that the prosecution is prohibited from using or commenting upon that selective silence). (**See e.g.**, ***People* v. *Coffman and Marlow*** (2004) 34 Cal.4th 1, 110; ***People* v. *Bowman*** (2011) 202 Cal.App.4th 353, 364; ***McBride* v. *Superintendent, SCI Houtzdale*** (3rd Cir. 2012) 687 F.3d 92, 104-105; and *compare* ***United States* v. *Burns*** (8th Cir.2002) 276 F.3d 439, 441–442 [proper]; ***United States* v. *Gamble*** (7th Cir. 2020) 969 F.3d 718, 724 [proper]; ***United States* v. *Pando Franco*** (5th Cir.2007) 503 F.3d 389, 397 [proper]; ***United States* v. *Pitre*** (2d Cir.1992) 960 F.2d 1112, 1125–1126 [proper]; ***State* v. *Fluker*** (Conn.App.2010) 1 A.3d 1216, 1223 [proper]; ***Thomas* v. *State*** (Fla.App.1999) 726 So.2d 357, 358 [proper]; ***Commonwealth* v. *Rivera*** (Mass. App. Ct. 2020) 146 N.E.3d 1132, 1138 [proper]; ***People* v. *McReavy*** (Mich.1990) 462 N.W.2d 1, 7-8 [proper]; ***State* v. *Smart*** (Mo.App.1988) 756 S.W.2d 578, 580–581 [proper] *with* ***United States* v. *May*** (10th Cir. 1995) 52 F.3d 885, 890 [improper]; ***United States* v. *Scott*** (7th Cir. 1995) 47 F.3d 904, 907 [improper, in dicta]; ***Hendrix* v. *Palmer*** (6th Cir. 2018) 893 F.3d 906, 925 [improper]; ***Grieco* v. *Hall*** (2nd Cir. 1981) 641 F.2d 1029, 1034 [improper]; ***United States* v. *Andujar–Basco*** (1st Cir.2007) 488 F.3d 549, 556–557 [improper]; ***Bartley* v. *Com.*** (Ky. 2014) 445 S.W.3d 1, 12 [improper]; **see also** the dissenting opinion in ***Salinas* v. *Texas*** (2013) 570 U.S. 178, 196 [claiming (possibly incorrectly) that "most" lower courts have held that it is improper for the prosecution to

comment on defendant's silence "even where the defendant, having received ***Miranda*** warnings, answers some questions while remaining silent as to others"].)

The analysis in ***Hendrix* v. *Palmer*** (6th Cir. 2018) 893 F.3d 906 is typical of the analysis used by courts who give an a very restrictive interpretation of the High Court's holding in ***Anderson* v. *Charles*** (1980) 447 U.S. 404. The Sixth Circuit highlighted language from ***Anderson***, in which the Supreme Court stated: "a defendant who voluntarily speaks after receiving ***Miranda*** warnings has not been induced to remain silent," it also explained that such a defendant "has not remained silent" only "[*a]s to the subject matter of his statements*." (***Hendrix*** at p. 925.) The Sixth Circuit then concluded that "***Doyle*** therefore continues to apply to subject matters on which the defendant has remained silent" and allowing a prosecutor "to probe inconsistencies between a defendant's statements" does not give a "prosecutor license to attempt to 'draw meaning from silence,' which ***Doyle*** and its progeny strictly forbid." (***Ibid***.)

Editor's note: The problem with this analysis is that a defendant's refusal or avoidance of answering a question about the crime being investigated is *part and parcel* of the subject matter of his statements.

Whether comment upon a defendant's post-***Miranda*** waiver "selective" silence violates the ***Doyle*** rule (and/or the Fifth Amendment) may turn on whether there has merely been silence in response to a particular question as opposed to express limited invocation of the right to silence. (**See *State* v. *Andujar-Basco*** (1st Cir. 2007) 488 F.3d 549, 555-557; ***McBride* v. *Superintendent, SCI Houtzdale*** (3rd Cir. 2012) 687 F.3d 92, 104-105; ***United States* v. *Jumper*** (7th Cir.2007) 497 F.3d 699, 705; ***Friend* v. *State*** (Tex. App. 2015) 473 S.W.3d 470, 480.)

Indeed, this seems to be the direction the United States Supreme Court is headed. In ***Salinas* v. *Texas*** (2013) 570 U.S. 178 [discussed in this IPG, section II-1 at pp. 37-38] the United States Supreme Court held that the **general rule** is that an express invocation of the privilege against self-incrimination is required in order to benefit from the protection of the Fifth Amendment. That is, outside a few contexts (such as in an un-Mirandized custodial interrogation) unless a defendant expressly invokes the privilege, the prosecutor may use defendant's silence in response to a potentially incriminating inquiry as evidence of the defendant's guilt in a criminal trial. (***Id***. at pp. 184-188.) The ***Salinas*** case involved a defendant in a pre-arrest/pre-***Miranda*** situation. However, in its discussion, the lead opinion noted that, when it comes to use of a defendant's silence, the pre-arrest/pre-***Miranda*** situation is a "closely related" situation to the *post*-arrest/*post*-***Miranda*** *waiver* situation that existed in ***Berghuis* v. *Thompkins*** (2010) 560 U.S. 370 wherein the court held that "a defendant failed to invoke the privilege when he refused to respond to police questioning for 2 hours and 45 minutes." (***Salinas*** at p. 188.) The lead opinion **rejected** the argument of the dissent that because ***Berghuis*** did not concern the admissibility of the defendant's silence, but instead involved the admissibility of his

subsequent statements, ***Berghuis*** could be distinguished. To the contrary, the lead opinion stated that "regardless of whether prosecutors seek to use silence or a confession that follows, the logic of ***Berghuis*** applies with equal force: A suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege." (***Salinas*** at p. 188.) Thus, the lead opinion **strongly indicates** that the rule requiring an express invocation (and its corollary that comment upon a defendant's silence is proper absent express invocation) would apply equally in the context of a post-arrest/post-***Miranda*** interview, where a defendant waives his ***Miranda*** rights but engages in selective silence during the interrogation. (***Salinas*** at p. 188.)

On the other hand, where a defendant in a post-arrest/post-***Miranda*** waiver situation ***does*** expressly state that he is ***not*** answering a particular question based on his Fifth Amendment privilege, it is likely that comment on that failure to answer will be held improper. This conclusion flows from: (i) the fact that the four dissenting justices in ***Salinas*** (the same justices also dissented in ***Berghuis***) would have found even the use of defendant's pre-arrest/pre-***Miranda*** mere silence to be improper – thus, they clearly would find comment upon an express invocation to be improper; and (ii) the fact the three justices in the lead opinion in ***Salinas*** did not agree with the rationale of Justice Thomas' concurring opinion (i.e., that ***Griffin*** was wrongly decided and should not be extended to bar comment on a defendant's refusal to speak in an unMirandized pre-trial context) - at least suggesting the justices in the lead opinion might find an express invocation may *not* be used in the People's case-in-chief.

It is possible that when silence is being "selectively invoked," the invocation need not be as unambiguous as when a defendant seeks to cut off all police questioning. [A] suspect who remains silent in response to certain questions may still claim protection under ***Doyle*** even if his silence falls short of the unambiguous declaration required to invoke the right to counsel under ***Davis*** or the right to cut off questioning under ***Thompkins***." (***United States* v. *Garcia-Morales*** (9th Cir. 2019) 942 F.3d 474, 476 [citing to ***Hurd* v. *Terhune*** (9th Cir. 2010) 619 F.3d 1080, 1087, but finding defendant did *not* selectively invoke]; **see also *Jackson* v. *Biter*** (E.D. Cal., 2020) 2020 WL 3510839, at *18 ["Where the suspect is invoking his rights under ***Doyle*** only with respect to his silence in response to certain questions, the invocation of the right to remain silence need not be so clear"].)

11. Is the *Doyle* Rule Implicated When the Prosecution Uses or Comments Upon Inconsistencies Between a Defendant's Prior Statement and Trial Testimony Where the Defendant Initially Waived His *Miranda* Rights but Later Invoked and the Inconsistencies Stem from the Fact of the Later Invocation?

The Ninth Circuit has held that where a defendant initially waives her ***Miranda*** rights, ***but later invokes her Miranda rights***, it is error to comment on the fact that the defendant's trial testimony is not credible because it does not include facts omitted from the earlier statement when it is the defendant's invocation of her ***Miranda*** rights that resulted in the prior statement not containing the omitted facts. (***United States* v. *Caruto*** (9th Cir. 2008) 532 F.3d 822, 831; ***United States* v. *Ramirez-Estrada*** (9th Cir. 2014) 749 F.3d 1129, 1134.)

For example, in ***United States* v. *Caruto*** (9th Cir. 2008) 532 F.3d 822, the defendant initially waived her ***Miranda*** rights and gave an alibi in response to questions from Immigration and Customs Enforcement agents. Minutes later, she invoked her right to counsel and the questioning ceased. At trial, the defendant offered a much more elaborate alibi. The prosecutor cross-examined the defendant about the differences between the earlier statement and the more elaborate trial testimony and later argued her failure to offer her more elaborate alibi to the officers during interrogation demonstrated her guilt. (***Id***. at pp. 826-827.) The Ninth Circuit held this was ***Doyle*** error because the defendant "could not fully explain why her post-arrest statement was not as detailed as her testimony at trial without disclosing that she had invoked her ***Miranda*** rights." (***Caruto*** at p. 830.) The Ninth Circuit reasoned that where the difference between the testimony and the prior statement stems from the later invocation of ***Miranda*** rights, then "cross-examination based on those omissions draws meaning from the defendant's protected silence in a manner not permitted by ***Doyle***." (***United States* v. *Caruto*** (9th Cir. 2008) 532 F.3d 822, 830; ***United States* v. *Ramirez-Estrada*** (9th Cir. 2014) 749 F.3d 1129, 1134; ***People* v. *Pao Seng Yang*** (unpublished) 2010 WL 2376895, at *6 [applying ***Caruto***]; **but see *People* v. *Ortiz*** (unpublished) 2009 WL 1480529, *4 [declining to follow ***Caruto***] and this IPG, section I-10 at pp. 19-22.)

12. Is the *Doyle* Rule Implicated When the Prosecution Uses or Comments Upon Inconsistencies Between a Defendant's Response to Booking Questions and His Trial Testimony Where the Defendant Earlier Invoked His *Miranda* Rights?

In ***United States* v. *Ramirez-Estrada*** (9th Cir. 2014) 749 F.3d 1129, the defendant was arrested for unlawful entry into the United States at the border. As part of the booking process, an officer read the defendant his ***Miranda*** rights. The defendant invoked those rights. The officer did not thereafter ask any questions about the circumstances of the defendant's crime, but instead asked him routine booking questions. In response to the booking questions, the officer asked certain questions about defendant's health. Defendant replied he had no health problems. (***Id***. at pp. 1132-1133.) That statement was later used to impeach the defendant at trial when he claimed he never intended to enter the United States but only approached to seek help for a jaw injury, which he thought he could receive from federal officials. (***Ibid***.) On appeal, the defendant claimed a ***Doyle*** violation. The prosecution argued there was no ***Doyle*** violation because the government did not use his silence to contradict his trial testimony only the statements he gave in response to booking questions – statements that did not violate the ***Miranda*** rule. (***Id***. at p. 1135.) The Ninth Circuit ruled that the answers defendant gave during booking "were narrow questions that did not call for [defendant] to mention his jaw injury." (**Id**. at p. 1136.) Thus, the court held the prosecutor actually used the fact that the defendant *failed* to mention his jaw injury (i.e., used defendant's *silence*) to impeach the defendant and the defense had no way to cross-examine the officer without eliciting the fact that defendant had earlier invoked his ***Miranda*** rights. (***Id***. at pp. 1136-1137.)

Editor's note: The only saving grace to the decision in ***United States* v. *Ramirez-Estrada*** (9th Cir. 2014) 749 F.3d 1129 is that the Ninth Circuit seemed to implicitly assume that *had* there actually been an inconsistency between what defendant said during the booking process and his later testimony, the ***Doyle*** rule would not bar comment or use of this inconsistency.

13. Can a Prosecutor Cross-Examine a Defendant About His Post-Arrest/Post-*Miranda* Failure to Contact Law Enforcement *After the Defendant's Right to Counsel Has Attached*?

As noted in this IPG at section I-9 at p. 19, the California Supreme Court in ***People* v. *Collins*** (2010) 49 Cal.4th 175 did not find that a prosecutor committed ***Doyle*** error by cross-examining a defendant regarding his failure to tell the police or the prosecutor about the alibi the defendant presented at trial where the defendant had given inconsistent accounts of his alibi in two interviews with a police officer and the prosecutor asked questions in the context of those interview statements. (***Id***. at pp. 203-204.)

However, the ***Collins*** court *did* find the fact the prosecutor repeatedly asked a defendant why he did not attempt to provide his alibi evidence to the police investigator or the prosecutor *during his many court appearances* (i.e., after charges were filed and counsel had been appointed) to be potentially problematic on *Sixth Amendment* grounds. (***Id***. at p. 205.) The court indicated there might be Sixth Amendment issues with the propriety of this type of questioning in general but held that since defendant never claimed his decision not to contact law enforcement after charges were filed reflected his own reliance on his right to remain silent or resulted from his lawyer's counsel, the Sixth Amendment was not implicated in the case before it. (***Ibid***.) The court also noted that the propriety of this line of questioning might also be impacted by the fact that, under the California State Bar Rules of Professional Conduct, rule 2–100(A) [now Rule 4.2], the prosecutor may not communicate directly or indirectly with the defendant without the consent of his counsel. (***Ibid***.)

14. Can a Prosecutor Comment Upon Defendant's Post-Arrest/Post-*Miranda* *Demeanor* as Evidence of Guilt Without Committing *Doyle* Error? Maybe.

It does not violate the ***Doyle*** rule to comment upon a defendant's demeanor or behavior at the time of his arrest and invocation of his ***Miranda*** rights. (**See *People* v. *Hughes*** (2002) 27 Cal.4th 287, 332, fn. 13 [citing to ***Wainwright* v. *Greenfield*** (1986) 474 U.S. 284 and ***People* v. *Crandell*** (1988) 46 Cal.3d 833, 878 for the proposition that "a prosecutor may legitimately inquire into and comment upon 'purely "demeanor" or 'behavior' evidence"'"]; **see also *United States* v. *Velarde-Gomez*** (9th Cir. 2001) 269 F.3d 1023, 1030-1031 [stating it is not improper, in a post-arrest/***pre-Miranda*** context, to comment upon a defendant's non-testimonial physical response such as the fact that defendant was apparently nervous, sweating or vomiting upon being confronted by the police].)

Editor's note: For a discussion of the "behavior" deemed outside the scope of the ***Doyle*** rule in ***People* v. *Hughes*** (2002) 27 Cal.4th 287, **see** this IPG, section I-8-D at pp. 16-17.)

In ***Wainwright* v. *Greenfield*** (1986) 474 U.S. 284, the High Court did not specifically address the issue of whether the ***Doyle*** rule was violated by comment upon a defendant's demeanor but noted that the defendant did not contest the point that "a prosecutor may legitimately inquire into and comment upon purely 'demeanor' or 'behavior' evidence." (***Id***. at p. 295, fn. 13.)

In ***People* v. *Crandell*** (1988) 46 Cal.3d 833, the court suggested that prosecutorial comment upon a defendant's tone of voice while invoking his right to counsel was not error where it was made for the purpose of showing defendant was being excessively flippant and how this attitude was inconsistent with defendant's story about what had occurred. (***Id***. at p. 879.)

However, prosecutors should be aware that the parameters of what constitutes "demeanor" evidence are not clearly defined. For example, in ***United States* v. *Velarde-Gomez*** (9th Cir. 2001) 269 F.3d 1023 (a pre-arrest/pre-***Miranda*** case) the court acknowledged that it would be proper to comment upon a defendant's non-testimonial physical response such as the fact that defendant was apparently nervous, sweating or vomiting upon being confronted by the police. (***Id***. at pp. 1030-1031.) Nevertheless, the court held that evidence of defendant's lack of physical reaction and non-responsive emotional state upon being informed by customs agents that marijuana was found in his vehicle was simply "failure to speak." And that "failure to speak" is not demeanor evidence but rather just a form of "remaining silent" and thus it was improper to comment upon this silence under the guise of it being evidence of defendant's physical "demeanor." (*Id*. at pp. 1031-1033.)

On the other hand, in ***State* v. *Ford*** (Wash. Ct. App. 2015) [unpublished] 186 Wash.App. 1017, the court characterized evidence concerning a defendant's slurred speech and apparent nervousness as demeanor evidence. (***Id***. at p. *3.) And in ***Michigan* v. *Rice*** (Mich. App. 1999) 597 N.W.2d 843, the appellate court held it was proper for the prosecutor to comment upon the fact that while being initially interviewed by police the "defendant made some statements, stopped talking, and hung his head down, and then again responded to questioning" and in a second interview, the defendant merely looked down, nodded, and cried." (***Id***. at p. 437.)

15. The *Doyle* Rule and Silence in the Face of Post-Arrest/Post-*Miranda* Questioning by a *Private Citizen*?

A. Can a Prosecutor Introduce Evidence of a Defendant's Post-Arrest, Post-*Miranda* Silence in the Face of Questioning by a Private Citizen in Either the Case-in Chief or to Impeach the Defendant? It Depends.

Defendants who have been arrested and have invoked their ***Miranda*** rights will sometimes speak with a private citizen while sitting in jail awaiting trial. Can a prosecutor use the fact a defendant refused to answer or remained silent in the face of an accusatory question by a private citizen?

In California, whether comment or use of defendant's silence in this context is proper will turn on whether the defendant's silence is viewed as an exercise of the defendant's Fifth Amendment privilege.

The ***Doyle*** rule does not prevent comment upon/cross-examination regarding defendant's post-*Miranda* silence invoked in the presence of a private party absent a showing that such conduct was an assertion of his constitutional rights to silence and counsel. (***People* v. *Hollinquest*** (2010) 190

Cal.App.4th 1534, 1556; ***People* v. *Delgado*** (1992) 10 Cal.App.4th 1837, 1842, fn. 2; ***People* v. *Eshelman*** (1990) 225 Cal.App.3d 1513, 1520.)

For example, in ***People* v. *Medina*** (1990) 51 Cal.3d 870, a defendant accused of murder was visited in jail by his sister. His sister asked the defendant why the defendant shot the victims. The defendant initially made no response and then stated he did not want to talk about it. The court *assumed the defendant had previously been given **Miranda** warnings* but nevertheless allowed the statement in as an "adoptive admission." The defendant argued that allowing silence in the face of an accusation to be admitted as evidence of guilt unconstitutionally penalized constitutionally-protected conduct, i.e., the right to remain silent following arrest. The court rejected the argument but left open the question of whether a different rule might apply if there was evidence that defendant believed his conversation with his sister was being monitored, or that his silence was intended as an invocation of any constitutional right. (***Id***. at pp. 891-892.)

And, in ***People* v. *Pitts*** (1990) 223 Cal.App.3d 606, post-***Miranda*** jailhouse conversations in which the defendant was silent in the face of accusations by private party were held admissible where they were not *immediately* preceded by ***Miranda*** warnings; they did not occur in an inherently accusatory or interrogative setting; and there was no indication defendant suspected they were being tape-recorded or that the person he was talking to would inform on them. (***Id***. at pp. 850-851.)

However, the ***Doyle*** rule **<u>will</u>** apply when the evidence shows that defendant's silence in response to questioning by a private party results primarily from the conscious exercise of his constitutional rights. (***People* v. *Hollinquest*** (2010) 190 Cal.App.4th 1534, 1556; ***People* v. *Delgado*** (1992) 10 Cal.App.4th 1837, 1842, fn. 2; ***People* v. *Eshelman*** (1990) 225 Cal.App.3d 1513, 1520.)

For example, in ***People* v. *Hollinquest*** (2010) 190 Cal.App.4th 1534, evidence was introduced that the defendant, after his arrest on a robbery-murder, spoke with a friend on numerous occasions. Both an investigator who listened to phone calls that took place between the defendant and his friend and the friend himself testified that defendant did not mention any facts related to the case, and specifically did not offer any explanation of a potentially incriminating relationship or cell phone contacts with an accomplice in the murder case—under circumstances in which defendant may have been expected to do so. The evidence of defendant's "silence" in this regard was offered to show consciousness of guilt. No evidence was introduced, however, that defendant ever expressed an intent to invoke his constitutional rights during the conversations. Nor was any evidence introduced that directly reflected upon defendant's motivation for declining to discuss the case with the friend. (***Id***. at pp. 1554, 1557.)

Nevertheless, the court held the "context of defendant's recorded phone conversations with [the friend were] indicative of an exercise of his constitutional rights to silence and counsel" and concluded ***Doyle***

error occurred because the prosecutor urged the jury to draw an adverse inference of guilt from defendant's postarrest "silence." (***Id***. at pp. 1557-1558 [albeit finding the error harmless at p. 1560].)

Editor's note: It appears, but is never actually stated in the opinion, that the defendant invoked his ***Miranda*** rights after arrest. But assuming defendant did so, the "indications" that defendant was exercising his constitutional right to silence and counsel were embarrassingly weak. Essentially, the ***Hollinquest*** court based its conclusion defendant was exercising his rights on (i) the fact defendant may have been aware of his right to silence since he was speaking while he was incarcerated and during their conversations institutional warnings were repeated that "everything you say here is being recorded" and (ii) the friend *might* have been advised by defendant's attorney "never to discuss the facts" of the murder (the friend could not recall being so advised but acknowledged "that very well could have happened" because he had not "done that"). (***Id***. at p. 1557.) The first factor will (ominously) apply to every telephone conversation in jail and the second factor is based on speculation and irrelevant. However, ***Hollinquest*** **may** no longer be good law in light of the holding in ***Salinas* v. *Texas*** (2013) 570 U.S. 178 that the invocation must be *express* in order to benefit from the protection of the Fifth Amendment. (**See** this IPG, section II-1 at pp. 37-38.)

In ***People* v. *Eshelman*** (1990) 225 Cal.App.3d 1513, the court found it error to cross-examine a defendant about his refusal to answer some questions about his motivation in killing his lover's adult son, where the defendant was in jail and the person asking the questions was the lover, because one of the reasons defendant gave for refusing to talk was that his attorney had advised him not to. (***Id***. at pp. 1520-1521 [albeit also noting that another reason defendant gave for remaining silent - that he was attempting to protect his lover emotionally – would not have called "***Doyle*** into play"].)

And, in ***Franklin* v. *Duncan*** (1995) 884 F.Supp. 1435, the court found it error to cross-examine a defendant about his silence where the defendant was in jail when asked by his daughter to admit the murder, defendant pointed to a sign in jail indicating the conversation would be monitored while declining to answer questions, and defendant believed the government would be monitoring his conversation. (***Id***. at pp. 1146-1448.)

IMPORTANT DEVELOPMENT

In ***Salinas* v. *Texas*** (2013) 570 U.S. 178, the United States Supreme Court made it clear that, in most circumstances, a defendant has to expressly assert the Fifth Amendment privilege in order to benefit from its protection. (***Id***. at pp. 181, 186-187.) The continuing validity of some of the cases inferring an "invocation" of the Fifth Amendment privilege from a defendant's silence in response to questioning by a private person (**e.g.**, ***People* v. *Hollinquest*** (2010) 190 Cal.App.4th 1534) should be reevaluated in light of the holding in ***Salinas***.

WARNING !!

Sometimes prosecutors will ask a defendant whether he has spoken "to anyone" about a defense first raised at trial by the defendant. The prosecutor may be intending to convey that the defendant has not spoken to any **private citizen**. But if the question can potentially be interpreted as referring to private citizens **or the police** and the defendant has invoked after being advised of his ***Miranda*** rights, the question may be found to be improper. (**See** this IPG, section I-16 at p. 30.)

B. Does the Rule Against Prosecution Use of Post-Arrest/Post-*Miranda* Silence Apply Where the Defendant Has Been Arrested and Given *Miranda* Warnings by a Private Security Guard?

The ***Doyle*** rule applies even where the ***Miranda*** warning is given by a private security guard (who has no duty to give such a warning) rather than by a police officer. (***People* v. *Givans*** (1985) 166 Cal.App.3d 793, 796.) In ***Givans***, the defendant was "arrested" by private security guards who then gave defendant ***Miranda*** warnings. Defendant remained silent once the private security guards turned defendant over to the custody of a police officer. The ***Givans*** court rejected the argument that ***Doyle*** required the defendant's silence be government-induced. Rather, the ***Givans*** court held all that is required is that the silence be ***Miranda***-induced. (***Id***. at pp. 797-798.)

Editor's note: The holding in ***Givans*** is very questionable. (**See** the concurring and dissenting opinion in ***Givans*** at pp. 802-804.) Although it is true that the ***Miranda*** warnings provide an assurance that a suspect's silence will not be used against him, the United States Supreme Court has also repeatedly stated: "***Doyle*** bars the use against a criminal defendant of silence maintained after receipt of ***governmental*** assurances." (***Fletcher* v. *Weir*** (1982) 455 U.S. 603, 606; ***Anderson* v. *Charles*** (1980) 447 U.S. 404, 407-408, emphasis added.) Unless the private security guards in ***Givans*** could be deemed to be acting as government agents (unlikely since police did not arrive until after the guards had arrested and advised the defendant), it does not make sense to apply the ***Doyle*** rule. This is because the ***Doyle*** rule acts as due process protection against infringement of a defendant's Fifth Amendment privilege and "[a]bsent evidence of complicity on the part of law enforcement officials, the admissions or statements of a defendant to a private citizen infringe no constitutional guarantees." (***People* v. *Whitt*** (1984) 36 Cal.3d 724, 745; ***In re Paul P.*** (1985) 170 Cal.App.3d 397, 401.)

16. Does it Violate the *Doyle* Rule for a Prosecutor to Ask a Defendant Whether He Told "Anybody" About a Defense Raised for the First Time at Trial?

In ***People* v. *Earp*** (1999) 20 Cal.4th 826, the California Supreme Court held the "spirit if not the letter" of ***Doyle*** may be violated where defendant has invoked his right to remain silent when given ***Miranda*** warnings by police and the prosecutor examines a civilian witness about whether defendant ***ever*** denied committing the crime *where that would include the time period after defendant invoked*. (**Id**. at pp. 856-857 [albeit finding any error harmless because the jury was unlikely to have focused on defendant's silence after defendant's arrest and receipt of ***Miranda*** warnings].)

In ***People* v. *Tate*** (2010) 49 Cal.4th 635, the defendant raised the claimed that asking the defendant about whether they told "anyone" about a story first being offered at trial violated the ***Doyle*** rule. However, the ***Tate*** court did not decide whether ***Doyle*** error occurred since an objection to the question was sustained on the ground it violated the attorney-client privilege; and accordingly, the California Supreme Court held any possible ***Doyle*** error was "nipped in the bud." (***Id***. at p. 692.)

Editor's note: In ***People* v. *Galloway*** (1979) 100 Cal.App.3d 551, the court held the ***Doyle*** rule was violated –even though no ***Miranda*** warnings had been given - when the prosecutor inquired of testifying defendant about whether it was the first time he "told anyone" about his alibi defense. (**Id**. at p. 556-559.) However, ***Galloway*** is no longer valid law in this regard. (**See *People* v. *O'Sullivan*** (1990) 217 Cal.App.3d 237, 244-245.)

In ***United States* v. *Lopez*** (9th Cir. 2007) 500 F.3d 840, a prosecutors' cross-examination of a defendant that elicited the fact the defendant "never" told a border agent about a duress defense was ***Doyle*** error because "never" would encompass both defendant's pre-***Miranda* *and post*-*Miranda*** silence. (***Id***. at p. 844 [finding error harmless, but and noting "[e]ven if counsel for the government intended his comments to refer only to post-arrest/pre- ***Miranda*** silence, the actual language used contains no such limitation and it is highly doubtful that the jury understood any such limitation"].)

17. Can a Prosecutor Comment Upon a Defense Counsel's Failure to Alert the Prosecutor to an Alibi Defense?

In ***People* v. *Lindsey*** (1988) 205 Cal.App.3d 112, the defendant presented an alibi defense. In closing argument, the prosecutor condemned defense counsel for not informing the district attorney or the police, before trial, of the alibi, and asserted that the attorney, as a knowledgeable public defender, would have done so if defendant was innocent. (***Id***. at p. 116.) The ***Lindsay*** court held that because it is generally known that an attorney speaks for the attorney's client, commenting upon defense counsel

failure to come forward before trial with an alibi defense was no different than commenting upon defendants' failure to come forward. (***Id***. at pp. 116-117.)

Editor's note: The ***Lindsay*** court did not indicate whether the defendant was ever informed of his ***Miranda*** rights. The court likened the case before it to the case of ***People* v. *Galloway*** (1979) 100 Cal.App.3d 551, where the court held the ***Doyle*** rule was violated –even though no ***Miranda*** warnings had been given - when the prosecutor inquired of testifying defendant about whether it was the first time he "told anyone" about his alibi defense. If, as in ***Galloway***, the defendant in ***Lindsay*** never invoked his ***Miranda*** rights, the prosecutor in ***Lindsay*** did not actually commit ***Doyle*** error. (**See *People* v. *O'Sullivan*** (1990) 217 Cal.App.3d 237, 244-245.) On the other hand, if the defendant in ***Lindsay*** *had* invoked his ***Miranda*** rights, ***Lindsay*** stands for the proposition that commenting on a defense attorney's failure to "speak" (i.e., come forward with an alibi defense) is no different than commenting upon a defendant's failure to speak.

18. Is it *Doyle* Error to Comment on Fact the Defense Failed to Request an *Evans* Lineup?

In a situation where the defense is impugning the identification procedures employed by law enforcement, the prosecution may elicit the fact that the defendant never requested an ***Evans*** lineup and may comment upon this failure in argument. This constitutes neither ***Doyle*** nor ***Griffin*** error because participation in lineup is a form of "nontestimonial, physical evidence" outside the privilege against self-incrimination protected by" those cases. (**See *People* v. *Lewis*** (2004) 117 Cal.App.4th 246, 256-258.)

19. Is the *Doyle* Rule Violated When a Defense Attorney for One Codefendant Comments on the Silence of the Other Codefendant?

In ***People* v. *Hardy*** (1992) 2 Cal.4th 86, the court held that ***Griffin*** error could be committed where an attorney representing one defendant comments on the fact a co-defendant did not testify. (***Id***. at pp. 153, 157; **see also *People* v. *Estrada*** (1998) 63 Cal.App.4th 1090, 1095 [error for co-counsel to comment on fact that defendant declined to testify when called as a witness by co-counsel at preliminary examination]. (**See** this IPG section IV-20 at p. 80.) However, the language used by the ***Hardy*** court in discussing the nature of the error repeatedly referred to the impropriety of commenting on "*the silence*" of the codefendant. (***Id***. at p. 157 [albeit all the cases cited in support of this proposition involve comment on a co-defendant's failure to testify].) Moreover, it stands to reason that if ***Griffin*** error can arise from co-counsel's comments, so can ***Doyle*** error. (**See *In re Harrell*** (unpublished) 1995 WL 748083, *7 [stating "[i]t is probably the case . . . that ***Doyle*** error may be

committed by counsel for a codefendant" and citing to ***Hardy***].) As in the context of ***Griffin*** error though, it should be anticipated that a "comment alluding to the silence of a defendant that would require reversal if made by a prosecutor may be deemed harmless—or even not error—if made by a codefendant's attorney." (***People* v. *Hardy*** (1992) 2 Cal.4th 86, 157.)

20. Can an Unelicited Comment by a Witness on Defendant's Silence Constitute *Doyle* Error? It Depends.

Sometimes, completely unexpectedly, a witness will blurt out that the defendant invoked his ***Miranda*** rights. Does this mean ***Doyle*** error has occurred?

It is true a prosecutor has the duty to guard against statements by his witnesses containing inadmissible evidence. [Citations.] If the prosecutor believes a witness may give an inadmissible answer during his examination, he must warn the witness to refrain from making such a statement." (***People* v. *Warren*** (1988) 45 Cal.3d 471, 481-482.) However, prosecutorial misconduct occurs only where the record shows that the prosecutor had reason to anticipate that the witness might make the inadmissible statement in question and was also in some way responsible for purposely eliciting the impermissible testimony. (***People* v. *Lucero*** (2000) 23 Cal.4th 692, 718.)

In ***People* v. *Lucero*** (2000) 23 Cal.4th 692, the court noted that where a *defense* witness brings out inadmissible evidence (i.e., the invocation by the defendant of his *Miranda* rights), the prosecutor cannot be charged with misconduct. (***Id***. at p. 718.) However, the ***Lucero*** court also appeared to acknowledge that even a comment by a defense witness remarking on defendant's exercise of his constitutional rights has the potential to cause a mistrial. (***Id***. at p. 714.)

21. Application of the *Doyle* Rule in Trials on Insanity

A. Does the *Doyle* Rule Prohibit Comment Upon Defendant's Silence Where the Silence is Not Being Used to Impeach or Establish Guilt But Simply to Show the Defendant is Not Insane? Yes.

A prosecutor's uses of defendant's post-arrest, post-***Miranda*** warnings silence as evidence of his sanity violates the ***Doyle*** rule. (***Wainwright* v. *Greenfield*** (1986) 474 U.S. 284, 291-295 [prosecution brought out silence in case-in-chief on issue of defendant's sanity]; ***People* v. *Coffman*** (2004) 34 Cal.4th 1, 64.)

B. If the Defense Tries to Create the Impression That the Defendant is Insane Because He Was Not Communicative While in Custody, Can Defendant's Statement That He Would Not Talk on the Advice of His Attorney Be Brought Out? Yes.

In an insanity trial, where a defendant introduces evidence that he was uncommunicative with the police because he suffered from a mental illness, the prosecution is entitled to rebut that assertion by presenting evidence that defendant consciously chose to remain silent on the advice of counsel. (***People* v. *Jones*** (1997) 15 Cal.4th 119, 170-174.) However, the ***Jones*** court took care to point out that it was not holding that "evidence of the reason for defendant's silence is admissible to prove defendant was malingering." (***Id***. at p. 174, fn. 18.)

C. If the Defense Expert Concludes the Defendant is Insane Based on a Defendant's Statements to the Expert Regarding the Defendant's State of Mind at the Time of the Crime but Relies on Police Reports Documenting Statements of the Defendant Made After Invocation of Defendant's *Miranda* Rights Undermining the Conclusion, Can the Expert be Cross-Examined About those Statements? Yes.

In ***People* v. *Smith*** (2021) 70 Cal.App.5th 298, the defendant murdered her mother. She called 9-1-1 the next day and made admissions and provided an explanation for not calling earlier. (***Id***. at pp. 303-304.) Shortly after her arrest, while in a patrol car, Smith told a detective at the scene, "I killed my mom." (***Id***. at p. 304.) The defendant also was interviewed at the police station but some of the interview contained statements the defendant made after she invoked her right to counsel. (***Id***. at p. 314.) The two earlier statements but not the statement made at the station were introduced in the guilt phase of the defendant's trial. (***Ibid***.)

In the sanity phase of trial, the defense put on an expert who opined defendant was insane and that she had "suffered an episode of depersonalization and derealization—a mental disorder prompted by stress—at the time of the killing." (***Id***. at p. 305.) The expert described depersonalization and derealization as "sort of looking down at oneself being in some sort of a dream state, not being in full control of your body functions and your thought processes." (***Ibid***.) This opinion was based, in part of statements made by the defendant during interviews with the expert. (***Ibid***.) The expert testified he reviewed police reports and jail records of the defendant. Those reports included all the statements made by the defendant, included those made after she invoked at the station. (***Id***. at pp. 318-319.)

On cross-examination, the prosecutor asked the defense expert when was "the first time, to your knowledge, that [the defendant] mentioned this idea of depersonalization and derealization?" (***Id***. at p. 316.) Defense counsel's ***Doyle*** objection was overruled, and the expert stated the defendant had not earlier mentioned experiencing a state of mind consistent with depersonalization and derealization. (***Ibid***.) The prosecutor then elicited more specific testimony from the expert that the defendant had not made any sort of comments that would lead you to believe that she was in a state of derealization either in the 9-1-1 call or to the officer in the patrol car. (***Ibid***.)

The prosecution countered with its own expert, who opined defendant's claim of being "out of body as if a passenger … in a vehicle," during the offense was fabricated. The prosecution expert based his conclusion, in part, on his review of the defendant's 9-1-1 call, as well as his own interview with the defendant. (***Id***. at p. 306.) The expert testified that "the first time [the defendant] described being in a state of depersonalization or derealization was several months after the offense." (***Id***. at p. 319.) On cross-examination, the expert reiterated that part of the basis of his finding was that the defendant no evidence of depersonalization or derealization appeared until the year and three months after the incident. (***Id***. at p. 320.) Defense counsel then elicited the fact that when defendant did make statements supporting that diagnosis, it was the first time she spoke with a psychiatrist. Defense counsel then asked if the expert was aware that after she was arrested, she was not allowed to be interviewed without the consent of her attorney. The prosecution expert then asked, "After she invoked?" (***Ibid***.) Defense counsel repeated the question and the expert agreed she could not be interviewed. (***Ibid***.)

During closing argument, the prosecutor asked the jury to consider the fact the defendant did not come forward with statements supporting a depersonalization or derealization until she met with a psychiatrist. (***Id***. at pp. 322-323.)

On appeal, defendant claimed the trial court erred in admitting evidence during the sanity phase that defendant had not described being in a state of depersonalization or derealization prior to her evaluation with a defense expert because "it amounted to a comment on her exercise of her right to remain silent after having been advised of her rights under ***Miranda***" during the stationhouse interview. (***Id***. at p. 314.) The appellate court disagreed. As to the cross-examination of the defense expert, the court observed the prosecution only specifically referenced the pre-stationhouse statements and held "the prosecutor did not violate ***Doyle*** by asking [defense expert] whether [the defendant] had mentioned depersonalization when making these statements." (***Id***. at p. 325.) The appellate court considered the prosecutor's question about whether the reports relied upon by the expert reflected any statements consistent with the diagnosis earlier than the psychiatric interview to fall into the category of "a fair response to defendant's claim or a fair comment on the evidence." (***Id***. at p. 324; **see also** this IPG, section I-8-C at p. 13.) The court stated: "the fundamental fairness concerns animating ***Doyle***

and its progeny do not prohibit a prosecutor from cross-examining a defense expert about whether there are statements to support his opinion in the documents on which the defense expert has expressly stated that he relied." (***Id***. at p. 325.) As to the testimony of the prosecution expert and the prosecutor's closing argument, no ***Doyle*** error was committed because all that was said was that the defendant's claim was inconsistent with voluntary statements that she made near the time of the offense. (***Id.*** at p. 325.)

22. Application of the *Doyle* Rule in Trials on Competency

In ***Nguyen* v. *Garcia*** (9th Cir. 2007) 477 F.3d 716, held that the admission of a defendant's post-***Miranda*** invocation of right to counsel at a competency hearing did not violate the ***Doyle*** rule. (***Id***. at p. 727.) The court distinguished both ***Doyle*** and ***Wainwright* v. *Greenfield*** (1986) 474 U.S. 284 on the ground that competency hearings are entirely distinct in purpose from the guilt or penalty phase of trial and "do not invoke the same concerns of self-incrimination—the right ***Miranda*** is designed to protect—that are relevant during the guilt and penalty phases of trial." (***Id***. at p. 725.)

The ***Nguyen*** court stated: "We fail to see how ***Wainwright*** and ***Doyle***, which hold that a defendant shall not be penalized for invoking ***Miranda*** rights, should apply to a hearing at which the Fifth Amendment privilege against self-incrimination is inapplicable. Here, reference to [defendant's] post-arrest invocation at the competency hearing was not used to satisfy the prosecutorial burden of proof of guilt; it was used, rather, to show cognition." (***Id***. at p. 7827.)

23. Can *Doyle* Error Be Committed by Commenting Upon a *Witness*'s Silence?

If a witness has committed no crime (i.e., cannot incriminate herself), then the witness has no constitutional right to remain silent and it cannot be misconduct to comment upon the witness's silence (i.e., failure to speak with the police). (**See *People* v. *Seumanu*** (2015) 61 Cal.4th 1293, 1334.)

In ***People* v. *Seumanu*** (2015) 61 Cal.4th 1293, the defendant presented an alibi defense though his wife and another witness who claimed to be the primary participant in the robbery and murder with which defendant was charged. The wife testified defendant was with her on the night of the crimes, and the other witness stated defendant was not present when the crimes were committed. During closing argument, the prosecutor argued the alibi defense was not worthy of belief because the wife and witness knew the defendant was sitting in custody for a long time but neither the wife nor the witness came forward: "Real alibi witnesses do not sit on their alibi and keep it secret for four-and-a-half years while their allegedly innocent husbands are rotting in jail." (***Id***. at p. 1332.) The defendant later claimed that this closing argument constituted improper comment on his right to remain silent in violation of his

constitutional rights under the United States Constitution as expressed in the ***Doyle*** rule. (***Seumanu*** at p. 1333.) However, after noting defendant's argument was forfeited because of defense failure to object on the asserted ground, the California Supreme Court rejected the argument on the merits because the gist of the prosecutor's argument was aimed not at defendant's silence, but *that of his primary alibi witness*, his wife. "Accordingly, the prosecutor's argument was not intended to have the jury draw negative inferences so much from defendant's silence as from [his wife's] silence. Mere witnesses, of course, have no constitutional right to remain silent." (***Id***. at p. 1334.)

24. Assuming *Doyle* Error Occurred, Will It Always be Reversible Error?

Doyle error may be forfeited by a defendant's failure to object unless an objection would have been futile. (***People* v. *Seumanu*** (2015) 61 Cal.4th 1293, 1333; ***People* v. *Collins*** (2010) 49 Cal.4th 175, 202.)

A de novo standard of review applies in determining whether a trial court violated a defendant's constitutional right to due process under ***Doyle***. (**See *People* v. *Smith*** (2021) 70 Cal.App.5th 298, 314 citing to ***People v. Seijas*** (2005) 36 Cal.4th 291, 304 ["independent review 'comports with this court's usual practice **373 for review of mixed question determinations affecting constitutional rights'"].)

Doyle error is subject to the harmless beyond a reasonable doubt standard of ***Chapman* v. *California*** (1967) 386 U.S. 18. (***Brecht* v. *Abrahamson*** (1993) 507 U.S. 619, 630; ***People* v. *Thomas*** (2012) 54 Cal.4th 908, 936; **see also *People* v. *Evans*** (1994) 25 Cal.App.4th 358, 370-372 [***Doyle*** error harmless where the trial record shows an exceptionally persuasive prosecution case confronting an exceptionally feeble showing by the defense].)

When deciding whether a prosecutor's reference to a defendant's post-arrest silence was prejudicial, courts will consider the extent of comments made by the witness, whether an inference of guilt from silence was stressed to the jury, and the extent of other evidence suggesting defendant's guilt. (**See *United States* v. *Whitehead*** (9th Cir. 2000) 200 F.3d 634, 639; ***Guam* v. *Veloria*** (9th Cir.1998) 136 F.3d 648, 652.)

Practice Tip: If there has been a potential violation of the ***Doyle*** rule, a prosecutor should (i) refrain from any further mention of defendant's post-***Miranda*** silence and (ii) ask defense counsel if they want a cautionary instruction to be given to the jury advising them not to consider defendant's silence. Some earlier cases indicated that curative instructions would be of little help. (**See *People* v. *Galloway*** (1979) 100 Cal.App.3d 551, 561 [considering fact no instruction admonishing the jury to ignore the questions or closing remarks about post-arrest silence was given in finding ***Doyle*** error

prejudicial but also noting that federal circuit courts have expressed serious reservations about the efficacy of curative instructions when dealing with ***Doyle*** violations]; ***United States* v. *Prescott*** (9th Cir.1978) 581 F.2d 1343, 1352 [***Doyle*** error is "so readily subject to misinterpretation by a jury as to render a curative or protective instruction of dubious value"].) However, more recent cases suggest the contrary. (**See e.g.**, ***United States* v. *Foster*** (9th Cir. 1993) 985 F.2d 466, 468 [noting the Supreme Court in ***Greer* v. *Miller*** (1987) 483 U.S. 756 held "that there is no ***Doyle*** violation if the district court promptly sustains a timely objection to a question concerning post-arrest silence, *instructs the jury to disregard the question, and gives a curative jury instruction*"].)

II. PRE-ARREST/PRE-*MIRANDA* SILENCE

1. Can a Prosecutor Introduce Evidence of Defendant's Pre-Arrest, Pre-*Miranda* Silence in the Prosecution's Case-in-Chief or Comment Upon Pre-Arrest Silence as *Substantive* Evidence of Guilt? Probably, if There is No Express Invocation; Otherwise, Probably Not.

Although the Supreme Court has held that the government may comment on a defendant's pre-arrest silence for *impeachment* purposes, until the decision in ***Salinas* v. *Texas*** (2013) 570 U.S. 178 it had never taken up the question of whether the use of pre-arrest, pre-***Miranda*** silence as ***substantive*** evidence of guilt was constitutional. (***People* v. *Waldie*** (2009) 173 Cal.App.4th 358, 365; ***United States* v. *Oplinger*** (9th Cir. 1998) 150 F.3d 1061, 1066.)

In ***Salinas***, a defendant who was answering questions posed by the police during a non-custodial and unMirandized interview, did not verbally respond when asked a particularly incriminating question. Instead, the defendant "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up." The defendant remained silent for a few moments. The interviewing officer then asked additional questions - which defendant answered. (***Id***. at p. 182.) The United States Supreme Court initially granted certiorari "to resolve a division of authority in the lower courts over whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief." (***Id***. at p. 183.) However, the High Court ducked the question upon which it granted review, by finding there had been *no assertion of the Fifth Amendment privilege*. (***Id***. at pp. 181, 191.)

Specifically, the lead opinion in ***Salinas*** held that the general rule is that to obtain the benefits of the Fifth Amendment privilege (e.g., prevent a prosecutor from commenting upon or using an invocation of the privilege or silence following an invocation), the defendant must expressly assert the privilege. (***Id***.

at pp. 181, 190-191.) The requirement of an express invocation is necessary "[t]o prevent the privilege from shielding information not properly within its scope" since, without knowing whether the witness is invoking the privilege, it cannot easily be determined (i) whether the witness is improperly trying to invoke the privilege to protect information that is not actually incriminating or (ii) whether the government needs to cure any potential self-incrimination through a grant of immunity. (***Id***. at p. 183-184.)

The ***Salinas*** court held the general rule that someone who desires the protection of the Fifth Amendment privilege must expressly invoke the privilege applies when a person is silent during a noncustodial police interview. In that context, silence in the face of questioning will not be treated as an invocation of the Fifth Amendment privilege against self-incrimination. (***Id***. at pp. 181, 186-188.) Since the defendant in ***Salinas***, did not expressly invoke his Fifth Amendment privilege, the lower court decision (which held there was no error in the prosecutor introducing evidence of defendant's silence in the case-in-chief and commenting upon the silence as evidence of guilt in closing argument) was affirmed. (***Id***. at pp. 181, 191.)

The ***Salinas*** court recognized that in ***Doyle* v. *Ohio*** (1976) 426 U.S. 610, it had held that "***due process*** prohibits prosecutors from pointing to the fact that a defendant was silent after he heard ***Miranda*** warnings[.]" (***Salinas*** at p. 188, fn. 3 [describing the holding in ***Doyle***].) However, the ***Salinas*** court then went on state that the ***Doyle*** rule "does not apply where a suspect has not received the warnings' implicit promise that any silence will not be used against him[.]" (***Salinas*** at p. 188, fn. 3 [citing to ***Jenkins* v. *Anderson*** (1980) 447 U.S. 231, 240].) Thus, commenting upon a defendant's silence before receiving ***Miranda*** warnings should more properly be viewed as simply a straight up violation of the Fifth Amendment and/or a variation on ***Griffin*** error. (**See *Salinas***, dissenting opinion at pp. 193-204 and concurring opinion at p. 191-193; ***People* v. *Ramos*** (2013) 216 Cal.App.4th 195, 205.)

A. Pre-arrest/pre-*Miranda* Silence During Noncustodial Police Questioning When There is No Express Invocation of the Fifth Amendment Privilege

The Supreme Court in ***Salinas*** left unresolved the question of whether, as a matter of course, prearrest silence may be used as substantive evidence of guilt, and held that, even assuming that prearrest silence may not be used as substantive evidence of guilt, the defendant in that case could not take advantage of that protection because he failed to expressly invoke the right. (***United States* v. *Zarauskas*** (1st Cir. 2016) 814 F.3d 509, 515; ***State* v. *Tsujimura*** (2017) 140 Hawai'i 299, 312; ***Carr* v. *Alabama*** (N.D. Ala. 2015) [unreported] 2015 WL 1422204, at *5.) However, in light of the lead opinion in ***Salinas* v. *Texas*** (2013) 570 U.S. 178, it is now pretty clear that a prosecutor may elicit (in the case-in-chief) and comment upon defendant's silence during a noncustodial police interrogation when no ***Miranda*** warnings are given, and

defendant's silence does **not** constitute an express assertion of his Fifth Amendment privilege. (**See** this IPG, section II-1 at pp. 37-38; **see also *People* v. *Tom*** (2014) 59 Cal.4th 1210, 1215, 1228, 1236 [where silence is not an express assertion of the Fifth Amendment privilege even in the *post*-arrest, pre-***Miranda*** context, comment upon and use of silence is fair game in the absence of custodial interrogation or a clear invocation of the privilege]; ***People* v. *Pak*** [unreported] 2018 WL 507744, at *5 [same]; ***State* v. *Anderson*** (Utah Ct. App. 2020) 475 P.3d 967, 978–979 [noting that while the plurality opinion in ***Salinas*** only garnered three votes, the two-member concurrence did not quibble with the proposition that suspects must unambiguously invoke their privilege to remain silent. Instead, the concurring justices would have gone further to hold that, even if Salinas had expressly invoked the privilege, the State's use of his precustodial silence would not violate the Fifth Amendment"].)

Indeed, even before ***Salinas*** and ***Tom*** issued, the rule in California permitted comment upon pre-arrest silence unless the court found the silence was an invocation of defendant's Fifth Amendment rights. (**See *People* v. *Free*** (1982) 131 Cal.App.3d 155, 165-166 [holding defendant could be cross-examined about flight after a shooting and his failure to contact the police prior to his arrest].)

In ***People* v. *Waldie*** (2009) 173 Cal.App.4th 358, the court came to a different conclusion -albeit one tied to the specific facts in the case before it. In ***Waldie***, the defendant was accused of child molestation. Police made numerous calls to the defendant before he was arrested. The defendant promised to call the officer back but never did. At trial, the investigating detective went beyond saying the defendant did not call him back; he described his repeated attempts to contact defendant-more than a dozen times-making it appear that defendant was evading the police. The prosecutor also placed emphatic emphasis on defendant's continuing failure to call the police. Without specifically stating whether substantive use of pre-arrest, pre-***Miranda*** silence was improper, the appellate court found that, in this particular situation, "the evidence and argument violated the Fifth Amendment because defendant was deprived of any meaningful right to refuse to talk to the police." (***Id***. at p. 366; **see also *People* v. *Ramos*** (2013) 216 Cal.App.4th 195, 205 [discussed in this IPG at section II-1-B at pp. 43-44.) The ***Waldie*** court did note that a "different result might be indicated if the detective had called defendant only one time or a few times" (***id***. at p. 366; **see also *State* v. *Borg*** (Minn.2011) 806 N.W.2d 535, 541–542 [proper for officer to testify in the state's case-in-chief that he made an attempt by mail to interview the defendant and received "no response"]), but regardless of whether the defendant failed to call back once or multiple times, the defendant in ***Waldie*** never expressly invoked his Fifth Amendment privilege. (**See *People* v. *Ramos*** (2013) 216 Cal.App.4th 195, 206 [suggesting ***Waldie*** did not involve an express invocation of the Fifth Amendment].)

In light of the holding in ***Salinas***, it is highly unlikely ***Waldie*** remains good law. As noted in ***People* v. *Hickerson*** [unreported] 2013 WL 5827550: "***Waldie*** preceded ***Salinas***. Applying ***Salinas*** to the facts in ***Waldie***, there could be no Fifth Amendment violation because the defendant in ***Waldie***—like the defendants in ***Salinas*** and this case—did not expressly invoke the Fifth Amendment." (***Id***. at p.*6, fn. 2;

see also *People* v. *Pak* [unreported] 2018 WL 507744 at p. *4 [finding prosecutor properly commented upon fact that during the investigative stage "defendant never called, never returned any voicemails or any phone calls" to the detective and noting ***Waldie*** was pre-***Tom*** and distinguishable in any event because there was no evidence of persistent, multiple calls]; ***State* v. *Pouliot*** (N.H. 2021) 2021 WL 117585 at p. *5 [permitting prosecution to use defendant's "no comment" response made during non-custodial pre-*Miranda* interview]; ***State* v. *Anderson*** (Utah Ct. App. 2020) 475 P.3d 967, 977-980 [finding that defense counsel was not ineffective for failure to object to prosecutor eliciting testimony and commenting upon fact that defendant did not return detective's phone calls in pre-custodial circumstances because it would have been futile].)

i. Commenting on Defendant's Failure to Make Contact with the Police Before Arrest

A prosecutor should be able to bring out the fact that prior to defendant's arrest and/or any conversation with the police, the defendant never contacted law enforcement in circumstances where it would be natural to do so if defendant's version of events were true: "[A] prosecutor may comment on a defendant's failure to report a crime when reporting the crime would have been natural if the defendant's version of the events were true." (***People* v. *Gibbs*** (Mich. Ct. App. 2013) 830 N.W.2d 821, 826; ***People* v. *McGhee*** (Mich. App. 2005) 709 N.W.2d 595, 635; ***People* v. *Goodin*** (Mich. Ct. App. 2003) 668 N.W.2d 392, 396; **accord *People* v. *Lawton*** (Mich. Ct. App. 1992) 492 N.W.2d 810, 817.) For example, in the case of ***People* v. *Collier*** (Mich. Ct. App. 1986) 393 N.W.2d 346, the court found it was proper to comment on the fact that a defendant who said he had acted in self-defense and was "the victim of an armed robbery rather than a perpetrator of an assault" did not come forward since it was "entirely natural and expected that one who has been robbed under the circumstances related by the defendant would report the crime to the police. Defendant knew the identity of the robber and the location of the robbery." (***Id***. at p. 351.) Similarly, even after the police have contacted the defendant, the defendant's failure to inform the police of information it would be natural to disclose may be fair comment. For example, in ***People* v. *Tate*** (2010) 49 Cal.4th 635 the California Supreme Court rejected a claim of ***Doyle*** error where a prosecutor asked why a murder defendant (who claimed he came across the body of the victim but did not kill the victim) did not promptly report finding the victims' body to the police since "the prosecutor was not casting suspicion upon defendant's silence during a period after he had been arrested, and had heard and decided to exercise his ***Miranda*** rights." (***Id***. at p. 692.) And in the case of ***State* v. *Girts*** (Ohio Ct. App. 1997) 700 N.E.2d 395, the court held a prosecutor properly commented that defendant failed to tell police he had ordered cyanide on three *pre*-arrest occasions while knowing police were looking for poisons and cyanide. (***Id***. at p. 414; **cf**., ***Mallory* v. *State*** (Ga. 1991) 409 S.E.2d 839, 842-843 [comment upon defendant's failure to come forward to explain his innocence when he knew that he was under investigation did not violate Fifth Amendment but was impermissible under Georgia state evidentiary rule]; **but see *State* v. *Orr*** (Ga. 2019)

827 S.E.2d 892 [new statute abrogated categorical evidentiary rule in Georgia excluding all comment upon a defendant's pre-arrest silence].)

Some courts have held that where it would *not* have been natural for the defendant to contact the police (i.e., because doing so would result in the defendant incriminating himself) the prosecution cannot properly comment on the defendant's failure to contact the police. (**See *People* v. *Gibbs*** (Mich. Ct. App. 2013) 830 N.W.2d 821, 826; ***Commonwealth* v. *Nickerson*** (Mass. Sup.Ct. 1982) 434 N.E.2d 992, 996.) *However*, this conclusion is not a federal constitutional mandate, especially in light of ***Salinas***. Rather, it stems from either the state constitution, a common law rule, or the state's own rules of evidence. (**See *Commonwealth* v. *Thompson*** (Mass. 2016) 50 N.E.3d 845, 863 [*state Constitution* prohibits the admission of evidence concerning a defendant's failure to meet with law enforcement officers when requested]; ***Irwin* v. *Com.*** (Mass. Sup.Ct. 2013) 992 N.E.2d 275, 288, fn. 31 [The High Court "has left it to the States to determine their own rules of evidence when prearrest silence is so inconsistent with a defendant's testimony that impeachment by reference to that silence is probative."]; **see also *Snyder* v. *State*** (Md. 2000) 762 A.2d 125, 133 [finding defendant's failure to inquire about the progress of the police investigation into his wife's murder during 7-year period should have been excluded as more prejudicial than probative].)

B. Pre-arrest/pre-*Miranda* Silence During Noncustodial Police Questioning When There is an *Express Invocation* of the Fifth Amendment Privilege

Up until ***Salinas* v. *Texas*** (2013) 570 U.S. 178 [discussed at length in this IPG, section II-1 at pp. 37-38], the United States Supreme Court did not draw a clear distinction in the pre-***Miranda*** context between express or implied invocations of the Fifth Amendment privilege in analyzing whether use of a defendant's "silence" prior to custodial interrogation was proper. In fact, even the way the question upon which the ***Salinas*** court originally granted review was phrased blurred any distinction between an implied (i.e., silent invocation) and an express invocation. The question originally posed was simply whether the prosecution could "use a defendant's ***assertion of the privilege*** against self-incrimination during a noncustodial police interview as part of its case in chief." (***Salinas*** at p. 183, emphasis added.)

As a result of the holding in ***Salinas***, cases allowing comment upon a defendant's "silence" in a pre-arrest/pre-***Miranda*** situation *may* no longer be valid **if** the "silence" follows an **express** invocation of the Fifth Amendment. This conclusion flows from: (i) the fact that the four dissenting justices in ***Salinas*** would have found even the use of defendant's pre-arrest/pre-***Miranda*** *mere silence* to be improper - thus, they clearly would find comment upon an express invocation to be improper; and (ii) the fact the three justices in the lead opinion in ***Salinas*** did not agree with the rationale of Justice Thomas' concurring

opinion (i.e., that ***Griffin*** was wrongly decided and should not be extended to bar comment on a defendant's refusal to speak in an unMirandized pre-trial context) at least suggesting the justices in the lead opinion would be open to finding that silence following an express invocation may not be used in the People's case-in-chief. (**See *Salinas***, dissenting opinion at pp. 193-204 and concurring opinion at p. 191-193.) Thus, use of silence following an *express* invocation arising during a noncustodial pre-***Miranda*** interview in the People's case-in-chief is a risky proposition. (**See *United States* v. *Okatan*** (2d Cir. 2013) 728 F.3d 111, 120, fn. 3 [noting that federal circuit cases allowing comment upon defendant's silence in a pre-custody/pre-***Miranda*** situation did not involve *invocation* of the Fifth Amendment and subsequent silence].)

Both before and after ***Salinas***, courts remain divided over whether the prosecution may elicit evidence regarding a defendant's silence (and/or express invocation of the right to silence or an attorney) in a pre-arrest, pre-***Miranda*** context in the prosecution's case-in-chief. (**See *Long* v. *United States*** (D.S.D., 2016) 2016 WL 2939144, at *5; ***State* v. *Lovejoy*** (Me. 2014) 89 A.3d 1066, 1073; ***United States* v. *Ashley*** (5th Cir. 2011) 664 F.3d 602, 604; ***Combs* v. *Coyle*** (6th Cir. 2000) 205 F.3d 269, 282-283.)

Several federal circuits and several state courts permit the government to use such evidence, reasoning that the protections against self-incrimination do not apply before a suspect is arrested and has been given ***Miranda*** warnings. These cases largely hold that because the government had not yet implicitly assured the defendant that his silence would not be used against him and the defendant's statements are not compelled, the failure to speak or the invocation of the right may be used as consciousness of guilt. (**See e.g., *United States* v. *Oplinger*** (9th Cir.1998) 150 F.3d 1061, 1066–1067; ***United States* v. *Cabezas-Montano*** (11th Cir. 2020) 949 F.3d 567, 595; ***United States* v. *Rivera*** (11th Cir. 1991) 944 F.2d 1563, 1568; ***Long* v. *United States*** [unreported] (D.S.D., 2016) 2016 WL 2939144, at *5; ***United States* v. *MacInnes*** (E.D. Pa. 2014) 23 F. Supp. 3d 536, 553; ***State* v. *Lee-Riveras*** (Conn. App. Ct. 2011) 23 A.3d 1269, 1275, fn. 9; ***People* v. *Schollaert*** (Mich. 1992) 486 N.W.2d 312, 315; ***State* v. *Kinder*** (Mo. 1996) 942 S.W.2d 313, 326; ***State* v. *Helgeson*** (N.D. 1981) 303 N.W.2d 342, 348; ***Buentello* v. *State*** (Tex. App. 2016) 512 S.W.3d 508, 521; ***Morales* v. *State*** (Tex. App. 2013) 389 S.W.3d 915, 921-922; ***State* v. *LaCourse*** (Vt. 1998) 716 A.2d 14, 16 [at least when arrest is not imminent – **see *State* v. *Kulzer*** (Vt. 2009) 979 A.2d 1031, 1035].)

Several federal circuits and several state courts prohibit the government from using pre-arrest, pre–***Miranda*** silence as substantive evidence. These courts extend the principle of ***Griffin* v. *California*** (1965) 80 U.S. 609 to prevent comment on defendant's silence or invocation in the prosecution's case-in-chief even where the defendant has not been arrested or Mirandized. (**See e. g., *Coppola* v. *Powell*** (1st Cir. 1989) 878 F.2d 1562, 1568; ***United States* v. *Okatan*** (2d Cir. 2013) 728 F.3d 111, 120; ***United States* v. *Caro*** (2d Cir. 1981) 637 F.2d 869, 876; ***Combs* v. *Coyle*** (6th Cir.2000) 205 F.3d 269, 283; ***United States ex rel. Savory* v. *Lane*** (7th Cir. 1987) 832 F.2d 1011; ***United States* v. *Burson*** (10th

Cir. 1991) 952 F.2d 1196, 1201; ***People* v. *Welsh*** (Colo.App. 2002) 58 P.3d 1065, 1070; ***Landers* v. *State*** (Ga. 1998) 508 S.E.2d 637, 638; ***State* v. *Parker*** (Idaho 2014) 334 P.3d 806, 821; ***Baumia* v. *Com.*** (Ky. 2013) 402 S.W.3d 530, 536; ***State* v. *Lovejoy*** (Me.2014) 89 A.3d 1066, 1075; ***Commonwealth* v. *Thompson*** (Mass. 2000) 725 N.E.2d 556, 565; ***State* v. *Dunkel*** (Minn.Ct.App. 1991) 466 N.W.2d 425, 428–429; ***State* v. *Rowland*** (Neb. 1990) 452 N.W.2d 758, 763; ***State* v. *Reid*** (N.H. 2011) 20 A.3d 298, 304; ***State* v. *Brown*** (N.J. 2007) 919 A.2d 107, 116–117; ***State* v. *Costillo*** (N.M. Ct. App. 2020) 475 P.3d 803, 811; ***People* v. *DeGeorge*** (N.Y. 1989) 541 N.E.2d 11, 13; ***State* v. *Taylor*** (N.C. App. 2015) 780 S.E.2d 222, 224; ***State* v. *Leach*** (Ohio 2004) 807 N.E.2d 335, 340-341; ***Com.* v. *Molina*** (Penn. 2014) 104 A.3d 430, 451; ***State* v. *Palmer*** (Utah Ct. App. 1993) 860 P.2d 339, 349–350 [**but see *State* v. *Anderson*** (Utah Ct. App. 2020) 475 P.3d 967]; ***State* v. *Easter*** (Wash. 1996) 922 P.2d 1285, 1290–1292; ***State* v. *Fencl*** (Wis. 1982) 325 N.W.2d 703, 711; ***Tortolito* v. *State*** (Wyo. 1995) 901 P.2d 387, 390.)

Some courts draw a distinction between pre-arrest, pre-***Miranda*** silence in the context of questioning by law enforcement and pre-arrest, pre-***Miranda*** silence in other contexts. (**See e.g., *United States* v. *Weast*** (5th Cir. 2016) 811 F.3d 743, 753 [citing to ***United States* v. *Salinas*** (5th Cir. 2007) 480 F.3d 750, 758 for the proposition that the Fifth Circuit has "taken the position that the prosecution can use a non-testifying defendant's pre-arrest silence as long as the silence 'is not induced by, or a response to, the actions of a government agent.'"]; ***United States* v. *Zanabria*** (5th Cir. 1996) 74 F.3d 590, 593; ***State* v. *Lopez*** (Ariz. Ct. App. 2012) 279 P.3d 640, 645 ["when a defendant's silence is not the result of state action, the protections of the Fifth Amendment do not prohibit the state's comment on that defendant's pre-arrest, pre-***Miranda*** silence."]; ***Owens* v. *State*** (Ind. Ct. App. 2010) 937 N.E.2d 880, 884 [proper to elicit testimony that defendant failed to contact detective but indicating it would be improper to comment upon defendant's invocation of the right in a pre-***Miranda***, pre-custodial situation].)

Significantly, most pre-***Salinas*** cases finding that pre-arrest, pre-***Miranda*** silence could be used as substantive evidence of guilt did **not** involve silence following an *express* invocation of the Fifth Amendment – albeit the rationale used by these courts in coming their conclusion was not based on the lack of an express invocation but on the assumption that the privilege against compulsory self-incrimination is irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak, and thus, comment upon the silence does not offend the Constitution. (**See e.g., *United States* v. *Oplinger*** (9th Cir. 1998) 150 F.3d 1061, 1066-1067; ***United States* v. *Zanabria*** (5th Cir.1996) 74 F.3d 590, 593; ***United States* v. *Rivera*** (11th Cir.1991) 944 F.2d 1563, 1568.) Albeit at least one post-***Salinas*** decision approved substantive use of an express invocation made after arrest but before ***Miranda*** warnings were given. (**See *Long* v. *United States*** (D.S.D., 2016) 2016 WL 2939144, at *6.)

In ***People* v. *Ramos*** (2013) 216 Cal.App.4th 195, the prosecution introduced evidence in the People's case-in-chief that the defendant was argumentative and uncooperative when she spoke with a detective

the phone, that she refused to give a statement in person or over the phone, said she did not want to talk to the detective about what happened, and broke appointments with the detective by failing to show up. (***Id***. at pp. 204-207.) The court declined to decide whether it was proper to admit a defendant's pre-arrest/pre-***Miranda*** silence in the People's case-in-chief; instead, the court simply found any error to be harmless. The ***Ramos*** court *did*, however, observe that the defendant had "expressly invoked" her right to remain silent by saying she did not want to talk to the detective and then cited to ***People* v. *Lopez*** (2005) 129 Cal.App.4th 1525 for the proposition that "a person's invocation of his or her right to remain silent cannot be used as evidence of guilt." (***Ramos*** at p. 206.) The ***Ramos*** court further observed that (i) there were federal cases finding it impermissible to use an effective invocation of the right to silence in the People's case-in-chief; (ii) there were California cases prohibiting use of silence following an invocation of the Fifth Amendment for *impeachment* purposes, and (iii) where a court ***finds silence is an invocation of the Fifth Amendment***, the rule prohibiting use of such silence for impeachment, "[a]t a minimum, . . . ***should*** apply to substantive use of precustody/pre- ***Miranda*** silence in the prosecution's case-in-chief." (***Id***. at pp. 206-207; **but see *People* v. *Hanway*** [unreported] 2018 WL 1887199, at *9, fn. 4 [suggesting ***Ramos*** and cases relied upon in ***Ramos*** are inconsistent with ***Jenkins* v. *Anderson*** (1980) 447 U.S. 231, 238, which held that impeachment is permissible "even if the prearrest silence were held to be an invocation of the Fifth Amendment right to remain silent."].)

C. Pre-arrest/pre-*Miranda* Silence During a Conversation With a Private Citizen

Whether the People can use a defendant's "silence" in the face of an accusation by a private citizen in a pre-arrest/pre-***Miranda*** situation as substantive evidence may also turn on whether there has been an express invocation.

As noted above, in ***Salinas* v. *Texas*** (2013) 570 U.S. 178 [discussed at length in this IPG, section II-1 at pp. 37-38], the general rule is that someone who desires the protection of the Fifth Amendment privilege must expressly invoke the privilege. There is even greater reason to apply the general rule when a defendant's silence is in response to a private citizen's inquiries than when the defendant's silence occurs during interrogation by law enforcement. Thus, silence (in the absence of an express invocation) in the face of questioning by a private person will not likely be treated as an invocation of the Fifth Amendment privilege against self-incrimination. (**See *Salinas*** at pp. 181, 189-191.)

Moreover, in the case of ***People* v. *Preston*** (1973) 9 Cal.3d 308, a case involving comment on a defendant's silence in a pre-arrest/pre-***Miranda*** situation, the California Supreme Court stated that the general rule is that where "a person is accused of having committed a crime, under circumstances

which fairly afford him an opportunity to hear, understand, and to reply, and ***which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution***, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt. (***Id***. at pp. 313-314, emphasis added.) ***Preston*** predated both the ***Doyle*** rule and ***Salinas***, but it has never been overruled, is not inconsistent with either ***Doyle*** or ***Salinas***, and has repeatedly been cited. (**See *People* v. *Jennings*** (2010) 50 Cal.4th 616, 661.)

On the other hand, ***where there is an express invocation*** of the Fifth Amendment privilege during a conversation with a private person in a pre-arrest/pre-***Miranda*** situation, the implication in both ***Salinas*** and in ***Preston*** is that use of such invocation in the People's case-in-chief will be improper.

That being said, when a private citizen is speaking with a defendant, a defendant's alleged invocation is less likely to be viewed as an express invocation of the Fifth Amendment privilege.

> **Editor's note**: The ***Doyle*** rule would not come into play in deciding whether silence during a pre-arrest/pre-***Miranda*** conversation between defendant and a private person could be used since the ***Doyle*** rule only applies when ***Miranda*** warnings have been given. (**See** this IPG, section I at p. 7.)

D. What Constitutes an "Express Invocation" of the Fifth Amendment Right to Silence?

One of the criticisms leveled against the lead opinion by the dissenters in ***Salinas* v. *Texas*** (2013) 570 U.S. 178 was that it would be difficult to figure out what constitutes an "express invocation." The lead opinion responded to this criticism by pointing out that has not been difficult to apply a "***similar invocation requirement***[] for suspects who wish to assert their rights and cut off police questioning during custodial interviews." (***Id***. at p. 190 [citing to ***Berghuis* v. *Thompkins*** (2010) 560 U.S. 370 and ***Davis* v. *United States*** (1994) 512 U.S. 452] emphasis added.)

In ***People* v. *Tom*** (2014) 59 Cal.4th 1210, the court specifically concluded that the express invocation requirement for purposes of asserting the Fifth Amendment privilege to silence was the same regardless of whether the invocation was being looked at to determine whether defendant effectively invoked his right to counsel (as in ***Davis* v. *United States*** (1994) 512 U.S. 452) or right to silence (as in ***Berghuis* v. *Thompkins*** (2010) 560 U.S. 370). (***Id***. at pp. 1225-1127.)

In ***Abby* v. *Howe*** (6th Cir. 2014) 742 F.3d 221 [cited with approval in ***People* v. *Tom*** (2014) 59 Cal.4th 1210, 1227], the court held the fact a prosecutor commented on defendant hiding in the bedroom when the police showed up at his fiancée's house was proper in light of ***Salinas***. (***Id***. at p. 228.)

In ***People* v. *Ramos*** (2013) 216 Cal.App.4th 195, the court treated a defendant's response to a detective's request for an interview, that "she did not want to talk about what had happened and refused to give a statement in person or over the telephone" as an express invocation of the Fifth Amendment right to silence. (***Id.*** at p. 206.)

2. Can a Prosecutor *Impeach* a Defendant with His Pre-Arrest, Pre-*Miranda* Silence?

A. May Pre-arrest/Pre-*Miranda* Silence During Noncustodial Police Interrogation be Used to *Impeach* When There is *No* Express Invocation of the Fifth Amendment Privilege?

It is clear that the ***Doyle*** rule does not prevent a prosecutor from cross-examining a defendant about the defendant's failure*, prior to his arrest*, to report the incident to the police and/or offer his exculpatory story. (***Jenkins* v. *Anderson*** (1980) 447 U.S. 231, 239; ***Fletcher* v. *Weir*** (1982) 455 U.S. 603, 604; **see also *People* v. *Tate*** (2010) 49 Cal.4th 635, 692 [no ***Doyle*** error where a prosecutor asked why a murder defendant (who claimed he came across the body of the victim but did not kill the victim) did not promptly report finding the victims' body to the police since "the prosecutor was not casting suspicion upon defendant's silence during a period after he had been arrested, and had heard and decided to exercise his ***Miranda*** rights].)

Similarly, the ***Doyle*** rule does not prevent a prosecutor from questioning a defendant about, or commenting on, the fact that a defendant failed to tell friends and family the version of events he testifies to at trial, so long as the comments or questions relate to failure to do so before the defendant was advised of and asserted the right to remain silent. (**See *People* v. *Earp*** (1999) 20 Cal.4th 826, 856-857.)

The United States Supreme Court has previously stated "***the Constitution*** does not prohibit the use for impeachment purposes of a defendant's silence ***prior*** to arrest." (***Brecht* v. *Abrahamson*** (1993) 507 U.S. 619, 628 citing to ***Jenkins* v. *Anderson*** (1980) 447 U.S. 231, 238; **see also *People* v. *Bowman*** (2011) 202 Cal.App.4th 353, 363, emphasis added.) Whether the language in ***Brecht* v. *Abrahamson*** (1993) 507 U.S. 619 was meant solely to indicate that use of defendant's pre-arrest silence does not violate *any* aspect of the Constitution or just the Due Process clause is not entirely clear. (**See *Wainwright* v. *Greenfield*** (1986) 474 U.S. 284, 291, fn. 6 [using very similar language to describe the inapplicability of the ***Doyle*** rule to pre-arrest silence, albeit specifically using the term "due process": "due process is not violated by the impeachment use of pre-***Miranda*** warnings silence, either before arrest, . . . or . . . after arrest"].) In the case of ***People* v. *Burton*** (1981) 117 Cal.App.3d

382, the court held asking an officer about defendant's pre-arrest silence (i.e., whether defendant ever came forward with a self-defense claim) to impeach the defendant's credibility violated ***neither*** the Fifth Amendment nor the due process clause of the Fourteenth Amendment. (***Id***. at p. 387)

In ***Salinas* v. *Texas*** (2013) 570 U.S. 178 [discussed at length in this IPG, section II-1 at pp. 37-38], the court made it clear that the prosecution may use a defendant's silence in response to pre-arrest/pre-*Miranda* questioning by the police – even the People's case-in-chief – if there has been no express invocation of the Fifth Amendment privilege. (***Id***. at pp. 181-191.) Certainly, if a prosecutor can comment upon and use pre-arrest/pre-***Miranda*** silence during noncustodial police interrogation in the People's case-in-chief ***when there has been no express invocation*** it necessarily follows a prosecutor may ***impeach*** a defendant with pre-arrest/pre-*Miranda* silence.

WARNING !!

Prosecutors must be careful not to query or comment upon a defendant's failure to speak regarding a crime during a period of time that covers *both* silence before arrest and silence following an arrest and invocation of ***Miranda*** rights. For example, in ***People* v. *Porras*** [unreported] 2017 WL 6334042, defendant was not arrested until 17 days after he committed an assault. Four days after that, he was advised of his ***Miranda*** rights and stated he was willing to speak with police but asked for a lawyer to be present. The officers could not secure counsel for him, so they did not question him. (***Id***. at p. *3.) In her rebuttal argument, the prosecutor rhetorically asked why the defendant did not tell the police the version of events defendant presented at trial. The prosecutor followed up that argument by stating: "Two years have passed since, almost two years have passed since the day of the incident. The defendant had over 700 days to come up with this story and he had not told anyone, but yesterday in front of you—." (***Id***. at p. *3.) The ***Porras*** court recognized that had the prosecutor merely referred to defendant's failure to call the police immediately after the attack, it would have been fair comment. But since the prosecutor alleged defendant failed to come forward for 700 days (a period which included his post-arrest, post-***Miranda*** silence) to impeach defendant's version of events, there was ***Doyle*** error. (***Id***. at p. *4-*5 [and noting the comments were "particularly improper given that defendant appeared willing to talk to the police so long as counsel was present and only did not talk to the police was because counsel could not be secured."]; **see also *State* v. *Custer*** (Neb. 2015) 871 N.W.2d 243, 260–261 [stating that where prosecutor's generalized comments about defendant's silence make it impossible to discern whether reference was being made defendant's silence before or after ***Miranda*** warnings were given, ***Doyle*** error will be found].)

B. May Pre-arrest/Pre-*Miranda* Silence During Noncustodial Police Interrogation be Used to *Impeach* When There Has Been an *Express* Invocation of the Fifth Amendment Privilege?

For the same reasons the decision in ***Salinas* v. *Texas*** (2013) 570 U.S. 178 casts some doubt on whether silence following an express invocation of the Fifth Amendment during a noncustodial police interrogation may be used in the People's case-in-chief (**see** this IPG, section II-1-B at pp. 41-44), it also puts into question whether silence following an express invocation can be used for *impeachment* purposes.

However, because there are interests favoring admissibility when it comes to impeaching a defendant that do not exist when it comes to use of evidence in the People's case-in-chief (e.g., the interest in deterring perjury) it is *more likely* that silence following an express invocation will be admissible to impeach than that it will be held admissible in the People's case-in-chief. (**See *Jenkins* v. *Anderson*** (1980) 447 U.S. 231, 238 [allowing impeachment with pre-arrest silence because, inter alia, impeachment "follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial"]; ***Fletcher* v. *Weir*** (1982) 455 U.S. 603, 607 [allowing impeachment of a defendant with the defendant's post-arrest silence where no ***Miranda*** warnings given]; ***Harris* v. *New York*** (1971) 401 U.S. 222, 225 [although a statement taken in violation of ***Miranda*** is inadmissible in the case-in-chief, if the defendant testifies to a story inconsistent with that statement, the defendant may be impeached with that statement].)

C. Pre-arrest/pre-*Miranda* Silence During a Conversation with a *Private Citizen*

Whether the People can use a defendant's "silence" in the face of an accusation by a *private citizen* in a pre-arrest/pre-***Miranda*** situation for *impeachment* purposes may also turn on whether there has been an express invocation.

For all the reasons that the People can use a defendant's pre-arrest/pre-***Miranda*** silence in the face of an accusation by a private citizen when there has ***no express invocation*** (**see** this IPG, section II-1-C at pp. 44-45), it follows that the People can use such silence for impeachment purposes. On the other hand, ***where there is an express invocation*** of the Fifth Amendment privilege during a conversation with a private person in a pre-arrest/pre-***Miranda*** situation, there is some *possibility* that use of the silence might be improper. (**See** discussion of ***Salinas* v. *Texas*** (2013) 570 U.S. 178 in this IPG, section II-1 at pp. 37-38).

That being said, for all the reasons an express invocation is *less likely* to be excluded when it is used for impeachment instead of in the case-in-chief (**see** this IPG, section II-2-B at p. 48) and that silence is *less likely* to be viewed as an express invocation when a defendant is speaking with a private citizen than when the defendant is speaking to the police (**see** this IPG, section II-1-C at p. 44), if the use of an express invocation by the defendant of the Fifth Amendment privilege is *ever* permissible, it is going to be permissible when it is invoked in the context of a conversation with a private citizen and is only going to be used for impeachment purposes.

Editor's note: The ***Doyle*** rule would not come into play in deciding whether silence during a pre-arrest/pre-***Miranda*** conversation between defendant and a private person could be used since the ***Doyle*** rule only applies when ***Miranda*** warnings have been given. (**See** this outline, section I at p. 7.)

III. POST-ARREST, PRE-*MIRANDA* SILENCE

1. Can a Prosecutor Comment Upon or Introduce Evidence of Defendant's Post-Arrest/Pre-*Miranda* Silence in the Prosecution's *Case-in-Chief*?

Neither the California Supreme Court nor the United States Supreme Court has directly addressed the issue of whether the government can admit, ***in its case-in-chief***, evidence of a defendant's ***post***-arrest, ***pre-Miranda*** silence. "[T]here is a split in the federal circuits and among state courts as to whether the Fifth Amendment bars the government from offering evidence in its case-in-chief of a defendant's postarrest, pre-***Miranda*** silence, ***even where the silence purports to be an assertion of the privilege against self-incrimination***." (***People* v. *Tom*** (2014) 59 Cal.4th 1210, 1223-1224, emphasis added.)

A very compelling argument can be made that use of a defendant's post-arrest/pre-***Miranda*** exercise of the privilege in the absence of custodial interrogation raises no issue of governmental compulsion and thus is not barred by the Fifth Amendment. (**See, e.g.**, ***United States* v. *Wilchcombe*** (11th Cir. 2016) 838 F.3d 1179, 1190 [permitted]; ***United States* v. *Frazier*** (8th Cir. 2005) 408 F.3d 1102, 1111 [permitted - albeit finding that use would not be permitted if a defendant in custody was silent in the face of actual police interrogation even if no ***Miranda*** warnings were given]; ***United States* v. *Rivera*** (11th Cir. 1991) 944 F.2d 1563, 1568 [permitted]; ***United States* v. *Love*** (4th Cir.1985) 767 F.2d 1052, 1063 [permitted]; ***Ordway* v. *Commonwealth*** (Ky. 2013) 391 S.W.3d 762, 778 [same]; ***People* v. *Schollaert*** (Mich. 1992) 486 N.W.2d 312 [same]; ***State* v. *Johnson*** (Minn. 2012) 811 N.W.2d 136, 148 [same]; ***State* v. *Byrne*** (Vt. 1988) 542 A.2d 667, 670; **see generally *Jenkins* v. *Anderson*** (1980) 447 U.S. 231 at pp. 243–244 (conc. opn. of Stevens, J.) ["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"]; ***Fletcher* v. *Weir*** (1982) 455 U.S. 603, 606 [*rejecting* the idea that that "an arrest, by itself, is governmental action which implicitly induces a defendant to remain silent"].)

The contrary argument is that "once the government places an individual in custody, that individual has a right to remain silent in the face of government questioning, regardless of whether the ***Miranda*** warnings are given" and "the government may not burden that right by commenting on the defendant's post-arrest silence at trial." (***United States* v. *Velarde-Gomez*** (9th Cir. 2001) 269 F.3d 1023, 1029; **accord *United States* v. *Moore*** (D.C. Cir. 1997) 104 F.3d 377, 385-386 [and noting "Any other holding would create an incentive for arresting officers to delay interrogation in order to create an intervening 'silence' that would then be used against the defendant."]; ***United States* v. *Hernandez*** (7th Cir. 1991) 948 F.2d 316, 322-324 [not permitted]; ***State* v. *Ellington*** (Idaho 2011) 253 P.3d 727, 734-735 [same]; ***State* v. *Mainaaupo*** (Hawaii 2008) 178 P.3d 1, 18 [same].) This argument has been adopted by the Ninth Circuit. (**See *United States* v. *Bushyhead*** (9th Cir. 2001) 270 F.3d 905, 912; ***United States* v. *Velarde-Gomez*** (9th Cir. 2001) 269 F.3d 1023, 1029; ***United States* v. *Whitehead*** (9th Cir. 2000) 2020 F.3d 634, 639; **but see *United States* v. *Baker*** (9th Cir.1993) 999 F.2d 412, 415 [hypothesizing that an argument commenting on a defendant's post-arrest but pre-***Miranda*** silence "may have been permissible"].)

Both these lines of cases were considered in ***People* v. *Tom*** (2014) 59 Cal.4th 1210, but the California Supreme Court declined to come down on one side or the other. Instead, the ***Tom*** court held that, "[e]ven assuming the privilege against self-incrimination protects against evidentiary use of postarrest silence in" (***id***. at p. 1225) a post-arrest/pre-***Miranda*** context, the defendant "needed to make a timely and unambiguous assertion of the privilege in order to benefit from it." (***Id***. at p. 1215.) The ***Tom*** court referred to this requirement as the "objective invocation rule." (***Id***. at pp. 1227, 1230.)

A. Is it *Doyle* Error to Comment Upon or Use a Defendant's Post-Arrest/Pre-*Miranda* Silence?

Although the High Court in ***Salinas* v. *Texas*** (2013) 570 U.S. 178 (**see** this IPG, section II-1 at pp. 37-38) did not address the question of whether it is proper to comment upon ***post***-arrest, pre-*Miranda* silence, it did indicate that comment would not violate the rule laid out in ***Doyle* v. *Ohio*** (1976) 426 U.S. 610, which only forbids the use of a defendant's silence *after the defendant has received* ***Miranda*** *warnings*. The ***Salinas*** court made it fairly clear that the ***Doyle*** rule will never apply (and it is not a due process violation) to use a defendant's silence when the defendant "has not received the [***Miranda***] warnings' implicit promise that any silence will not be used against him[.]" (***Id***. at p. 188, fn. 3.) Thus, where no ***Miranda*** warnings are given, use or comment upon defendant's silence or invocation should not be a violation of the ***Doyle*** rule. If the High Court were ever to hold comment upon post-arrest/pre-***Miranda***

silence was improper, the reason for the ruling would likely have to be based on a ***Griffin***-like rationale, i.e., an expanded view of the Fifth Amendment privilege.

B. If the Defendant Does *Not* Expressly Invoke His Fifth Amendment Privilege, Can a Prosecutor *Always* Comment Upon or Introduce Evidence of Defendant's Post-Arrest/Pre-*Miranda* Silence in the Prosecution's Case-in-Chief – Even Over an Evidence Code Section 352 Objection?

As indicated above, "the threshold inquiry in assessing the scope of the privilege against self-incrimination in the post-arrest, pre-***Miranda*** context is whether a reasonable police officer in the circumstances would understand that the defendant had invoked the privilege either at or prior to the silence at issue." (***People* v. *Tom*** (2014) 59 Cal.4th 1210, 1228.) The California Supreme Court in ***Tom*** court held, whether the silence occurs in a pre-arrest or post-arrest context, unless the defendant makes a timely and unambiguous assertion of the Fifth Amendment privilege in a post-arrest/pre-***Miranda*** situation, the prosecution may use and comment upon the defendant's silence. (***Id***. at p. 1236.) Thus, there is no *constitutional* bar to use of the defendant's silence in this context. (**See also *United States* v. *Jones*** (E.D.N.Y., 2014) 2014 WL 950025, at pp. *6-*7 [prosecution may comment upon post-arrest, pre-***Miranda*** silence where no express assertion of the privilege].)

However, the ***Tom*** court cautioned that its "conclusion that use of a defendant's post-arrest, pre-***Miranda*** silence is not barred by the Fifth Amendment in the absence of custodial interrogation or a clear invocation of the privilege does not mean that evidence overcoming those constitutional hurdles would necessarily be admissible under the Evidence Code." (***Id***. at p. 1236.) A court may still decide that the probative value of the silence is not relevant, or that its relevance "is substantially outweighed by the probability of undue consumption of time or undue prejudice under Evidence Code section 352." (***Id***. at p. 1237.)

In making that decision, the ***Tom*** court stated "[t]he probative value of a defendant's silence depends peculiarly on a careful assessment of all of the relevant circumstances." (***Id***. at p. 1236.) The court noted that sometimes silence may be "evidence of the most persuasive character" and other times may be "so ambiguous that it is of little probative force[.]" (***Ibid*; see also *Weitzel* v. *State*** (Md. 2004) 863 A.2d 999, 1003 [noting that "courts around the country have reasoned that silence, in and of itself, whether pre-arrest, pre-*Miranda*, or post-arrest, simply is too ambiguous to have probative value as an indicator of guilt and any probative value would be outweighed by the prejudice to the defendant at trial"].)

Among the factors that goes into deciding whether silence should be viewed as probative: (i) whether the silence "immediately precedes or follows an arrest" (a factor which other courts have held to be one enhancing the ambiguous nature of the silence); (ii) "the ubiquity of ***Miranda*** warnings in popular

culture" (another factor held to enhance the ambiguity of post-arrest silence); (iii) "the extent to which a defendant may have subjectively intended to rely on the privilege, even if that intent was not communicated to law enforcement officers;" and (iv) "the extent to which one would expect a person in the particular circumstances to speak or volunteer a statement." (***Tom*** at p. 1236.)

The ***Tom*** court advised courts in future cases involving attempts by a party to offer or exclude evidence of post-arrest/pre-***Miranda*** silence, to "proceed by way of a motion in limine, which will offer the trial court the opportunity to develop a record as to whether the circumstances would have made it clear to the officer that the defendant had invoked the privilege against self-incrimination, whether the evidence of silence is relevant, and, if so, whether its probative value is substantially outweighed by the probability of undue consumption of time or undue prejudice under Evidence Code section 352." (***Tom*** at p. 1237.)

C. If a Defendant *Expressly* Invokes his Fifth Amendment Privilege After Being Arrested, but Before He is Given *Miranda* Warnings, Can the Defendant's Silence Before the *Miranda* Warning be Used in the People's *Case-in-Chief?*

As indicated above at p. 37, neither ***Salinas* v. *Texas*** (2013) 570 U.S. 178 [discussed in this IPG, section II-1 at pp. 37-38] nor ***People* v. *Tom*** (2014) 59 Cal.4th 1210 [discussed in this IPG, section III-1-B at pp. 50-52] addressed the question of whether the prosecution may use a defendant's ***post***-arrest/pre-***Miranda*** silence in the People's case-in-chief when there ***has been an express invocation***. Rather, the cases respectively held a showing of an express invocation is a necessary prerequisite to prohibiting use or comment on silence in a pre-***Miranda*** context.

Certainly, in light of ***Salinas***' and ***Tom***'s focus on whether there was an express invocation or not, cases allowing comment upon a defendant's "silence" in a post-arrest/pre-***Miranda*** situation in the Peoples' case-in-chief *may* no longer be valid **if** the "silence" constitutes an **express** assertion of the Fifth Amendment. Accordingly, while it remains an open question whether use and/or comment upon an express assertion in any pre-***Miranda*** circumstance is permissible, use or comment upon an express assertion of the privilege in the People's case-in-chief entails *some* risk. (**See *United States* v. *Okatan*** (2d Cir. 2013) 728 F.3d 111, 119 [noting that in the context of questioning, a defendant "who simply stopped talking during the course of an interrogation" is distinct from one who "affirmatively claimed the privilege before he fell silent"].)

Editor's note: As indicated, the ***Tom*** court did not decide the issue of whether pre-***Miranda*** silence may be commented upon. It is interesting to note, however, that the ***Tom*** majority began its discussion of the issue by pointing out that the Fifth Amendment does not establish an unqualified right to remain silent and that a necessary element of compulsory self-incrimination is some kind of governmental coercion. (**See *Tom*** at pp. 1222-1223.) This is very reason why courts finding even an express invocation in the post-arrest/pre-***Miranda*** context allow the prosecutor to comment upon defendant's silence. On the other hand, the ***Tom*** opinion was a 4-3 decision written by Justice Baxter who has since left the court.

In two post-***Salinas*** out-of-state cases, the appellate court held it was proper to bring out a defendant's post-arrest, pre-***Miranda*** silence on grounds the defendant "opened the door." In ***Kelly* v. *State*** (Ind. 2019) 122 N.E.3d 803, "defense counsel presented in opening the theory that [the defendant] was merely trying to make money driving others around and unwittingly got caught up in a drug bust. In response, the state asked police officers if defendant said anything at the time of arrest, and they responded that he did not. Then "during the State's closing, it took the matter further by stating that [defendant's] guilty mind was demonstrated because he had the chance to talk but did not say what he was doing or ask why he was stopped, nor did he look, act, or express any confusion." (***Id***. at p. 807.) The ***Kelly*** court held the comments were permissible because the defendant "opened the door to the State's response that included comments about his silence." (***Ibid***.) And in ***Cameron* v. *State*** (Ind. Ct. App. 2014) 22 N.E.3d 588, the court held it was permissible for the prosecution to ask an arresting officer during the case-in-chief whether defendant said anything about injuries at the time of the arrest, elicit that defendant declined to say anything when asked whether he wanted to provide "his side of the story," and later comment upon that failure in rebuttal argument where defense counsel asked the victim on cross-examination questions suggesting the victim stabbed the defendant as part of the defense theory" because "even if the prosecutor's questions and comments could be considered a violation of [the defendant's] right against self-incrimination, [the defendant] opened the door to those questions and comments." (***Id***. at pp. 590, 592.)

D. How Can a Court Determine Whether Silence Reflects an Express Assertion of the Fifth Amendment Privilege in a Post-Arrest/Pre-*Miranda* Context?

In ***People* v. *Tom*** (2014) 59 Cal.4th 1210, the court specifically concluded that the express invocation requirement for purposes of asserting the Fifth Amendment privilege to silence was the same regardless of whether the invocation was being looked at to determine whether defendant effectively invoked his right to counsel (as in ***Davis v. United States*** (1994) 512 U.S. 452) or right to silence (as in ***Berghuis* v. *Thompkins*** (2010) 560 U.S. 370). (***Id***. at pp. 1225-1127.) Thus, the same type of factors considered in deciding whether there has been an unambiguous invocation of the right to silence or counsel once

Miranda warnings have been given may be considered in deciding whether an express invocation has been given before a ***Miranda*** warning has been given.

In ***People* v. *Tom*** (2014) 59 Cal.4th 1210, the court indirectly gave some guidance on this question by citing to some cases involving circumstances held *not to* involve an express invocation. Specifically, the ***Tom*** court cited approvingly to an unpublished decision from the Texas Court of Appeals (***Torres* v. *State*** (Tex. App. 2014) 2014 WL 2720800) which held the defendant "did not invoke his Fifth Amendment rights when he refused to offer an explanation to police" regarding items found in the back seat of his vehicle that matched the description of items reported stolen. (***Tom*** at p. 1227 citing to ***Torres*** at pp. *3-*4.) The ***Tom*** court also noted a decision from a federal district court (***United States* v. *Jones*** (E.D.N.Y. 2014) 2014 WL 950025) finding post-arrest silence was admissible where the arrestee, who initiated a conversation with police pre-***Miranda*** "and then fell quiet after a brief back and forth," did not unequivocally assert the privilege. (***Tom*** at pp. 1227-1128 citing to ***Jones*** at pp. *6-*7.)

2. Can a Prosecutor *Impeach* a Defendant with His Post-Arrest/Pre-*Miranda* Silence?

In ***Brecht* v. *Abrahamson*** (1993) 507 U.S. 619, the High Court stated, "the Constitution does not prohibit the use for impeachment purposes of a defendant's silence . . . after arrest if no ***Miranda*** warnings are given," citing to ***Fletcher* v. *Weir*** (1982) 455 U.S. 603, 606-607.) Thus, a prosecutor's questioning, during cross-examination of a defendant, regarding defendant's post-arrest silence in an attempt to rebut a defense claimed for the first time at trial does not violate the ***Doyle*** rule where no ***Miranda*** warnings were ever given to the defendant. (***Fletcher* v. *Weir*** (1982) 455 U.S. 603, 606-607; **accord *People* v. *Tom*** (2014) 59 Cal.4th 1210, 1223; ***People* v. *O'Sullivan*** (1990) 217 Cal.App.3d 237, 240.)*

> ***Editor's note**: Whether the language in ***Brecht* v. *Abrahamson*** (1993) 507 U.S. 619 was meant solely to indicate that use of defendant's pre-arrest silence for impeachment does not violate *any* aspect of the Constitution or just the Due Process clause is not entirely clear. In ***Wainwright* v. *Greenfield*** (1986) 474 U.S. 284, the Court used very similar language to describe the inapplicability of the ***Doyle*** rule to post-arrest silence, albeit specifically using the term "due process": "due process is not violated by the impeachment use of pre-***Miranda*** warnings silence . . . after arrest[.]" (***Id***. at p. 291, fn. 6.)

For example, in ***People* v. *Delgado*** (1992) 10 Cal.App.4th 1837, a defendant was arrested on a burglary charge after being found carrying the items stolen in the burglary. The defendant was never Mirandized by the police and never spoke to the police. At trial, the defendant testified the stolen items were given to him by the burglary victim's brother. The prosecutor asked on cross-examination if the defendant had told the arresting officer, or any other officer, that he had just gotten the items from the

victim's brother. During closing argument, the prosecutor stated that the defendant's failure to tell the police or anyone about his post-arrest version of how he came to possess the items suggested that the defendant's story at trial was fabricated. Both the cross-examination *and* argument were held to be proper. (***Id.*** at p. 704 [and pointing out that older California cases holding to the contrary were no longer valid in light of the passage of Prop 8].)

Similarly, in ***People* v. *O'Sullivan*** (1990) 217 Cal.App.3d 237, a defendant was in jail custody when, during a search of her belongings, some drugs were found. When this was brought to the defendants' attention, she cried, "Oh, oh." However, she otherwise remained silent. No ***Miranda*** warnings were given. The defendant also remained silent when she was later told by two inmates that something had been found by the deputies in her belongings. The prosecutor established defendant's silence in both situations through cross-exam of defendant and through other witnesses and then argued that defendant's silence following the discovery of the contraband was a factor to consider in evaluating the credibility of her defense that the contraband did not belong to defendant. Both the cross-examination *and* argument were held to be proper. (***Id***. at pp. 244-245.)

For some of the same reasons the recent United States Supreme Court decision in ***Salinas* v. *Texas*** (2013) 570 U.S. 178 casts doubt on whether silence following an *express* invocation of the Fifth Amendment in a pre-arrest/pre-***Miranda*** context can be used in the People's case-in-chief, **see** this IPG, sections II-2-B at p. 48) or whether silence following an *express* invocation in a post-arrest/pre-***Miranda*** can be used in the People's case-in-chief (III-1-C at pp. 52-53), it puts into question whether a post-arrest/pre-***Miranda*** express invocation can be used for *impeachment* purposes. Significantly, neither the prior United States Supreme Court cases (nor the California cases cited) upholding the use of post-arrest/pre-***Miranda*** silence for impeachment purposes involve an express invocation.

That being said, because there are interests favoring admissibility when it comes to impeaching a defendant that do not exist when it comes to use of evidence in the People's case-in-chief (e.g., the interest in deterring perjury), it is more likely that silence following an express invocation will be admissible to impeach than that it will be held admissible in the People's case-in-chief. (**See *Jenkins* v. *Anderson*** (1980) 447 U.S. 231, 238 [allowing impeachment with pre-arrest silence because, inter alia, impeachment "follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial"]; ***Fletcher* v. *Weir*** (1982) 455 U.S. 603, 607 [allowing impeachment of a defendant with his post-arrest silence where no ***Miranda*** warnings given]; ***Harris* v. *New York*** (1971) 401 U.S. 222, 225 [although statement taken in violation of ***Miranda*** inadmissible in case-in-chief, if the defendant gets up on the stand and gives a story inconsistent with that statement, it is permissible to impeach the defendant with that statement].)

3. Can a Prosecutor *Impeach* a Defendant with Statements Made Post-Arrest by a Defendant *During* Invocation of the *Miranda* Rights?

Where the words used to invoke ***Miranda*** tend to impeach the defendant's trial testimony, they are likely to be admissible to impeach over a ***Doyle*** objection. In ***United States* v. *Gomez*** (9th Cir. 2013) 725 F.3d 1121, the defendant was arrested after driving across the border with several kilos of methamphetamine hidden in the gas tank. After a ***Miranda*** advisement, the defendant said, "I can't talk." When the officer asked if the defendant wanted to talk, the defendant said, "It's my family." When asked to clarify, the defendant said, "I can't say anything because my family … will get killed." At trial, the defendant testified he was unaware the drugs were hidden in the car. The Ninth Circuit held the trial court properly allowed the prosecutor to cross-examine the suspect about the "arguably inconsistent" statement of concern about potential harm to his family. (***Id***. at p. 1126.)

The Ninth Circuit in ***Gomez*** court did, however, indicate that it would be a different story if "the prosecution argued that Defendant's silence itself undermined his credibility or had [the interrogating agent] testified that Defendant said only, "I can't talk." (***Id***. at p. 1127.) Similarly, the ***Gomez*** court said it would be a different story if the prosecution sought to use the defendant's explanation in its case-in-chief, noting that "when the prosecution attempts to use a defendant's 'explanatory refusal' in its case-in-chief, as affirmative evidence of guilt or consciousness of guilt, the Fifth Amendment bars the introduction of the explanation just as it bars the introduction of the silence." (***Id***. at p. 1127, citing to ***United States* v. *Bushyhead*** (9th Cir.2001) 270 F.3d 905 and ***Hurd* v. *Terhune*** (9th Cir.2010) 619 F.3d 1080.)

Editor's note: Both ***Bushyhead*** and ***Hurd*** are cases which held that the prosecution is barred from commenting upon any post-arrest/pre-***Miranda*** silence in its case-in-chief. (**See** this outline, section III-1 at p. 50) But if a statement made during invocation is treated *as part of* the invocation itself – then any comment or use should be barred regardless of whether it is being used for impeachment or as part of the case-in-chief.

4. Can a Prosecutor *Impeach* a Defendant with Defendant's *Post-Arrest, Pre-Miranda* Silence When *Miranda* Warnings are Given and Defendant Invokes *After* the Silence?

Whether comment upon post-arrest/pre-***Miranda*** silence is proper should not turn on whether ***Miranda*** warnings are *later* given.

In ***Fletcher* v. *Weir*** (1982) 455 U.S. 603, the United States Supreme Court allowed impeachment of a defendant with the defendant's post-arrest silence where **no *Miranda*** warnings were **ever** given. In ***Fletcher***, the Court explained the rationale behind the ***Doyle*** rule was that due process was violated when the government commented upon a defendant's silence after inducing that silence by implicitly assuring the defendant that his silence would not be used against him. Since a defendant who is silent after being arrested, but before being given ***Miranda*** warnings, is not remaining silent during that period because of any government assurances either, the rule of ***Fletcher*** should not change simply because the defendant later invokes. (**See e.g., *United States* v. *O'Keefe*** (11th Cir. 2006) 461 F.3d 1338, 1346; ***United States* v. *Rivera*** (11th Cir.1991) 944 F.2d 1563, 1568; ***United States* v. *Osuna-Zepeda*** (8th Cir. 2005) 416 F.3d 838, 844; ***United States* v. *Frazier*** (8th Cir. 2005) 408 F.3d 1102, 1111; ***United States ex rel. Smith* v. *Rowe*** (7th Cir. 1984) 746 F.2d 386, 387-388; ***Feela* v. *Israel*** (7th Cir. 1984) 727 F.2d 151, 157; ***United States* v. *Musquiz*** (5th Cir. 1995) 45 F.3d 927, 930.)
The Ninth Circuit has indicated comments referring to post-arrest, pre-***Miranda*** silence are permissible even where there is a later invocation, so long as those comments are not likely to be interpreted as comments upon both pre-***Miranda*** and ***post*-*Miranda*** silence. (**See *United States* v. *Lopez*** (9th Cir. 2007) 500 F.3d 840, 844 fn. 2; ***United States* v. *Baker*** (9th Cir.1993) 999 F.2d 412, 415-416.)

5. Does the Subsequent Waiver of *Miranda* Rights Impact Whether Comment Upon an Initial Post-Arrest/Pre-*Miranda* Silence is Proper? No.

Just as a subsequent invocation should not retroactively render permissible comment upon post-arrest/pre-*Miranda* silence impermissible, if comment upon post-arrest/pre-*Miranda* silence is held to be impermissible, then a subsequent *waiver* of ***Miranda*** rights should not retroactively render the impermissible comment upon a defendant's earlier post-arrest, pre-waiver silence permissible. (**See *United States* v. *Velarde-Gomez*** (9th Cir. 2001) 269 F.3d 1023, 1033-1034.)

6. Post-Arrest/Pre-*Miranda* Silence During a Conversation with a Private Citizen

Most of the cases addressing whether it is proper to comment upon a defendant's post-arrest silence in the face of an accusation by a private party involve defendants who were previously given the ***Miranda*** warnings. The general rule, in *that* circumstance, is that such silence may be used or commented upon unless the silence results primarily from the conscious exercise of his constitutional rights. (**See** this IPG, section I-15-A at pp. 26-29). Albeit, in light of ***Salinas* v. *Texas*** (2013) 570 U.S. 178, an express invocation of the privilege may be necessary to prevent any comment on the silence. (**See** this IPG, II-1 at pp. 37-38.)

It should be assumed a prosecutor will be able to use and comment upon a post-arrest/*pre-**Miranda*** defendant's silence whenever the prosecutor would be able to use and comment upon a defendant's post-arrest/*post-**Miranda*** silence. Similarly, whenever a prosecutor would be able to use a defendant's post-arrest/pre-***Miranda*** silence *in general* (**see** this IPG, section III-1 through 4 at pp. 49-57), a prosecutor will be able to use a defendant's post-arrest/pre-***Miranda*** silence occurring in a conversation with a private party – albeit it is *more* likely that such use will be held proper when a citizen is involved since it is *less* likely a court will view silence as an invocation when law enforcement is not involved.

A. Can a Prosecutor Introduce Evidence in the *Case-in Chief* of Defendant's Post-Arrest, Pre-*Miranda* Silence in the Face of Questioning by a *Private Citizen*?

As a prosecutor is permitted to use a defendant's post-arrest/***post*-*Miranda*** silence during a conversation with a private party in the People's case-in-chief, absent an express (or at least reasonably inferable) invocation of the Fifth Amendment privilege (**see *People* v. *Medina*** (1990) 51 Cal.3d 870, 891-892), a prosecutor should also be permitted to use a defendant's post-arrest/***pre*-*Miranda*** silence during a conversation with a private party absent an express invocation of the Fifth Amendment privilege in the People's case-in-chief.

B. Can a Prosecutor *Impeach* a Defendant with His Post-Arrest, Pre-*Miranda* Silence in the Face of Questioning by a *Private Citizen*?

As a prosecutor is permitted to impeach a defendant with his post-arrest/***post*-*Miranda*** silence during a conversation with a private party absent an express (or at least reasonably inferable) invocation of the Fifth Amendment privilege (**see *People* v. *Pitts*** (1990) 223 Cal.App.3d 606, 850-851), a prosecutor should also be permitted to impeach a defendant with his post-arrest/***pre*-*Miranda*** silence during a conversation with a private party absent an express invocation of the Fifth Amendment privilege.

7. Can a Prosecutor Use or Comment Upon Evidence of Defendant's Post-Arrest/Pre-*Miranda* "Demeanor" at the Time of Arrest Without Committing *Doyle* Error?

If a defendant's post-arrest/pre-***Miranda*** conduct or nonverbal responses is deemed to be evidence of "demeanor" and not "silence," then it should be assumed that the rules governing use or comment upon evidence of a defendant's post-arrest/pre-*Miranda* conduct or nonverbal responses will largely track the rules governing "demeanor" evidence in a post-arrest/post-***Miranda*** context. (**See** this IPG,

section I-14 at pp. 25-26.) On the other hand, if the defendant's post-arrest/pre-***Miranda*** conduct or nonverbal response is deemed to be "silence," then it should be assumed the general rules governing post-arrest/pre-***Miranda*** silence will apply to it. (**See** this IPG, section III at pp. 49-58.)

IV. COMMENT UPON DEFENDANT'S FAILURE TO TESTIFY (*GRIFFIN* ERROR)

1. Is it Proper for a Prosecutor to Comment Upon Defendant's Failure to Testify at Trial? No. Doing so is *Griffin* Error.

The Fifth and Fourteenth Amendments to the United States Constitution "forbid[ ] either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." (***Griffin* v. *California*** (1965) 380 U.S. 609, 615.)

In ***Griffin* v. *California*** (1965) 380 U.S. 609, the defendant did not take the stand. The prosecutor argued that the defendant would have knowledge about the facts of the crime but "has not seen fit to take the stand and deny or explain." (***Id***. at p. 611.) The prosecutor also stated that the victim was dead so "she can't tell you her side of the story. The defendant won't." (***Ibid***.) The trial court then instructed the jury: "As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, ***if he does not testify*** or if, though he does testify, he fails to deny or explain such evidence, ***the jury may take that failure into consideration as tending to indicate the truth of such evidence*** and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.'" (***Id***. at p. 609, emphasis added.)

The High Court reasoned that the Fifth Amendment – which provides a privilege against self-incrimination - outlaws the "inquisitorial system of criminal justice" and "comment on the refusal to testify is a remnant of" that system. (***Id***. at p. 614.) The court stated such comment "is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." (***Ibid***.) Accordingly, the Court found neither the judge nor the prosecutor may suggest to the jury that it can draw the very logical conclusion that a defendant who decides not to testify is probably guilty as sin. (***Griffin* v. *California*** (1965) 380 U.S. 609, 615.)

Although, as pointed out by the dissent in ***Griffin***, "if any compulsion be detected in the California procedure, it is of a dramatically different and less palpable nature than that involved in the procedures which historically gave rise to the Fifth Amendment guarantee[,]" (***id*** at p. 620), the ***Griffin*** majority *rejected* "the argument that inference of guilt for failure to testify as to facts peculiarly within the

accused's knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege." (***Id***. at p. 614.)

> **Editor's note**: Interestingly, given that it is now deemed jury misconduct for jurors to reference the fact the defendant did not testify (**see *People* v. *Loker*** (2008) 44 Cal.4th 691, 749), no justice on the ***Griffin*** court had a problem with the jurors drawing such inferences – just with the instruction that effectively permitted the defendant's failure to testify to be used as evidence of guilt. (**See *Griffin*** at p. 614 ["What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."]; dis. opn of J. Stewart at pp. 620-622 [stating the "California comment rule is not a coercive device which impairs the right against self-incrimination, but rather a means of articulating and bringing into the light of rational discussion a fact inescapably impressed on the jury's consciousness"].)

The ***Griffin*** holding seems to stretch "the concept of compulsion beyond all reasonable bounds" since "whatever compulsion may exist derives from the defendant's choice not to testify, not from any comment by court or counsel." (Dis. opn. J. Stewart in ***Griffin*** at p. 620.) Nevertheless, the ***Griffin*** rule has been extended to prohibit a prosecutor from ***directly***, ***indirectly***, or ***inferentially*** calling attention to the defendant's failure to testify. (***United States* v. *Robinson*** (1988) 485 U.S. 25, 32; ***People* v. *Medina*** (1995) 11 Cal.4th 694, 755; ***People* v. *Guzman*** (2000) 80 Cal.App.4th 1282, 1287 [***Griffin*** has been interpreted as prohibiting prosecution from "so much as suggesting to the jury that it may view the defendant's silence as evidence of guilt"].)

This rule applies in both the guilt and penalty phase of a trial. (***Mitchell* v. *United States*** (1999) 526 U.S. 314, 327–328; ***People* v. *Tafoya*** (2007) 42 Cal.4th 147, 184; ***People* v. *Carter*** (2005) 36 Cal.4th 1215, 1277.) Thus, "a prosecutor may not urge that a defendant's failure to take the stand at the penalty phase, in order to confess his guilt after having been found guilty, demonstrates a lack of remorse." (***People* v. *Monterroso*** (2004) 34 Cal.4th 743, 768; ***People* v. *Boyette*** (2002) 29 Cal.4th 381, 454.)

2. Can *Griffin* Error be Committed by Indirectly Commenting on the Failure of the Defendant to Testify?

As indicated above, "a prosecutor is prohibited from commenting directly ***or indirectly*** on an accused's invocation of the constitutional right to silence[.]" (***People* v. *Thompson*** (2016) 1 Cal.5th 1043, 1117; ***People* v. *Tafoya*** (2007) 42 Cal.4th 147, 184, emphasis added; **accord *People* v. *Caldwell*** (2013) 212 Cal.App.4th 1262, 1273 ["***Griffin*** error may be committed by either direct or ***indirect*** comments on the defendant's failure to testify in his defense" citing to ***People* v. *Medina*** (1995) 11 Cal.4th 694, 755 and ***People* v. *Guzman*** (2000) 80 Cal.App.4th 1282, 1288; **see also *United States* v. *Inzunza*** (9th Cir. 2011) 638 F.3d 1006, 1022 [a prosecutor's statement is improper

"if it is . . . *is of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify*"; ***Lincoln* v. *Sunn*** (9th Cir.1987) 807 F.2d 805, 809 [same].)

Here are some examples of less than explicit comments on defendant's silence that were held to violate the ***Griffin*** rule:

In ***People* v. *Modesto*** (1967) 66 Cal.2d 695, the court found ***Griffin*** error where the prosecutor argued to the jury that the defendant, who was the only person who knew the facts, was sitting in the courtroom, "and just sitting." (***Id***. at p. 710.)

In ***People* v. *Denard*** (2015) 242 Cal.App.4th 1012, the prosecutor called the defendant's ex-wife as a witness in order to have her identify him from a surveillance video. The prosecutor argued that: "The defendant clearly does not want to take responsibility for his actions. *He has put it upon [the witness] to testify to get himself convicted. He has not taken responsibility himself*. That is the kind of man he is. And that is typical of someone who is using or who has used [drugs], as [the witness] testified to. There is no accountability, no responsibility, and that's why he cruelly made [the witness] testify in identifying him, yet again." (***Id***. at p. 1019, emphasis added.)

In ***People* v. *Sanchez*** (2014) 228 Cal.App.4th 1517, the court held the prosecutor violated the ***Griffin*** rule by commenting that "*the defendant is still in that wheel well in a very real sense, and this time he's hiding from all of you*" because the most reasonable interpretation of the comment was that defendant was "hiding" from the jury in a figurative sense by not testifying. (***Id***. at pp. 1527-1528 [and noting that the prosecutor compounded the error by asking the jury to "[p]ull him out of that wheel well one last time."].)

In ***People* v. *Bruce G.*** (2002) 97 Cal.App.4th 1233, the court held the jury would reasonably interpret a prosecutor's comment that "Nobody has even testified for the defense" to be an indirect comment on defendant's failure to testify "because, in fact, the defense had presented various witnesses." (***Id***. at p. 1245 [albeit finding error to be harmless].)

In ***United States* v. *Inzunza*** (9th Cir. 2011) 638 F.3d 1006, the prosecutor, in rebuttal, referred to the 1919 Chicago White Sox scandal, quoting a disappointed fan's lament to the corrupt player Shoeless Joe Jackson: "Say it isn't so, Joe. Say it isn't so. Say it isn't so." (***Id***. at p. 1022.) While making this statement, the prosecutor closed roughly half the distance between himself and the defendants, and then looked and stretched out his hand in the general direction of the defendants. The prosecutor then said, "But it is. Plan here was to deceive the public, to deceive their fans, deceive their families." (***Ibid***.) The Ninth Circuit held this was a comment on defendant's failure to testify, albeit a harmless comment. (***Id***. at pp. 1022-1023.)

Even when prefaced by comments that a defendant does not have to take the stand, an indirect comment implying guilt based on defendant's failure to take the stand can be ***Griffin*** error. For example, in ***People* v. *Rios*** (1983) 140 Cal. App.3d 616, the court found ***Griffin*** error where the prosecutor stated: "Now, don't misunderstand me. A defendant doesn't have any obligation to get up on the stand and explain anything to you," but then went on say "and if I were the accused, I don't believe I would get up on the stand and say anything either in a lot of circumstances[.]" (***Id***. at p 622.)

3. What if the *Defense Counsel* Argues Defendant Has Somehow Been *Prevented* from Testifying: Can a Prosecutor Respond to That Without Committing *Griffin* Error?

Where a defense attorney argues that the government has not allowed the defendant to tell his side of the story, it is **proper** for the prosecutor to point out, in response, that the defendant could have testified. (***United States* v. *Robinson*** (1988) 485 U.S. 25, 31-32.) "Questions or argument suggesting that the defendant did not have a fair opportunity to explain his innocence can open the door to evidence and comment on his silence." (***People* v. *Hubbard*** (2020) 52 Cal.App.5th 555, 564 [citing to ***People* v. *Lewis*** (2004) 117 Cal.App.4th 246, 257].)

For example, in ***People* v. *Hubbard*** (2020) 52 Cal.App.5th 555, defense counsel told the jury that "the government" had not, in any "way, shape, or form," given defendant the "chance of proving he is not guilty." (***Id***. at p. 565.) "[T]his argument permitted the prosecutor to counter the suggestion that defendant was somehow precluded by the government from telling his story." (***Ibid*** [and noting this was true even though "for practical purposes, defendant was not able to testify given his prior sex offenses"].)

4. May a Prosecutor Point Out That the Prosecution's Evidence is Uncontradicted or Unexplained Without Committing *Griffin* Error?

It is well-established that the rule of ***Griffin*** "does not extend to the comments on the state of the evidence or on the failure of the defense to introduce material evidence or call logical witnesses." (***People* v. *Brady*** (2010) 50 Cal.4th 547, 566; ***People* v. *Lewis*** (2009) 46 Cal.4th 1255, 1304; ***People* v. *Morris*** (1988) 46 Cal.3d 1, 35; ***People* v. *Szeto*** (1981) 29 Cal.3d 20, 34.; but see ***People* v. *Echevarria*** (1992) 11 Cal.App.4th 444, 452 ["Any time a prosecutor chooses to comment on some perceived failure of evidence by the defense in a case in which the defendant has chosen not to testify, the prosecutor will be "close" to ***Griffin*** error. It is a path fraught with peril and generally ill-advised, but it is not forbidden."].) There is an exception to this rule discussed below in section IV-6 at p. 66 and the principles discussed in IV-4-B and C at pp. 64-65 may *also* be seen as exceptions to this rule.

Editor's note: Sometimes commenting upon the defendant's failure to introduce material evidence or call logical witnesses is attacked, not on the ground that it violates the ***Griffin*** rule, but on the ground the comment shifts the burden of proof. For a discussion of the rules governing this type of argument, **see** the 2022-IPG-52 "Staying Within the Circle of Permissible Opening Statement and Closing Argument" at section II-S at pp. 89-92.) That IPG is accessible on the "L" Drive to Santa Clara County prosecutors under that title. And is available to IPG electronic subscribers upon request.

Commenting upon the fact the defendant failed to exercise his Sixth Amendment right to process of the court to compel the attendance of witnesses is no more impermissible than commenting on the defense failure to call logical witnesses. "A comment on the defense's failure to call a logical witness is inherently a comment on the defense's failure to exercise the subpoena power. If the defense did not have the subpoena power, its failure to call a logical witness would be irrelevant." (***People* v. *Munoz*** [unreported] 2021 WL 4271818, at *13.)

A. Examples of Arguments That Have Been Held Proper in Trials Where the Defendant Did Not Testify or Offer Alibi Evidence

"Keep in mind that there is not a shred of evidence. Not a shred to suggest that anybody else did the killing, other than [the defendant]. Not a shred." "There is not a shred of evidence to indicate that [the defendant] was anywhere else on the morning of [the crime]." Nothing. Put yourself in the position of being a defendant, and you can bet your boots that if you had anything to offer by way of evidence, by way of alibi, that you would offer it. Be assured of that. Be assured of the fact that any defense attorney would make sure that if any such evidence existed, you would have it. You don't have it." (***People* v. *Morris*** (1988) 46 Cal.3d 1, 35; **see also *People* v. *Briggs*** (unreported) 2006 WL 1645222, at *8 [approving prosecutor quoting verbatim from ***Morris***].)

"*Not one person came forward" to say defendant "couldn't have done it, he was with me."* (***People* v. *Thomas*** (2012) 54 Cal.4th 908, 945.)

"*The evidence in this case is not contradicted by any other evidence in this case.*" (***People* v. *Castaneda*** (2011) 51 Cal.4th 1292, 1333.)

"*It was new [a Liquid–Plumr bottle found at the scene], it still had liquid in it, and had the defendant's prints all over it. There's been no explanation offered as to how they possibly could have been there.*" (***People* v. *Lancaster*** (2007) 41 Cal.4th 50, 84.)

"If he wasn't there, where was he? Everyone else says he was there. Where was he? No alibi witness took the stand and said he was with me that night watching T.V. You didn't hear any of that, did you?

All of the evidence points to one man. One man only. The defendant." (***People* v. *Brown*** (2003) 31 Cal.4th 518, 552, 554.)

"[T]he defense had not called a single witness, nor produced a single piece of evidence pointing to [the] defendant's innocence." And, after arguing the victims had been killed for pleasure, stating there was *"no evidence to the contrary."* (***People* v. *Bradford*** (1997) 15 Cal.4th 1229, 1339.)

"[*A*]*bsolutely zero evidence has been presented to you by the defendant and his attorney*." (***People* v. *Ratcliff*** (1986) 41 Cal.3d 675, 691.)

"If the defense had a plausible, reasonable explanation why the defendant was in the yard that morning, they would have given it. They haven't." (***People* v. *Sanchez*** (2014) 228 Cal.App.4th 1517, 1525.)

"*[W]e have the prosecution's positive evidence that the defendant is guilty of robbery in the first degree, and we have the defense which has just been shot out of the water, zero. So you have the prosecution's case against nothing for the defense. The state of the record is that there has been no explanation given for this [the People's evidence of guilt] ...."* (***People* v. *Bethea*** (1971) 18 Cal.App.3d 930, 936 [cited with approval in ***People* v. *Vargas*** (1973) 9 Cal.3d 470, 474.)

B. Be Careful in Commenting Upon Failure to Call Character Witnesses

Although prosecutors may properly attack the defense for failure to call witnesses, it may be improper to comment on the fact the defense failed to call *character* witnesses. (**See *People* v. *Adams*** (1928) 92 Cal.App. 6, 10-11; ***People* v. *Harris*** (1926) 80 Cal.App. 328, 334. **see also *Brokenberry* v. *State*** (Tex. App. 1990) 788 S.W.2d 1043, 105 [referring to defendant's failure to call character witnesses was functional equivalent of injecting defendant's character into case and constituted reversible error where defendant did not take stand nor elect to exercise his prerogative to present character witnesses to testify that he had no propensity to commit charged offense]; **but see *People* v. *Salomon*** [unreported] 2012 WL 171872 at p. *7 [suggesting that if it is logical to call a character witness, comment on failure to do so may be proper]; ***People* v. *Lopez*** [unreported] 2009 WL 4853883, at *12 [suggesting that where defense counsel references a specific person as a potential character witness but then declines to call the witness, comment upon witness' absence may be made].)

C. Prosecutors May *Not* Comment Upon Failure to Call a Logical Witness When the Prosecution Knows the Witness Could Not Be Called Due to Circumstances Beyond the Control of the Defense

If the prosecution knows a logical witness could not be called by the defense due to circumstances beyond the control of the defense, it can be improper to comment on the failure to call the witness. In those circumstances the prosecutor may not invite the jury to speculate that the defendant's failure to call the witness reflects recognition that the testimony would not be favorable to the defense. (***People* v. *Ford*** (1988) 45 Cal.3d 431, 445; ***People* v. *Frohner*** (1976) 65 Cal.App.3d 94, 109 [unfair to comment on failure to call informant where prosecutor knew informant had made himself unavailable as witness]; **cf.**, ***People* v. *Lewis*** (2009) 46 Cal.4th 1255, 1302-1304 [no ***Griffin*** error where prosecutor commented on fact defense did not call an investigator to impeach a witness, even though defense counsel claimed they made efforts to locate the investigator, where (i) defense counsel did not inform the prosecutor of their efforts until after the prosecutor's comments and (ii) defense counsel chose to cross-examine the witness in a manner insinuating the witness had made certain contradictory statements to the investigator while knowing the investigator could not be located].)

Similarly, it is improper to suggest that a failure to produce the records could be relied upon to show that a witness's testimony is not true when the prosecutor knew or should have known the records would actually corroborate the witness. (**See *People* v. *Bryant*** (2014) 60 Cal.4th 335, 428 [albeit finding the error to be harmless in context of the case before it].)

5. Is it *Griffin* Error for a Prosecutor to Comment Upon the Defense Failure to Test Physical Evidence or Bring in an Expert on Such Testing?

In ***People* v. *Bennett*** (2009) 45 Cal.4th 577, the California Supreme Court summarily rejected the argument that it was ***Griffin*** error for the prosecution to question its experts regarding whether (i) the defense could have retested forensic evidence and (ii) defense sought to have the forensic evidence retested. (***Id***. at p. 596.)

Editor's note: For an extensive discussion of the prosecutor's ability to comment upon the defense failure to test physical evidence or bring in a defense expert if defense conducted testing, **see** this IPG, section VII at pp. 89-95.

6. Can the Prosecutor Point Out that Certain Evidence is Uncontradicted or Unexplained When the Only Person Able to Provide an Explanation is a Non-Testifying Defendant?

A prosecutor may commit ***Griffin*** error if he or she argues to the jury that certain testimony or evidence is not contradicted or denied, **if** such contradiction or denial could be provided **only** by the defendant, who would have been required to take the witness stand to do so. (***People* v. *Gomez*** (2018) 6 Cal.5th 243, 299;***People* v. *Thomas*** (2012) 54 Cal.4th 908, 945; ***People* v. *Brady*** (2010) 50 Cal.4th 547, 565-566; ***People* v. *Lewis*** (2009) 46 Cal.4th 1255, 1304; ***People* v. *Carter*** (2005) 36 Cal.4th 1215, 1266; ***People* v. *Hughes*** (2002) 27 Cal.4th 287, 371-372; ***People* v. *Bradford*** (1997) 15 Cal.4th 1229, 1339; ***People* v. *Johnson*** (1992) 3 Cal.4th 1183, 1229; **see also *People* v. *Sanders*** (1995) 11 Cal.4th 475, 529; **but see *People* v. *Roberts*** (1975) 51 Cal.App.3d 125, 135 [prosecutor could properly refer to lack of conflicting witnesses even though only eyewitness who could have countered prosecution eyewitness was defendant himself].)

"[W]here a defendant is the only possible witness who could rebut the testimony of the government witnesses, it is inappropriate for a prosecutor to point out the lack of witnesses or testimony on the other side, because "'this can only cause the jury to naturally look to the only other evidence there is—the defendant—and, hence, this could be a prohibited comment on the defendant's failure to testify.'"" (***United States* v. *Preston*** (9th Cir. 2017) 873 F.3d 829, 842 quoting ***Lincoln* v. *Sunn*** (9th Cir. 1987) 807 F.2d 805, 809.)

A. Will a Defendant be Viewed as the "Only" Witness Able to Contradict or Refute the Prosecution Case If the Prosecution is Not Specifically *Aware* of the Existence of Other Actual Witnesses or Evidence That Could Potentially Contradict or Refute the Prosecution Case?

Even where there is no affirmative evidence of other witnesses, this does not mean that a prosecutor's comment on the failure of defense to refute the issue of identity is a reference to the absence of evidence that only the defendant's testimony could provide. (**See *People* v. *Brady*** (2010) 50 Cal.4th 547, 565-566 [finding no ***Griffin*** error in commenting that the identity of defendant was unrefuted since defendant could have refuted identity without testifying through alibi witnesses, witnesses identifying someone other than defendant as the suspect or owner of the murder weapon, or expert witnesses who might refute ballistics or other evidence - even though there was no evidence such witnesses existed]; ***People* v. *Szeto*** (1981) 29 Cal.3d 20, 34 [no ***Griffin*** error when the prosecutor "merely pointed out that the defense had not produced alibi witnesses for the crucial period."]; ***People* v. *Hubbard*** (2020)

52 Cal.App.5th 555, 566 [where counsel argued, without any factual support, a defendant charged with indecent exposure was merely a student leaving campus who had to urinate, prosecution entitled to comment on failure of defense to provide evidence since "defendant could have called his professor, a classmate, or an administrator to testify that he was in a class that had concluded immediately before the incident or some other fact to show that he was, indeed, 'a student,' as counsel argued"]; ***People* v. *Echevarria*** (1992) 11 Cal.App.4th 444, 452 [no ***Griffin*** error where prosecutor observed that none of the defense witnesses could tell jury " 'where [the defendant] was that night' "]; **cf.**, ***People* v. *Carter*** (2005) 36 Cal.4th 1215, 1282 conc. opn. J. Kennard [concluding that prosecutorial comment that nothing prevented the defense from "bringing forth witnesses to explain why the defendant was in the car with all that property" was improper since "evidence presented to the jury at trial did not disclose the existence of any living person other than defendant who could have testified as to how defendant had acquired a car that belonged to one of the murder victims and that contained property belonging to each of the other murder victims" and there would not necessarily be such a person if defendant were innocent of the murders].)

B. Is Defendant the "Only" Witness Who Can Attest to Defendant's State of Mind?

A defendant's state of mind may be inferred from sources other than defendant. (***People* v. *De Leon*** (1992) 10 Cal.App.4th 815, 824.) For example, in ***People* v. *Gomez*** (2018) 6 Cal.5th 243, an issue arose as to whether defendant could have known facts about the murder (he mentioned during an interrogation) that were included in some news articles. In argument, the prosecutor noted that "There is absolutely no evidence that [the defendant] saw those articles. There is absolutely no evidence that [the defendant] read those articles. There is absolutely no evidence that [the defendant] reads any newspaper." (***Id***. at p. 299.) The defendant argued there was ***Griffin*** error because "only his own testimony could have contradicted the prosecutor's claim that [the defendant] did not read the articles or newspapers . . ." (***Ibid***.) However, this argument was rejected considering the defendant could have introduced evidence that he subscribed to the newspaper with the articles, or evidence *through other people* that he was an avid reader, or that he read the paper and/or commented to others about reading the paper. (***Ibid***.)

In ***People* v. *Bruce G.*** (2002) 97 Cal.App.4th 1233, the court observed a prosecutors' remarks that "the state of the evidence is uncontroverted" in a case involving claims defendant sexually assaulted some children "might seem," to be a comment on failure to provide evidence "that only defendant could have controverted . . . because he was the only other person who could have known what did or did not happen" but held that "[i]n context" . . . it appears that the prosecutor was commenting on the entire state of the evidence"]; **see also *People* v. *Hubbard*** (2020) 52 Cal.App.5th 555, 566.)

7. How Fine a Line Exists Between Comment on the Failure of the *Defense* to Counter the Prosecution's Case and the Failure of the *Defendant* to Testify?

Prosecutors must walk a fine line when treading in the area of commenting upon the failure of the defense to counter the prosecution's case. A prosecutor may call attention to the defense's failure to put on exculpatory evidence, but only if those comments are not aimed at the defendant's failure to testify and are not of such a character that the jury would naturally and necessarily interpret them to be a comment on the failure to testify. (***People* v. *Guzman*** (2000) 80 Cal.App.4th 1282, 1289.) Prosecutors should be aware that the use of certain terms may be problematic:

"Defense" Versus "Defendant": Courts have maintained a distinction between comments about the lack of explanation provided by the "defense," and comments about the lack of explanation furnished by the "defendant." "A 'comment on the failure of the *defense* as opposed to the *defendant* to counter or explain the testimony presented or evidence introduced is not an infringement of the defendant's Fifth Amendment privilege.'" (***United States* v. *Mares*** (9th Cir. 1991) 940 F.2d 455, 461 [quoting ***United States* v. *Castillo*** (9th Cir. 1988) 866 F.2d 1071, 1083 (emphasis in original)]; **see also *United States* v. *Tam*** (9th Cir. 2001) 240 F.3d 797, 805 ["when the government refers to 'defendant's arguments' but ***obviously*** is addressing the arguments made by defense counsel, there is no ***Griffin*** violation" (emphasis added)].) References to a lack of explanation by *the defendant* are more likely to result in ***Griffin*** error. (**See *People* v. *Sanchez*** (2014) 228 Cal.App.4th 1517, 1525; ***People* v. *Denard*** (2015) 242 Cal.App.4th 1012, 1020-1021; ***Demirdjian* v. *Gipson*** (9th Cir. 2016) 832 F.3d 1060, 1067; ***Rhoades* v. *Henry*** (9th Cir. 2010) 598 F.3d 495, 509-511; ***United States* v. *Mayans*** (9th Cir.1994) 17 F.3d 1174, 1185; **see also *People* v. *Northern*** (1967) 256 Cal.App.2d 28, 30-31 [finding ***Griffin*** error in the prosecutor's statement that the People's evidence "'has not been refuted by the *Defendant* ...."]; **but see *People* v. *Carr*** (2010) 190 Cal.App.4th 476, 484 [statement of prosecutor "You haven't heard from the defense . . ." is ambiguous as to whether comment on failure to take stand].)

"Denial": Even when there was no evidence contradicting the prosecution witness' testimony that she saw the defendant with the victims right before the victims were robbed, it was improper for the prosecutor to state: "And there was no denial at all that they were there." ***Griffin*** error occurred because the word "denial" connotes a personal response by the defendant as opposed to the lack of response by the defense counsel or defense team. (***People* v. *Vargas*** (1973) 9 Cal.3d 470, 474.)

"Unrefuted" or "Uncontradicted": If the evidence could have been contradicted by a witness other than the defendant, a prosecutor does not violate the defendant's privilege against self-incrimination by

describing the evidence as "unrefuted" or "uncontradicted." (***People* v. *Johnson*** (1992) 3 Cal.4th 1183, 1229; ***People* v. *Hubbard*** (2020) 52 Cal.App.5th 555, 566; ***People* v. *Sanchez*** (2014) 228 Cal.App.4th 1517, 1524; **see also *Lockett* v. *Ohio*** (1978) 438 U.S. 586 [prosecutor's comment evidence was "unrefuted' and "uncontradicted proper where defense attorney said defendant would testify and then did not]; **but see *People* v. *Allen*** [unreported] 2021 WL 805439, at p.*8 [treating the word "refuted" as connoting "a personal response by the accused himself"]; ***People* v. *Medina*** (1974) 41 Cal.App.3d 438, 457 [a claim that the evidence is "unrefuted" is the equivalent of a comment that there has been no denial].)

A. Can Prosecutors "Ask" Defense Counsel to "Explain Away" Prosecution Evidence and Comment Upon Defense Failure to Do So?

Prosecutors can ask defense counsel to explain away prosecution evidence and comment upon defense counsel's failure to do so. However, prosecutors must be careful not to pose questions that, effectively ask the *defendant* to explain away prosecution evidence.

In ***Al-Amin* v. *Warden Georgia Department of Corrections*** (11th Cir. 2019) 932 F.3d 1291, the prosecution presented a chart during closing argument entitled, "Questions for the Defendant." (***Id***. at p. 1296.) The chart posed questions amounting to a "mock cross-examination" of a defendant who had invoked his right to remain silent. (***Id.*** at p. 1299.) Because "[t]he prosecutor's closing argument highlighted the defendant's failure—not the defense's failure—to explain inculpatory evidence[,]" the Eleventh Circuit held this was an impermissible comment on defendant's silence. (***Ibid***.)

In ***Demirdjian* v. *Gipson*** (9th Cir. 2016) 832 F.3d 1060, the court rejected defendant's claim of ***Griffin*** error when it came to questions posed during closing argument by the prosecutor where it was clear the prosecutor was asking the defense attorney to explain or come up with evidence (e.g., "So I say to you, Mr. Mathews, explain it. What is the explanation for this other than mine? What is the evidence that is offered other than ours?"). (***Id***. at p. 1068 [and noting "such comments are impermissible only where there are "very clear signals that the defendant himself, rather than the defense generally, was being discussed"].) The court also held that the prosecution did not err in responding to defense counsel's argument that suggested that the defendant and another person had seen a third person (whom the defense was arguing was the murderer) at the crime scene. Specifically, the prosecutor stated in rebuttal, "You've heard no testimony, no evidence from this witness stand, that puts [the third person] at that crime scene." (***Id***. at pp. 1069-1070.) The Ninth Circuit found this statement "troublesome," but arguably permissible (and not grounds for reversal under AEDPA review) because the prosecutor "never singled out [the defendant] as a possible witness—and there was another possible

witness . . . - her remarks arguably constituted "legitimate comment ... on the weaknesses in the defense case." (***Id***. at pp. 1070-1071.)

In ***United States* v. *Wasserteil*** (9th Cir.1981) 641 F.2d 704, a case involving the smuggling of watch movements, the three defendants did not take the stand. The prosecutor in his rebuttal argument said to the jury: "How about the other evidence in this case that demonstrates that no duties were paid? How about the evidence of Mr. Friedman sending the watches back and forth from New York to Switzerland? How about the way this business was conducted? I asked all the defendants, invited them in my opening argument, to please explain to you how this legitimate business transaction worked in the hotel in Los Angeles, and the transportation of the suitcases. ¶ Did you hear an explanation from them? I invited them to give you one ..." (***Id***. at p. 709.) The Ninth Circuit observed this argument could be interpreted as being directed at the defendants' lack of testimony but that, considered within the context, the argument could be understood as a reference to the lack of the explanation requested of the defense and thus there was no infringement on the defendant's Fifth Amendment rights. (***Id***. at pp. 709-710.)

In ***United States* v. *Sehnal*** (9th Cir. 1991) 930 F.2d 1420, the prosecutor discussed various pieces of evidence and, essentially asked defense counsel to explain away the evidence: "As you listen to [defense counsel]'s argument, I want you to think about these questions. And when you listen to his argument, ask him, to yourself if he's answered these questions to your satisfaction. Ask him these hard questions." (***Id***. at p. 1423.) The prosecutor then asked a series of questions in which it is unmistakable that the defense counsel is being asked to explain the evidence but several of the questions used pronouns ("he" and "him") in a way that clearly referred to the defendant. The Ninth Circuit held some of the questions posed were permissible but that the "prosecution slipped in its use of pronouns so that questions that it claims were posed to [the defense attorney] could have been read as posed only to [the defendant] and should not have been asked. (***Id***. at p. 1425 [albeit finding no "plain error" requiring reversal].)

8. Does a Prosecutor Commit *Griffin* Error by Commenting in Trial on the Fact the Defense Did Not Offer Evidence at the *Preliminary Examination*?

Although commenting in trial on the fact the defense did not offer evidence at the preliminary examination may (or may not) be ***Griffin*** error, a prosecutor is <u>not</u> permitted to comment in trial on the failure of defendant to produce a witness at the preliminary hearing since "the practice of not offering evidence on behalf of the defendant at a preliminary hearing is well-known and frequently adhered to" and thus it would be unfair to ask the jury to draw any inference from this failure. (***People* v. *Conover*** (1966) 243 Cal.App.2d 38, 49.)

9. Does a Prosecutor Commit *Griffin* Error by Pointing Out the Defendant Has No Obligation to Testify?

Both CALCRIM and CALJIC have jury instructions that inform the jury that a defendant has an absolute constitutional right not to testify and that they should not consider the fact defendant did not testify. (**See** CALCRIM 355; CALJIC 2.60; **see *Carter* v. *Kentucky*** (1981) 450 U.S. 288, 300 ["the Fifth Amendment requires that a criminal trial judge must give a 'no-adverse-inference' jury instruction when requested by a defendant to do so."].) Is it error for a prosecutor to state that a defendant has a privilege not to testify and no adverse inference should be drawn from the failure of the defendant to testify?

In ***People* v. *Bradley*** (2012) 208 Cal.App.4th 64, the prosecutor legitimately commented upon a failure of the defense to provide an explanation for some damning evidence. The defense claimed it was ***Griffin*** error. The trial court rejected this claim and the prosecutor then told jury the defendant "has a constitutional right not to testify" and the jury could not draw an inference from the fact that the defendant did not testify because he was "entitled to just sit in that chair on his constitutional right and not say anything." (***Id***. at p. 85.) The prosecutor also clarified that his earlier comment should not be interpreted as a comment on defendant's failure to take the stand. The defendant renewed his claim of ***Griffin*** error on appeal. However, the appellate court held: "With respect to the prosecutors second set of comments to the effect that the jury should not draw any adverse inferences from [the defendant's] failure to testify, the trial court properly denied the motion for mistrial. The prosecutor merely paraphrased the language of CALJIC Nos. 2.60 and 2.61, which had already been read to the jury, and explained he did not mean to suggest the jury should draw any adverse inference from [defendant's] failure to testify." (***Id***. at p. 86.)

In the above circumstances, it was apparent the prosecutor was not engaging in a disingenuous argument in the hopes of having the jury actually consider defendant's failure to testify. However, it may be risky to tell the jury not to consider a defendant's failure to testify unless defense counsel has requested an instruction. This is because the instruction should only be given on request. (**See *Carter* v. *Kentucky*** (1981) 450 U.S. 288, 300; ***People* v. *Evans*** (1998) 62 Cal.App.4th 186, 191.) And as a matter of state judicial policy, the California Supreme Court has found it should not be given over defendant's objection. (**See *People* v. *Roberts*** (1992) 2 Cal.4th 271, 314.) Thus, if the instruction has not been requested by the defense, a prosecutor may be viewed as engaging in an attempt to have the jury consider the fact defendant did not testify under the guise of telling them not to consider it. (**See *People* v. *Hubbard*** (2020) 52 Cal.App.5th 555, 564 [noting that in ***In re Rodriguez*** (1981) 119 Cal.App.3d 457, 468, the court discouraged "reference to comparable instruction by the prosecutor in argument, noting that the 'probable effect is to focus the jury's attention upon' defendant's failure to

testify and comments thereon, and that 'depending upon the tone and manner in which they are delivered, ... convey a meaning precisely contrary to their literal import'"].)

10. Can a Prosecutor Place Repeated Emphasis on the Fact that the Prosecution Witnesses Bravely Got Up on the Stand and Were Subject to Cross-Examination in the Hopes the Jury Will Note the Contrast with the Defendant's Failure to Testify?

In ***People* v. *Dement*** (2011) 53 Cal.4th 1, the prosecutor asked the jury to take into consideration that even though there is a Fifth Amendment right to refuse to be interviewed by the police or testify, two of the prosecution witnesses chose to testify. (***Id***. at p. 48-49.) The court held the comments were not ***Griffin*** error as the "comments made no reference to defendant, let alone suggested the jury could treat '"defendant's silence as substantive evidence of guilt."'" (***Id***. at p. 50.)

However, where a prosecutor continually emphasized that the victim in a hit and run case had repeatedly testified and subjected himself to professional cross examination and this emphasis was closely juxtaposed with comments about the lack of a defense version of events, there *was* ***Griffin*** error. (***People* v. *Guzman*** (2000) 80 Cal.App.4th 1282, 1288-1289 [noting also that prosecutor insinuated that defendant never provided his version where defendant actually gave statement to police which prosecutor declined to introduce]; **cf**., ***People* v. *Hardy*** (1992) 2 Cal.4th 86, 155 [indicating that a comment by a co-defendant's counsel, "If you know a man has nothing to hide, he gets up on that witness stand and he tells you what's in his mind. And that's what [the co-defendant] did" in case where the defendant did not testify might be held prejudicial error if said by a prosecutor].)

11. Does a Prosecutor Commit *Griffin* Error by Commenting on the Fact the Defendant Chose Not to Answer Certain Questions *Outside the Scope of Direct Examination*?

In ***People* v. *Monterroso*** (2004) 34 Cal.4th 743, the defendant took the stand in the penalty phase of trial. At the close of direct examination, defense counsel explained to the court that he had elected not to inquire into the two murders with which defendant was charged and would interpose an objection of "beyond the scope" if the district attorney brought up the topic. On cross-examination, the prosecutor (who was unsure about whether he was, in fact, entitled to inquire into the murders) attempted through a series of questions to have defendant effectively agree on the stand to voluntarily discuss the murders. The trial court was less cautious than the prosecutor and believed there was no need for the defendant to agree to talk about the murders on the stand. The trial court indicated that if defendant did not answer direct questions about the murder, the defendant's testimony on direct examination would be stricken. The prosecutor then did further research and ultimately decided not to ask defendant about

the murders. (***Id***. at pp. 768-769.) In the California Supreme Court, the defendant argued that, notwithstanding the fact the defense objections were sustained, and defendant never had the opportunity to answer the questions, the district attorney's questions violated his privilege against self-incrimination. The ***Monterroso*** court did not address the question of whether a capital defendant has the ability to testify at the penalty trial on some topics but not others. Rather the court simply noted that cases are divided on the issue and found no prejudice, even assuming the defendant was entitled to resist efforts to inquire into the circumstances of the crime at the penalty trial once he took the stand, because the prosecutor did not suggest that defendant's failure to answer these questions exhibited a lack of remorse or that defendant's silence was evidence of his guilt of the murders. (***Id***. at p. 770.)

Editor's note: The general rule, however, is that "[a] defendant who takes the stand to testify in his own behalf waives the privilege against self-incrimination to the extent of the scope of relevant cross examination." (***People* v. *Coffman*** (2004) 34 Cal.4th 1, 72; **accord *Jenkins* v. *Anderson*** (1980) 447 U.S. 231, 236, fn. 3.)

12. Does a Prosecutor Commit *Griffin* Error by Arguing a Jury Should Assess the Credibility of a Non-Testifying Defendant's Statement to the Police Using the Same Standards as Applied to Trial Testimony?

In ***People* v. *Tully*** (2012) 54 Cal.4th 952, a defendant claimed the prosecutor committed ***Griffin*** error by arguing the jury should assess the credibility of defendant's statement to police using the same standards as applied to trial testimony. Presumably, the defense theory was the argument highlighted the fact the defendant did not testify at trial. However, the ***Tully*** court rejected this argument because this was a correct statement of the law, "was plainly limited to defendant's statement to the police[,] and did not implicate directly or indirectly defendant's decision not to testify at trial." (***Id***. at p. 1022.)

13. Does a Prosecutor Still Have to Worry About Committing *Griffin* Error if the Defense Counsel First Mentions the Fact Defendant Did Not Testify? Yes.

Although a prosecutor is entitled to respond to a defense claim that the defense was not given an opportunity to explain his side of the story at trial (**see *United States* v. *Robinson*** (1988) 485 U.S. 25, 31-32 [discussed in this IPG, section IV-3 at p. 62], the mere fact defense counsel has mentioned defendant's failure to take the stand does not give the prosecution carte blanche to comment on that fact.

In ***People* v. *Diaz*** (1989) 208 Cal.App.3d 338, the defendant was charged with burglary based in part on a videotape of the defendant attempting to sell property stolen in the burglary to an undercover officer. Defense counsel argued that the statements in the video only showed defendant was a "fence" who received the stolen property, not the burglar. Defense counsel also suggested that defendant did not take the stand and tell the jury from whom he bought the stolen property because he did not want to be labeled a snitch. Counsel pointed out that neither counsel nor the court could make the defendant tell the jury who was the real burglar. The court held that while the prosecutor could properly point out in rebuttal that there was no evidence defendant was a middleman, the prosecutor still committed ***Griffin*** error when he stated: "Now, if we are to believe this gentleman is only a fence, we need to say where is it? Who testified that he was a fence? Who came in and said he was a fence? Who testified or what evidence do we have that says I'm a middleman? That I didn't steal this property and that someone else did." (***Id***. at pp. 342-343; **but see *Lockett* v. *Ohio*** (1978) 438 U.S. 586, 595 [rejecting defendant's claim of ***Griffin*** error where prosecutor said the State's evidence was "unrefuted" and "uncontradicted" because, inter alia, defendant's "own counsel had clearly focused the jury's attention on her silence, first, by outlining her contemplated defense in his opening statement and, second, by stating to the court and jury near the close of the case, that Lockett would be the 'next witness'"]; ***People* v. *Font*** (1995) 35 Cal.App.4th 50, 56 [noting, inter alia, that *defense counsel* brought up fact defendant did not testify in finding no ***Griffin*** error].)

14. Does a Prosecutor Commit *Griffin* Error by Arguing that Defendant Had a Chance to Hear All the Other Witnesses Testify and Tailor his Own Testimony Based on What the Witnesses Said? No.

The rule of ***Griffin*** is not violated by cross-examining defendant about and commenting upon fact that defendant was in the courtroom and was able to listen to all the other witnesses before he testified. (***Portuondo* v. *Agard*** (2000) 529 U.S. 61, 65-66.)

It does not make a difference that comments on defendant's ability to hear the other witnesses and tailor his testimony were made during closing argument, rather than during cross-examination. That is, the prosecutor does not have to cross-examine the defendant about tailoring his testimony in order to bring out the point in closing argument. (***Portuondo* v. *Agard*** (2000) 529 U.S. 61, 72-74.)

15. Does a Prosecutor Commit *Griffin* Error by Commenting Upon Defendant's Off-Stand Courtroom Demeanor (i.e., Non-Testimonial Courtroom Behavior)? Possibly.

As a practical matter, the court cannot control the way jurors perceive and evaluate defendants. However, the non-testimonial behavior or demeanor of a defendant while in the courtroom cannot be used as evidence of guilt. (***People* v. *Prince*** (1988) 203 Cal.App.3d 848, 854-856; ***People* v. *Garcia*** (1984) 160 Cal.App.3d 82, 92-93.) "[C]omment during the guilt phase of a capital trial on a defendant's courtroom demeanor is improper . . . unless such comment is simply that the jury should ignore a defendant's demeanor." (***People* v. *Boyette*** (2002) 29 Cal.4th 381, 434.)

In criminal trials of guilt, prosecutorial references to a non-testifying defendant's demeanor or behavior in the courtroom have been held improper on three grounds: "(1) Demeanor evidence is cognizable and relevant only as it bears on the credibility of a witness and where a defendant does not testify, his credibility is not in issue. (2) The ***prosecutorial comment infringes on the defendant's right not to testify***. (3) Consideration of the defendant's behavior or demeanor while off the stand violates the rule that criminal conduct cannot be inferred from bad character." (***People* v. *Boyette*** (2002) 29 Cal.4th 381, 434; ***People* v. *Heishman*** (1988) 45 Cal.3d 147, 197, emphasis added; **see also *United States* v. *Schuler*** (9th Cir.1987) 813 F.2d 978, 981-982 [prosecutorial comments about a non-testifying defendant's courtroom behavior may violate the defendant's Fifth Amendment right not to testify].)

A common argument made by prosecutors is to ask the jury not to confuse the image of the defendant as displayed in the courtroom (i.e., quiet, behaved, nonaggressive, etc.,) with how the defendant must have appeared or acted during the commission of the charged crime. This may be viewed as simply no more than properly asking the jury to ignore defendant's courtroom demeanor. (**See *People* v. *Cummings*** (1993) 4 Cal.4th 1233, 1301 [***Griffin*** rule is not violated by asking the jury to judge a non-testifying defendant as he was portrayed by the evidence, rather than by his courtroom appearance].) Prosecutors must be careful in how this argument is presented, however.

In ***People* v. *Boyette*** (2002) 29 Cal.4th 381, the prosecutor said ""[Defendant is a very] remorseless, cold-blooded individual.... Remember, appearances can be very deceiving and he's been working on you. He has been working on you, watching you come and go, smiling and waving when he's introduced to you. Appearances, ladies and gentlemen, can be very deceiving." (***Id***. at p. 434.) The ***Boyette*** court held that "to the extent [the prosecutor] was simply urging the jury to disregard defendant's demeanor, there was no misconduct" but "[t]o the extent she was instead suggesting that the jury should find defendant was duplicitous based on his courtroom demeanor, she committed misconduct." (***Ibid***.)

In ***People* v. *Vance*** (2010) 188 Cal.App.4th 1182, the court held that a prosecutor's remarks about "the defendant's appearance throughout this trial" being "extremely deceiving" what with "the defendant … sitting there looking like a pitiful excuse for a human being" were at best, imprudent, because "comment during the guilt phase of a capital trial on a defendant's courtroom demeanor is improper." (***Id***. at p. 1201.)

However, a defendant's courtroom demeanor or behavior may sometimes be relevant on an issue other than guilt and thus "comment on courtroom demeanor may be proper under some circumstances." (***People* v. *Edelbacher*** (1989) 47 Cal.3d 983, 1031; **see e.g**., ***People* v. *Valencia*** (2008) 43 Cal.4th 268, 307-308 [proper to consider defendant's courtroom demeanor in penalty phase of capital trial]; ***People* v. *Navarette*** (2003) 30 Cal.4th 458, 516 [comment during penalty phase closing argument on defendant angrily pointing finger at prosecutor permissible]; ***People* v. *Coddington*** (2000) 23 Cal.4th 529, 613 [proper for prosecutor to ask expert about defendant's behavior in courtroom to show defendant was a "con man" in sanity phase]; ***People* v. *Prince*** (1988) 203 Cal.App.3d 848, 854-856 [proper for prosecutor to ask jurors to consider defendant's demeanor at counsel table in determining whether defendant was competent].)

Moreover, if a witness on the stand testifies to a defendant's relevant off-stand, but in-court, behavior or demeanor (i.e., "a finger across the throat" gesture), it may be commented upon because it is now in evidence. This makes sense since the primary concern of the court with prosecutorial comment on off-stand demeanor is that the jury may not have seen the behavior and the defense had no chance to cross-examine about whether it occurred. (**See *People* v. *Manson*** (1976) 61 Cal.App.3d 102, 156 [testimony establishing a defendant's attempt to intimidate a witness while she is testifying is relevant evidence]; ***United States* v. *Gatto*** (3rd Cir. 1993) 995 F.2d 449, 455-456 [prosecution may discuss in closing argument a witness' testimony that he had received intimidating looks from a defendant before and during the time the witness was on the stand in order to show consciousness of guilt and to explain the witness' reluctance to give information on direct and eagerness to agree with defense on cross]; ***United States* v. *Mickens*** (2nd Cir. 1991) 926 F.2d 1323, 1329 [testimony of prosecution witness that defendant made hand gesture in the shape of a gun as witness entered courtroom to testify was admissible to prove consciousness of guilt, albeit not the bad character of the defendant]; ***United States* v. *Maddox*** (6th Cir. 1991) 944 F.2d 1223, 1229-1230 [witness permitted to testify that defendant mouthed in-court threat to her during break in testimony].)

Finally, if the prosecutor's comment on a defendant's off-stand demeanor is made in a trial where the defendant has testified, at least one of the reasons for finding such comment improper (i.e., that prosecutorial comment impinges on the defendant's Fifth Amendment right not to testify) is obviated. (**See *People* v. *Edelbacher*** (1989) 47 Cal.3d 983, 1031; ***Allen* v. *Woodford*** (9th Cir. 2005) 395 F.3d 979, 997.)

16. Does a Prosecutor Commit *Griffin* Error by Noting the Defendant Will Testify in His Opening Statement if Defense Counsel Has Promised Defendant Would Testify?

In ***People* v. *Powell*** (2018) 6 Cal.5th 136, the defendant was tried in conjunction with two other defendants – albeit in front of separate juries. During pretrial proceedings, defense counsel repeatedly stated that defendant would be testifying in the prosecution's case-in-chief against the co-defendants. Based on these promises, the prosecutor in his opening statement to both juries said the defendant would be testifying. However, the defendant did not ultimately testify. (***Id***. at pp. 144-145, 150.) The trial court instructed the jury that statements by counsel are not evidence, and a defendant's failure to testify is not to be considered during deliberations. It also gave an instruction, approved by defendant's counsel, that "any references in the prosecutor's opening statement concerning the expected content of the testimony of the defendant is to be disregarded and not enter into your deliberations in any way. (***Id***. at p. 151.) On appeal, the defendant claimed the prosecutor's "false promise" of his testimony invited the jury to draw an adverse inference from his silence and amounted to ***Griffin*** error. Defendant also claimed it was a violation of his rights to due process and a fair trial and the trial court should not have allowed the prosecutor to mention defendant's potential testimony during opening statements. (***Ibid***.) However, the California Supreme Court rejected all these arguments, finding "any error was invited by the defense's calculated strategy to have defendant testify during the prosecutor's case-in-chief" and that, in fact, the prosecutor made no comment on defendant's failure to testify. Rather, the court said the prosecutor simply "adopted the defense's representation of the expected testimony. That choice cannot be deemed misconduct or court error in light of defense counsel's repeated assurances that their client intended to take the stand and their decision not to object to the opening statement." (***Ibid***.)

17. Does a Prosecutor Commit *Griffin* Error by Noting the Failure of the Defense to Present Evidence to Support What Defense Counsel Said Would Be Shown in Opening Statement?

A prosecutor is permitted to refer in closing argument to defense counsel's opening statement and to note the failure of the defense to present evidence to support the outline counsel had drawn of the defendant's case. (***People* v. *Harris*** (1989) 47 Cal.3d 1047, 1085, fn. 19.)

Moreover, in ***Lockett* v. *Ohio*** (1978) 438 U.S. 586, the High Court rejected a claim that a prosecutor committed ***Griffin*** error by repeatedly referring to the State's evidence as "unrefuted" and "uncontradicted" where defense counsel "had clearly focused the jury's attention on her silence, first, by outlining her contemplated defense in his opening statement and, second, by stating to the court and

jury near the close of the case, that [defendant] would be the 'next witness.'" (***Id***. at p. 595.) The Court stated, "When viewed against this background, it seems clear that the prosecutor's closing remarks added nothing to the impression that had already been created by [defendant's] refusal to testify after the jury had been promised a defense by her lawyer and told that [defendant] would take the stand." (**Ibid**.)

There are some cases indicating that it is permissible to comment on the fact defense counsel made unfulfilled promises in opening statement about defendant testifying and/or would produce evidence regarding defendant's state of mind. (**See e.g**., ***State* v. *Dollens*** (Mo. Ct. App. 1994) 878 S.W.2d 875, 877 [prosecutor's comment that there may be reasons why defendant did not take the stand was a fair response to defendant's opening statement in which his counsel told the jury defendant would take the stand and then proceeded to outline the details of defendant's testimony for the jury]; ***Eastman* v. *State*** (Md. Ct. Spec. App. 1980) 422 A.2d 41, 42 [proper for prosecutor to comment to jury that the defense attorney told them that the defendant did not know where he was but "[n]o evidence has come from the stand on that"].) But it remains risky to directly comment on defendant's failure to take the stand – even when the defense counsel has stated the defendant would testify in opening statement. (**See *State* v. *Gladue*** (Mont. 1984) 677 P.2d 1028, 1030-1032 [prejudicial error for prosecutor to comment on defendant's failure to testify notwithstanding promise of defense counsel in opening statement defendant would testify; and distinguishing ***Lockett*** on ground prosecutor in ***Lockett*** only stated the evidence was unrefuted and uncontroverted – not that defendant failed to testify]; ***State* v. *Busey*** (Mo. Ct. App. 2003) 143 S.W.3d 6, 13 [defense counsel's comments during voir dire and his opening statement that he "anticipated" that defendant would testify did not constitute a sufficiently specific commitment that defendant would testify, and thus, defendant did not invite the closing argument comments of the prosecution concerning defendant's failure to testify].)

18. Is it *Griffin* Error for the Prosecution to Comment on a Defendant's Lack of Remorse in the Penalty Phase of a Capital Case?

Calling attention to the fact that defendant has never expressed remorse for a crime is not ***Griffin*** error. (**See *People* v. *Spencer*** (2018) 5 Cal.5th 642, 687 [no ***Griffin*** error where prosecutor commented defendant's trial counsel "won't be able to point to any remorse on the part of his client for what he has done, because there is none here before you" and noting that defendant did not say anywhere in his statement "that he's sorry for what he's done"]; ***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1174 "The prosecutor did not comment that defendant had failed to take the stand to express remorse; he simply said there was no evidence that defendant had ever expressed remorse. We have consistently found such penalty phase argument permissible under ***Griffin*** ...." (some italics

omitted)]; ***People* v. *Brady*** (2010) 50 Cal.4th 547, 585 [similar]; **see also *People v. Houston*** (2012) 54 Cal.4th 1186, 1223 [no ***Griffin*** error to comment on fact defendant cried while off the stand but not when there was a discussion about the victims].)

19. Is it *Griffin* Error as to a Non-testifying Codefendant to Examine a Testifying Codefendant About *His* Decision to Testify?

In ***People* v. *Holmes*** (2022) –5th— [2022 WL 277043], one of three co-defendants testified. On cross-examination the prosecutor questioned the testifying co-defendant about his decision to testify. Specifically, after the co-defendant testified the prosecution witnesses were lying and he was telling the truth, "the prosecutor challenged this assertion by asking whether [the testifying co-defendant] would 'get up there and admit it' if he had killed the victims." (***Id***. at p. *14.) Afterwards, the jury was instructed a defendant has a right not testify and may rely on the state of the evidence. (***Ibid***.) The defendant claimed the cross-examination amounted to comment on defendant's own silence. However, the court held that the "question related to [the co-defendant's] own credibility and was not an impermissible commentary on the [other defendants'] silence." (***Ibid***.)

20. Is it *Griffin* Error When Counsel for One Defendant Comments on the Failure of a Co-defendant to Take the Stand?

In a joint trial, comment by an attorney representing one defendant on the silence of a co-defendant violates the co-defendant's constitutional right to freedom from adverse comment on his silence at trial in violation of the ***Griffin*** rule. (***People* v. *Bryant*** (2014) 60 Cal.4th 335, 387; ***People* v. *Hardy*** (1992) 2 Cal.4th 86, 153, 157**; see also *People* v. *Estrada*** (1998) 63 Cal.App.4th 1090, 1103 [error for co-counsel to comment on fact co-defendant declined to testify when called as a witness by co-counsel at preliminary hearing and, in conjunction with severe misconduct by co-counsel in other areas, required reversal]; ***United States* v. *Moreno-Nunez* (**9th Cir. 1979) 595 F.2d 1186, 1187 ["We have more than once ruled that comment on a defendant's failure to testify, whether by the prosecutor, the court, or a codefendant, is improper."].) "This rule also binds defendants acting as their own counsel." (***People* v. *Bryant*** (2014) 60 Cal.4th 335, 387.)

Just like with a prosecutor, where a co-counsel commits ***Griffin*** error, reversal is required unless error is harmless beyond a reasonable doubt. However, ***Griffin*** error by the co-counsel may be less damaging than similar ***Griffin*** error committed by a prosecutor. Thus, a comment alluding to the silence of a defendant that would require reversal if made by a prosecutor may be deemed harmless - or not even error - if made by a co-defendant's attorney. (***People* v. *Hardy*** (1992) 2 Cal.4th 86, 153, 157 [holding co-counsel's statement that "If you know a man has nothing to hide, he gets up on that witness

stand and tells you what's on his mind" was not necessarily error but even assuming error, it was harmless error]; **see also *United States* v. *Patterson*** (9th Cir. 1987) 819 F.2d 1495, 1506 [improper, but not reversible error, for defense counsel to state his client was "different than the other defendants in this case" because, in contrast to the codefendants, "he has taken the stand and faced his accusers"]

Counsel for one defendant may emphasize to the jury that his defendant's credibility is strong because he took the stand and submitted to cross- examination, so long as there is no indirect comment on the failure of the co-defendant to take the stand. (***People* v. *Hardy*** (1992) 2 Cal.4th 86, 153, 158.)

21. Is it *Griffin* Error When a Witness Comments on Defendant's Failure to Testify?

In ***People* v. *Noriega*** (2015) 237 Cal.App.4th 991, a child molestation victim was asked by the prosecutor why she decided to testify that the defendant had sex with her even though she had only previously claimed defendant inappropriately touched her. The victim replied, "Because I just don't like the fact that he knows what he did. It wasn't just me, it was also my sister. *And he still wants to sit here and deny everything*." (***Id***. at p. 1002, emphasis added.) On appeal, the defendant argued this was error and cited to two federal decisions holding a witness' comment on a defendant's failure to testify is ***Griffin*** error: ***United States* v. *Sylvester*** (5th Cir.1998) 143 F.3d 923, 929 and ***United States* v. *Rocha*** (5th Cir.1990) 916 F.2d 219, 232.) Nevertheless, the ***Noriega*** court declined to follow those cases and refused "to extend ***Griffin*** beyond its plain language to include a witness's testimony." (***Noriega*** at p. 1003.)

22. If *Griffin* Error When a Judge Comments on a Defendant's Failure to Testify?

The rule of ***Griffin*** prohibits "comment on a defendant's silence by the trial judge." (***People* v. *Thompson*** (2016) 1 Cal.5th 1043, 1117 citing to ***People* v. *Morris*** (1988) 46 Cal.3d 1, 35 ["Under the rule in ***Griffin***, error is committed whenever the prosecutor ***or the court*** comments, either directly or indirectly, upon defendant's failure to testify." (italics added)] and ***People* v. *Medina*** (1995) 11 Cal.4th 694, 755 [same].)

In ***People* v. *Thompson*** (2016) 1 Cal.5th 1043, after the defendant's final witness had finished his testimony, and still in the jury's presence, defense counsel stated: "Except for the remaining witnesses we discussed, we rest." The trial court then asked: "You are resting without calling your client?" Defense counsel then replied: "Yes, sir." At sidebar, counsel moved for a mistrial, claiming the court made a prohibited comment on defendant's right to remain silent. (***Id***. at p. 1117.) The California

Supreme Court observed that "by expressing surprise at defendant's silence, the court's comment—which we assume was audible to the jury—may have inadvertently communicated to the jury that it should (or may) consider defendant's silence as evidence of her guilt. Such a message would have trenched on defendant's constitutional right to remain silent." (***Id.*** at p. 1118.) Moreover, the court recognized that since the comment came from the trial judge "it stands to reason that jurors would assign more weight to a judge's remark than that of a prosecutor." (***Ibid.***) Nevertheless, the court found the error to be harmless in light of being a single short query that did not directly suggest the jury should draw an inference of guilt from defendant's decision not to testify and because the jury was instructed it could not draw such an inference from the defendant's failure to testify. (***Ibid.***)

23. If *Griffin* Error Occurs, Must a Mistrial Be Granted?

If ***Griffin*** error occurs, it need not necessarily result in a mistrial. (**See *People* v. *Carter*** (2005) 36 Cal.4th 1215, 1201, fn. 41; ***People* v. *Vargas*** (1973) 9 Cal.3d 470, 476-481.)

If a prosecutor's remarks are inadvertent or ambiguous, the need for a mistrial may be avoided if, among other things, the jury is instructed that the defendant has a right not to testify.

The CALJIC instructions that may be given are CALJICS 2.60 and 2.61:

"A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way." (CALJIC 2.60)

"In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against [him] [her]. No lack of testimony on defendant's part will make up for a failure of proof by the People so as to support a finding against [him] [her] on any essential element." (CALJIC 2.61.)

The CALCRIM instruction that may be given is CALCRIM 355:

"A defendant has an absolute constitutional right not to testify. He or she may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt. Do not consider, for any reason at all, the fact that the defendant did not testify. Do not discuss that fact during your deliberations or let it influence your decision in any way."

It should not be given as a remedy if the defense objects. The Bench note to CALCRIM 355 states, inter alia, "The United States Supreme Court has held that the court may give this instruction over the defendant's objection (***Lakeside* v. *Oregon*** (1978) 435 U.S. 333, 340-341, but as a matter of state judicial policy, the California Supreme Court has found otherwise. (***People* v. *Roberts*** (1992) 2

Cal.4th 271, 314 ["[T]he purpose of the instruction is to protect the defendant, and if the defendant does not want it given the trial court should accede to that request, notwithstanding the lack of a constitutional requirement to do so."].)

Albeit, in a co-defendant case, where one defendant wishes the instruction to be given and the other does not, the instruction should be given. (**See *People* v. *Daveggio*** (2018) 4 Cal.5th 790 [231 Cal.Rptr.3d 646, 701].) This is because the state-law holding that courts should honor requests to omit CALJIC No. 2.60 does not displace the *federal constitutional right* to a no-adverse-inference instruction. (***Ibid***.)

24. When Will *Griffin* Error Be Reversible Error?

Whether a case should be reversed on the grounds of ***Griffin*** error is assessed under the standard of prejudice set forth in ***Chapman* v. *California*** (1967) 386 U.S. 18. That is, ***Griffin*** error is reversible error unless it is deemed harmless beyond a reasonable doubt. (***United States* v. *Hasting*** (1983) 461 U.S. 499, 507-509; ***People* v. *Hardy*** (1992) 2 Cal.4th 86, 154.) The determination must be based on the reviewing court's "own reading of the record and on what seems to us to have been the probable impact of the . . . (errors) on the minds of an average jury." (***People* v. *Vargas*** (1973) 9 Cal.3d 470, 478.)

In order for ***Griffin*** error to be found to be prejudicial under the ***Chapman*** standard, "the improper comment or instruction must either 'serve to fill an evidentiary gap in the prosecution's case,' or 'at least touch a live nerve in the defense . . .'" (***People* v. *Vargas*** (1973) 9 Cal.3d 470, 478; ***People v. Regan*** (1979) 95 Cal.App.3d Supp. 1, 7.)

If the prosecutor's comments that are challenged as ***Griffin*** error are "ambiguous," reviewing courts will look at "whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (***People* v. *Carr*** (2010) 190 Cal.App.4th 476, 484, citing to ***People* v. *Prieto*** (2003) 30 Cal.4th 226, 260; **see also *People* v. *Caldwell*** (2013) 212 Cal.App.4th 1262, 1273 citing to ***People* v. *Roybal*** (1998) 19 Cal.4th 481, 514.)

In assessing whether ***Griffin*** error is reversible, courts will also look to (1) the extent to which the comment itself might have increased the jury's inclination to treat the defendant's silence as an indication of his guilt; and (2) whether the jury was promptly admonished and fully informed that no adverse inferences were to be drawn from defendant's silence. (***People* v. *Vargas*** (1973) 9 Cal.3d 470, 478; **see also *United States v. Inzunza*** (9th Cir. 2011) 638 F.3d 1006, 1022 [noting the Ninth Circuit has been reluctant to reverse "where the prosecutorial comment was a single isolated statement, where it did not stress any reference to guilt, and where it was followed by curative instructions"].)

The fact a comment was brief and indirect makes it less likely the error will be deemed reversible error. "Indirect, brief and mild references to a defendant's failure to testify, without any suggestion that an inference of guilt be drawn therefrom, are uniformly held to constitute harmless error. (***People* v. *Thompson*** (2016) 1 Cal.5th 1043, 1118; ***People* v. *Monterroso*** (2004) 34 Cal.4th 743, 770; ***People* v. *Boyette*** (2002) 29 Cal.4th 381, 455-456; ***People* v. *Bradford*** (1997) 15 Cal.4th 1229, 1340; **see also *People* v. *Denard*** (2015) 242 Cal.App.4th 1012, 1022 ["Our Supreme Court has held most indirect ***Griffin*** error—where the prosecutor's remarks contain no references, express or implied, to defendant's silence—to be harmless"]; **cf.**, ***People* v. *Guzman*** (2000) 80 Cal.App.4th 1282, 1288-1289 [stating harmless error standard can be met when "the evidence of guilt is overwhelming and the constitutional error is minor" but finding error prejudicial considering prosecutor repeatedly highlighted fact victim testified and emphasized holes in the defense case that only the defendant could fill]; ***People* v. *Glass*** (1975) 44 Cal.App.3d 772, 780 [noting that where there is little evidence of guilt, even a brief and indirect comment can serve to fill an evidentiary gap].)

It is assumed the jury will follow an instruction given by the court. (***People* v. *Thompson*** (2016) 1 Cal.5th 1043, 1118; ***People* v. *Seumanu*** (2015) 61 Cal.4th 1293, 1336.)

If a defense counsel does not object to a prosecutor's comment upon defendant's failure to take the stand, the claim of ***Griffin*** error will be forfeited. (**See *People* v. *Sanchez*** (2014) 228 Cal.App.4th 1517, 1525 citing to ***People* v. *Morales*** (2001) 25 Cal.4th 34, 43–44.) However, when the issue on appeal involves a question of law which affects the substantial rights of the defendant such as whether a defendant's Fifth Amendment right has been violated, "a reviewing court may, in its discretion, decide to review a claim that has been or may be forfeited for failure to raise the issue below." (***People* v. *Sanchez*** (2014) 228 Cal.App.4th 1517, 1525 citing to ***In re Sheena K.*** (2007) 40 Cal.4th 875, 887, fn. 7.) Moreover, failure to object to ***Griffin*** error, may still provide a basis for an ineffective assistance of counsel claim. (**See *People* v. *Castaneda*** (2011) 51 Cal.4th 1292, 1333-1334.)

V. CAN A PROSECUTOR COMMENT ON DEFENDANT'S NONTESTIMONIAL CONDUCT?

The prosecution may introduce evidence of (and comment upon) the nontestimonial actions of a defendant, such as refusal to provide exemplars, participate in line-ups, etc., to show consciousness of guilt in the case-in-chief without violating the Fifth Amendment right to silence or Sixth Amendment right to counsel. (**See *People* v. *Collie*** (1981) 30 Cal.3d 43, 55, fn. 7 [the self-incrimination privilege is "inapplicable to, and allow[s] mandatory production of, nontestimonial evidence such as fingerprints, blood samples, breath samples, appearances in line-ups, and handwriting and voice exemplars."]; ***People* v. *Clark*** (1993) 5 Cal.4th 950, 1003 [refusal to provide handwriting exemplar]; ***People* v. *Tai***

(1995) 37 Cal.App.4th 990, 998 [comment upon defendant's efforts to disguise his handwriting on an exemplar]; ***People* v. *Ellis*** (1966) 65 Cal.2d 529, 536–539 [refusal to provide voice sample]; **see also *United States* v. *Francois*** (1st Cir.2013) 715 F.3d 21, 32 [flight, hiding, or resisting arrest may be admissible as evidence of consciousness of guilt in any phase of trial]; ***Smith* v. *State*** (Tex. App. 2001) 65 S.W.3d 332, 339 [where defense promised to show jury injured leg of defendant but did not, prosecutor entitled to comment upon failure to produce *non-testimonial* evidence of injured leg].)

VI. CAN A PROSECUTOR COMMENT ON A DEFENDANT'S EXERCISE OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL OR OTHER CONSTITUTIONAL RIGHTS?

Although the holding in ***Griffin*** was premised in large part on the *Fifth* Amendment privilege against self-incrimination (**see** this IPG, section IV-1 at p. 59), the California Supreme Court had held it is improper to comment upon the fact that a defendant has exercised his *Sixth* Amendment right to counsel. In so finding, the ***Bryant*** court relied on language in ***Griffin*** to find that "[g]uilt cannot be inferred from the reliance on a constitutional right. Imposing a penalty for its exercise undermines that right 'by making its assertion costly.'" (***People* v. *Bryant*** (2014) 60 Cal.4th 335, 387 [citing to ***Griffin* v. *California*** (1965) 380 U.S. 609, 614]; **see also *Bruno* v. *Rushen*** (9th Cir. 1983) 721 F.2d 1193, 1194 [noting that the mere act of hiring an attorney is not probative in the least of the guilt or innocence of defendants].)

Editor's note: The issue actually arose in ***People* v. *Bryant*** (2014) 60 Cal.4th 335 based on the conduct of a self-represented co-defendant who stated that he was representing himself because he believed that doing so was "the best way to get to the truth." He also mentioned that, although he had the right to refrain from presenting a defense, he had chosen to give up his right to remain silent, so he could testify to establish his innocence. (***Id***. at pp. 386-387.) The other co-defendants argued these comments improperly invited the jury to draw a negative inference from their having exercised their constitutional rights to be represented by counsel and the right not to testify." (***Id***. at p. 387.) The ***Bryant*** court rejected this argument, noting that (i) not every comment that might "possibly be interpreted as a reference to the defendant's failure to testify" violates the ***Griffin*** rule; and (ii) "in a joint trial a defendant's individual right to present a vigorous defense may justify making arguments that could seem to implicate the other defendants' constitutional rights, even though similar comments would be improper had they been made by a prosecutor[.]" (***Id***. at p. 387.)

1. Is it Error to Comment on a Defendant's Request to Speak with Counsel When Neither the Fifth Amendment Nor the Sixth Amendment Right to Counsel Has Attached?

Sometimes the police contact someone in a *noncustodial* situation *before any charges have been filed* and ask to speak to him about a crime. At the time of contact, the person may simply be viewed by the police as a witness or potential suspect. For example, the person contacted may be the husband of missing spouse whom the police want to question about the circumstances of the disappearance. And it is only much later that the spouse turns up dead and evidence linking the husband to the murder is uncovered.

If, at the time of initial contact, the husband tells the police he would like to speak to an attorney but then continues to talk to the police, and the husband is later charged with the murder, can the prosecution introduce the fact the suspect initially requested an attorney? And does it matter, if, instead of speaking with the police, the husband declines to speak at all outside the presence of an attorney?

The Fifth Amendment right to counsel does **not** attach when the police merely seek to interview a suspect in a non-custodial situation. (**See *People* v. *Beltran*** (1999) 75 Cal.App.4th 425, 432 ["to be effective, a suspect's invocation of his or her Fifth Amendment right to counsel must be asserted at the point when the suspect is in custody and interrogation by the police has begun"].) Similarly, the Sixth Amendment right to counsel does not attach when the police merely seek to interview a suspect before charges have been filed. (**See *Rothgery* v. *Gillespie County, Tex***. (2008) 554 U.S. 191, 198 ["The Sixth Amendment right to the assistance of counsel "is limited by its terms: 'it does not attach until a prosecution is commenced.'"].) There is no constitutional right to an attorney during a pre-charging non-custodial interview. And while comment upon the exercise of a constitutional right is generally prohibited, there should be no legal barrier to commenting upon the fact that a defendant requested counsel before he was charged or was about to undergo custodial interrogation. (**Cf.**, ***People* v. *Huggins*** (2006) 38 Cal.4th 175, 198 [the reasoning of ***Doyle*** forbidding comment upon a defendant's exercise of his right to silence *after being arrested and given the Miranda warnings* extends to comments on a defendant's exercise of his right to counsel].)

There does not appear to be any court that has expressly held there is any *federal* constitutional "right" to an attorney at *any* time. Indeed, the law is to the contrary. (**See *People* v. *Nguyen*** (2005) 132 Cal.App.4th 350, 356 [defendant cannot assert Fifth Amendment right to counsel anticipatorily; assertion of right must come during custodial interrogation or when custodial interrogation is impending or imminent]; ***People* v. *Avila*** (1999) 75 Cal.App.4th 416, 421 [citing to footnote in ***McNeil* v. *Wisconsin*** (1991) 501 U.S. 171, 182, fn. 3 stating "[w]e have in fact never held that a person

can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation'"]; ***United States* v. *Wright*** (9th Cir.1992) 962 F.2d 953, 956 [holding ***Miranda*** rights may not be invoked in advance outside the custodial context]; ***People* v. *Rogers*** (Colo. App. 2002) 68 P.3d 486, 492 [no constitutional right to counsel in noncustodial pre-charging circumstance].) Nor has any California court held such a right exists under the California state constitution. And where there is no right to counsel, a person's request to speak to any attorney in pre-charging, noncustodial circumstances **should** be fair game for comment.

In ***Meek* v. *Martin*** (E.D. Okla. 2020) 450 F.Supp.3d 1232, the defendant was a suspect in his wife's disappearance. He gave investigators at least three versions of what he did immediately before his wife's disappearance. In the final pre-arrest, pre-Mirandized interview, the defendant ended the interview by saying he did not want to talk to the officer anymore and requested an attorney. (***Id***. at p. 1255.) At trial, defendant testified in his own behalf, his testimony generally comported with the pre-arrest statement he provided in the final interview, i.e., that his wife had wanted to leave him and he had nothing to do with her appearance. (***Id***. at pp. 1256-1257.) Under these circumstances, the court held that eliciting the fact defendant said he needed an attorney before speaking further with law enforcement "impeached his testimony that he was completely innocent in his wife's disappearance," and there was no violation of defendant's Fifth Amendment rights. (***Id***. at p. 1257.) In support of this opinion the ***Meek*** court cited to an earlier pre-***Salinas*** opinion ***United States* v. *Watters*** (10th Cir. 2007) 237 F. App'x 376, 381-382, which held it was proper for the prosecution to question the defendant about contacting an attorney before contacting the police after he learned a search warrant had been executed on his property where the defendant raised the defense that someone else occupied property where guns and drugs were found. (***Meek*** at p. 1257.)

That said, there are number of cases from other jurisdictions indicating that comment upon the fact the defendant sought counsel **is improper**- at least if seeking counsel is used for the purposes of establishing consciousness of guilt. In ***State* v. *Angel T***. (Conn. 2009) 973 A.2d 1207, the Connecticut Supreme Court stated: "the vast majority of the federal and state courts . . . that have considered this issue have . . . concluded that prosecutors may not suggest that a defendant's retention of counsel is inconsistent with his or her innocence." (***Id***. at p. 1218.) The ***Angel T.*** court observed that some of these courts base their conclusion on the defendant's rights to counsel under the federal Fifth or Sixth Amendment right to counsel (***id***. at p. 1219 [and listing numerous decisions], while other courts "base this same conclusion on the more generalized guarantees of a fair trial implicit in the due process clause of the fourteenth amendment to the United States constitution" (***id***. at p. 1220 [and listing numerous decisions]). The ***Angel T.*** court recognized that neither the Sixth Amendment nor the Fifth Amendment right to counsel is implicated when the request for counsel is made in a non-custodial pre-charging context. (***Id***. at p. 1221.) However, the ***Angel*** court agreed that "a prosecutor

violates the ***due process clause of the fourteenth amendment*** when he or she elicits, and argues about, evidence tending to suggest a criminal defendant's contact with an attorney prior to his arrest." (***Id***. at p. 1220.) "[T]his prohibition necessarily is founded in the fourteenth amendment due process assurances of a fair trial under which proscriptions on prosecutorial impropriety are rooted generally." (***Ibid*; see also *State* v. *Mucha*** (Conn. App. Ct. 2012) 47 A.3d 931, 947 [improper to argue defendant's attempts to secure legal representation when he was asked to take a Breathalyzer test were indicative of guilt by rhetorically asking jury: "if he was sober, why would he need an attorney?"]; ***United States ex rel. Macon* v. *Yeager*** (3rd Cir. 1973) 476 F.2d 613, 615–616 [defendant's Sixth Amendment right to counsel is violated when a prosecutor asks the jury during closing arguments if an innocent man would have consulted with an attorney the day after a murder]; ***Bruno* v. *Rushen*** (9th Cir.1983) 721 F.2d 1193, 1194–1195 [a defendant's due process right to a fair trial under the Fourteenth Amendment is violated when a prosecutor suggests the defendant's retention of an attorney is probative of guilt"].)

It is worthwhile noting also a line of cases from Massachusetts that indicates commenting on a request to counsel for the purpose of drawing an inference of guilt is improper under ***that state's*** constitution. (**See *Commonwealth* v. *Thompson*** (Mass. 2016) 50 N.E.3d 845, 863 ["Massachusetts cases establish that, *at least under the State Constitution*, even prearrest, non-Mirandized invocations of the rights to silence *or counsel* should not be used to argue consciousness of guilt before the jury and should not even be introduced as evidence at trial because of the risk that the jury will draw" an adverse inference of guilt from the invocation, emphasis added]; ***Commonwealth* v. *Nolin*** (Mass. 2007) 859 N.E.2d 843 ["the due process protection embodied in the prohibition against arguing guilt from a defendant's decision to consult a lawyer extends beyond the police interrogation context"]; ***Commonwealth* v. *Person*** (Mass. 1987) 508 N.E.2d 88, 91 ["A defendant's decision to consult an attorney is not probative in the least of guilt or innocence, and a prosecutor may not 'imply that only guilty people contact their attorneys.'"].) The Massachusetts cases even suggest that that the state Constitution prohibits the admission of evidence concerning a defendant's failure to meet with law enforcement officers when requested. (**See *Commonwealth* v. *Thompson*** (Mass. 2016) 50 N.E.3d 845, 863 [and cases cited therein].) For example, in ***Thompson***, the court held the state Constitution required redaction of references "addressing the defendant's failure to meet with police, her desire to have counsel, and her desire to assert her right not to say anything to the police" from a voice mail left with the police stating: "I feel that if I did go down there without legal representation, I just wanted to have you know an attorney there I want to be very cooperative with you and I just wanted to assert my right to not to say anything and you know if they're going to proceed with this [investigation] I guess, you know, where are we going to go from there." (***Id***. at pp. 851, 863.)

A. Request for Counsel as Tantamount to Invocation of Right to Silence in Pre-Charging/Pre-Custodial Circumstance

There does appear to be a general Fifth Amendment privilege not to speak that exists regardless of whether a refusal to speak comes before or after the defendant is charged or whether the refusal occurs before or during a custodial interrogation. (**See** this IPG, section II-1 at pp. 37-38 discussing ***Salinas* v. *Texas*** (2013) 570 U.S. 178.) Thus, *if* a suspect's request to speak with an attorney before speaking with the police is treated *as an* invocation of the *right to silence* (**cf.**, ***Combs* v. *Coyle*** (6th Cir. 2000) 205 F.3d 269, 279 [defendant's "Talk to my lawyer" is "best understood as communicating a desire to remain silent outside the presence of an attorney"]), then the analysis of whether the request to speak to an attorney in a pre-charging non-custodial situation is going to be very similar to the analysis of whether the request to remain silent in that circumstance may be commented upon. (**See** this IPG, section II at pp. 37-48 [Pre-Arrest/Pre-*Miranda* Silence].)

Of course, an invocation of the Fifth Amendment privilege against self-incrimination must be unambiguous in order to be protected. (**See *Salinas* v. *Texas*** (2013) 570 U.S. 178, 181, 188-191 [to obtain the benefits of the Fifth Amendment privilege (e.g., prevent a prosecutor from commenting upon or using an invocation of the privilege or silence following an invocation), the defendant must expressly assert the privilege].) And an invocation of a non-existent *right to counsel* should almost always be viewed as an *ambiguous* invocation of the *right to silence*. (**Cf.**, ***Edwards* v. *Arizona*** (1981) 451 U.S. 477, 480, fn. 6 [defendant's "request for an attorney to assist him in negotiating a deal was 'sufficiently clear' *within the context of the interrogation* that it 'must be interpreted as a request for counsel and as a request to remain silent until counsel was present.'", emphasis added by IPG.) Whether a request for counsel will be treated as an invocation of the right to silence may turn on whether the request is followed by silence or by a comment making it apparent that the request to speak with an attorney is really a request to remain silent.

2. Is it "*Griffin*" or "*Doyle*" Error to Comment on a Defendant's Exercise of a Constitutional Right?

It is generally improper to comment upon a defendant's valid exercise of a constitutional right, including the right to refuse to consent to a search and the right to a jury trial. (**See** the 2022-IPG-52 ["Staying within the Circle of Permissible Opening Statement and Closing Argument"] at section II-Z at pp. 100-102.)*

Editor's note: That IPG is accessible on the "L" Drive to Santa Clara County prosecutors and is available to IPG electronic subscribers upon request.

Neither *Griffin* nor *Doyle* expressly prohibit comment on the exercise of a constitutional right other than the Fifth Amendment right to silence, the Fifth Amendment right not to testify, or the Due Process right not to have an invocation induced by the *Miranda* admonition used against the defendant. However, in the unpublished case of ***People* v. *Kittrell*** (unreported) 2021 WL 5783179, the appellate court cited to a series of out-of-state opinions holding that comment on a defendant's refusal to consent to a search was impermissible. The court then described those opinions as "fundamentally an extension of what is commonly referred to as a "***Griffin*** error" or a "***Doyle*** error" in numerous California opinions." (***Id***. at p. *6.)

Editor's note: To the extent analogies can be drawn between the ***Doyle*** or ***Griffin*** line of cases, those cases can provide some guidance as to when exceptions may be made to the general rule against commenting upon the exercise of other constitutional rights. For example, if a defendant were to claim that he offered to allow officers to enter his home, the fact the defendant refused consent should be admissible to impeach that claim. (**Cf**. this IPG at section I-8-C at pp. 13-14 [prosecution may elicit fact defendant invoked right to silence when defendant seeks to create an impression he was not given the chance to explain his side of the story or had cooperated with the police].)

VII. CAN A PROSECUTOR COMMENT UPON THE FACT EVIDENCE HAS BEEN PROVIDED TO THE DEFENSE

Whether it is permissible for the prosecution to elicit and/or comment upon the fact that evidence is available for testing by the defense and/or on the fact evidence was provided to defense for testing, but the defense did not introduce the results of any testing, is largely resolved in California. (**See *People* v. *Gray*** (2005) 37 Cal.4th 168, 207-209; **see also *People* v. *Foster*** (2010) 50 Cal.4th 1301, 1356-1357.)

There are several arguments defendants make as to why such elicitation or comment is improper: (i) it violates the work-product privilege; (ii) it violates the attorney-client privilege; (iii) it violates the federal and state constitutional right to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and corollary state provisions by interfering with the attorney-client relationship; (iv) it violates the federal constitutional right to due process under the Fifth and Fourteenth Amendments by interfering with the ability to prepare and present a defense; (v) it violates the rule against commenting upon defendant's failure to testify as outlined in ***Griffin* v. *California*** (1965) 380 U.S. 609; and (vi) it shifts the burden of proof onto the defendant. (**See *People* v. *Foster*** (2010) 50 Cal.4th 1301 , 1356-1357; ***People* v. *Gray*** (2005) 37 Cal.4th 168, 207-209; ***People* v. *Zamudio*** (2008) 43 Cal.4th 327, 353-355; ***People* v. *Bennett*** (2009) 45 Cal.4th 577, 595-596.) Below we explain how courts have addressed each of those arguments.

(i) The Work Product Privilege Claim

In ***People* v. *Scott*** (2011) 52 Cal.4th 452, the prosecution asked whether a bullet (which purportedly had been fired by the defendant during an attempted murder and which was matched to a pistol belonging to the defendant) had been in the possession of a defense expert. The defendant claimed this line of inquiry violated the attorney work product privilege. The California Supreme Court held the "fact that the bullet had been in the possession of a defense expert did not implicate the attorney work product privilege." (***Id***. at p. 489.) "The mere fact that a piece of evidence was given to the defense says nothing about what the defense team did or did not do with the evidence." (***Ibid***.)

In ***People* v. *Zamudio*** (2008) 43 Cal.4th 327, a case in which a criminalist testified she provided a blood sample to the defense for testing, the California Supreme Court made it clear that, at a minimum, elicitation of such evidence would not violate the work-product privilege. The court reasoned that section 1054.6 limits what is considered work product to the definition provided in Code of Civil Procedure section 2018.030(a). That section defines work product as a "writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories." Since evidence of the fact that an item was sent by the lab to the defense for testing did not qualify as a "writing," it was not "work-product" and thus not protected by the work product privilege. (***Id***. at p. 355; **accord *People* v. *Bennett*** (2009) 45 Cal.4th 577, 595 [finding questions by the prosecutor of forensic experts as to whether evidence was available for retesting did not violate work-product privilege under same theory]; **see also *People* v. *Gray*** (2005) 37 Cal.4th 168, 207-209 [Evidence Code § 913 only prohibits comment upon and drawing of inferences from exercise of privilege and fact forensic evidence was made available to the defense does not constitute comment on the "exercise of" the work product privilege].)

The ***Zamudio*** court distinguished the case of ***People* v. *Coddington*** (2000) 23 Cal.4th 529, which had found a violation of the work product privilege where the prosecution asked defense experts whether they were aware that three other *non*testifying experts (whose names the prosecution had learned from defendant's jail visitor records) had also evaluated the defendant, on the ground that the ***Coddington*** court was interpreting the work-product privilege as it existed *before* the passage of Proposition 115].)

These above California cases establish that eliciting or commenting upon the fact evidence was provided to the defense for testing does not violate the work-product privilege. (**See also *Pope* v. *State*** (Tex. Crim. App. 2006) 207 S.W.3d 352, 354 [no violation of work-product privilege to note and argue state DNA experts had forwarded their reports to a designated defense expert and if defense expert or any other expert disagreed with the state's DNA experts, defendant would have called them to testify].)

(ii) The Attorney-Client Privilege Claim

The attorney-client privilege is "a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer." (Evid. Code, § 954.) "That privilege encompasses confidential communications between a client and experts retained by the defense." (***People* v. *Coddington*** (2000) 23 Cal.4th 529, 605, citing to Evid. Code, § 952.)

In ***People* v. *Bennett*** (2009) 45 Cal.4th 577, the prosecution asked several questions of its forensic experts regarding whether there was evidence available for retesting by the defense and whether the defense had asked for any samples for retesting. (***Id***. at pp. 593-595.) The defense argued that asking these questions violated the attorney-client privilege (Evid. Code, § 954). (***Id***. at p. 596.) The ***Bennett*** Court held that "[a]sking whether there was evidence available for retesting, and even whether the defense sought a split of the sample, did not violate the privilege." (***Id***. at p. 596.)

The ***Bennett*** Court was not confronted with the issue of whether *comment* upon the defense failure to retest would violate the attorney-client privilege. However, in support of its holding, the ***Bennett*** court cited to ***People* v. *Coddington*** (2000) 23 Cal.4th 529, a case involving both questioning *and* comment on the failure of the defense to call expert witnesses. In ***Coddington***, the prosecutor elicited evidence (*and commented upon the fact*) that the defendant had been examined by experts other than those who testified. The defendant argued that doing so violated the attorney-client privilege. The ***Coddington*** court held "[n]either evidence that [defendant] had been examined by experts other than those who testified nor evidence that the testifying experts were aware or not aware of the opinions of the nontestifying experts disclosed a confidential communication between defense counsel and [defendant] or [defendant] and any psychiatrist. Therefore, the decision of the defense to call only three of the experts who had examined [defendant] did not constitute the exercise of the attorney-client privilege and comment was not precluded by Evidence Code section 913." (***Id***. at p. 605.) Under ***Bennett*** and ***Coddington***, eliciting and/or commenting upon the fact that samples were available or provided to the defense for testing does not violate the *attorney-client* privilege.

(iii) The Claim of Interference with the Attorney-Client Relationship (i.e., the Right to Effective Assistance of Counsel Claim)

In ***People* v. *Scott*** (2011) 52 Cal.4th 452, the prosecution asked whether a bullet (which purportedly had been fired by the defendant during an attempted murder and which was matched to a pistol belonging to the defendant) had been in the possession of a defense expert. The defendant claimed this line of inquiry violated, inter alia, his right to the assistance of counsel under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. (***Id***. at p. 489.) Although the ***Scott*** case focused on rejecting defendant's claims that the question violated the work-product privilege, it also

stated the "rejection of defendant's work product claim on the merits necessarily leads to rejection of his *constitutional* claims." (***Ibid***, emphasis added by IPG.)

In ***People* v. *Gray*** (2005) 37 Cal.4th 168, the defendant claimed his trial attorney should have argued that his federal and state constitutional right to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and corollary state provisions were violated when the prosecution elicited and commented upon the availability of, or provision to the defense of, forensic evidence that was not later presented by the defense. However, the California Supreme Court did not address the issue on the merits, but simply found there was no prejudice from the failure to raise the issue. (***Id***. at p. 209; **see also *People* v. *Zamudio*** (2008) 43 Cal.4th 327, 353 [issue raised but held forfeited for failure to raise it in trial court].)

The issue was more directly confronted in the unreported decision of ***People* v. *Wilson*** 2012 WL 5928727. In ***Wilson***, the trial court ordered the police department to release the biological evidence gathered for the case to the defense, and also authorized the collection of DNA samples of the defendant for comparison purposes. (***Id***. at p. *3.) During argument, the prosecutor commended the defense counsel on conceding that the "chemistry" of the police lab testing was correct "because of course his own retesting undoubtedly proved that fact to be true. I mean, *we know he had the evidence retested*." (Italics in opinion.) Shortly thereafter, the prosecutor stated, "*I guarantee that the DNA was retested at 15 loci.*" Later, the prosecutor told the jury that it had no evidence of retesting, "but the judge has already made a ruling that I get to comment on the fact of the retest and any inferences that you can draw from that.... What that means is that *you get to know that [defense counsel] sent the DNA to be retested at a lab*." Defense counsel objected on grounds of speculation and after a sidebar conference, the prosecutor reminded the jury that there was DNA available to retesting to defense labs and then stated, "So again, I told you before, I told you the first time, the defense is not obligated to present anything to you, but you can *draw reasonable inferences about why they produced no evidence to contradict the match and [defense counsel] is conceding that the chemistry was correct*." (***Id***. at p. *5.)

The appellate court rejected defendant's claim that allowing the comment violated his right to effective assistance of counsel as a well as his claim that it violated his privilege against self-incrimination. (***Id***. at pp. *5-*7.) The case is not citeable, but, fortunately, defendant filed a habeas petition in federal court; and so now there is a *published* federal district court decision finding the California court of appeal was not contrary to or an unreasonable application of clearly established federal law. (***Wilson* v. *Knipp*** (N.D. Cal. 2015) 85 F.Supp.3d 1165, 1170 [and noting, at p. 1171, in support of its conclusion, "under Federal law, prosecutors are permitted to call attention to the defendant's failure to present exculpatory evidence."]; **see also *Pope* v. *State*** (Tex. Crim. App. 2006) 207 S.W.3d 352, 355.)

(iv) The Claim of Interference with the Ability to Prepare and Present a Defense (i.e., Due Process)

In ***People* v. *Scott*** (2011) 52 Cal.4th 452, the prosecution asked whether a bullet (which purportedly had been fired by the defendant during an attempted murder and which was matched to a pistol belonging to the defendant) had been in the possession of a defense expert. The defendant claimed this line of inquiry violated, inter alia, his right to a fair trial. (***Id***. at p. 489.) Although the ***Scott*** case focused on rejecting defendant's claims that the question violated the work-product privilege (**see** this IPG, section VII at p. 90, it also stated the "rejection of defendant's work product claim on the merits necessarily leads to rejection of his *constitutional* claims." (***Ibid***, emphasis added.)

In ***People* v. *Gray*** (2005) 37 Cal.4th 168, the defendant claimed his trial attorney should have argued that his federal and state constitutional right to the effective assistance of counsel under the Fifth and Fourteenth Amendments to the United States Constitution were violated when the prosecution elicited and commented upon the availability of, or provision to the defense of, forensic evidence that was not later presented by the defense because it interfered with his ability to prepare and present a defense. However, the California Supreme Court did not address the issue on the merits, but simply found there was no prejudice from the failure to raise the issue. (***Id***. at p. 209; **see also *People* v. *Zamudio*** (2008) 43 Cal.4th 327, 353 [issue raised but held forfeited for failure to raise it in trial court].)

Whether the defense argument has any legs will likely depend on whether the rationale of the holding in ***Prince* v. *Superior Court*** (1992) 8 Cal.App.4th 1176 (i.e., that if evidence is available for retesting without the evidence being consumed, the defense is entitled to do independent testing without revealing results to prosecution unless the results will be introduced into evidence) can be stretched to prevent the prosecution from even pointing out that such evidence was available and provided to the defense for testing. At least in the unpublished opinion ***People* v. *Wilson*** (unreported) 2012 WL 5928727 [discussed in greater detail in IPG, section VII at p. 92], the court rejected such an attempt to stretch ***Prince*** to cover comment upon the fact the defense got evidence for testing and did not produce any results. (***Wilson*** at p. *6.) Obviously, the reason for pointing out the defense had the evidence for testing but did not produce any test results is to create the inference that the defense has not been able to come up with any evidence to refute the prosecution's test results. However, the inference to be drawn is no different than the inference that is generally drawn when it is brought out and commented upon that the defense failed to call witnesses who were available and known to the defense and who would logically be called if they had said anything to support the defense. (**See *People* v. *Mitcham*** (1991) 1 Cal.4th 1027, 1051-1052.) Thus, if commenting upon the fact that the defense has obtained evidence for testing and failed to introduce evidence of it violates due process by interfering with the defendant's ability to present and prepare a defense, then the long line of cases finding it appropriate to comment upon the failure to call logical witnesses (**see *People* v. *Brown*** (2003) 31 Cal.4th 518, 554;

People* v. *Morris (1988) 46 Cal.3d 1, 35; ***People* v. *Szeto*** (1981) 29 Cal.3d 20, 34) must also be suspect. (**Cf.**, ***People* v. *Bolden*** (2002) 29 Cal.4th 515, 549-550 [rejecting Sixth Amendment challenge to comment of prosecutor asking jury to consider the failure to call the defense expert who had been present during the police lab testing of the evidence and been hired to collaborate in the testing].)

(v) The Claim of *Griffin* Error

In ***Griffin* v. *California*** (1965) 380 U.S. 609, the High Court held the prosecution may not comment on a defendant's failure to testify. (***Id***. at p. 615.) However, the holding in ***Griffin*** does not normally prevent comment on the failure of the defense to introduce material evidence or call logical witnesses, excepting the defendant. (***People* v. *Stevens*** (2007) 41 Cal.4th 182, 210; ***People* v. *Hughes*** (2002) 27 Cal.4th 287, 372.)

In ***People* v. *Bennett*** (2009) 45 Cal.4th 577, the California Supreme Court summarily **rejected** the argument that it was ***Griffin*** error for the prosecution to question its experts regarding whether (i) the defense could have retested forensic evidence and (ii) the defense sought to have retested forensic evidence. (***Id***. at p. 596.)

(vi) The Claim of Burden Shifting

A prosecutor may not suggest that "a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (***People* v. *Bradford*** (1997) 15 Cal.4th 1229, 1340; ***People* v. *Woods*** (2006) 146 Cal.App.4th 106, 112.) However, "[p]ointing out that contested physical evidence could be retested did not shift the burden of proof." (***People* v. *Cook*** (2006) 39 Cal.4th 566, 607.)

In ***People* v. *Bennett*** (2009) 45 Cal.4th 577, the California Supreme Court summarily **rejected** the argument that the prosecution somehow shifted the burden of proof onto the defense by questioning its experts regarding (i) whether the defense could have retested forensic evidence and (ii) whether the defense sought to have the forensic evidence retested. (***Id***. at p. 596.) The ***Bennett*** court observed that "[t]he prosecutor did not state or imply that defendant had a duty to produce evidence" and that "[t]he complained-of questions merely asked whether there was evidence for retesting." (***Ibid*** [and noting, as well, that the jury was instructed that the prosecution bears the burden of proof and it is presumed the jury followed those instructions]; **accord *People* v. *Foster*** (2010) 50 Cal.4th 1301, 1356-1357 [no shifting of burden of proof where prosecutor's questioning revealed evidence released to defense but was not tested]; ***People* v. *Cook*** (2006) 39 Cal.4th 566, 607 [permissible for prosecutor to ask government expert "whether the defense could have subjected the autopsy bullets to its own testing by an independent laboratory" and no burden shifting occurred because "the prosecutor did not ask

whether the defense had a duty to do independent testing, merely whether the defense had an opportunity to do so."].)

Neither ***Bennett*** nor ***Foster*** involved a situation where the prosecutor commented upon the failure of the defense to introduce evidence of testing contradicting the prosecution test results. However, "[a] distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (***People* v. *Bradford*** (1997) 15 Cal.4th 1229, 1340.) Thus, so long as the prosecutor makes it clear that he or she is not arguing the defense has the burden of producing evidence or proving innocence, the rule against burden-shifting should not be implicated by commenting on failure of the defense to introduce evidence of test results from forensic evidence obtained by the defense. (**See *People* v. *Bradford*** (1997) 15 Cal.4th 1229, 1339-1340 [not burden shifting for prosecutor to note "the defense did not call an expert witness to testify contrary to the conclusions reached by the coroner with regard to the time frame of [the victim's] death, although defendant 'certainly is free to call his own witness to testify to those facts.'"].)

-END-

NEXT EDITION: A PRINT ONLY EDITION ON PROTECTING CONFIDENTIAL INFORMATION AND INFORMANTS.

Suggestions for future topics to be covered by the Inquisitive Prosecutor's Guide, as well as any other comments or criticisms, should be directed to Jeff Rubin at (408) 792-1065.