No. 127223

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- MICHAEL B. PINKETT, Defendant-Appellee.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 4-19-0172. There on appeal from the Circuit Court of the Eighth Judicial Circuit, Pike County, Illinois, No. 17-CF-84. Honorable Jerry J. Hooker, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

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ISSUES PRESENTED FOR REVIEW

I.

Whether the appellate court correctly reversed the trial court's order denying Michael Pinkett's motion for a mistrial where the prosecutor impermissibly referenced Mr. Pinkett's post-arrest, pre-*Miranda* silence in his opening statement and the error was not harmless.

II.

Whether the prosecutor engaged in a pattern of misconduct which violated Michael Pinkett's right to remain silent by arguing that Mr. Pinkett's post-arrest silence was evidence of his guilt throughout the trial.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Ill. Const. 1970, art. I, § 10.

No person shall be compelled in a criminal case to give evidence against himself nor be twice put in jeopardy for the same offense.

ARGUMENTS

I.

The appellate court correctly held that the trial court should have granted Michael Pinkett's motion for a mistrial because the prosecutor impermissibly commented on Mr. Pinkett's post-arrest, pre-*Miranda* silence in his opening statement.

Argument Summary

Illinois evidentiary law prohibits prosecutors in Illinois from using an accused's post-arrest silence as substantive evidence of his guilt at trial. In the opening statement, the prosecutor here called the jury's attention to Michael Pinkett's decision to exercise his right to remain silent following his arrest. The prosecutor told the jury that the officers wanted to arrest Mr. Pinkett "at Walmart without making a scene since it's in the middle of the store, [and] *at no point did he ever ask in any way the reason why he was being detained*." (July 9, 2018, Sup. R. 241) This statement was an impermissible comment on Mr. Pinkett's decision to exercise his right to remain silent after his arrest, and the error was of such gravity that it caused incurable prejudice and denied Mr. Pinkett his right to a fair trial. The appellate court thus correctly found that the trial court erred when it denied Mr. Pinkett's motion for a mistrial based on the prosecutor's impermissible reference to his post-arrest silence. Alternatively, the prosecutor's comment on Mr. Pinkett's post-arrest, pre-*Miranda* silence unconstitutionally infringed on Mr. Pinkett's decision to exercise his right to remain silent under both the federal and Illinois constitutions.

Standards of Review

Whether a prosecutor's improper commentary on a defendant's constitutional right to remain silent is so egregious as to warrant a new trial presents a question of law which is reviewed *de novo*. *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007); see *People v. Dameron*, 196 Ill. 2d 156, 162 (2001). The trial court's denial of a defendant's motion for a mistrial will not be disturbed unless the denial was a clear abuse of discretion. *People v. Nelson*, 235 Ill. 2d 386, 435 (2009) (citing *People v. Bishop*, 218 Ill. 2d 232, 252 (2006)).

A. The prosecutor's comments on Michael Pinkett's post-arrest, pre-*Miranda* silence in his opening statement were inadmissible under Illinois evidentiary principles.

A trial court should grant a motion for a mistrial "where an error of such gravity has occurred that the defendant has been denied fundamental fairness such that continuation of the proceedings would defeat the ends of justice." *Nelson*, 235 Ill. 2d at 435; see also *People v. Middleton*, 2018 IL App (1st) 152040, ¶ 29 (holding that a trial court should grant a mistrial motion with great caution and "under urgent circumstances and for very plain and obvious causes"). For a reviewing court to reverse the denial of a motion for a mistrial, the defendant must show prejudice from the error such that "the resulting damage could not be remedied by the court's admonitions and instructions." *Middleton*, 2018 IL App (1st) 152040, ¶ 29.

Mr. Pinkett was entitled to a "fair, orderly, and impartial trial." See *Wheeler*, 226 Ill. 2d at 121-22; U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I, § 2. To that end, prosecutors "have an ethical obligation to refrain from presenting improper and prejudicial evidence or argument." See *People v. Porter*, 372 Ill. App. 3d 973, 978-79 (3d Dist. 2007). An opening statement should inform the jury what each party expects to prove and it "may include a discussion of the expected evidence and reasonable inferences from the evidence." *People v. Kliner*, 185 Ill. 2d 81, 127 (1998). However, a prosecutor may not make statements that only serve to "inflame the passions or develop the prejudices of the jury without throwing any light upon the issues." *Wheeler*, 226 Ill. 2d at 128-29 (Internal quotations and citation omitted.). Here, Mr. Pinkett did not receive a fair trial when the prosecutor improperly pointed to his post-arrest silence[1]

[1] The State characterizes Mr. Pinkett's silence as occurring "during arrest" throughout its brief. (St. Br. 12-36) But while the State implies there is a distinction between silence "during arrest" and silence post-arrest, it fails to develop such an argument. (St. Br. 12-36) Certainly, the State did not dispute that Mr. Pinkett's silence was post-arrest in the appellate court. *People v. Pinkett*, 2021 IL App (4th) 190172-U, ¶ 48. To be clear, an arrest occurs "when, by means of physical force or a show of authority, a person's freedom of movement is restrained." *People v. Lopez*, 229 Ill. 2d 322, 345 (2008). Considering that an arrest immediately restrains one's movement, silence "during arrest" *is* post-arrest silence.

as evidence of his guilt during opening statements. (July 9, 2018, Sup. R. 241) And the appellate court correctly recognized that this improper commentary is simply disallowed in Illinois. *People v. Pinkett*, 2021 IL App (4th) 190172-U, ¶ 53.

Stepping back for a moment, under the federal constitution, the United States Supreme Court held that it is improper to impeach a testifying defendant with evidence that he was silent after he was arrested and advised of his *Miranda* rights. See *Doyle v. Ohio*, 426 U.S. 610, 617-20 (1976); *Miranda v. Arizona*, 384 U.S. 436 (1966). The Court later clarified that federal law permits impeachment of a defendant with evidence that he was silent at any time before receiving *Miranda* warnings. *Fletcher v. Weir*, 455 U.S. 603, 605-07 (1982). Critically, however, the *Fletcher* Court also held that the states were free to form their own rules of evidence regarding "the extent to which post-arrest silence may be deemed to impeach a criminal defendant's own testimony." *Fletcher,* 455 U.S. at 607.

The State insists that Rule of Evidence 403 (the evidentiary balancing test) governs whether post-arrest silence is substantively admissible in Illinois. (St. Br. 23-28) The State's argument, however, cites to no cases employing Rule 403 in such a situation. (St. Br. 23-28) Instead, the State cites mostly federal cases – *Brecht v. Abrahamson*, 507 U.S. 619 (1993) and *United States v. Hale*, 422 U.S. 171 (1975) – to argue that a defendant's post-arrest silence may be probative. (St. Br. 24) But Illinois courts that have examined the substantive admissibility of post-arrest silence have not done so under the Rule 403 framework. See, *e.g.*, *People v. Sanchez*, 392 Ill. App. 3d 1084 (3d Dist. 2009); *People v. Quinonez*, 2011 IL App (1st) 092333, ¶ 27; *People v. Boston*, 2018 IL App (1st) 140369, ¶¶ 84-100.

The State misunderstands the appellate court's holding and Illinois' longstanding rules regarding the very limited admissibility of post-arrest silence. And the State offers no reason, much less a compelling one, as to why Illinois should depart from its long-established framework

for addressing post-arrest silence. As this Court stated in *Chicago Bar Ass'n v. Illinois State Bd. of Elections*:

> "The doctrine of *stare decisis* is the means by which courts ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. *Stare decisis* permits society to presume that fundamental principles are established in the law rather than in the proclivities of individuals. The doctrine thereby contributes to the integrity of our constitutional system of government both in appearance and in fact. *Stare decisis* is not an inexorable command. However, a court will detour from the straight path of *stare decisis* only for articulable reasons, and only when the court must bring its decisions into agreement with experience and newly ascertained facts." 161 Ill. 2d 502, 510 (1994).

Here, neither experience nor the facts of this case demand this Court abandon and radically alter its jurisprudence regarding post-arrest silence. Indeed, and despite the State's argument to the contrary, these protections do not rest in any part on federal law or *its* protections. *People v. McMullin*, 138 Ill. App. 3d 872, 876 (2d Dist. 1985).

Since 1934, this Court has recognized that an accused's refusal to "make a statement at the police station[]" cannot be used to either "prove or disprove" the charge against him. *People v. Rothe*, 358 Ill. 52, 57 (1934). In *Rothe*, the defendants were charged with armed robbery and taken into custody. *Rothe*, 358 Ill. at 57. At trial, the court allowed the prosecution to prove that the defendants refused to make statements when they were at the police station. *Id*. On direct appeal to this Court, this Court held that evidence that the defendants did not make a statement "was prejudicial, and since it was neither material nor relevant to the issue being tried, it should have been excluded." *Id*.

Following *Rothe*, this Court in *People v. Lewerenz*, 24 Ill. 2d 295, 299 (1962), revisited the propriety of a prosecutor's effort to use an accused's exercise of his right to silence as evidence of his guilt. The defendant in *Lewerenz* was charged with unlawful sale of narcotics. *Lewerenz*, 24 Ill. 2d at 296-97. Over counsel's objection, the trial court permitted the prosecution to prove that "at the time of his arrest [the] defendant had refused to make a statement on

advice of counsel." *Id*. at 299. The defendant directly appealed to this Court. *Id*. at 296-97. Citing *Rothe*, this Court held that "an accused is within his rights when he refuses to make a statement, and the fact that he exercised such right has no tendency to prove or disprove the charge against him, thus making evidence of his refusal neither material or relevant to the issue being tried." *Id*. at 299 (citing *Rothe*, 358 Ill. at 57). This Court thus reaffirmed in *Lewerenz* that reference to a defendant's exercise of his right to remain silent post-arrest is irrelevant to his guilt. *Id*.

Illinois courts have thus long held that evidence of a defendant's post-arrest silence is "neither material nor relevant, having no tendency to prove or disprove the charge against" him. *McMullin*, 138 Ill. App. 3d at 876 (citing *Rothe*, 358 Ill. at 57; *Lewerenz*, 24 Ill. 2d at 299); see *People v. Strong,* 215 Ill. App. 3d 484, 488 (4th Dist.1991) (noting that this rule is "rooted in Illinois evidentiary law" and listing several cases holding the same); *People v. Clark*, 335 Ill. App. 3d 758, 763 (3d Dist. 2002); *People v. Nesbit*, 398 Ill. App. 3d 200, 212 (3d Dist. 2010); *Quinonez*, 2011 IL App (1st) 092333, ¶ 27. The appellate court here, relying on one such case – *People v. Sanchez*, 392 Ill. App. 3d 1084 (3d Dist. 2009) – found that evidence of Mr. Pinkett's post-arrest silence was inadmissible where he did not testify. *Pinkett*, 2021 IL App (4th) 190172-U, ¶¶ 52-54.

The State argues that *Sanchez* rested on this Court's pre-*Miranda* decisions in *Rothe* and *Lewerenz*, and that neither *Rothe* or *Lewerenz* suggested that evidence of a defendant's post-arrest silence, absent invocation of his fifth amendment right, is "categorically irrelevant." (St. Br. 24-25) But *Rothe* and *Lewerenz* did in fact hold that a defendant's post-arrest silence is irrelevant to proving or disproving the charge against a defendant. *Rothe*, 358 Ill. at 57 (holding that "the fact that [the defendants] refused to make a statement had no tendency to either prove or disprove the charge against them . . . [and] was neither material nor relevant to the issue

being tried"); *Lewerenz*, 24 Ill. 2d at 299 (holding that "the fact that [the defendant] exercised such right has no tendency to prove or disprove the charge against him, thus making evidence of his refusal neither material or relevant to the issue being tried"). Further, the Court's use of "materiality" and "relevancy" in both *Rothe* and *Lewerenz* establish that its holding is based on general evidentiary principles. *McMullin*, 138 Ill. App. 3d at 876. Considering that *Rothe* and *Lewerenz* predate *Miranda*, and the rationale employed in both cases, "the rule they set forth does not depend upon whether the silence sought to be utilized occurred before or after a defendant was given *Miranda* warnings." *Id.* (internal citation omitted); *Strong*, 215 Ill. App. 3d at 488 (citing *McMullin* and noting that in Illinois the protection starts "from time of arrest, in contrast to the time from the *Miranda* warning").

Miranda did not alter the landscape in which this Court decided *Rothe* and *Lewerenz*; it instead required the implementation of procedural safeguards to protect a defendant's right to silence in the face of custodial interrogation. See *Miranda*, 384 U.S. at 466. Aside from silence in the face of *Miranda*, Illinois courts recognize the inherent prejudice in "drawing a negative inference from an accused's exercise of his right to remain silent, both because it impermissibly penalizes the accused for exercising his rights and because an accused's exercise of his right is not inconsistent with a claim of innocence." *People v. Bradley*, 192 Ill. App. 3d 387, 391 (1st Dist. 1989) (citing *Lewerenz*, 24 Ill. 2d at 295, 299; *McMullin*, 138 Ill. App. 3d at 877). Put differently, "[b]ecause the rule of *Rothe* and *Lewerenz* is rooted in Illinois evidentiary law, it is unaltered by the Federal constitutional case law with respect to the use of *Miranda*-warning-induced silence." *McMullin*, 138 Ill. App. 3d at 876. And significantly, *Rothe* and *Lewerenz* have never been overruled by this Court. *Id.* The State's attempt to undermine *Sanchez*'s reliance on *Rothe* and *Lewerenz* is therefore unavailing.

Certainly, Illinois courts have identified two exceptions where post-arrest silence is relevant to issues in a case, and importantly, both exceptions require a defendant to testify before his silence can be used: (1) when the defendant testifies at trial that he made an exculpatory statement to the police at the time of his arrest; and (2) when the defendant makes a post-arrest statement that is inconsistent with his exculpatory trial testimony. *Quinonez*, 2011 IL App (1st) 092333, ¶ 27; *McMullin*, 138 Ill. App. 3d at 877. In other words, as the appellate court here noted – citing *People v. Herrett*, 137 Ill. 2d 195, 213 (1990) – evidence of a defendant's post-arrest silence is improper where impeachment is not an issue because the defendant has not testified. *Pinkett*, 2021 IL App (4th) 190172-U, ¶ 52.

The State criticizes the appellate court's reliance on *Herrett*, arguing the case is inapposite because it involved post-*Miranda* silence. (St. Br. 22) But the appellate court did not draw parallels between *Herrett* and Mr. Pinkett's case when citing to it; instead, it cited to *Herrett* for the proposition of law that evidence of post-arrest silence is generally improper except when used to impeach a defendant's trial testimony. *Pinkett*, 2021 IL App (4th) 190172-U, ¶ 52. While *Herrett* dealt specifically with post-arrest, post-*Miranda* silence, Illinois courts have routinely held the same in reference to post-arrest, pre-*Miranda* silence. See *Strong*, 215 Ill. App. 3d at 488; *McMullin*, 138 Ill. App. 3d at 876-77; *Boston*, 2018 IL App (1st) 140369, ¶ 90. The State's attempt to discredit the appellate court's holding is thus unpersuasive. (St. Br. 22)

Like the appellate court observed below, Mr. Pinkett did not testify and he was not impeached with his post-arrest, pre-*Miranda* silence. *Pinkett*, 2021 IL App (4th) 190172-U, ¶ 52. Instead, the prosecutor commented on Mr. Pinkett's post-arrest silence as evidence of his guilt during opening arguments. *Id.* The State does not discuss the critical distinction Illinois law makes between evidence that is offered for impeachment purposes and that which is offered as substantive evidence of the defendant's guilt. (St. Br. 23-28) The State's silence on this

subject further buttresses Mr. Pinkett's claim, and the appellate court's correct conclusion, that there was no basis for the prosecutor to comment on Mr. Pinkett's post-arrest silence in opening arguments. See *McMullin*, 138 Ill. App. 3d at 877.

Arguably, as the State points out by citing to *People v. Aughinbaugh*, 36 Ill. 2d 320, 322-23 (1967), courts have found a defendant's post-arrest silence to be relevant under the tacit admission rule. Under the rule, "an admission may be implied from the conduct of a party charged with a crime who remains silent when one states in his hearing that he was concerned in the commission of a crime, when the statement is made under circumstances which allow an opportunity to him to reply and where a man similarly situated would ordinarily deny the imputation." *People v. Bennett*, 3 Ill. 2d 357, 361 (1954). But as the appellate court has noted, *Miranda* discredited "the Illinois cases allowing the use of silence in the face of accusations as implied admissions." *People v. Nolan*, 152 Ill. App. 3d 260, 267 (2d Dist. 1987).

Regardless, to the extent the State is implying that *Aughinbaugh* and the tacit admission rule apply here, it is incorrect. (St. Br. 23-24) In *Aughinbaugh*, the defendant was identified in a police lineup by two eyewitnesses to a robbery. *Aughinbaugh*, 36 Ill. 2d at 322. During the lineup, the witnesses tapped the defendant on the shoulder and at neither time did the defendant respond to the tap. *Id*. The State argued in its closing argument that the defendant's failure to respond to the witnesses' taps was evidence of his guilt, and on direct appeal to this Court, the defendant challenged both the witnesses' testimony and the prosecutor's argument. *Id*. at 323. The defendant argued that his right to silence was violated when he was identified by the witnesses in the lineup who then testified that he did not respond when they tapped his shoulder. *Id*. at 322-23.

This Court held that while silence in the face of an accusation may be offered as substantive evidence of guilt, doing so is only proper when it "affirmatively appear[s]" in the record that the "the defendant knew he was being asked about the crime for which he is on

trial . . . ." *Id*. at 323. Then the tacit admission rule applies, "for it is the assumption that one similarly situated would ordinarily deny the imputation of guilt which renders admissible [the] defendant's failure to do so." *Id*. The taps alone, without an oral accusation, fell "considerably short" of showing that the defendant knew he was being charged with the robbery. *Id*. This Court held that the witnesses' comments on the defendant's silence and the prosecutor's reference to that silence in his closing argument was reversible error. *Id*.

In this case, Mr. Pinkett was not told why he was being arrested until after the officer read him his *Miranda* warnings, well after his silence the State commented on at trial. (July 9, 2018, Sup. R. 278-79, 285; St. Ex. 41 at 9:00-15:50) Thus, just like in *Aughinbaugh*, the prosecutor's comment on Mr. Pinkett's post-arrest silence was error because there was no affirmative evidence to show that he knew why he was being arrested. (July 10, 2018, Sup. R. 95); *Aughinbaugh*, 36 Ill. 2d at 323. Indeed, the prosecutor conceded during a sidebar conference that Mr. Pinkett asked what he was being arrested for *after* he arrived at the police station. (July 9, 2018, Sup. R. 285) The State's argument that Mr. Pinkett's silence was probative under the tacit admission rule thus fails and the prosecutor's reference to his post-arrest silence was error. See *Aughinbaugh*, 36 Ill. 2d at 323; see also *People v. Powell*, 301 Ill. App. 3d 272, 278 (4th Dist. 1998) (refusing to apply the tacit admission rule when the police asked the defendant if he had spit on and choked his wife because the defendant's "silence may have been motivated by nothing more that his prior experience or the advice of counsel[]").

Critically, the State does not argue that evidence of Mr. Pinkett's post-arrest silence falls within the two exceptions where post-arrest silence is relevant to a case. *Quinonez*, 2011 IL App (1st) 092333, ¶ 27. The State also does not expressly argue that the tacit admission rule applies here. Rather, citing to Rule 403, the State insists that under the facts of this case, Mr. Pinkett's post-arrest silence was "highly probative of consciousness of guilt." (St. Br. 26-27) Despite the fact that, as noted above, this is the incorrect inquiry, the evidence at issue here had little probative value.

During opening arguments, the prosecutor commented that Mr. Pinkett was instructed to exit the Wal-mart without "making a scene." (July 9, 2018, Sup. R. 241) Specifically, when the officer approached Mr. Pinkett, he told him "not to make a scene" and to "keep his mouth shut." (July 10, 2018, Sup. R. 265, 277) Mr. Pinkett's silence was therefore only probative of the fact that he complied with the officer's order. Moreover, the State's claim that Mr. Pinkett failed to react to an "unknown man" detaining him must be corrected. (St. Br. 26-27) The officer who approached and arrested Mr. Pinkett immediately identified himself as law enforcement, a fact detailed in the State's own brief. (St. Br. 7) (noting: "As defendant exited the restroom, Frazier approached him from behind and grabbed the knife from the sheath while identifying himself as a deputy sheriff.") As such, Mr. Pinkett's silence is "entirely consistent with a person complying with police[,]" which the State admits has "minimal probative value." (St. Br. 26)

But even if this Court finds that Mr. Pinkett's silence was relevant and probative despite the fact that he did not testify, the prejudicial impact of the evidence substantially outweighed its probative value. (St. Br. 25-28); see *People v. Pikes*, 2013 IL 115171, ¶ 11 (noting that even when relevant, evidence should not be admitted "if its probative value is substantially outweighed by its prejudicial effect"). The State argues that the risk of unfair prejudice was "unusually low" because Mr. Pinkett "began making statements of all kinds" moments after his silence. (St. Br. 27-28) But the State fails to explain how Mr. Pinkett's later statements lessened the prejudice of the prosecutor suggesting in opening arguments that the jury could infer Mr. Pinkett's guilt because he exercised his right to remain silent. (July 9, 2018, Sup. R. 241)

The prosecutor's comment was inordinately prejudicial because it was "intended to invite the jury to infer from [Mr. Pinkett's] silence that his [ ] defense is a recent fabrication." *Boston*, 2018 IL App (1st) 140369, ¶ 84 (quoting *People v. Ridley*, 199 Ill. App. 3d 487 (1st Dist. 1990)). The statement served to do nothing more than encourage the jury to decide the case based on Mr. Pinkett's post-arrest silence, a fact which was only probative of his decision

to comply with the officer's request. Simply put, Mr. Pinkett's post-arrest silence had little probative value and the danger of unfair prejudice was significant. Thus, even if Rule 403 is the pertinent analysis for determining the admissibility of post-arrest silence, which it is not, the evidence was still inadmissible here.

In summary, the prosecutor in this case impermissibly referenced Mr. Pinkett's post-arrest decision to remain silent in opening arguments. Reference to silence of this kind is only relevant when used for impeachment purposes. Because Mr. Pinkett did not testify, his post-arrest silence held no probative value, and the prosecutor's comment served only to prejudice the jury and impermissibly call its attention to Mr. Pinkett's decision to exercise his right to remain silent. As addressed in sub-argument D, the trial court's failure to grant the defense motion for mistrial was anything but harmless. As such, the appellate court correctly remanded for a new trial. See *Pinkett*, 2021 IL App (4th) 190172-U, ¶ 54.

B. The prosecutor's improper reference to Mr. Pinkett's silence was also a federal and Illinois constitutional violation.

Initially, because this case can be resolved on non-constitutional grounds, this Court need not consider the constitutional issue. This Court has held that it "will not consider a constitutional question if the case can be decided on other grounds." *People v. Lee*, 214 Ill. 2d 476, 482 (2005). Constitutional issues should be reached only as a "last resort." *In re E.H.*, 224 Ill. 2d 172, 178 (2006).

Nevertheless, the State faults the appellate court for not analyzing whether Mr. Pinkett invoked his fifth amendment right and whether the fifth amendment rationale for excluding evidence of post-*Miranda* silence is applicable to post-arrest, pre-*Miranda* silence. (St. Br. 21-22) But because this case was resolved on non-constitutional grounds, the appellate court properly did not analyze the constitutional issues. *E.H.*, 224 Ill. 2d at 178. This Court should likewise decide Mr. Pinkett's case based on Illinois evidentiary law, and find that the prosecutor

impermissibly referenced Mr. Pinkett's post-arrest, pre-*Miranda* silence in opening arguments. See, *supra*, pages 1-13. Alternatively, for the following reasons, constitutional law similarly prohibits prosecutors from commenting on an arrestee's post-arrest, pre-*Miranda* silence.

The fifth amendment of the United States constitution prohibits the government from compelling an accused person in "any criminal case to be a witness against himself . . . ." U.S. Const. amend. V. Similarly, the Illinois constitution provides that "[n]o person shall be compelled in a criminal case to give evidence against himself . . . ." Ill. Const. 1970, art. I, § 10. Since 1924, this Court has recognized that the self-incrimination clause of both constitutions "guarantee to every person accused of [a] crime the privilege to remain silent." *People v. Hodson*, 406 Ill. 328, 337 (1950) (citing *People v. Nitti*, 312 Ill. 73 (1924)). This Court in *Nitti* proclaimed that "[b]oth the federal and state Constitutions guarantee to every person accused of [a] crime the privilege of silence, and for three-quarters of a century our Criminal Code has provided that the failure of the accused to testify shall not create any presumption against him." *Nitti*, 312 Ill. at 93.

Two years after this Court's opinion in *Nitti*, the Supreme Court in *Raffel v. U.S.*, 271 U.S. 494, 497 (1926), advised in *dicta* that if a defendant is retried after the jury failed to reach a verdict at the defendant's first trial, his silence in the first trial cannot be used against him if he does not take the stand in his second trial. Nearly 30 years later, the Court revisited the fifth amendment's self-incrimination clause when it decided *Griffin v. California*, 380 U.S. 609, 615 (1965). The Supreme Court held that the fifth amendment's self-incrimination clause, as applied to the states through the fourteenth amendment, forbids "either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin*, 380 U.S. at 615. Illinois thus recognized an accused's right to remain silent at trial more than a century before the Supreme Court also prohibited prosecutors from commenting on an accused's decision to remain silent at his trial. See *Nitti*, 312 Ill. at 93.

On the heels of *Griffin* was the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). There, the Court expanded the fifth amendment's protections when it held that the prosecution is prohibited from using an accused's statements, whether exculpatory or inculpatory, obtained in a custodial interrogation unless it "demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda*, 384 U.S. at 444. As an example of a procedural safeguard, the Court held that "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id*.

The Court addressed the consequence of a prosecutor's attempt to impeach testifying defendants with post-*Miranda* silence in *Doyle v. Ohio*, 426 U.S. 610 (1976). The Court found that impeaching the defendants with their post-*Miranda* silence was a due process violation warranting reversal of the defendants' convictions. *Doyle*, 426 U.S. at 616. And in *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980), the Court held that there was no due process violation when a prosecutor impeached a testifying defendant with his pre-arrest silence.

Following the cases in which the accused was properly warned of his right to remain silent, the Court addressed the admissibility of an accused's silence in the absence of *Miranda* warnings. In *Fletcher*, the record did not indicate that the defendant received *Miranda* warnings and the Court held absent the assurances of *Miranda* warnings, it was not a due process violation for the prosecutor to cross-examine a testifying defendant about his post-arrest silence. *Fletcher*, 455 U.S. at 605-07. The Court, however, did leave to the States to decide under applicable rules of evidence the "extent to which post-arrest silence may be deemed to impeach a criminal defendant's own testimony." *Id.* at 607. Next, the Court held that the federal constitution "does not prohibit the use for impeachment purposes of a defendant's silence prior to arrest, or after arrest if no *Miranda* warnings are given." (Internal citations omitted.) *Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993).

Within the last decade, the Supreme Court has revisited its right to silence and self-incrimination precedent, this time emphasizing that a suspect must invoke his fifth amendment right, in a pre-arrest, non-custodial setting, if he seeks to exercise said right. See *Salinas v. Texas*, 570 U.S. 178, 181 (2013) (plurality opinion). In *Salinas*, the Court considered whether the prosecutor impermissibly argued in his case-in-chief that an out-of-custody suspect's silence in response to an officer's question evidenced his guilt. *Salinas*, 570 U.S. at 181. Writing for a plurality of the Court, Justice Alito held that because the defendant did not "expressly invoke the privilege against self-incrimination in response" to the question, he did not "claim" the privilege. *Id*. Critical to the Court's analysis was that the interview was non-custodial. *Id*. at 182, 185. Put differently, *Salinas* holds that a defendant's silence in response to a question in a non-custodial interview is substantively admissible where the defendant does not "expressly invoke" his fifth amendment right. *Id.* This Court has yet to address *Salinas.* Unlike the State suggests, doing so here is unnecessary where the facts of Mr. Pinkett's case do not square with those in *Salinas* because Mr. Pinkett was in custody. (St. Br. 14-18)

Here, Mr. Pinkett *exercised* his right to remain silent when he did not protest his innocence in response to his arrest. See *Nitti*, 312 Ill. at 93. The prosecutor thus improperly argued that Mr. Pinkett's post-arrest, pre-*Miranda* silence should be used by the jury to infer his guilt. (July 9, 2018, Sup. R. 241) The State, relying primarily on the *Salinas* plurality, instead argues that the prosecutor's comments on Mr. Pinkett's silence during opening statement did not infringe on his right to remain silent because Mr. Pinkett did not *invoke* his right to silence.[2] (St. Br. 14-16)

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[2] In this brief, Mr. Pinkett refers to an accused staying silent as the accused "exercising" his right to remain silent, and an accused informing an officer that he wishes to cut of questioning as the accused "invoking" his right to remain silent. See Laurent Sacharoff, *Miranda's Hidden Right*, 63 Ala. L. Rev. 535, 539 (2012) ("[I]f the police read a suspect her rights and she says nothing, she is exercising her right not to speak, but she has not invoked her right to cut off police questioning. In such a circumstance, the police may question the suspect.").

But unlike the State's suggestion, the Court's plurality opinion in *Salinas* in no way requires an *arrestee* to expressly invoke his right to remain silent. (St. Br. 15-22). This is because the post-arrest setting differs from the pre-arrest, non-custodial-questioning setting in *Salinas*. *Salinas*, 570 U.S. at 181 (holding that to claim the privilege to remain silent, the accused must invoke that right). The post-arrest setting should be treated akin to the post-*Miranda* setting at issue in *Doyle*. *Doyle* 426 U.S. at 617 ("Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights.").

Requiring an express invocation following arrest puts lay persons, who do not know the intricacies of the law, at a distinct disadvantage when faced with the power of the State. See Brandon L. Garrett, *Remaining Silent After Salinas*, 80 U. Chi. L. Rev. Dialogue 116, 123 (2013) (arguing that an express invocation "is not remotely realistic" for lay persons). It is quite possible that an arrestee remaining silent may simply understand the popularized warning heard on countless television shows – "You have a right to remain silent" – to be applicable whenever arrested by the police. This is certainly not an outrageous thought, as the oft-heard warning does not further include: "You have the right to remain silent . . . but only if you expressly invoke your right." And this is to say nothing of the fact that people of color, minors, and women are less likely to assert their rights than their white, older, and male counterparts. Devon W. Carbado, *(e)racing the Fourth Amendment*, 100 Mich. L. Rev. 946, 1013 (2002); Saul M. Kassin, *Inside Interrogation: Why Innocent People Confess,* 32 Am. J. Trial Advoc. 525, 533 (2009); Janet E. Ainsworth, *In A Different Register: The Pragmatics of Powerlessness in Police Interrogation,* 103 Yale L.J. 259, 261 (1993).

The *Salinas* express-invocation requirement also should not apply to post-arrest, pre-*Miranda* settings because the suspect has not yet been warned of his rights. Under the *Miranda* and *Doyle* authority, an unwarned suspect subject to a custodial interrogation is not required

to invoke his right to remain silent. See *Salinas*, 570 U.S. at 184 (citing *Miranda*, 384 U.S. at 467-68, and n. 37). Requiring invocation in the post-arrest, pre-*Miranda* context is similarly unworkable because the silence has occurred in police custody and in the absence of *Miranda* warnings. In effect, here, the officers were prohibited from asking Mr. Pinkett incriminating questions, if they wished to have those statements admitted at trial, until he was advised of his *Miranda* rights. See *Salinas*, 570 U.S. at 184-85 (plurality opinion) ("[A] suspect who is subjected to the 'inherently compelling pressures' of an unwarned custodial interrogation need not invoke the privilege." (quoting *Miranda*, 384 U.S. at 468, and n.37)).

To that end, the State's argument – that not having an express invocation requirement puts the police at a disadvantage – is off base. In short, the State argues that not requiring an express invocation following arrest means "police would be placed in the impossible position of trying to determine when a defendant's lack of comment was an invocation of his Fifth Amendment right . . . [and o]fficers would then have to guess whether initiating an interview would 'scrupulously honor' that possible invocation of the right." (St. Br. 17-18)

But the State misunderstands the general law at issue. An arrestee, like Mr. Pinkett, is not facing interrogation from officers at the post-arrest (*i.e.* custodial) stage, otherwise *Miranda* warnings would be necessitated. See *Miranda*, 384 U.S. at 478 ("[W]e hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized."). Only when *Miranda* warnings are provided, and only after an individual expressly invokes his right to remain silent, must the police "scrupulously honor" that invocation. See *People v. Jones,* 371 Ill. App. 3d 303, 307 (2d Dist. 2007) ("Statements made after the defendant properly invokes his right to silence are admissible only if the prosecutors scrupulously honor the defendant's right to cut off questioning.").The police would therefore not be placed in

an "impossible position" because when an individual merely exercises his right to remain silent by staying silent, but fails to expressly invoke such right, the police are not required to cease questioning. See *Berghuis v. Thompkins,* 560 U.S. 370, 382 (2010) (holding that only after an unequivocal invocation of an accused's right to remain silent must police cut off questioning). In other words, if the police initiate an interrogation, and the suspect remains silent and fails to expressly invoke his right to remain silent, the police may continue the interrogation without concern.

Putting aside *Salinas*'s express-invocation requirement, the State claims that evidence of Mr. Pinkett's post-arrest silence was admissible because it was not in response to questioning. (St. Br. 16) The State likens Mr. Pinkett's post-arrest silence to an "outcry" such as "'What are you doing?'" or "'Hey!'" (St. Br. 16-17) The two are not the same.

On this matter, *United States v. Moore*, 104 F.3d 377 (D.C. Cir. 1997) is instructive. In *Moore*, an officer observed a vehicle containing three individuals moving at a high rate of speed and passing through several red lights without stopping. *Moore*, 104 F.3d at 380. The officer initiated a stop, and ordered the defendants to exit the vehicle. *Id.* A frisk for weapons revealed that the defendant, who was the driver of the vehicle, was wearing an empty shoulder holster and a bullet-proof vest. *Id.* The defendant agreed to a search of the car, where officers discovered numerous weapons and drugs. *Id.*

At trial, the prosecutor asked an officer during direct examination if the defendants said anything when the weapons and drugs were found under the hood of the car, and the officer answered in the negative. *Id.* at 384. Then, during closing argument, the prosecutor argued that if the defendant "didn't know the stuff was underneath the hood, [he] would at least look surprised. [He] would at least [have] said, 'Well, I didn't know it was there.'" *Id.* The jury ultimately found the defendant guilty. *Id.* at 380.

On appeal, the D.C. Circuit Court of Appeals found that the prosecutor's use of the defendant's post-arrest, pre-*Miranda* silence violated his fifth amendment rights. *Id.* at 385. In doing so, the court noted that though "interrogation per se had not begun, neither *Miranda* nor any other case suggests that a defendant's protected right to remain silent attaches only upon the commencement of questioning as opposed to custody." *Id.* The court further stated: "While a defendant who chooses to volunteer an unsolicited admission or statement to police before questioning may be held to have waived the protection of that right, the defendant who stands silent must be treated as having asserted it." *Id.* This is because "custody and not interrogation is the triggering mechanism for the right of pretrial silence under *Miranda*." *Id.*

As applied here, and contrary to the State's argument, the relevant question is not whether Mr. Pinkett's silence was in response to police questioning but rather whether he was in custody. (St. Br. 16); *Moore*, 104 F.3d at 385. And he was. (July 10, 2018, Sup. R. 265, 277) As such, the prosecutor's comment on Mr. Pinkett's post-arrest silence violated his constitutional rights.

The State also claims that Mr. Pinkett did not exercise his right to remain silent because he did not remain silent for very long. (St. Br. 17) But when a defendant stands silent post-arrest, even momentarily as Mr. Pinkett did in this case, he is exercising his protected right to remain silent. See *United States v. Hernandez*, 948 F.2d 316, 323 (7th Cir. 1991) (finding that evidence of the defendant's momentary silence post-arrest, pre-*Miranda* was inadmissible even though he made post-*Miranda* statements). Thus, while the State can admit Mr. Pinkett's post-arrest, pre-*Miranda* statements, it cannot point to his momentary silence as evidence of his guilt as it did here. See *Moore*, 104 F.3d at 385.

Critically, there are a number of reasons that custody, and not interrogation, gives rise to a defendant's fifth amendment right to remain silent. One such reason is that a prosecutor's comment on a defendant's post-arrest, pre-*Miranda* silence "unduly burdens that defendant's [f]ifth [a]mendment right to remain silent at trial." *Moore*, 104 F.3d at 385. This is because

absent the defendant's testimony, the jury will question why he has not testified to remove the "taint" of his post-arrest silence. *Id.* Another reason is that "[a]ny other holding would create an incentive for arresting officers to delay interrogation in order to create an intervening 'silence' that could then be used against the defendant." *Id.*

In addition to the D.C. Circuit Court of Appeals, the Seventh and Ninth circuit courts have found that evidence of a defendant's post-arrest, pre-*Miranda* silence in the State's case-in-chief violates the fifth amendment. *Hernandez*, 948 F. 2d at 323; *United States v. Whitehead*, 200 F. 3d 634, 639 (9th Cir. 2000) (finding that when the court admitted evidence of the defendant's post-arrest, pre-*Miranda* silence and allowed the government to comment on the silence in its closing argument, the defendant's privilege against self-incrimination was infringed); but see *United States v. Love*, 767 F. 2d 1052, 1063 (4th Cir. 1985) (holding that because the defendants had yet to receive their *Miranda* warnings, their silence was admissible as substantive evidence); *United States v. Wilchcombe*, 838 F. 3d 1179, 1190 (11th Cir. 2016) (same); *United States v. Frazier*, 408 F.3d 1102, 1111 (8th Cir. 2005) (same). This Court should follow the Seventh, Ninth, and D.C. circuit courts and hold that custody triggers a defendant's right to remain silent, and thus a defendant's post-arrest, pre-*Miranda* silence cannot be used as substantive evidence of guilt.

Next, the State argues that because Mr. Pinkett was not under official compulsion to speak, his silence was admissible. (St. Br. 18-20) For support, the State notes the Supreme Court has rejected that "an arrest, by itself, is governmental action which implicitly induces a defendant to remain silent." *Fletcher,* 455 U.S. at 60; (St. Br. 19) The State further relies on *Frazier*, which held that use of the defendant's post-arrest silence during the prosecution's case-in-chief was permissible because "there was no governmental action at that point inducing his silence" and he "was under no government-imposed compulsion to speak." (St. Br. 20); *Frazier*, 408 F.3d at 1111.

Critically, however, the governmental action at issue here was more than simply an "arrest." When the officer approached Mr. Pinkett, he told him "not to make a scene" and to "keep his mouth shut." (July 10, 2018, Sup. R. 265, 277) Under *Frazier*, upon which the State relies, this was governmental action that induced Mr. Pinkett's silence. *Frazier*, 408 F.3d at 1111. As such, it was entirely inappropriate for the prosecution to use Mr. Pinkett's silence as evidence of his guilt during its case-in-chief.

In the end, when Mr. Pinkett chose to not protest his innocence he exercised his right to remain silent. And just like the prosecutor's comment violated Illinois evidentiary legal principles, the comment also impermissibly infringed on Mr. Pinkett's decision to remain silent under the federal and Illinois constitutions' self-incrimination clauses. Mr. Pinkett's right to remain silent existed upon his arrest, and he was not required to invoke his right, but rather to merely exercise it by remaining silent. The prosecutor's comments on Mr. Pinkett's post-arrest silence in opening statements was therefore reversible error, as discussed in sub-argument D.

C. Trial counsel was ineffective for failing to argue that the prosecutor's comments were inadmissible under Illinois evidentiary law.

In the alternative, trial counsel provided ineffective assistance for failing to argue that the prosecutor's reference to Mr. Pinkett's post-arrest silence was both unconstitutional *and* an inadmissible comment on his silence under Illinois evidentiary law. (July 9, 2018, Sup. R. 242-46) A criminal defendant is guaranteed the right to the effective assistance of counsel under the United States and Illinois Constitutions. U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I, § 8; *Strickland v. Washington*, 466 U.S. 668, 684-687 (1984). A defendant is denied their right to effective assistance of counsel when their attorney's representation falls below an objective standard of reasonableness, and when the deficiencies in counsel's performance deprive the defendant of a fair trial. *Strickland*, 466 U.S. at 687; *People v. Albanese*, 104 Ill. 2d 504, 525-527 (1984). Additionally, a defendant must show there is a reasonable

probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Here, counsel's failure to articulate that the prosecutor's statements were also inadmissible under Illinois evidentiary law fell below an objective standard of reasonableness. *Albanese*, 104 Ill. 2d at 525-27. As discussed in sub-argument A, *supra*, pages 1-13, the prosecutor's comments during opening statements were improper under Illinois evidentiary law because the prosecutor expressly invited the jury to view Mr. Pinkett's post-arrest silence as evidence of his guilt. (July 9, 2018, Sup. R. 241); *McMullin*, 138 Ill. App. 3d at 876.

Had counsel pointed out that not only was the comment an unconstitutional reference to Mr. Pinkett's right to remain silent, but that it was also inadmissible as a matter of Illinois evidentiary law, there was at least a reasonable probability that the court would have granted the motion for a mistrial. See *People v. Graham*, 206 Ill. 2d 465, 478 (2003). There was no reasonable strategy for counsel to refrain from arguing an alternative basis for relief. In a case where Mr. Pinkett never testified, counsel's failure to also allege that the comment was error under Illinois evidentiary principles denied Mr. Pinkett his right to a fair trial since the prosecutor proceeded to inject evidence of Mr. Pinkett's post-arrest silence as evidence of his guilt at trial and during closing arguments. (See July 10, 2018, Sup. R. 267, 290, 360-61) And as addressed in sub-argument D, the evidence of Mr. Pinkett's post-arrest silence was prejudicial. Accordingly, this Court should reverse Mr. Pinkett's conviction and remand for a new trial. *Kliner*, 185 Ill. 2d at 127.

D. The State cannot prove its unconstitutional and inadmissible reference to Mr. Pinkett's decision to exercise his right to remain silent was harmless.

If this Court finds that the prosecutor's statements were barred by Illinois evidentiary principles, then the State must prove that the error was harmless such that there was "no

reasonable probability that the jury would have acquitted the defendant" if the evidence was excluded. See *People v. Nevitt*, 135 Ill. 2d 423, 447 (1990); see also *People v. Thurow*, 203 Ill. 2d 352, 363 (2003) (citing *United States v. Olano*, 507 U.S. 725, 734 (1993)) (noting that in a harmless error analysis, it is the State's burden to prove that the error was not harmless). If the prosecutor's statements referred to statements barred by the fifth amendment of the federal constitution, then the constitutional harmless error standard applies and the State is required to prove the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967); *People v. Hart*, 214 Ill. 2d 490, 518 (2005). If the prosecutor's comments were barred by the self-incrimination clause of the Illinois constitution, then the State is required "to prove beyond a reasonable doubt that the result would have been the same absent the error." *People v. Nitz*, 219 Ill. 2d 400, 410 (2006). Significantly, the appellate court here found the State had not met its burden of showing the error to be harmless. *Pinkett*, 2021 IL App (4th) 190172-U, ¶¶ 56-72.

To sustain a conviction for the offense of aggravated fleeing or attempting to elude a peace officer, the State was required to prove that (1) the police officer gave the driver a signal to bring his vehicle to a stop, (2) the driver willfully failed or refused to obey such a direction, (3) the signal to stop included a display of illuminated oscillating, rotating, or flashing red or blue lights that, when used in conjunction with an audible siren, indicated that the vehicle is an official police vehicle, and (4) the driver's rate of speed was at least 21 miles per hour over the legal speed limit. 625 ILCS 5/11-204.1(a)(1) (2017).

Here, the evidence that Mr. Pinkett wilfully fled to attempt to elude a police officer was anything but overwhelming, as the State suggests. (St. Br. 28-32) In order for the State to prove that Mr. Pinkett wilfully fled from a police officer, it was required to demonstrate that he knew the officer was behind him. See *People v. Pena*, 170 Ill. App. 3d 347, 354 (2d Dist. 1988) (remarking that a conviction of fleeing and eluding requires proof of a "willful"

failure to obey a visual or audible signal of a police officer). In this respect, the State's case rested primarily on the testimony of Deputy Wassell who attempted to initiate a traffic stop for speeding of Mr. Pinkett, Mikhail Williams, and another motorcyclist as they traveled on U.S. 54. (July 9, 2018, Sup. R. 253-57)

While on the shoulder of the opposite side of the road, Deputy Wassell noted he activated his radar which detected that the motorcycles traveled 78 miles per hour in a 55 miles per hour zone. (July 9, 2018, Sup. R. 255) As a result, he activated the emergency lights of his unmarked car while the three motorcycles approached him on the opposite side of the road. (July 9, 2018, Sup. R. 253) Yet, during a police interview, Mr. Pinkett said that he looked down and did not see any lights. (July 10, 2018, Sup. R. 141; Sup. 2 E. 46, 14:33-14:53) Since Deputy Wassell's unmarked vehicle was on the other side of the road as the motorcycles passed him, a reasonable trier of fact would not necessarily hold it against Mr. Pinkett that he did not notice Deputy Wassell's lights. (July 9, 2018, Sup. R. 253) In any event, the State was required to prove that Deputy Wassell also activated his siren and he had not done so at that stage. (July 9, 2018, Sup. R. 257) Further, Mr. Pinkett's statement that he looked down was not incriminating since it was equally plausible that he may have glanced at the road in front of him or at his console.

Once Deputy Wassell conducted a U-turn and began following the motorcycles, all three of them stopped at a four-way stop sign. (July 9, 2018, Sup. R. 258) At that point, Deputy Wassell observed Williams turn around to look at him. (July 9, 2018, Sup. R. 258, 262, 264; July 10, 2018, Sup. R. 95) Deputy Wassell gestured to Williams, directing him to pull over. (July 9, 2018, Sup. R. 258, 260) Williams did not do so, and all three motorcycles continued through the intersection while maintaining a speed of 60 miles per hour. (July 9, 2018, Sup. R. 258, 262, 264; July 10, 2018, Sup. R. 95) Notably, Deputy Wassell admitted that Mr. Pinkett never turned around to look at him. (July 10, 2018, Sup. R. 121) Yet, if Mr. Pinkett knew of the police officers presence, it is implausible that he would follow traffic laws.

Instead, a reasonable trier of fact would expect an individual evading arrest to turn around, turn left or right, or increase his speed. Mr. Pinkett did not do so.

Certainly, Officer Hobbs turned on her lights before the motorcycles passed her. (July 10, 2018, Sup. R. 172) Yet the mere fact that her lights were turned on while she was parked on the side of the road did not indicate to the motorcycles that she was in pursuit of them. (July 10, 2018, Sup. R. 172) This is especially true where her sirens were not activated to alert the motorcycles to her presence until after they drove by. (July 10, 2018, Sup. R. 172, 194)

Additionally, the physical characteristics of the motorcycle along with Mr. Pinkett's manner of dress supported an inference that he could not hear the emergency sirens. Notably, Mr. Pinkett's motorcycle did not have rearview mirrors and there was no evidence that he ever turned around during the chase. (July 10, 2018, Sup. R. 120; Sup. 2 E. 16) This suggests that he did not see the officers' emergency lights. Further, Mr. Pinkett wore a helmet and a face mask while traveling on the motorcycle. (July 10, 2018, Sup. R. 125-26; Sup. 2 E. 36-44) The face mask is tied behind his head and covered his ears and is commonly worn by motorcyclists to protect the nose and mouth from bugs, wind, or debris. (July 10, 2018, Sup. R. 125-26) The State's own witness admitted that the loud noise of the motorcycles in conjunction with the wind would make hearing sirens more difficult. (July 10, 2018, Sup. R. 124) With his ears covered by both the helmet and the face mask along with the loud noise of the motorcycles and wind, it was equally plausible that Mr. Pinkett could not hear the sirens.

At trial, the State also admitted screen shots of the Walmart surveillance video which captured Mr. Pinkett entering the store. (July 10, 2018, Sup. R. 121; Sup. 2 E. 36-44) Critically, the photographs depicted Mr. Pinkett wearing either headphones or earplugs around his neck. (July 10, 2018, Sup. R. 281; Sup. 2 E. 43-44) It is thus reasonable to infer that he had the objects in his ears while driving the motorcycle. And Deputy Wassell agreed that it would be difficult to hear an emergency siren if an individual wore a helmet, face mask, and ear plugs while riding a motorcycle. (July 10, 2018, Sup. R. 319, 321) In total, this evidence supports an inference that Mr. Pinkett did not hear the emergency sirens of police officers.

Additionally, the State's theory that Mr. Pinkett was connected to the other two motorcycles was not established. As stated above, once Deputy Wassell observed all three motorcycles stopped at a four-way stop sign, Deputy Wassell observed Williams turn around to look at him. (July 9, 2018, Sup. R. 258, 262, 264; July 10, 2018, Sup. R. 95) Deputy Wassell gestured to Williams, directing him to pull over. (July 9, 2018, Sup. R. 258, 260) Williams did not do so, and all three motorcycles proceeded through the intersection. (July 9, 2018, Sup. R. 262; July 10, 2018, Sup. R. 143) Deputy Wassell further testified that the motorcycles traveled in relatively close proximity in a "triangle-type formation," and that the motorcyclists "touched" at some point while their heads moved "slightly from left to right." (July 9, 2018, Sup. R. 256, 264; July 10, 2018, Sup. R. 95)

Although Deputy Wassell was within ten feet of the motorcycles at the stop sign, he did not testify that he witnessed Williams say anything to the other motorcyclists at this point. (See July 9, 2018, Sup. R. 264) In any event, it was unlikely that Mr. Pinkett would have heard anything Williams stated since Deputy Wassell testified that the front motorcycle was situated in front of the other two motorcycles who were stopped closely together. *Id.* Further, the motorcycles merely traveling in a triangular formation did not suggest that Mr. Pinkett was associated with the other two motorcycles. It is equally plausible that only the back two motorcycles were associated with one another and happened to be trailing behind Mr. Pinkett on U.S. 54. Additionally, the fact that the motorcyclists moved their heads from left to right did not necessarily mean that they were communicating. Rather, it is a reasonable inference that they were following the rules of the road and checking their surroundings.

While in pursuit of the three motorcycles, Deputy Wassell saw them encounter a silver SUV which they followed for a mile before increasing their speed to pass the vehicle. (July 9, 2018, Sup. R. 268; July 10, 2018, Sup. R. 146) Although Deputy Wassell's emergency lights and siren were activated, the silver SUV did not pull over. (July 10, 2018, Sup. R. 147)

If Mr. Pinkett was trying to evade police officers, it does not make sense that he would follow a slower SUV for a mile before speeding. In addition, Mr. Pinkett traveled ahead of the other two bikes, which made it less likely that he would hear the sirens. Thus, this evidence suggested that he was unaware that police officers attempted to stop him.

Further, Mr. Pinkett's behavior once he entered the Walmart parking lot did not necessarily support an inference that he tried to evade arrest. Frank Smith's claim that Mr. Pinkett entered the parking lot at a high speed was an uncorroborated, subjective impression. (July 10, 2018, Sup. R. 198) And Mr. Pinkett's decision to park his motorcycle near the mulch of the Walmart did not suggest that he was trying to elude police officers. (July 10, 2018, Sup. R. 199-200) The State failed to admit witness testimony concerning how full the parking lot was; indeed, if parking spaces were taken, it is not unreasonable for Mr. Pinkett to park near the back of the store. If Mr. Pinkett was aware that officers were trying to arrest him, it is inexplicable why he would carry his motorcycle vest and a helmet into the Walmart because those items would associate him with the motorcycle. (July 10, 2018, Sup. R. 182; Sup. 2 E. 36-44) Also, Mr. Pinkett told Sergeant Frazier he went to Walmart to "buy zip ties for something that came off his motorcycle." (July 10, 2018, Sup. R. 266, 282) Deputy Wassell testified he observed a piece of plastic dragged from the bottom of Mr. Pinkett's motorcycle. (July 9, 2018, Sup. R. 265; Sup. 2 E. 15, 17) The evidence indicates Mr. Pinkett was unaware of the officers' attempts to stop him when he proceeded to Walmart to repair his motorcycle.

The State claims that while Sergeant Frazier was transporting Mr. Pinkett to the police station, he "volunteered that he had not been running from the police," and thus "he knew why he had been detained and sought to exculpate himself." (St. Br. 31) But it is unclear from the record whether Mr. Pinkett was told why he was being detained while in Walmart. That question was never asked of Sergeant Frazier. (July 10, 2018, Sup. R. 266, 282) Moreover, this argument does not support a finding that Mr. Pinkett's guilt was overwhelming. Instead, it is, as the State argued he should have done, evidence that Mr. Pinkett eventually did protest his arrest.

Mr. Pinkett's statement was consistent with his defense at trial, which was that he did not know he was being pursued by police and that he was not trying to flee from or elude the police.

The prosecutor's comment on Mr. Pinkett's post-arrest silence was thus not harmless. The State attempts to minimize the prosecutor's comment by arguing it constituted five lines out of 13 pages, and the jury was instructed twice that opening statements are not evidence. (St. Br. 29) But as the appellate court noted below, "[w]hile the trial court provided a curative instruction about opening statements and closing argument, the instruction alone is not always curative but rather a factor to be considered in determining the prejudice to defendant." *Pinkett*, 2021 IL App (4th) 190172-U, ¶ 65 (citing *People v. Bunning*, 298 Ill. App. 3d 725, 729 (4th Dist. 1998)). Here, the prosecutor argued Mr. Pinkett's post-arrest silence at every stage of trial. *Id.*, ¶ 63. The prosecutor elicited testimony from Sergeant Frazier about the post-arrest silence. (July 10, 2018, Sup. R. 267) Then, during closing arguments, the prosecutor queried if a "normal person" would have reacted with silence, as Mr. Pinkett did, in such a situation. (July 10, 2018, Sup. R. 360-61) The error may have originated in opening statements, but it was not limited to that stage where the prosecutor repeatedly relied on Mr. Pinkett's post-arrest silence as evidence of his guilt, thus tainting the entire trial. See *People v. Lucas*, 132 Ill. 2d 399, 432-33 (1989) (finding harmless error where the witness's reference to the defendant's request for an attorney was not argued in evidence or elicited by the prosecutor).

The State also claims that counsel mitigated any prejudice from the prosecutor's opening statements during counsel's cross-examination of Sergeant Frazier and counsel's closing argument. (St. Br. 29-30) Counsel, however, had no other option but to cross-examine Sergeant Frazier because the State argued that Mr. Pinkett's post-arrest silence was evidence of his guilt. (July 10, 2018, Sup. R. 360-61) Any mitigating effect of counsel's cross-examination was outweighed by the inherently prejudicial nature of the evidence and the State's reference to that silence not just in opening statement, but also in its case-in-chief and closing argument. (July 10, 2018, Sup. R. 241, 360-61)

Similarly, contrary to the State's argument, the prosecutor's acknowledgment in closing argument that Mr. Pinkett had the right to remain silent or "say nothing," did not cure the prejudice. (St. Br. 30) As this Court can see, the prosecutor's acknowledgment was sandwiched between improper commentary of Mr. Pinkett's silence and arguments as to why this silence demonstrated his guilt:

> "He doesn't ask why he's being detained. Mr. Schnack made a lot of arguments about he has a right to remain silent. Certainly, he has the right to remain silent, but, again, you just have to ask yourself what would a normal person who, if it's his argument "it wasn't me, I had nothing to do with this," what would that normal person do when someone comes up to you in the bathroom of Walmart, plain clothes -- now, he does say I'm a deputy sheriff -- takes your knife and detains you? Don't you think a normal person would say what's this all about, why, why are you detaining me, what's going on? Just, that would be a normal response." (Sup. R. 360-61)

Surely the prosecutor did not cure any prejudice to Mr. Pinkett where he "directly called into question" Mr. Pinkett's post-arrest silence immediately after stating that a defendant has the right to remain silent. *Pinkett*, 2021 IL App (4th) 190172-U, ¶ 63. As the appellate court found below, the prosecutor's comments merely served to confuse the jury. *Id.*

As set forth above, the State's case rested almost entirely on Deputy Wassell's version of the events, which primarily presupposed that the motorcycles acted in concert to elude arrest. And the State's evidence was weak in this regard. In contrast, the defense theory of the case rested on the State's lack of evidence that Mr. Pinkett wilfully eluded arrest since the State's evidence that he heard or saw police officers was weak. Notably, the jury did not return from deliberation until over two hours later, which further supports that the evidence was far from overwhelming. (C. 68-69; July 10, 2018, Sup. R. 403)

In a case where Mr. Pinkett did not testify, the jurors were charged with weighing the State's evidence when deciding whether he wilfully eluded arrest. Thus, the jury's duty was likely tainted by the prosecutor's erroneous use of Mr. Pinkett's post-arrest silence as evidence

of guilt, since it provided the jury with a reason to find him guilty without weighing the credibility and reliability of the State's evidence. See *Quinonez*, 2011 IL App (1st) 092333, ¶¶ 40-42. Because the State cannot prove that the error was harmless, under any standard, this Court should affirm the appellate court's order reversing Mr. Pinkett's conviction and remanding his case for a new trial. See *Pinkett*, 2021 IL App (4th) 190172-U, ¶ 74.

II.

The prosecutor engaged in a pattern of misconduct which violated Michael Pinkett's right to remain silent by arguing that his post-arrest silence was evidence of guilt throughout his trial.

During opening statements and closing arguments, the prosecutor erroneously urged the jury to find Michael Pinkett's inadmissible and protected post-arrest silence as evidence of guilt and elicited testimony from police officers on Mr. Pinkett's exercise of that right. (July 10, 2018, Sup. R. 241, 360-61) The prosecutor's inflammatory remarks were irrelevant and testimony of Mr. Pinkett's post-arrest silence was barred by Illinois evidentiary law. By engaging in this pattern of misconduct, the prosecutor's actions deprived Mr. Pinkett of a fair trial and undermined any confidence in the trial's outcome since his actions likely factored into the jurors' finding of guilt. Because the prosecutor's pattern of misconduct constituted clear and obvious error, relief after plain-error review is warranted. Ill. S. Ct. Rule 615(a).

Alternatively, defense counsel provided deficient representation when he failed to object to the prosecution's improper questioning of police officers and its improper remarks during closing arguments. (July 10, 2018, Sup. R. 267, 290, 360-61) There was no reasonable trial strategy for counsel's failure to continuously object to the introduction and use of Mr. Pinkett's post-arrest silence as evidence of guilt at trial and during closing arguments since he previously objected to the State's use of post-arrest silence during opening statements. (July 9, 2018, Sup. R. 242). Accordingly, this Court should reverse Mr. Pinkett's conviction and remand for a new trial. *People v. Linscott*, 142 Ill. 2d 22, 28 (1991).

Standards of Review

Whether a prosecutor engaged in misconduct so egregious as to warrant a new trial presents a question of law which is reviewed *de novo*. *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007); see *People v. Dameron*, 196 Ill. 2d 156, 162 (2001). Ineffective assistance of counsel claims present mixed questions of law and fact, and the ultimate question of whether counsel was ineffective is a question of law that is subject to *de novo* review. *People v. Coleman*, 2015 IL App (4th) 131045, ¶ 66. Whether the cumulative effect of several trial errors deprived a defendant of his due-process right to a fair trial is a question of law that this Court should review *de novo*. See *People v Radcliff*, 2011 IL App (1st) 091400, ¶ 22.

Authorities

"A criminal defendant, regardless of guilt or innocence, is entitled to a fair, orderly, and impartial trial." *Wheeler*, 226 Ill. 2d at 121-22; U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I, § 2. This Court has expressed an "'intolerance of prosecutorial misconduct that deliberately undermines the process by which we determine a defendant's guilt or innocence.'" *Id.* at 122 (quoting *People v. Johnson*, 208 Ill. 2d 53, 66-67 (2003)). To this end, the prosecutor has an ethical obligation to refrain from introducing irrelevant and prejudicial evidence at trial. *Johnson*, 208 Ill. 2d at 71.

An opening statement should inform the jury what each party expects to prove and it "may include a discussion of the expected evidence and reasonable inferences from the evidence." *People v. Kliner*, 185 Ill. 2d 81, 127 (1998). Similarly, in closing arguments, a prosecutor may only comment on the evidence and any fair and reasonable inferences the evidence may suggest. *People v. Perry*, 224 Ill. 2d 312, 347 (2007). Although a prosecutor is allowed a "great deal of latitude in making his opening statement and closing argument," *People v. Pasch*, 152 Ill. 2d 133, 184 (1992), "comments intending only to arouse the prejudice passion of the jury are improper." *People v. Jones*, 2016 IL App (1st) 141008, ¶ 21; see *Wheeler*, 226 Ill. 2d at 128-29.

Improper remarks by the State will merit reversal if it constituted a material factor in a defendant's conviction or substantially prejudiced the defense. *Wheeler*, 226 Ill. 2d at 123. Any improper statements by the prosecutor must be evaluated in the context of the closing argument through considering the language used, its relationship to the evidence, and its effect on the defendant's right to a fair trial. See *People v. Smith*, 141 Ill. 2d 40, 60 (1990); *Perry*, 224 Ill. 2d at 347. A single error endangering the integrity of the judicial process is sufficient to justify reversal of an improperly obtained conviction. *People v. Young*, 347 Ill. App. 3d 909, 926 (1st Dist. 2004). It follows that the State's improper conduct substantially prejudices a defendant if the jury could have reached a contrary verdict had the improper remarks not been made or the reviewing court cannot determine that the State's improper remarks did not contribute to the conviction. *People v. Marzonie*, 2018 IL App (4th) 160107, ¶ 48. If a reviewing court cannot say that the prosecutor's improper conduct did not contribute to the conviction, then the court should order a new trial. *Linscott*, 142 Ill. 2d at 28.

Additionally, when a defendant alleges numerous instances of prosecutorial misconduct, a reviewing court may consider the cumulative effect of the remarks rather than assess each isolated act individually. See*, e.g.*, *People v. Whitlow*, 89 Ill. 2d 322, 338-339 (1982) (finding the prosecutor's direct examination of a witness was improper while evaluating prosecutorial misconduct cumulatively); see also *People v. Blue*, 189 Ill. 2d 99, 139-140 (2000).

Analysis

Individuals have a constitutional right to remain silent. U.S. Const. amend. V; see *People v. Mulero*, 176 Ill. 2d 444, 463, (1997). Both the United States Supreme Court and this Court have held that a prosecutor's comments on "a defendant's exercise of a constitutional right are improper because they penalize a defendant for exercising his or her right." *Mulero*, 176 Ill. 2d at 462-63 (citing *Griffin v. California*, 380 U.S. 609, 614 (1965)); see also *People v. Libberton*, 346 Ill. App. 3d 912, 923 (2d Dist. 2003). Such comments have a "chilling effect" by making an exercise of that right "costly." *Id.*

Under the federal constitution, the United States Supreme Court held that is improper to impeach a testifying defendant with evidence that he was silent after he was arrested and advised of his *Miranda* rights. *Doyle v. Ohio*, 426 U.S. 610, 617-20 (1976). Later on, the Court clarified that federal law permits impeachment of a defendant with evidence that he was silent any time *before* receiving *Miranda* warnings. *Fletcher v. Weir*, 445 U.S. 603, 605-07 (1982). However, the *Fletcher* Court further held that the states were free to form their own rules with respect to defendant's post-arrest, pre-*Miranda* silence. *Fletcher*, 445 U.S. at 607.

In contrast, Illinois courts follow a broader rule – holding that evidence of a defendant's post-arrest silence is generally inadmissible regardless of the timing of *Miranda* warnings since the prohibition of such evidence is derived from Illinois evidentiary law which predates *Miranda*. See *e.g. People v. Taylor*, 2019 IL App (3d) 160708, ¶ 19; *People v. Anderson*, 2018 IL App (4th) 160037, ¶ 56; *People v. Quinonez,* 2011 IL App (1st) 092333, ¶ 25; *People v. McMullin*, 138 Ill. App. 3d 872, 876 (2d Dist. 1985); see also *People v. Lewerenz*, 24 Ill. 2d 295, 299 (1962). As a result, Illinois courts recognize the inherent prejudice in drawing a negative inference from a defendant's exercise of his right to silence since it both impermissibly penalizes the defendant for the exercise of his rights and because a defendant's exercise of his rights is not inconsistent with a claim of innocence. *Lewerenz,* 24 Ill. 2d at 295, 299; *McMullin*, 138 Ill. App. 3d at 877.

To be sure, Illinois courts have identified two exceptions where post-arrest silence is relevant to issues in a case, and importantly, both exceptions require a defendant to testify before his silence can be used. *Quinonez*, 2011 IL App (1st) 092333, ¶ 27; *McMullin*, 138 Ill. App. 3d at 877. As such, a prosecutor's comments on a defendant's post-arrest silence are improper where impeachment is not an issue because the defendant has not testified. See *People v. Herrett*, 137 Ill. 2d 195, 213 (1990) (holding that the prosecutor's remarks during rebuttal closing argument on the defendant's post-arrest silence were improper since the defendant did not testify); see also *People v. Holt*, 2019 IL App (3d) 160504-B, ¶ 35.

After police officers placed Mr. Pinkett under arrest at the Walmart, he exercised his constitutional right to remain silent. Yet throughout trial, the prosecutor repeatedly encouraged the jury to consider Mr. Pinkett's post-arrest silence as evidence of guilt. (July 10, 2018, Sup. R. 241, 360-61) Beginning with opening statements, the prosecutor used Mr. Pinkett's exercise of a constitutional right against him in promising the jurors that "[the arresting police officers will] both testify in spite of the fact that they tried to arrest [Mr. Pinkett] there at Walmart without making a scene since it's in the middle of the store, *[and] at no point did [he] ever ask in any way the reason why he was being detained.*" (July 9, 2018, Sup. R. 241) Similarly, the prosecutor reminded the jury of Mr. Pinkett's post-arrest silence during closing arguments:

> "[THE STATE]: *[Mr. Pinkett] doesn't ask why he's being detained.* [Defense counsel] made a lot of arguments about he has [*sic*] a right to remain silent. Certainly, he has the right to remain silent, but, again, you just have to ask yourself what would a normal person who, if it's his argument 'it wasn't me, I had nothing to do with this,' what would that normal person do when someone comes up to you in the bathroom of Walmart, plain clothes -- now, he does say I'm a deputy sheriff – takes your knife and detains you? *Don't you think a normal person would say what's this all about, why, why are you detaining me, what's going on? Just, that would be a normal response.*
>
> Again, he has the right to say nothing. But you have to ask yourself what would a normal person who had – if that's his argument – nothing to do with this, *what would that normal person have said when they're suddenly detained in the bathroom of Walmart? If it's his argument that he had nothing to do with it, surely you would ask what's going on.*" (July 10, 2018, Sup. R. 360-61)

Because Mr. Pinkett's post-arrest silence was inadmissable in the State's case-in-chief, the prosecutor committed misconduct by commenting on it as evidence of guilt during opening statements. See *Lewerenz*, 24 Ill. 2d at 299. Accordingly, defense counsel objected on this very basis and made an oral motion for a mistrial. (July 9, 2018, Sup. R. 241, 243) Counsel explained to the trial court that Mr. Pinkett did not have an obligation to ask why he was being arrested and that this was an improper commentary on him exercising his right to remain silent. (July 9, 2018, Sup. R. 241)

In response, the prosecutor brought two cases to the trial court's attention: the Supreme Court's opinion in *Fletcher*, and *People v. Givens*, 135 Ill. App. 3d 810 (4th Dist. 1985). (July 9, 2018, Sup. R. 247) Based on *Givens*, the State insisted that it was allowed to comment on Mr. Pinkett's post-arrest silence since police officers had not read him his *Miranda* rights. *Id.* Defense counsel reiterated that the fifth amendment guaranteed Mr. Pinkett the right to remain silent after arrest and that the prosecutor improperly argued "admission of guilt by silence." (July 9, 2018, Sup. R. 244) Over defense counsel's objection, the trial court concluded that the State's case law was on point and denied the motion for a mistrial. (July 9, 2018, Sup. R. 247)

Yet *Givens* was inapposite to the case at bar. In *Givens*, the prosecutor cross-examined the defendant on his post-arrest, pre-*Miranda* silence as a form of impeachment. 135 Ill. App. 3d at 813-14. On appeal, the defendant argued that this testimony was prohibited by the due process clause and the privilege against self-incrimination of both the state and federal constitutions. *Id.* at 821. Ultimately, the court held that the use of the defendant's post-arrest silence as impeachment of his trial testimony did not violate the Illinois or federal constitutions. *Id.* at 825. Notably, the defendant in *Givens* did not argue that the admission of his post-arrest statements violated Illinois evidentiary law. *Id.* at 823-24; see also *Quinonez*, 2011 IL App (1st) 092333, ¶ 26 (distinguishing *Givens* since that court did not address whether the use of post-arrest, pre-*Miranda* silence violates Illinois evidentiary principles).

Unlike the defendant in *Givens*, Mr. Pinkett did not testify at trial. Indeed, the prosecutor was unaware at that stage whether Mr. Pinkett would choose to testify. By arguing that this inadmissable evidence was relevant as early as opening statements, the prosecutor did not fulfill his duty to keep his statements "free from material that may tend to improperly prejudice the accused in the eyes of the jury." *People v. Jones*, 2016 IL App (1st) 141008, ¶ 22 (quoting *People v. Weller*, 123 Ill. App. 2d 421, 427 (4th Dist. 1970)). Remarkably, the prosecutor's

own words suggested that he misunderstood the law since he admitted that he researched an Illinois Practice Volume that discussed "defendant's pre-arrest silence." (July 9, 2018, Sup. R. 243) Thus the prosecutor's misunderstanding of *Givens* was an obvious mistake that was avoidable and deprived Mr. Pinkett of a fair trial by providing the jury with an improper, additional reason to find him guilty. *Kliner*, 185 Ill. 2d at 127.

Subsequently, the prosecutor elicited testimony from the arresting police officers on Mr. Pinkett's post-arrest silence. When the prosecutor asked Sheriff Petty if Mr. Pinkett made any statements to him, Petty responded that he did not. (July 10, 2018, Sup. R. 290) During direct examination, the following exchange occurred:

> "Q. [THE STATE]: You talked about walking in from the bathroom to the front. Did he at that point, when you had detained him, ask why he was being detained?
>
> A. [SGT. FRAZIER]: No, not like somebody going to your side and grabbing – in plain clothes grabbing a knife off your waistband and [*sic*] anything. *[Mr. Pinkett] didn't act like I was doing anything out of line whatsoever which to me is odd.*" (July 10, 2018, Sup. R. 267)

As already established, *Givens* did not condone impeachment of a non-testifying defendant with post-arrest silence through witnesses. See *Lewerenz*, 24 Ill. 2d at 299; see also *Quinonez*, 2011 IL App (1st) 092333, ¶ 27. Thus, the State erred in asking Sheriff Petty and Sergeant Frazier to comment on Mr. Pinkett's silence and the prosecutor committed misconduct by eliciting this prejudicial testimony from police officers. *Id.*

In the same vein, while the prosecutor had wide latitude in closing arguments, that latitude did not permit him to expand his remarks on Mr. Pinkett's silence as evidence of guilt. See *Lewerenz*, 24 Ill. 2d at 299; *Jones*, 2016 IL App (1st) 141008, ¶ 21. Critically, Mr. Pinkett did not testify at trial, and thus the State had no basis to impeach him with his post-arrest silence. *See People v. Sanchez*, 392 Ill. App. 3d 1084,1097 (3d Dist. 2009) (holding that the State could not use a non-testifying defendant's post-arrest silence to impeach alibi witnesses at trial). Although the prosecutor acknowledged that Mr. Pinkett had a right to remain silent, he nevertheless invited the jury to place themselves in Mr. Pinkett's shoes and asked what a "normal

person" would do in a post-arrest situation. (July 10, 2018, Sup. R. 360-61) In doing so, the State reiterated the phrase "normal person" five times, which directly attacked Mr. Pinkett's credibility for exercising his constitutional right to silence. *Id.* Because this evidence was inadmissable, the prosecutor's inflammatory remarks only served to distract the jury from "the awesome responsibility with which they are charged," which was to decide Mr. Pinkett's guilt or innocence. *Johnson*, 208 Ill. 2d at 77-78.

In a case where Mr. Pinkett did not testify, the prosecutor's pattern of misconduct caused substantial prejudice and affected the fundamental fairness of the proceedings. *Lewerenz,* 24 Ill. 2d at 295; *McMullin*, 138 Ill. App. 3d at 877. Although Mr. Pinkett was under no obligation to ask why he was being detained, the prosecutor's suggestion that a "normal," innocent person would have done otherwise was an unfair attack on his credibility. (July 10, 2018, Sup. R. 360-61) In arguing Mr. Pinkett's post-arrest silence was evidence of guilt throughout trial, the prosecutor minimized its burden of proving that he wilfully fled from police officers and shifted the burden of proof on to Mr. Pinkett to explain why he remained silent. See *People v. Mulero*, 176 Ill. 2d 444, 463 (1997) ("The exercise of a constitutional right may not be turned into a sword to be used against a defendant [...]. The 'chilling effect' on a defendant's decision to exercise a constitutional right in circumstances such as those in this case is obvious.").

It is implausible to assume that every juror in this case disregarded the prosecutor's suggestion that Mr. Pinkett's post-arrest silence was evidence of guilt. This is especially true since the State reminded the jurors of this throughout trial and effectively provided the jury with a means of finding Mr. Pinkett guilty without assessing the sufficiency of the State's case. (July 10, 2018, Sup. R. 241, 360-361) The prosecutor's statements were designed to lead the jury to return a verdict formed in emotion and suspicion of Mr. Pinkett's silence. The prosecutor's pattern of misconduct constituted plain error since it denied Mr. Pinkett his right to a fair trial.

Plain Error

Mr. Pinkett recognizes that he did not contemporaneously object to the prosecutor's direct examination of arresting police officers and the prosecutor's improper statements during closing arguments, nor did he raise these issues in a timely post-trial motion. Therefore, the pattern of prosecutorial misconduct throughout trial is not preserved for appeal. *People v. Thompson*, 238 Ill. 2d 598, 611-12 (2010). The first step of analysis under "the plain error doctrine is determining whether there was a clear or obvious error at trial." *People v. Sebby*, 2017 IL 119445, ¶ 49. Where no objection is made to the prosecutor's remarks, the statements will constitute plain error if they were so inflammatory as to deny the defendant a fair trial or so flagrant as to threaten deterioration of the judicial process. *People v. Trice*, 2017 IL App (4th) 150429, ¶ 60 (citing *People v. Taylor*, 2015 IL App (4th) 140060, ¶ 39). As argued above, the prosecutor's statements in this case were of such magnitude, and thus Mr. Pinkett has established clear or obvious error.

Next, the defendant must demonstrate the evidence was closely balanced. *Sebby*, 2017 IL 119445, ¶ 51. "In determining whether the evidence adduced at trial was close, a reviewing court must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case." *Id.,* ¶ 53. The issue is not whether the evidence presented was sufficient to support a guilty verdict, but whether the evidence presented was close. *Id.*, ¶ 60 (citing *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007)).

A commonsense assessment of the evidence in this case demonstrates that it was closely balanced. *Sebby* , 2017 IL 119445, ¶ 53. As discussed above, to sustain a conviction for the offense of aggravated fleeing or attempting to elude a peace officer, the State was required to prove that (1) the police officer gave the driver a signal to bring his vehicle to a stop, (2) the driver willfully failed or refused to obey such a direction, (3) the signal to stop included a display of illuminated oscillating, rotating, or flashing red or blue lights that, when used in conjunction with an audible siren, indicated that the vehicle is an official police vehicle, and (4) the driver's rate of speed was at least 21 miles per hour over the legal speed limit. 625 ILCS 5/11-204.1(a)(1) (2017); *supra*, pages 23-31.

Here, the evidence was closely balanced as to whether Mr. Pinkett wilfully fled to attempt to elude a police officer. As detailed above in Argument I, sub-argument D, the evidence was not only far from overwhelming, but in fact was closely balanced. In a case where Mr. Pinkett did not testify, the jury's responsibility of weighing the evidence could have been tainted by the prosecutor's pattern of misconduct in using Mr. Pinkett's post-arrest silence as evidence of guilt. See *Quinonez*, 2011 IL App (1st) 092333, ¶¶ 40-42. *Sebby* entitles Mr. Pinkett to receive a new trial because the prosecutor's pattern of misconduct constituted clear error and the evidence was closely balanced. 2017 IL 119445, ¶ 69. Accordingly, Mr. Pinkett requests this Court reverse his conviction and remand for a new trial. *Linscott*, 142 Ill. 2d at 28.

B. Defense counsel provided ineffective assistance by failing to object to the State's pattern of prosecutorial misconduct.

A criminal defendant is guaranteed the right to the effective assistance of counsel under the United States and Illinois Constitutions. U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I, § 8; *Strickland v. Washington*, 466 U.S. 668, 684-87 (1984). To prove that counsel was ineffective, *Strickland* requires the defendant to show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) that but for counsel's unprofessional errors, a reasonable probability exists that the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687; *People v. Albanese*, 104 Ill. 2d 504, 525-526 (1984). Additionally, a defendant must show there is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694; see *People v. Graham*, 206 Ill.2d 465, 478 (2003). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Here, trial counsel's failure to continue his objections to all of the instances of the prosecutor's misconduct constituted ineffective assistance of counsel. *People v. Eddmonds*, 101 Ill. 2d 44, 63, 66 (1984) (explaining that errors that are not properly preserved may be considered regarding an ineffective-assistance-of-counsel claim). An attorney's failure to object

to a prosecutor's improper closing argument may constitute deficient performance by counsel. *People v. Moore*, 356 Ill. App. 3d 117, 122 (1st Dist. 2005) (holding that defense counsel's failure to object to the prosecution's closing argument constituted ineffective assistance of counsel). Further, competent counsel is aware of the law and argues it to his client's interest in post-trial motions to preserve his client's claims. See, *e.g.*, *People v. Owens*, 384 Ill. App. 3d 670, 672-73 (1st Dist. 2008) (finding defendant prejudiced on appeal by counsel's failure to properly preserve sentencing issue in post-sentencing motion). Here, defense counsel permitted the State to commit misconduct without preserving the issue for appellate review, and this was deficient performance.

There was no reasonable trial strategy behind defense counsel failing to object to the prosecutor's misconduct. Ordinarily, trial counsel's decisions are treated as strategic matters that deserve great deference. *People v. West*, 187 Ill. 2d 418, 432-33 (1999). However, a "strategic" decision can nevertheless support a claim of ineffective assistance of counsel if the decision was unreasonable. *West*, 187 Ill. 2d at 432-33. Allowing the prosecutor to argue inflammatory and inadmissible evidence that Mr. Pinkett's post-arrest silence was evidence of guilt did not further the defense theory of the case. See *Mulero*, 176 Ill. 2d 444, 463 (1997). This is supported by defense counsel initially objecting to the prosecutor's opening statements on the basis that comments on his post-arrest silence violated Mr. Pinkett's right to remain silent. (July 9, 2018, Sup. R. 242) Since the prosecutor elicited testimony from police officers on Mr. Pinkett's post-arrest silence and explicitly argued his silence as evidence of guilt during closing arguments, there was no reasonable trial strategy for counsel to cease objecting throughout trial on the same basis. In failing to preserve the prosecutor's overall pattern of misconduct, defense counsel's conduct was objectively unreasonable. See *Moore*, 356 Ill. App. 3d at 122.

Additionally, the prejudice prong of *Strickland* is satisfied by the same balance of factors that made the evidence "closely balanced" for purposes of plain error-review as discussed above. *People v. Johnson*, 218 Ill. 2d 125, 143-44 (holding that the analysis applicable to the

prejudice prong of *Strickland* is similar to the analysis applicable to the first prong of the plain-error inquiry). Because Mr. Pinkett did not testify or present any evidence, this case depended on the jury's assessment of the State's evidence. The prosecutor's pattern of misconduct encouraged the jury to disregard its duty to assess the weight of the evidence and instead convict Mr. Pinkett on the basis of his post-arrest silence.

CONCLUSION

For the foregoing reasons, Michael B. Pinkett, defendant-appellee, respectfully requests that this Court affirm the judgment of the appellate court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is forty-three pages.

/s/Jessica L. Harris
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Assistant Appellate Defender

No. 127223

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- MICHAEL B. PINKETT, Defendant-Appellee.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 4-19-0172. There on appeal from the Circuit Court of the Eighth Judicial Circuit, Pike County, Illinois, No. 17-CF-84. Honorable Jerry J. Hooker, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On October 11, 2022, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellee in an envelope deposited in a U.S. mail box in Springfield, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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