THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI

Respondent

vs.

ROBERT R. BROOKS

Appellant

No. SC 90347

Appeal from the Circuit Court of Jefferson County
The Honorable M. Edward Williams, Circuit Judge

SUBSTITUTE REPLY BRIEF OF APPELLANT

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ARGUMENT

I.

The Circuit Court erred in allowing the State to comment on and adduce testimony regarding Mr. Brooks' failure to provide an exculpatory statement to police after being advised of his *Miranda* rights and in not declaring a mistrial on that account because the references to post-*Miranda* silence violated Mr. Brooks' right to due process and his right to remain silent and not have his silence used against him as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the Missouri Constitution, in that: (1) the State repeatedly emphasized Mr. Brooks' failure to make an exculpatory statement to the police after he had been Mirandized; (2) the State commented on Mr. Brooks' silence in opening statement and closing argument and presented evidence highlighting Mr. Brooks' failure to make an exculpatory statement after he had been advised of his *Miranda* rights; (3) a major theme of the State's case was that Mr. Brooks' claim of self-defense was unbelievable because he did not tell the police that Ms Cates was shot when he was attempting to disarm her and acting in self-defense; (4) the Circuit Court's curative instructions were inadequate to remove the prejudicial effect of the references to Mr. Brooks' post-*Miranda* silence; (5) Mr. Brooks' defense was undermined by the State's misconduct because it depended entirely on the jury finding him credible and believing his version of the incident; (6) Mr. Brooks' defense was not transparently frivolous; and (7) there was not overwhelming evidence of guilt.

1. Mr. Brooks made no post-*Miranda* statements related to the shooting.

The State maintains the prosecutor's references to Mr. Brooks' post-*Miranda* silence did not violate *Doyle* because Mr. Brooks waived his right to remain silent and not to have his silence used against him by making statements to the detectives about the shooting. In addition to the statements that he had "nothing to hide" and "didn't do nothing," which were the basis for the Court of Appeals' waiver ruling and addressed in Mr. Brooks' initial brief, the State argues Mr. Brooks waived his right to remain silent by making other "post-*Miranda* statements about the homicide" that "were inconsistent with his later claim of self-defense." Resp.Sub.Br. 28.

The State claims Mr. Brooks replied "I don't know" when Lieutenant Thomas asked "for his version [of] what occurred." Resp.Sub.Br. 29 (citing Tr. 555). This claim, which the State raises for the first time, is incorrect. Mr. Brooks never made such a statement. The recording establishes that Mr. Brooks did not say "I don't know" in response to Lieutenant Thomas.[1] Ex. 64. The exchange between Mr. Brooks and Lieutenant Thomas was as follows:

BROOKS: Give me a phone book. I got to talk to somebody. I got to talk to somebody.

THOMAS: Who?

BROOKS: I don't know.

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[1] As Mr. Brooks' noted in his initial brief, the transcript of the recorded interview contains several inaccuracies. *See* App.Sub.Br. 18 n. 6, 19 n.7.

THOMAS: Right now it wasn't so much to ask you questions, as to [sic] your version of what occurred. [Inaudible][2] I wasn't there—

BROOKS: —I know.

THOMAS: —So, I don't know.

BROOKS: Please give me a phone book. Please.

Ex. 64 (Timer 2:30:40 – 2:31:08).

The recording plainly shows Mr. Brooks interjected "I know" after Lieutenant Thomas said "I wasn't there," agreeing that Lieutenant Thomas was not present when the shooting occurred. Ex. 64.

The State also claims Mr. Brooks replied "I don't know" to a question posed by Detective Pruneau. Resp.Sub.Br. 31 (citing Tr. 564). Again, the recording does not indicate that Mr. Brooks said "I don't know." Ex. 64. The exchange recorded on the video is as follows:

PRUNEAU: . . . You've done this, you have done it for seventeen years. If you didn't do anything, you know good and well that you can tell us what happened.

BROOKS: [Inaudible]. I just—I am lost right now, brother.

Ex. 64 (Timer 2:44:08 – 2:44:23).

The court reporter transcribed the inaudible segment as "I don't know, man." Tr. 564. Counsel submits that from listening to the recording it appears Mr. Brooks said "I know, man." Lieutenant Thomas did not clarify what Mr. Brooks said and Detective

[2] It sounds like Lieutenant Thomas said "period." Ex. 64.

Pruneau was not called as a witness. Because "[w]aiver principles should be construed liberally in favor of the defendant," *United States v. Jaimes-Jaimes*, 406 F.3d 845, 848 (7th Cir. 2005), because the State has the burden of proving a waiver of the right to remain silent, *State v. Madison*, 684 S.W.2d 532, 534 (Mo.App. E.D.1984), and because the right to remain silent is "of a constitutional dimension" and "cannot be unduly burdened," *South Dakota v. Neville*, 459 U.S. 553, 565 (1983), any uncertainty concerning this statement should be resolved in Mr. Brooks' favor. Regardless, even if the court reporter's transcription is accurate, the purported statement reflects indecision as to whether he should answer questions at 2:45 a.m. while being "lost" due to the recent death of his fiancée.

The State's assertion that Mr. Brooks told the detectives he had no idea Ms Cates how was shot is, therefore, not supported by the record and does not justify a finding that Mr. Brooks waived his right to remain silent.

The State also points to the fact that after Lieutenant Thomas advised Mr. Brooks of his *Miranda* rights, Mr. Brooks opined he likely was a suspect in the shooting, inquired whether he was free to go, said he wanted to call someone, and claimed he felt stressed. None of these post-*Miranda* remarks concerned the shooting or contradicted his testimony. Consequently, they are irrelevant to the *Doyle* analysis. Moreover, it is hardly a revelation that Mr. Brooks considered himself a suspect or felt stressed after he was escorted into a tiny interview room, read his rights, and questioned about the death of his fiancée, particularly when no one else was present when the shooting occurred. Tr. 534 (Lieutenant Thomas advised Mr. Brooks of his *Miranda* rights because "he was the

only person that was involved in the shooting."). Asking to make a phone call and questioning his arrest status were legitimate and reasonable requests that should not give rise to a waiver of the right to remain silent. The State cites no authority to the contrary.[3] Indeed, the policy the State endorses—that a defendant waives his right to remain silent by requesting to make a phone call, questioning his freedom, or exhibiting signs of stress—is repugnant to *Doyle*.

Finally, Mr. Brooks' claim that he and Ms Cates had a good relationship did not involve the subject matter of the shooting. Even if this characterization was inconsistent with Mr. Brooks' testimony regarding his relationship with Ms Cates, the prosecutor could have impeached Mr. Brooks on this basis. The prosecutor, however, did not broach this topic while cross-examining Mr. Brooks.

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[3] In an attempt to distinguish *Bass v. Nix*, 909 F.2d 297, 304 (8th Cir. 1990), in which the court noted that the Supreme Court "has never applied the waiver doctrine to a *Doyle* violation," the State misrepresents the nature of the defendant's post-*Miranda* statements. The State claims the defendant's only post-*Miranda* statement was "a conversation in which the defendant asked the police a question about the murder." Resp.Sub.Br. 37. But the court stated that the defendant asked "the officers on the flight . . . some questions about the murder," made "a statement asking if the Iowa authorities were so smart why were [he] and [the victim] in Des Moines," and made "a general denial of guilt." *Bass*, 909 F.2d at 304 n.11. The court concluded that none of these statements authorized the prosecution to mention the defendant's post-*Miranda* silence. *Id*. at 304.

2. The prosecutor's references to Mr. Brooks' post-*Miranda* silence violated *Doyle*.

The State's attempt to justify its use of Mr. Brooks' post-*Miranda* silence is based on a fundamental misreading of *Doyle v. Ohio*, 426 U.S. 610 (1976), and its progeny. Under *Anderson v. Charles*, 447 U.S. 404 (1980), the prosecution may ***impeach*** a defendant with inconsistencies between his testimony and his post-*Miranda* statements. In *Charles*, the defendant was arrested while driving a stolen car that had belonged to someone who had been strangled to death less than a week earlier. *Id*. at 404. After being Mirandized the defendant told a detective that he had stolen the automobile about two miles from the bus station. *Id*. at 405. At trial, the defendant testified that he stole the automobile from a parking lot next to the bus station. *Id*. Holding that *Doyle* does not bar cross-examination that "merely inquires into prior inconsistent statements," the Supreme Court concluded that the prosecutor did not violate the defendant's constitutional rights by cross-examining him regarding the inconsistency between what he told the detective and what he told the jury on direct examination. *Id*. at 408-09.

In this case the prosecutor did not attempt to impeach Mr. Brooks with statements he made to Lieutenant Thomas and Detective Pruneau. Instead, the prosecutor repeatedly emphasized that Mr. Brooks never said anything to them. In focusing on Mr. Brooks' post-*Miranda* silence, the prosecutor violated *Doyle*. *Charles*, 447 U.S. at 409 (holding that questioning intended to "elicit an explanation for a prior consistent statement" is proper while questioning "designed to draw meaning from silence" is prohibited).

The State also contends the prosecutor did not violate *Doyle* by mentioning in opening statement that Mr. Brooks "never would tell" the detectives what happened and said "not a word" during the interview and in referring to his silence during the State's case-in-chief. The State maintains the prosecutor was merely reciting "what Mr. Brooks' videotaped statement would reveal to the jury." According to the State, it was "entirely proper" for the prosecutor to explain that Mr. Brooks "den[ied] wrongdoing (i.e., not remaining silent)" while "provid[ing] not a single word of explanation (i.e., self-defense) to support his claim." Resp.Sub.Br. 25.

The State maintains the prosecutor only crossed the line once—when he told the jury Mr. Brooks invoked his rights in opening statement.[4] Resp.Sub.Br. 25 n.3. The prosecutor, however, repeatedly violated *Doyle* by referring to Mr. Brooks' post-*Miranda* silence throughout the trial. While it was highly improper for the prosecution to inform the jury that the detectives terminated their questioning of Mr. Brooks when he exercised his *Miranda* rights, the circuit court's ruling on defense counsel's objection was not limited to direct references to Mr. Brooks' assertion of his constitutional rights. In admonishing the prosecutor, the court stated: "Your statement was he said not a word is clearly a direct comment on his right to remain silent. The objection is sustained. You

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[4] Later in its brief the State claims the jury never learned that Mr. Brooks invoked his right to remain silent. Resp.Sub.Br. 33 (citing Tr. 569). The State, however, overlooks the prosecutor's remark in opening statement that the detectives stopped the interview because Mr. Brooks "invokes his rights." Tr. 163.

will not refer to it further." Tr. 165. The next words out of the prosecutor's mouth, however, revisited this forbidden subject: "The evidence will show that for a good part of an hour, after repeatedly asking what happened, and he would not tell them." Tr. 168. Featuring Mr. Brooks' post-*Miranda* silence plainly was part of the prosecutor's strategy.

Assuming arguendo that Mr. Brooks made post-*Miranda* statements which were inconsistent with his testimony as the State contends, the prosecutor's references to Mr. Brooks' post-*Miranda* silence in opening statement and its case-in-chief were still improper. Until Mr. Brooks offered testimony that contradicted his post-*Miranda* statements, there was no basis for impeachment. In *State v. Graves*, 27 S.W.3d 806, 811 (Mo.App. W.D.2000), the court held there was a facial constitutional violation when the prosecution referred to the defendant's post-arrest, pre-*Miranda* silence in opening statement and its case-in-chief before the defendant presented evidence of "a defense that could be impeached by her silence." *Id*. at 811. The fact that the defendant foreshadowed her self-defense strategy in opening statement "did not present anything for the State to impeach or contradict" because "the opening statement is not a presentation of evidence." *Id*. at 812. Referring to the defendant's silence under these circumstances, the court concluded, was "repugnant to the Fifth Amendment privilege against self-incrimination" since "the State necessarily used [the defendant's] post-arrest silence, not as impeachment, but as affirmative proof of her guilt." *Id*. This case presents an even more glaring constitutional violation because the silence to which the prosecution improperly referred may have been induced by and in reliance on the *Miranda* warnings. *State v. Anderson*, 79 S.W.3d 420, 441 (Mo. 2002) (stating "it is improper to use a defendant's

post-arrest post-*Miranda* silence either as affirmative proof of a defendant's guilt or to impeach his testimony") (internal quotations omitted).

The fundamental flaw in the State's position in this case is the prosecutor never attempted to impeach Mr. Brooks with the alleged contradictions between his trial testimony and post-*Miranda* statements. From the opening statement through the end of trial, the prosecutor emphasized the fact that Mr. Brooks never said anything to the detectives. The prosecutor did not ask Lieutenant Thomas or Mr. Brooks (Detective Pruneau did not testify) what Mr. Brooks said during the interview. Instead, the prosecutor concentrated on Mr. Brooks' post-*Miranda* silence by inquiring about an array of things Mr. Brooks did not tell the detectives. For example, Lieutenant Thomas answered "No" when the prosecutor asked him: "Prior to his arrest, did [Mr. Brooks] ever give you any type of explanation whatsoever as to what happened?" Tr. 571. During cross-examination Mr. Brooks acknowledged that he "[d]idn't say anything" to the detectives and "didn't tell [the detectives] what [he] told the jury in your Direct Examination." Tr. 719, 721. In urging the jury to infer guilt from Mr. Brooks' failure to tell the detectives the same thing he had told the jury, the prosecutor sought to penalize Mr. Brooks for remaining silent. The jury was left with the firm impression that Mr. Brooks had an obligation to speak and exhibited a consciousness of guilt by not telling his story to the detectives and exercising his right to remain silent. Under *Doyle*, these references to Mr. Brooks' post-*Miranda* silence are inherently unfair and a violation of due process since Lieutenant Thomas assured Mr. Brooks that he did not have to talk and had the right to remain silent. Tr. 551-52 ("[W]e are just going to advise you of your

rights, you know, you don't have to tell us anything. . . . You have the right to remain silent.").

The State argues "at any time before the defendant invokes his right to remain silent – and particularly where the defendant instead makes statements that purport to explain his conduct in the alleged crime – any 'silence' or omitted fact is highly probative, for it legitimately shows that the defendant initially had no valid explanation for his conduct, that the defendant was conscious of his guilt, and that any subsequent (different) exculpatory story was fabricated in the interval between the first and later accounts." Resp.Sub.Br. 27. There is little correct about this statement. The argument's premise—that post-*Miranda* silence is "highly probative"—was rejected in *Doyle*. *Doyle* is intended to safeguard the accused's constitutional right to remain silent and correctly observed that once the accused is informed he has the right to remain silent and that anything he says may be used against him, his subsequent silence is "insolubly ambiguous." 426 U.S. at 617 (holding that "every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested"). Thus, the rule announced in *Doyle* is grounded on the principle that post-*Miranda* silence is ***not*** "highly probative" evidence.

Second, *Brecht v. Abrahamson*, 507 U.S. 619 (1993), does not support the State's contention that the prosecution may allude to a defendant's post-*Miranda* failure to divulge the exculpatory story he later offers at trial. In *Brecht*, the petitioner was charged with first degree murder. At trial he claimed the shooting was an accident. The evidence showed that after the shooting, the defendant drove his sister's car into a ditch. When a

police officer stopped to offer assistance, the petitioner told him that his sister knew about the car mishap and had called a tow truck. When later stopped by the police, the petitioner attempted to conceal his identify, but ultimately identified himself and was arrested. When he was informed he was being held for the shooting, the petitioner replied that "it was a big mistake and asked to talk with "somebody that would understand him." He was advised of his *Miranda* rights at an arraignment.

At trial the prosecution argued that the petitioner's account was unbelievable because he failed to get help for the victim and fled after the shooting, because he lied to the police officer who came upon him in the ditch, and because he failed to mention anything about the shooting being an accident to that police officer or the officers who subsequently arrested him. The prosecution also cross-examined the petitioner as to whether he had told anyone before trial that the shooting was an accident. The petitioner responded "no." The prosecutor made several references to the petitioner's post-*Miranda* silence during closing argument.

Contrary to the State's argument here, the Supreme Court concluded that evidence regarding the petitioner's pre-*Miranda* silence was proper but references to his post-*Miranda* silence were not. *Id*. at 629. The Court held that "the State's references to the petitioner's silence after [he was Mirandized], or more generally to petitioner's failure to come forward with his version of events at any time before trial, see n. 2, *supra*, ***crossed the Doyle line.***" *Id*. at 628-29 (emphasis added). The Court identified the following *Doyle* violations which are quite similar to the violations Mr. Brooks alleges in this case:

The State's cross-examination of petitioner included the following exchange:

"Q. In fact the first time you have ever told this story is when you testified here today is it not?

* * *

"A. You mean the story of what actually happened?

"Q. Yes.

"A. I knew what happened, I'm just telling it the way it happened, yes. I didn't have a chance to talk with anyone, I didn't want to call somebody from a phone and give up my rights, so I didn't want to talk about it, no sir.

Then on re-cross-examination, the State further inquired:

"Q. Did you tell anyone about what happened in Alma?

"A. No I did not."

During closing argument, the State urged the jury to "remember that Mr. Brecht never volunteered until in this courtroom what happened in the Hartman residence…." It also made the following statement with regard to petitioner's pretrial silence: "He sits back here and sees all of our evidence go in and then he comes out with this crazy story…." Finally, during its closing rebuttal, the State said: "I know what I'd say [had I been in petitioner's shoes], I'd say, 'hold on, this was a mistake, this was an

> accident, let me tell you what happened,' but he didn't say that did he. No, he waited until he hears our story."

Id. at 625 n.2.[5]

The State contends that because *Doyle* does not support "Mr. Brooks' claim that a 'general' denial will not subject a defendant to impeachment" because the *Doyle* Court "did not analyze whether [implicit general denials] would subject a defendant to subsequent impeachment." Resp.Sub.Br. 37. In *Doyle*, however, the Court did not "simply ignore[] those statements" as the State maintains. The post-*Miranda* statements were mentioned in the majority and dissenting opinions. *Doyle*, 426 U.S. at 615 n.5; *Id*. at 623 n.4 (Stevens, J., dissenting). In equating the defendant's post-*Miranda* statements with silence, the Court recognized that most people do not stand mute after they are

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[5] *Brecht* establishes that the State may violate *Doyle* even though the defendant's pre-*Miranda* silence is admissible. In *Brecht* the court found the admission of the defendant's post-*Miranda* silence was not prejudicial, relying on the fact that "the State's references to petitioner's post-*Miranda* silence were infrequent, comprising less than two pages of the 900-page trial transcript." *Id*. at 639. The Court also noted the "weighty" evidence of guilt, including that the path of the bullet through the victim's body "was inconsistent with petitioner's testimony that the rifle had discharged as he was falling" and other substantial evidence "point[ing] to the petitioner's guilt." *Id*. The circumstances which mitigated the prejudice caused by the *Doyle* violations in *Brecht* do not exist in this case. *See* App.Sub.Br. 66-80.

arrested and, therefore, a rule requiring complete silence would not adequately protect an accused's right to due process.

The State raises the specter that ruling in Mr. Brooks' favor would "greatly limit [its] ability to present a defendant's post-*Miranda* statement in any given case." Resp.Sub.Br. 28.[6] According to the State, prosecutors would be precluded from introducing evidence of a defendant's post-*Miranda* admission to knowingly shooting someone if the defendant "was 'silent' about various facts showing that the defendant acted in self-defense." Resp.Sub.Br. 28. As a preliminary matter, the State's argument overlooks the fact that the prosecutor never attempted to impeach Mr. Brooks with

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[6] In *Doyle*, the prosecution raised a similar concern in support of using a defendant's post-*Miranda* silence for impeachment purposes:

> The State pleads necessity as justification for the prosecutor's action in these cases. It argues that the discrepancy between an exculpatory story at trial and silence at time of arrest gives rise to an inference that the story was fabricated somewhere along the way, perhaps to fit within the seams of the State's case as it was developed at pretrial hearings. Noting that the prosecution usually has little else with which to counter such an exculpatory story, the State seeks only the right to cross-examine a defendant as to post-arrest silence for the limited purpose of impeachment.

404 U.S. at 616-17. The Court held the defendant's due process rights trumped the State's need for impeachment.

anything he said to the detectives. In addition, as the State concedes, Mr. Brooks never admitted that he knowingly shot Ms Cates. Resp.Sub.Br. 28.

Anderson v. Charles demonstrates that the State's concerns are unwarranted. In *Charles*, the Supreme Court concluded that *Doyle* does not prevent cross-examination of a defendant about prior inconsistent statements. Accordingly, in the State's hypothetical, the prosecution could impeach the defendant with the inconsistency between his claim of self-defense at trial and his previous admission to police that his actions were intentional.

In Missouri, this principle is well illustrated by *State v. Rogers*, 973 S.W.2d 495 (Mo.App. S.D.1998). The state trooper dispatched to the accident scene was the sole witness for the State in a DWI prosecution. *Id*. at 496. The trooper testified that when he arrived at the scene he found an overturned pickup. An individual named Jones was being treated by paramedics and the defendant was sitting on the road. *Id*. The defendant made several statements to the trooper regarding the accident. The trooper asked the defendant who was driving the vehicle, and the defendant responded "I'm sorry for what I've done." *Id*. After he was advised of his *Miranda* rights, the defendant told the trooper that Jones was sitting in the passenger side of the pickup. *Id*. When asked by the prosecution whether the defendant "ever denied driving the vehicle" or told him "that James Jones was driving that vehicle," the trooper responded in the negative. *Id*. at 497. The court determined these questions violated *Doyle* because they referred to the defendant's failure to volunteer an exculpatory statement. *Id*. at 499-500. The court stated that if the defendant had testified that Jones was driving the pickup, "*Anderson [v. Charles]* would have allowed the prosecutor to cross-examine [him] about his statement

to [the trooper] that Jones was on the passenger side." *Id*. at 499. While concluding the questions concerning the defendant's post-*Miranda* silence were improper, the court found no impropriety with the trooper's testimony regarding what the defendant actually said to him about the accident.

The State's reliance on *United States v. Ochoa-Sanchez*, 676 F.2d 1283 (9th Cir. 1982) is misplaced. Ochoa-Sanchez was arrested at a border crossing when heroin was discovered in the car he was driving. Unlike this case, Ochoa-Sanchez told the arresting officer a story that varied greatly from his trial testimony:

> The trial transcript reveals that defendant's version of the events of his trip into and return from Mexico is quite different from the version he proposed to agent Murray upon his arrest. When he was arrested he claimed that he had borrowed the car from a friend who lived in Santa Ana, that he had driven to Tijuana to visit a friend, and that he was returning. At trial, he asserted that he had hesitatingly accompanied two specific acquaintances to a bar in Tijuana and had assumed control of the car only a short time before.

Id. at 1286-87.

Ochoa-Sanchez is further distinguishable because the prosecutor focused on the details of two accounts given by the defendant to draw out the inconsistencies between the stories, not to suggest guilt. The court stated: "[W]e do not believe the prosecutor was attempting to draw meaning from silence. The questioning clearly related specifically to details that defendant offered at trial but failed to reveal at the time of

arrest." *Id*. at 1287. Here, the prosecutor never inquired about any inconsistencies between Mr. Brooks' post-*Miranda* statements and his testimony. In emphasizing Mr. Brooks' post-*Miranda* silence instead, the prosecutor pursued a practice the Supreme Court condemned in *Doyle*.

Finally, the defendant in *Ochoa-Sanchez* never invoked his right to remain silent. Therefore, it could not be said that omissions from Ochoa-Sanchez's post-*Miranda* statements were due to the exercise of his constitutional rights. Courts have recognized that when a defendant invokes his right to remain silent, as Mr. Brooks did, omissions in the defendant's post-*Miranda* statement may be due to the exercise of that right. *See, e.g., United States v. Caruto*, 532 F.3d 822, 828-32 (9th Cir. 2008).[7] Allowing the prosecution to adduce evidence of omissions in the defendant's post-*Miranda* statement in such cases impermissibly invites the jury to draw meaning from silence in violation of *Doyle*.

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[7] Several of the cases the State relies upon are distinguishable as non-invocation cases. *See, e.g., State v. Antwine*, 743 S.W.2d 51, 70 (Mo. 1987) (noting defendant "sign[ed] a written waiver of his right to remain silent" and there is no indication the defendant invoked that right); *State v. Smart*, 756 S.W.2d 578, 580 (Mo.App. W.D.1988) ("Smart did not elect to terminate the questioning and did not affirmatively assert any right at all."); *People v. Hurd*, 62 Cal.App.4th 1084, 1094 (Cal.App. 1998) (noting that there was no evidence that the defendant's "refusal to demonstrate the shooting [to the police] or take a polygraph was based upon an invocation of his Miranda rights").

The State's contention that *State v. Roth* does not support Mr. Brooks' argument is incorrect. In *State v. Wallace*, 952 S.W.2d 395 (Mo.App. W.D.1997), the court questioned *Roth* and several other cases to the extent they held that pre-*Miranda* silence could not be used for impeachment purposes. The *Wallace* court stated: "To the extent that *Mabie* can be read to prohibit the use of a defendant's post-arrest, pre-*Miranda* warning silence for impeachment purposes, it is in conflict with *Antwine* and should not be followed." *Id*. at 397. Since Mr. Brooks is asserting *Doyle* violations based on post-*Miranda* silence, not pre-*Miranda* silence, the limited abrogation of *Roth* recognized in *Wallace* has no bearing on this case. As discussed *supra*, *Graves* later recognized that while pre-*Miranda* silence is admissible for impeachment purposes, it is inadmissible as affirmative evidence of guilt. 27 S.W.3d at 811-12.

The State maintains *United States v. Canterbury*, 985 F.3d 483 (10th Cir. 1993), was wrongly decided because the defendant's post-*Miranda* statement that he wanted the silencer "for protection" contradicted his defense of entrapment. Resp.Sub.Br. 38-39. The *Canterbury* court, however, did not conclude that the prosecution was prohibited from pointing out inconsistencies between his defense and post-*Miranda* statements. Rather it faulted the prosecution for the same thing the State did in this case—for seeking to draw an adverse inference from the defendant's silence: "[T]his case turns on whether the cross-examination was designed to impeach the defendant's trial testimony by calling attention to prior inconsistent statements or, instead, was designed to suggest an inference of guilt from the defendant's post-arrest silence." *Canterbury*, 985 F.2d at 486. The court determined that the prosecution crossed this line because the "inference suggested by the

[prosecutor's] line of question is that Canterbury was guilty because an innocent person would have presented the set-up theory to the arresting officers." *Id*. at 486. The prosecution violated the defendant's due process rights by focusing on his "failure to present his exculpatory story at the time of arrest." *Id*.

The State claims that Mr. Brooks cannot complain of prejudice from *Doyle* violations because he introduced evidence of his post-*Miranda* silence when cross-examining the medical examiner. This argument should be rejected because the questions posed by defense counsel were proper subjects of cross-examination. Defense counsel's questioning was designed to ascertain what information Dr. Case considered in determining the cause of death and whether she might change her opinion after hearing Mr. Brooks' account. Dr. Case testified that it is not her practice to consider the defendant's account in reaching her conclusion. Tr. 332 ("That [the defendant's account] is not usually something I base my opinions on."). Further, no adverse inference of guilt was could be drawn from defense counsel's cross-examination of the medical examiner. On the other hand, the State's earlier comments on Mr. Brooks' post-*Miranda* silence in opening statement were entirely improper as they could only serve as affirmative proof of guilt. *See Graves*, 27 S.W.3d at 811-12.

CONCLUSION

The prosecution's numerous and improper references to Mr. Brooks' post-*Miranda* silence violated his due process rights as established in *Doyle v. Ohio*. Because the *Doyle* violations permitted the prosecutor to undermine his credibility and trial defense, Mr. Brooks was deprived of a fair trial. Accordingly, for the reasons stated herein and in Mr. Brooks' initial brief, this Court should reverse the judgment of conviction and remand the case for a new trial.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that pursuant to Rule 84.06(c), this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06(b); and (3) contains 5,035 words, exclusive of the sections exempted by Rule 84.06(b), determined using the word count program in Microsoft Word 2007. The undersigned counsel further certifies that the accompanying compact disk has been scanned and was found to be virus free pursuant to Rule 84.06(g).

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CERTIFICATE OF SERVICE

I certify that two hard copies of this brief and an electronic copy of the brief on a CD-ROM filed pursuant to Rule 84.06 were served on counsel identified below via U.S. Mail, postage prepaid, on December 10, 2009:

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