

No. _____

IN THE
SUPREME COURT OF THE UNITED
STATES

BENJAMIN WILKINSON,
Petitioner,
v.
STATE OF MISSOURI,
Respondent.

On Petition for Writ of Certiorari
To The Missouri Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The government may not use a defendant's silence against him as proof of his guilt when he has invoked his right to remain silent. The Missouri court in this case held that the right does not attach until there is a custodial interrogation preceded by *Miranda* warnings, conflicting with six federal circuits and several state supreme courts. When a defendant is in the presence of police – or is in jail where his conversations are recorded and monitored by the State – and is asked an accusatory question, does the Fifth Amendment right to remain silent attach?

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

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Benjamin Wilkinson respectfully petitions for a writ of certiorari to review the judgment of the Missouri Court of Appeals, Eastern District.

OPINIONS BELOW

State v. Wilkinson, No. ED103997 (Mo. App. E.D. Aug. 22, 2017) (per curiam order).

State v. Wilkinson, No. ED103997 (Mo. App. E.D. Aug. 22, 2017) (memorandum supplementing order).

State v. Wilkinson, No. ED103997 (Mo. App. E.D. Sept. 25, 2017) (order denying rehearing or transfer).

State v. Wilkinson, No. ED103997 (Mo. App. E.D. Sept. 25, 2017) (order denying motion to publish).

State v. Wilkinson, 531 S.W.3d 626 (Mo. App. E.D. 2017) (transfer denied).

JURISDICTION

The Missouri Court of Appeals issued its order and memorandum supplementing the order on August 22, 2017 and denied a motion for rehearing on September 25, 2017. On November 21, 2017, the Missouri Supreme Court entered an order denying transfer. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the Constitution of the United States

. . . nor shall any person . . . be compelled in any criminal case to be a witness against himself . . .

Amendment VI of the Constitution of the United States

In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel.

Amendment XIV of the Constitution of the United States

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Benjamin Wilkinson, the Petitioner, was arrested in February 2014 for second-degree murder and armed criminal action in the shooting death of his girlfriend, April Ward.¹ Ms. Ward died of a single gunshot wound in a bedroom that she and Mr. Wilkinson occupied in Ms. Ward's parents' home. There was no gunshot residue, no fingerprints, no DNA, or other evidence as to who fired the gun. Ms. Ward and Ms. Wilkinson were the only persons in the room at the time of the incident.

Mr. Wilkinson was held on a \$500,000 cash-only bond in the St. Louis County Justice Center (the jail) until his trial twenty-two months later [L.F. 2]. While in jail, the State recorded Wilkinson's conversations on the phone and with visitors.

Prior to trial, Mr. Wilkinson moved the trial court to exclude any testimony from two state's witnesses, the deceased's parents, concerning conversations in which the parents asked him accusatory questions about the death of their daughter while the State recorded the conversations. [L.F. 11]. Mr. Wilkinson argued that the testimony would violate his right to remain silent, a fair trial, and due process [L.F. 11-12]. The trial court denied the motion.

During opening statements, the prosecutor informed the jury that the mother, Debra Palmier,

¹ References to the legal file are denoted as "[L.F.]"; references to the trial transcript are denoted as "[Tr.]"; references to the appendix are denoted as "[#a]."

would testify about conversations at the jail that were recorded, telling the jury:

“[Ms. Palmier] was close to the defendant, Benjamin, who lived in their house with them. She would visit him in the St. Louis County jail a couple of times after this happened. And she went in and visited with him and asked him again, begging, begging, ‘Just tell me what happened. Tell me what happened.’ And he wouldn’t answer her.

She went back another time, had an opportunity to visit him. He accepted her visit. And she had a chance to go in and see him again, begging him, ‘Tell me what happened. Just tell me what happened.’ Again, he refused to answer.” [Tr. 228-229]

Mr. Wilkinson did not testify at trial. During the trial, the prosecutor elicited testimony from Ms. Palmier specifically about the recorded jail conversations. Over defense objection, Ms. Palmier testified that she initially believed the incident to be an accident. Once Mr. Wilkinson was charged with murder and “after things started coming out” about the incident online, Ms. Palmier became convinced Mr. Wilkinson murdered her daughter [Tr. 361]. Prior to trial, Ms. Palmier initiated contact with Mr. Wilkinson and visited him in jail “three, maybe four” times [Tr. 327-328]. Mr. Wilkinson and Ms. Palmier spoke in-person over a phone being recorded by jail officials [Tr. 327-328].

The jail records all conversations between inmates and visitors, whether in-person or via telephone call, and the prosecutor's office monitors the recordings. Before any conversation, the inmate must enter his or her inmate number into the recording system. For an in-person visit, the inmate hears a pre-recorded message stating: "This call may be recorded and is subject to monitoring at any time." For a telephone call, the inmate enters his inmate number and is subjected to a voice recognition process. Then, inmates are warned, "This call may be recorded and is subject to monitoring at any time."

During these recorded conversations, Ms. Palmier questioned Mr. Wilkinson about what happened [Tr. 327]. Having been warned by his attorney not to discuss the issues of his case with anyone, especially while he was being recorded by the State, Mr. Wilkinson repeatedly told Ms. Palmier that "[h]e wanted to tell [her what happened] in private," [Tr. 327]. During one visit, Ms. Palmier implored Mr. Wilkinson to "serve the Lord," and tell her what happened [Tr. 329].

Ms. Palmier testified that "he couldn't tell [her], and he wanted to talk to [her], but wanted it to be in private," [Tr. 329]. During another visit, Ms. Palmier told Mr. Wilkinson that she "couldn't understand what happened," but Mr. Wilkinson did not answer her questions [Tr. 329]. Ms. Palmier testified that Mr. Wilkinson had called her on the telephone while he was in custody, but he would not discuss the case [Tr. 329].

Similarly, Rocky Emin, the deceased's step-father, over Mr. Wilkinson's objection, testified that he questioned Mr. Wilkinson during a telephone call that Mr. Wilkinson made to him and Ms. Palmier at their home from jail. Mr. Emin asked Mr. Wilkinson to explain how Ms. Ward died, but that Mr. Wilkinson would not tell him what happened [Tr. 381].

During the testimony of both Ms. Palmier and Mr. Emin, Mr. Wilkinson renewed his objections to their testimony concerning the recorded conversations, which the trial court overruled [Tr. 328; 380].

The following occurred during the prosecutor's closing argument:

P: "[Ms. Palmier] even had a chance to go and visit with [Mr. Wilkinson]. She said, I treated him as my son. We know what happened at this point. We know that he shot her in the head and killed her. [Ms. Palmier] just wanted to know why.

She goes to visit him at the jail two or three times, she said, talked to him on the phone several times. Every time she asked him, What happened? Why? No answer.

Rocky, on the phone, Just tell us this was an accident or something. We'll be behind you."

D: "Object. That's not in evidence, Your Honor."

Court: "Ladies and gentlemen, you are instructed to be guided by the evidence as you recall it and the reasonable inference that you believe should be drawn from it."

P: "We'll be behind you. Just tell us what happened. Nothing. Nothing. And that's because we all know what happened in that room. He killed her that night by placing that gun to her head, directly to her head and pulling the trigger." [Tr. 614-15].

The jury acquitted Mr. Wilkinson of second-degree murder but convicted him of the lesser-included charge of involuntary manslaughter and armed criminal action [Tr. 650]. He was sentenced to 17 years' imprisonment in the Missouri Department of Corrections. Mr. Wilkinson filed a motion for a new trial arguing, as here, that he was denied his rights under the Fifth, Sixth, and Fourteenth Amendments [L.F. 47]. The motion was denied [L.F. 53].

On appeal, Mr. Wilkinson argued five points of error, two of which raise federal constitutional claims relevant to this petition. First, did the trial court err in allowing the testimony of Ms. Palmier and Mr. Emin, violating Mr. Wilkinson's rights under the Fifth Amendment? Second, did the trial court err in allowing the prosecution to develop and maintain a theme throughout the trial that Mr. Wilkinson's invocation of his right against self-incrimination was proof of his guilt?

The Court of Appeals, Eastern District, filed a *per curium* order and memorandum supplementing the order denying Mr. Wilkinson's appeal on August 22, 2017 [19a; 1a]. The memorandum supplementing the order was not published [1a].

On September 6, 2017, Mr. Wilkinson filed a Motion for Rehearing/Transfer to the Missouri Supreme Court and a Motion to Publish. On September 25, 2017, the Eastern District denied each motion [21a; 22a].

On October 10, 2017, Mr. Wilkinson timely applied for transfer to the Supreme Court of Missouri. The question presented to the court was:

“When a suspect is held in pretrial custody by the State, and his conversations with non-attorney parties are recorded by the State, may that person invoke his right to remain silent, right to a fair trial, and due process of law under U.S. Const. Amends. V, VI, and XIV; and Mo. Const., Art. 1 §§ 10 and 18(a), during those conversations with the assurance that his silence will not be used as affirmative or subjective proof of his guilt, unless such silence is used to impeach a defendant who testifies?”

On November 21, 2017, the Missouri Supreme Court denied Mr. Wilkinson's transfer application [23a]. This petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

I. ALTHOUGH THIS COURT HAS NOT YET DIRECTLY DECIDED THAT THE RIGHT TO REMAIN SILENT ATTACHES TO RECORDED IN-CUSTODY QUESTIONS FROM NON-STATE ACTORS, THE MISSOURI DECISION VIOLATES THE DEFENDANT'S RIGHT TO REMAIN SILENT, WHICH EXISTS WHETHER OR NOT A *MIRANDA* WARNING HAS BEEN GIVEN

The Fifth Amendment right to remain silent, also known as the Self-Incrimination Clause, and its applicability to the states through the Fourteenth Amendment, derives from the Constitution, not from the warnings required by *Miranda v. Arizona*.² *Franklin v. Duncan*, 884 F.Supp. 1435, 1147 (N.D. Cal. 1995), *aff'd* and *adopted*, 70 F.3d 75, 76 (9th Cir. 1995).

"To sustain the privilege, it need only be evident from the implications of the questions and in the setting in which it was asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous" because the answer may tend to be incriminating or construed to be incriminating. *Hoffman v. United States*, 314 U.S. 479, 486-87 (1951). "The protection must be confined to instances where the witness has reasonable cause to apprehend danger from the government from a direct answer." *Id.* at 486. If a person invokes his right to remain silent in situations where there is a

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

threat of self-incrimination due to the environment in which the questions are asked, the prosecution may not comment on that invocation in court. *Malloy v. Hogan*, 378 U.S. 1, 15 (1964). “The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner.” *Miranda v. Arizona*, 384 U.S. at 476.

It is the environment in which the questioning occurs that is the biggest factor in determining when the Fifth Amendment attaches to a person. *Illinois v. Perkins*, 496 U.S. 292, 297 (1990). This Court has found the right to be applicable to trials and grand jury testimony. *Hoffman*, 342 U.S. at 488. In each, the environment created an atmosphere in which the defendant could “apprehend danger from the government from a direct answer.” *Id.* at 486.

One situation – custodial interrogation by police or other state actors – is so inherently dangerous to the Self-Incrimination Clause that this Court imposed extra requirements on the government to ensure the rights are protected. *Miranda*, 384 U.S. at 444-45.

In *Miranda*, this Court granted certiorari to “further explore some facets of the problems, thus exposed, of applying the privilege against self-incrimination to in-custody interrogations and to give concrete constitutional guidelines for law enforcement agencies and courts to follow.” *Id.* at 441-42. This Court held:

“the prosecution may not use statements, whether exculpatory or inculpatory, stemming

from a custodial interrogation unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Id.* at 444.

This Court was concerned “primarily with [the] interrogation atmosphere and the evils it can bring.” *Id.* at 456. This Court noted, “the privilege [against self-incrimination] has been accorded a liberal construction.” *Id.* at 461. This Court also rejected outright the notion that the record must reflect that a defendant was or was not advised of his right to remain silent for him to invoke the right to remain silent. *Id.* at 497-99.

Nothing in *Miranda* suggests that the only time a person may invoke his right to remain silent is where the government advised him of it; rather, the *Miranda* warnings were designed to ensure that a defendant who did not know that he had the right to remain silent, while he was being interrogated by police, was informed of that right and voluntarily waived it. *Id.* at 479. Finally, *Miranda* placed the burden on the prosecution to demonstrate that the warnings had been given. *Id.*; see *Missouri v. Siebert*, 542 U.S. 600, 608 (2004).

Police custody does not always carry with it the inherent dangers of self-incrimination. *Illinois v. Perkins*, 496 U.S. at 299. The questioning must occur

in a coercive situation, which is determined from the perspective of the suspect. *Id.* at 297.

Perkins held that an undercover officer posing as a fellow inmate was not required to give *Miranda* warnings to an incarcerated suspect before asking questions that could elicit an incriminating response because there was no reason for the suspect to feel that the undercover agent had any legal authority to force him to answer questions or that the agent could affect the suspect's future treatment. *Id.* at 300. "When the suspect has no reason to think that the listeners have official power over him, it should not be assumed that his words are motivated by the reaction he expects from his listeners." *Id.* at 296. This Court also said "[t]he essential ingredients of a 'police-dominated' atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone he believes to be a fellow inmate." *Id.* Importantly, this Court noted that "[c]oercion is determined from the perspective of the suspect." *Id.* Thus, when a suspect speaks in the presence of someone he views as an equal, "the coercive atmosphere is lacking," because the "suspect has no reason to think that the listeners have official powers over him." *Id.* at 297.

"*Miranda* warnings are only due when a suspect interrogated by police is 'in custody.'" *Thompson v. Keohane*, 516 U.S. 99, 102 (1995). That is, the government only has a duty to inform someone of his right to remain silent during a custodial interrogation by police or state actors. That is not to say that a person's right to remain silent does not

attach *until* the government informs him of it. Nor does it attach only when the record reflects that the government adhered to the Constitution and gave the *Miranda* warnings. *Miranda*, 384 U.S. at 497-99. The *Miranda* warnings do not create a hurdle for a defendant to overcome, but rather a hurdle for the government – *if* the government wishes to introduce a defendant’s exculpatory or inculpatory statements at trial. *Miranda*, 384 U.S. at 444.

The Self-Incrimination Clause guarantees that a defendant has a right to remain silent and that he is free from the prosecution, at trial, using his assertion of his right as proof of his guilt, also known as an adoptive admission. *Griffin v. California*, 380 U.S. 609, 615 (1965). The right against prosecutorial or judicial comment is so important that one comment by the prosecution on a defendant’s silence as proof of guilt warrants reversal of a conviction. *Id.* at 612.

This Court held in *Griffin* that the “Fifth Amendment, and its direct application to the Federal Government and its bearing on the States by reason of 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.” *Id.* at 615.

There, during closing statements, the prosecutor commented on the fact that the defendant had not denied or explained the charges, but instead had remained silent. *Id.* at 611. The “comment on the refusal to testify is a remnant of the ‘inquisitorial system of criminal justice’ which the Fifth Amendment outlaws.” *Id.* at 614, quoting *Murphy v.*

Waterfront Comm., 378 U.S. 52, 55, (1964). Such comment “is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.” *Id.* Surely, the jury is free to infer from a defendant’s silence what they wish, but when the “court solemnizes the silence of the accused into evidence against him,” the court has directed the jury to infer guilt. *Id.* *Griffin*’s holding is a restraint on the prosecution and the court to ensure the rights of the Fifth Amendment of defendants who elect not to testify. *Id.*

After the *Miranda* decision in 1966, this Court, in *Doyle v. Ohio*, held that the use of a defendant’s post-arrest, post-*Miranda* warning silence for impeachment purposes by the prosecution violates the Due Process Clause of the Fourteenth Amendment. *Doyle v. Ohio*, 426 U.S. 610, 611 (1976). Subsequent decisions by this Court enforce this holding.³ *Doyle* is implicated in *Miranda* situations – that is, custodial interrogations by police or state actors. *Id.* at 617. *Doyle* does not abrogate *Griffin*, but rather applies the rationale of *Griffin* to custodial situations that implicate *Miranda*.

The Self-Incrimination Clause derives from the Constitution, *not* from the *Miranda* warnings. *Griffin* still stands. This Court has not modified *Griffin* to apply only to situations where the *Miranda* warning has been given. The *Miranda* warnings are a

³ See *Dickerson v. United States*, 530 U.S. 428 (2000); *Salinas v. Texas*, 570 U.S. 178 (2013).

safeguard for persons not aware of their constitutional rights. *Miranda*, 86 S.Ct. at 1625. Miranda warnings do not attach the constitutional rights to defendants; the rights belong to the defendant and where the rights attach depend on the environment in which the questioning occurs.

Despite clear and consistent case law of this Court stating that the Fifth Amendment right to remain silent applies to all situations in which it is evident – from the perspective of the defendant – that answering in the setting in which the questions are asked would jeopardize his right against self-incrimination, subsequent interpretation of the right to remain silent by some lower state and federal courts have diluted that right. The Missouri court here is among those that have diluted this constitutional right. This Court should grant this writ of certiorari to resolve conflicts among the federal and state courts to ensure uniformity as to rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

II. THE MISSOURI COURT OF APPEALS DECISION CONFLICTS WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT AND IS INCONSISTENT WITH OPINIONS OF THE UNITED STATES COURT OF APPEALS.

In Missouri, a defendant's right to not have his post-arrest silence used against him only triggers when he is questioned by police or other state actors shortly after he has been arrested and read his

Miranda rights. *State v. Mahan*, 971 S.W.2d 307, 314 (Mo. banc 1998). A defendant does not have the right to remain silent in the face of accusations when the government is present unless the questions are asked by the government. *Id.* The Missouri courts' interpretation of this federally protected right conflicts with several states as well as several circuits of the United States court of appeals.

i. *Missouri*

In Missouri, the right to remain silent and to not have that silence used as subjective proof of guilt by the State only attaches when: (1) the State has advised a defendant of his *Miranda* rights and (2):

- a. The questioner is a state actor or the functional equivalent to a state actor;
- b. The defendant is in custody; and
- c. The questioning of the defendant amounted to a custodial interrogation. *Id.*

Missouri courts define the "functional equivalent to a state actor" as a witness whose "interests are so integrated and aligned with the police that his role is adversarial in nature and his conduct and questioning at the defendant are accusatory in nature." *State v. Perkins*, 753 S.W.2d 567, (Mo. App. E.D. 1988). Factors included in making this determination include:

- a. Environment: was it coercive?
- b. Use of witness: was the witness adversarial to the defendant?
- c. Witness gain: did the witness profit?

- d. Police involvement: was the witness working with law enforcement?

Id.

If the above tests are not satisfied, the protections explained in *Doyle v. Ohio* do not attach. *Id.* The result of the Missouri courts' restrictive view of the Self-Incrimination clause in the present case is clear: a Missouri prosecutor may use a custodial defendant's invocation of his right to remain silent as proof of his guilt and may create a theme throughout the trial to imply as much to the jury.

The Missouri court rejected Mr. Wilkinson's contention that his conversation with the deceased's parents were protected by his Fifth Amendment right to remain silent for two primary reasons. First, the court noted that there was nothing in the record showing that the police fulfilled their constitutional obligation in giving Mr. Wilkinson his *Miranda* warnings [15a]. Because of this lack of record, the court concluded that there "is no indication that Appellant's silences during conversations with Mother and Stepfather in jail were in any reliance of any *Miranda* warnings." [15a]. This result shifts the burden from the State to the defendant to prove that the State informed him of his rights. It also creates a bright-line rule: if proof of the *Miranda* warning is not on the record, a defendant is precluded from making a claim of constitutional error on appeal [15a].

Second, the court concluded that Palmier and Emin – State's witnesses who were the victim's parents – were not the functional equivalent to state

actors [15a-16a]. The court required that there must have been evidence of collusion between the witnesses and the police for *Miranda* or *Doyle* to have been implicated [15a-16a]. As discussed below in Section III, this result conflicts with this Court's analysis in *Illinois v. Perkins*.

The conclusion by these courts begs the question: if conversations recorded between third parties and a defendant raise no Self-Incrimination Clause issues, why do jails, such as the one in St. Louis County, warn prisoners that their conversations are being recorded and monitored? The logical answer, and only answer, is that the government is acknowledging its presence and warning defendants that what they say may be used against them in court. Through signs and pre-recorded messages, prisons and jails remind defendants of their right to remain silent prior to each conversation a defendant has with private parties. This creates a trap for defendants – if they provide information that incriminates themselves, it may be used against them, but if they refuse to answer accusatory questions, then that silence may be used as proof of guilt. This result is an affront to the Self-Incrimination Clause.

It is unclear what rights a defendant has while he is being monitored by police, knows he is being monitored by police, and verbally or physically invokes his right to remain silent. Missouri courts are in direct conflict with several states, including

Arizona.^{4 5 6} This conflict should be resolved by this Court.

ii. *States*

The Arizona Supreme Court recognized that “[t]he right to remain silent derives from the Constitution and not from the *Miranda* warnings themselves.” *State v. VanWinkle*, 792 P.3d 1148, 1151 (Ariz. 2012), quoting *United States v. Velarde-Gomez*, 269 F.3d 1023, 1029 (9th Cir. 2001) (en banc). In *VanWinkle*, the Arizona court held that the defendant’s post-custody, pre-*Miranda* silence may not be used as evidence of guilt. *Id.* at 1152.

There, the court determined that when a person is in custody, even if police have not given the *Miranda* warnings, the prosecution’s “comment on the defendant’s exercise of his right to silence violates the Fifth Amendment.” *Id.* at 1152, quoting *Velarde-Gomez*, 269 F.3d at 1029. The defendant, while in the custody of the police, was accused by a third party of shooting a victim. *Id.* at 1149. The defendant did not respond to the accusation but instead remained silent. *Id.* The state created and maintained a theme that such silence was proof of his guilt. *Id.*

⁴ Alabama: *Ex parte Marek*, 556 So.2d 375, 382 (Ala. 1989).

⁵ Indiana: *Akard v. State*, 924 N.E.2d 202 (Ind. App. 2010).

⁶ Kentucky: *Baumia v. Commonwealth*, 402 S.W.3d 530, 536-37 (Ky. 2013 and *Trigg v. Commonwealth*, 460 S.W.3d 322, 325 (Ky. 2015).

The Arizona court rejected the argument that the situation required the *Miranda* warnings because the defendant's silence was in response to an accusation made "by a civilian unaffiliated with police before a warning could be given." *Id.* at 1151. The court noted that although *Miranda* was not implicated, the analysis under the Fifth Amendment did not end. *Id.*

The Arizona court relied in part on this Court's holding in *Hoffman*: "[a] defendant has the right to remain silent when it is 'evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.'" *Id.* The Arizona court, citing this Court in *Griffin*, held: "The prosecution may not comment on a defendant's exercise of his right to remain silent." *Id.*

During its analysis, the Arizona court noted that the circuits of the United States court of appeals are split on the issue of whether post-custody, pre-*Miranda* silence is admissible. *Id.* at n. 5. The Seventh, Ninth, and the District of Columbia Circuits have found that the Self-Incrimination Clause attaches to post-arrest, pre-*Miranda* silence.⁷ *Id.* The First, Sixth, and Tenth attach the right to

⁷ See *United States v. Hernandez*, 948 F.2d 316, 321-24 (7th Cir. 1991); *United States v. Whitehead*, 200 F.3d 634, 637-39 (9th Cir. 2000); *United States v. Moore*, 104 F.3d 377, 384-90 (D.C. Cir. 1997).

pre-arrest silence.⁸ *Id.* The Fourth, Eighth, and Eleventh Circuits have found that the Self-Incrimination Clause does not attach until post-arrest and post-*Miranda* warnings.⁹ *Id.*

The Arizona court found the Ninth Circuit and the D.C. Circuit reasoning persuasive, because the Fifth Amendment guarantees a person's right to remain silent once in custody even if the *Miranda* warnings are not given. *Id.* at 1151. "The *Miranda* warnings are not the genesis of the right to remain silent." *Id.*, (internal quotations omitted). Quoting the Alabama Supreme Court, the Arizona court noted that "[a]n individual with the right to remain silent has the right to remain silent *without regard to whether an officer has told him of that right.*" *Id.*, quoting *Ex parte Marek*, 556 So.2d 375, 382 (Ala. 1989), emphasis in original.

The State of Arizona argued that the defendant only had the right to remain silent if under police questioning. The Arizona court rejected the argument stating, "[C]ustody and not interrogation is the triggering mechanism for the right of pretrial silence." *Id.* at 1151-52 (internal quotations omitted).

⁸ See *Copola v. Powell*, 878 F.2d 1562, 1567-68 (1st Cir. 1989); *Combs v. Coyle*, 205 F.3d 269, 280-83 (6th Cir. 2000); *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991); but see *United States v. Oplinger*, 150 F.3d 1061 (9th Cir. 1998), overruled on other grounds by *United States v. Contreras*, 593 F.3d 1135 (9th Cir. 2010) (en banc) (per curiam).

⁹ *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985); *United States v. Frazier*, 408 F.3d 1102, 1109-11 (8th Cir. 2005); *United States v. Rivera*, 944 F.2d 1563, 1567-68 (11th Cir. 1991).

Further, “the Fifth Amendment’s protection does not vanish simply because a question is posed or statement made by a third party in the presence of police rather than the police themselves.” *Id.* quoting *United States v. Yates*, 524 F.2d 1282, 1285 n. 8 (D.C. Cir. 1975).

The Arizona court concluded that the prosecution’s use of the defendant’s silence to prove his guilt violated the Fifth and Fourteenth Amendment of the United States Constitution, because the accusation made by the third party was made in the presence of police while the defendant was in custody. *Id.* at 1152.

The conflict between the Missouri tests and the Arizona test is noted by the Missouri Supreme Court in *State v. Mahan*, 971 S.W.2d 307 (Mo. banc 1998). The Missouri court has never answered whether a defendant may assert his right to remain silent in the face of an accusation by an accuser while the defendant is in police custody and the conversation is held in the presence of police. *Id.* at 314.

The defendant in *Mahan* received a letter from a woman asking him if he had infected her with HIV. He did not reply to the letter. The woman testified that the defendant did not respond to the letter. The prosecution commented on the defendant’s lack of response implying to the jury that such behavior was proof of guilt.

The Missouri court declined to answer the constitutional question because there was overwhelming evidence of the defendant’s guilt but

noted the split between states and circuits on the issue. *Id.* The Missouri court suggested that if it did decide the constitutional issues, it would reject the Arizona test of *VanWinkle* and instead apply an interpretation of the Fourth Circuit in *Folston v. Allsbrook*, 691 F.2d 184, 187 (4th Cir. 1982).

In *Folston*, the court admitted testimony of a fellow inmate who said he heard the defendant's co-defendant ask the defendant, "why did he shoot the man?" The inmate, a cellmate of defendant and co-defendant, testified that defendant "gave no reply." *Id.*

The Fourth Circuit noted that the record was unclear as to whether the defendant in *Folston* had received his *Miranda* warnings. The lack of record persuaded the court to reject the defendant's argument that the testimony was inadmissible under *Miranda* and *Doyle*. *Id.* The Fourth Circuit also noted that there was no evidence that the witness was working for the government or that he was going to be a government witness before the conversation occurred. *Id.* at 188.

Comparing *VanWinkle* and *Folston*, the Missouri court suggested that it would follow *Folston* if it were to answer the constitutional questions, which it declined to do.

Mr. Wilkinson argued that the facts in *Mahan* and *Folston* were distinguishable from his case because he asserted his Fifth Amendment right by repeatedly telling Ms. Palmier that he would tell her what happened, but only in private. He clearly knew

the listeners had official power over him. The Missouri court here disagreed and applied the Missouri Supreme Court's *dicta* in *Mahan*.

The conflict among the states presents different results based on the geographic location of the defendant. This Court should grant this writ of certiorari to resolve these conflicts.

iii. *Circuits Of The United States Court Of Appeals*

The Missouri court is also in direct conflict with the Ninth Circuit's decision in *Franklin v. Duncan*, 884 F.Supp. 1435, 1147 (N.D. Cal. 1995), *aff'd* and *adopted*, 70 F.3d 75, 76 (9th Cir. 1995), and the District of Columbia Circuit in *United States v. Moore*, F.3d 377 (D.C. Cir. 1997). The decision is also in conflict with the First,¹⁰ Sixth,¹¹ Seventh,¹² and Tenth Circuits.¹³ This Court should grant this writ of certiorari to resolve the conflicts.

The Ninth Circuit held, "[w]hen a defendant is in the presence of the government, he has the right to remain silent in the face of questioning whether the questioning is from a private individual or the police." *Franklin v. Duncan*, 884 F.Supp. 1435, 1147 (N.D. Cal. 1995), *aff'd* and *adopted*, 70 F.3d 75, 76 (9th Cir. 1995).

¹⁰ *Copola v. Powell*, 878 F.2d 1562, 1567-68 (1st Cir. 1989).

¹¹ *Combs v. Coyle*, 205 F.3d 269, 180-83 (6th Cir. 2000).

¹² *United States v. Hernandez*, 948 F.2d 316, 321-24 (7th Cir. 1991).

¹³ *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991).

In *Franklin*, the defendant was given the *Miranda* warnings and his counsel informed him not to discuss his case with anyone. *Id.* at 1444. The jail where the defendant was held pre-trial warned him that anything he said to a visitor over the phone could be monitored by jail officials. *Id.* He stood accused of murdering his daughter's friend. *Id.* His daughter, who was also his accuser, visited him after asking the prosecutor for permission, and suggested that the defendant tell the truth. *Id.* at 1445. In response, the defendant pointed to a sign in the jail that read, "Conversations May Be Monitored." *Id.*

The prosecution elicited trial testimony from the daughter as to the defendant's silence and his pointing to the sign. *Id.* During closing argument, the prosecutor used the silence as an adoptive admission to prove his guilt.

On appeal, the court found that the defendant had invoked his right to remain silent by pointing to the sign. *Id.* 1447. He did so knowing that he was in custody and that the government was listening to his calls. *Id.* The court explained, "His pointing to the sign indicates that the desire not to talk to the government was his motivating factor." *Id.* The court went on to explain that even had he not pointed to the sign, the circumstances under which the defendant was questioned were improper. *Id.* "Although the government was not visibly present [when questioned by the witness] the government was audibly present. [The defendant] knew that the government could be monitoring his conversation.

Therefore, his silence may not be used against him.”
Id.

The Missouri court is also in direct conflict with the District of Columbia Circuit. In *United States v. Moore*, the court noted that “[n]either *Miranda* or any other case suggests that a defendant’s protected right to remain silent attaches only upon the commencement of questioning as opposed to custody. . . Custody and not interrogation is the triggering mechanism for the right of pretrial silence.” *Moore*, 104 F.3d at 385.

The D.C. Circuit recognizes that if a person is in custody and invokes the right to remain silent, it does not matter if *Miranda* warnings have been given. *Id.* The reasoning is that the Fifth Amendment does not derive from *Miranda*. *Id.* The court found that because the defendant was not being interrogated at the time, *Miranda* and *Doyle* would not apply. The D.C. Circuit explained, “[t]he silence of an arrested defendant, under *Griffin*, is an exercise of his Fifth Amendment rights which the Government cannot use to his prejudice.” *Id.* at 387.

The lower courts have grappled with whether a defendant may invoke his right to remain silent to private parties in the presence of the government. *VanWinkle*, 273 P.3d at 1151. This confusion has led to a dilution of the Fifth Amendment’s Self-Incrimination Clause because courts have focused on *Miranda*, *Doyle*, and its progeny, but have ignored the opinions from this Court prior to *Miranda*. Some lower courts have placed a requirement that *Miranda* be implicated in any custody situation in

order to invoke the right to remain silent, despite this Court explaining in 1951 that “[t]o sustain the privilege [against self-incrimination], it need only be evidence from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.” *Hoffman*, 486-87. *Miranda* did not abrogate *Hoffman*, and that fact is evident by this Court’s analysis in *Illinois v. Perkins*.

III. TO RESOLVE THE CONFLICTS, THIS COURT SHOULD GRANT REVIEW OF THE MISSOURI COURT OF APPEALS BECAUSE THIS IMPORTANT ISSUE OF FEDERAL CONSTITUTIONAL LAW SHOULD BE APPLIED CONSISTENTLY THROUGHOUT THE UNITED STATES

This Court should decide this issue for three practical reasons. First, the lower courts’ interpretation of this Court’s jurisprudence has created different consequences for defendants in different geographical locations – a result that should not occur for a federally protected constitutional right. Second, this decision significantly alters what defense attorneys should advise their custodial clients prior to trial. Third, this decision disproportionately affects indigent defendants who are unable to afford bail pretrial.

It is current common practice for defense attorneys to advise custodial clients in jail awaiting trial to not discuss their case with anyone, specifically during telephone conversations and in-

person visits conducted via a telephone being recorded. The reason for this warning is simple: the state may use any information provided by the defendant about his case against him at trial. As such, it is common practice for defense attorneys to advise their clients to tell people who ask about their case – regardless of who the third party is – that they cannot discuss their case while they are in custody and being recorded.

As evident from this petition for writ of certiorari, if the Missouri court's decision stands, defense attorneys must alter what they tell their custodial clients. Rather than tell clients to not answer accusatory questions, defense attorneys should advise their clients, who are likely in pretrial custody due to their financial inability to post bond, to not accept *any* phone calls, visitors, or mail, on the off-chance that they will be *asked* about the details of their cases. In Missouri and other jurisdictions that reach the result in this case, the prosecution may use a confined defendant's refusal to answer questions as proof of guilt.

Practically, any defendant in custody, despite being innocent until proven guilty, would be well-advised to forgo all contacts with the outside world to protect his rights under the Self-Incrimination Clause. This equates to a punishment for a defendant in pre-trial custody because if the defendant was free on bond, he could inform people he cannot talk about his case without the threat of the government listening to every conversation he has with a third-party.

Most defendants held in pretrial custody cannot afford bond. Most custodial defendants are indigent. The result of the Missouri decision imposes a pretrial penalty – having no contact with the outside world – on primarily poor persons and persons of color. The Self-Incrimination clause is blind to both income and skin color – it should apply equally with the same rights for everyone, not just those who can afford to pay for their pretrial release.

Defense attorneys whose pretrial clients are in custody need to know what advise their clients. Should they advise their custodial clients not to accept any phone calls, in-person visits, mail, or any other visit from third parties? If defense attorneys' clients are deprived of their constitutional rights for refusing to talk about their cases because they are being recorded by the government, a new question arises – is a defense attorney violating his duty to his client if he fails to inform his client not to accept phone calls and visitors because those communications are recorded by the state? Defense attorneys need guidance from this Court to settle this issue. This Court should grant review of this writ of certiorari.

IV. THIS COURT SHOULD GRANT REVIEW BECAUSE THE RESULT OF THE MISSOURI DECISION CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

While this Court has not addressed this issue directly, the Court has addressed the issue of when a

defendant may *not* invoke his right to remain silent in the face of accusations made by third parties while the defendant is being monitored by the government. *Perkins*, 396 U.S. 292, 300. In doing so, this Court has indicated that a person who is aware he is being monitored by the government, knows what he says could be used against him, and is asked guilt-seeking questions, may invoke his right to remain silent. *Id.*

The test for attachment of the Self-Incrimination Clause is whether the situation is one where the witness or defendant “has reasonable cause to apprehend danger from a direct answer.” *Hoffman*, 341 U.S. at 486-87. “To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.” *Id.*

Wilkinson argues that the Missouri decision here conflicts with the relevant decisions of this Court. Wilkinson asserts two propositions: 1) that the holding here conflicts with *Miranda* and *Perkins*, and 2) in the alternative, if the situation did not require *Miranda* warnings, his Fifth Amendment rights were violated as explained in *Hoffman* and *Malloy*.

Regardless of the analysis chosen, the result in the present case is an affront to the Fifth Amendment’s Self-Incrimination Clause. Here, the government was present because it admitted through the required pre-recorded message to being present and warned Mr. Wilkinson that it was recording and monitoring the conversations. Mr. Wilkinson was

aware of the government listeners and asserted his Fifth Amendment privilege because the environment was one where he could not answer the state's witnesses' questions without possibly furnishing the prosecution with "a link in the chain of evidence to prosecute" him for the crime for which he was held. *Hoffman*, 341 U.S. at 486.

CONCLUSION

WHEREFORE, Petitioner Benjamin Wilkinson prays that this Court issue its writ of certiorari to the Missouri Court of Appeals, and after review of the lower court decision, vacate that court's decision which denies Mr. Wilkinson his rights under the Fifth, Sixth, and Fourteenth Amendments, and remand the case for further proceedings that conform to constitutional standards.

Respectfully Submitted,

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APPENDIX

STATE OF MISSOURI,
Respondent,
vs.
BENJAMIN J. WILKINSON,
Appellant.

No. ED103997

Appeal from the Circuit Court of St. Louis County
Honorable Colleen M. Dolan

FILED: August 22, 2017

Before Lisa P. Page, P.J., Roy L. Richter, J., and
Philip M. Hess, J.

MEMORANDUM SUPPLEMENTING ORDER
AFFIRMING JUDGMENT PURSUANT TO RULE
30.25(b)

This memorandum is for the information of the parties and sets forth the reasons for our order affirming the judgement.

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED, OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT. IN THE EVENT OF THE FILING OF A MOTION TO REHEAR OR TRANSFER TO THE SUPREME COURT, A COPY OF THIS MEMORANDUM SHALL BE ATTACHED TO ANY SUCH MOTION.

Benjamin Wilkinson (“Appellant”) appeals from the trial court’s judgment following a jury trial convicting him of involuntary manslaughter in the first degree, in violation of Section 565.024 (RSMo. 2000),¹ and armed criminal action, in violation of Section 571.015. Appellant was sentenced to seven years’ imprisonment for involuntary manslaughter and ten years’ imprisonment for armed criminal action, to be served consecutively for a total sentence of 17 years. We affirm.

I. Background

The parties are familiar with the facts of the case; thus, we proceed directly to Appellant’s points on appeal.

II. Discussion

Appellant alleges five points on appeal, each of which argue that the trial court’s ruling deprived him of his rights to due process of law and a fair trial under U.S. Const. Amends. V, VI, and XIV and Mo. Const., Art. I, Sections 10 and 18(a).

First, Appellant argues that the trial court erred in denying his motion for judgment of acquittal for involuntary manslaughter because the State of Missouri (“State”) failed to establish sufficient proof of the *corpus delicti* of a homicide in that the State did not establish that the gunshot wound was not self-inflicted or accidentally caused.

¹ All statutory references are to RSMo. 2000, unless otherwise stated.

Second, Appellant argues that the trial court erred in denying his motion for judgment of acquittal for involuntary manslaughter because there was insufficient evidence to establish that Appellant recklessly caused April Ward's ("Victim") death in that the State never proved that Appellant had possession of the gun at any time during the shooting or that Appellant shot the gun.

Appellant's third and fourth points claim the trial court erred in denying his Motion in Limine and admitting testimony of Victim's mother, Debra Palmier ("Mother"), and stepfather, Rocky Emin ("Stepfather"), regarding Appellant's post-Miranda² silence in response to guilt-seeking questions while he was in custody and being recorded by the State. Appellant contends the questions violated his right to not be a witness against himself in that the guilt-seeking questions were adversarial, accusatory, and the equivalent of a custodial interrogation.

Fifth, and finally, Appellant argues that the trial court erred in submitting to the jury and instruction of voluntary intoxication because there was no evidence that Appellant had been heavily drinking or intoxicated at the time of the shooting and the instruction misled and confused the jury.

² Miranda v. Arizona, 384 U.S. 436, 479 (1966) (The Supreme Court of the United States held that, to give effect to the constitutional prohibition against compelled self-incrimination, an individual in police custody must be warned prior to any interrogation that he has the right to remain silent, the right to an attorney, and that anything the individual says may be used against him in a future criminal prosecution).

A. Sufficient Proof of *Corpus Delicti*

Appellant alleges that the trial court erred in denying his motion for judgment of acquittal because the State failed to establish sufficient proof of the *corpus delicti* of involuntary manslaughter. Appellant argues that the State failed to establish that Victim's gunshot wound was not self-inflicted because the State never proved that Appellant had possession of the gun at any time during the shooting or that he shot the gun himself. We disagree.

1. Standard of Review

When reviewing a claim for insufficient evidence, we are limited to a determination of whether sufficient evidence was presented from which a reasonable juror could find the defendant guilty beyond a reasonable doubt. State v. Barnett, 492 S.W.3d 646, 650 (Mo. App. E.D. 2016). In making that determination, all evidence and reasonable inferences are viewed in the light most favorable to the jury's verdict. Id. We accept all evidence and inferences supporting the conviction as true and disregard any contrary evidence and inferences. State v. Bowman, 337 S.W.3d 679, 688 (Mo. banc 2011).

2. Analysis

"The *corpus delicti* rule is essentially evidentiary in nature because it determines whether the defendant's confession of guilt may be considered substantive evidence of guilt." State v. Miller, 139 S.W.3d 632, 637 (Mo. App. S.D. 2004). Pursuant to the rule: "Extrajudicial statements, admissions or confessions, are both inadmissible and insufficient to

sustain a conviction unless there is independent proof, direct or circumstantial, of the essential elements of the *corpus delicti*.” State v. Arnot, 724 S.W.2d 676, 679 (Mo. App. S.D. 1987). A defendant’s statements, however, are not precluded from determining whether *corpus delicti* has been established if there is evidence of corroborating circumstances independent of the defendant’s statements that tend to prove the offense. Miller, 139 S.W.3d at 637. When evaluation whether the *corpus delicti* has been proven, “all that is required is evidence of circumstances tending to prove the *corpus delicti* corresponding with the confession.” State v. Madorie, 156 S.W.3d 351, 355 (Mo. banc 2005). “Slight corroborating facts are sufficient to establish the *corpus delicti*.” Id. The *corpus delicti* in a homicide case consists of two elements: (1) proof of the death of the victim, and (2) evidence that the criminal agency of another caused the victim’s death. State v. Byrd, 389 S.W.3d 702, 710 (Mo. App. E.D. 2012).

Here, the State presented sufficient evidence of corroborating facts to establish Appellant’s criminal agency in causing Victim’s death. Mother testified that after hearing a loud noise, she ran to Victim’s bedroom and saw Victim lying on her side with blood on her face while Appellant sat behind her. Mother further stated that when she asked Appellant what happened to her daughter, Appellant said they were “playing a stupid game.” Mother and Stepfather repeatedly asked Appellant what happened to Victim, but Appellant never said that it was accidental or self-inflicted shooting.

Officer Melody Quinn (“Officer”) responded to the shooting and testified that when she asked Appellant what happened to Victim he replied that he

“was scared” and that another male “was trying to get him.” Appellant then informed Officer that two men were outside the house and that the gun used in the shooting belonged to one of them. Appellant, however, refused to provide any context or explanation for his statements or implications of the other two men.

An expert medical examiner testified that Victim’s contact wound, gun imprint on the left side of her head, and the bullet’s trajectory and location in the bed, all supported the possible scenario that Appellant shot Victim while sitting behind her laying on her bed. This scenario was consistent with Appellant and Victim’s initial locations following the shooting. After performing an autopsy and reviewing the circumstances of the shooting, the medical examiner declared the death a homicide.

A firearms examiner testified that an accidental shooting was not likely because the gun would not fire when the safety was engaged. The firearm examiner further testified that there was no indication that the gun malfunctioned.

The State presented a picture of Appellant and Victim taken the day before the shooting that depicted Appellant pointing a gun toward Victim’s head. The gun in the picture was a Titan .25-caliber, which was the same model gun found in Victim’s bedroom after the shooting. Further, a friend of Victim testified that Appellant had pointed his fingers in the shape of a gun at Victim earlier in the day.

Appellant’s Mother testified that Appellant was upset with Victim the night of the shooting over photographs Victim had posted on Facebook, which he

thought were inappropriate and that the argument over resulted in Appellant grabbing Victim's arm and leaving a mark.

The State's evidence of Appellant's possession of a Titan .25-caliber gun the day prior, his sole presence with Victim in the room immediately following the shooting, recent physical anger and simulated gunplay toward Victim, and physical evidence of Victim's shooting wounds, provide sufficient corroborating circumstances independent of Appellant's statements. Further, the medical examiner and firearm examiner's testimony provided evidence that the shooting was not an accident or suicide. Because of these corroborating circumstances, we also consider Appellant's statements in which he admitted that they were "playing a stupid game" prior to Victim being shot. Thus, the State's evidence was sufficient to establish the *corpus delicti* of homicide and the trial court did not err in denying Appellant's motion for judgement of acquittal. Appellant's first point is denied.

B. Sufficiency of Evidence

Appellant argues that the trial court erred in denying his motion for judgment of acquittal for involuntary manslaughter in the first degree because there was insufficient evidence to establish that Appellant recklessly caused Victim's death. Appellant contends that the State failed to establish that Appellant possessed or used gun the night of the shooting and failed to present sufficient evidence that he acted recklessly. We disagree.

1. Standard of Review

The same standard of review as applied in the section above, Appellant's first point, applies here.

2. Analysis

Pursuant to Section 565.024.1 (RSMo. Supp. 2013), a person commits first-degree involuntary manslaughter if he "recklessly causes the death of another person." A person acts recklessly if he "consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." Section 562.016 (RSMo. 2000). Specifically, "[a]n accidental shooting, where the irresponsible use of a gun is shown, can support a finding of recklessness." State v. Belton, 153 S.W.3d 307, 309 (Mo. banc 2005).

In reviewing the evidence in the light most favorable to the verdict, we determine there is sufficient evidence from which a reasonable juror could find the defendant guilty beyond a reasonable doubt. As discussed supra, the State presented an abundance of evidence demonstrating that Appellant recklessly caused Victim's death. Appellant was upset with Victim the night of the shooting after discovering she posted lewd photographs of herself on Facebook. Appellant referred to her as a "no good hooker" in text messages that evening and grabbed her arm leaving a mark during an argument about the photographs.

The State presented a picture taken the day before the shooting of Appellant pointing a gun at Victim's head. The gun in the picture was the exact

same style as the gun found in Victim's room after the shooting. Appellant had also pretended to shoot Victim in the head using his fingers the day of the shooting. Appellant's own statements following the shooting were that they were "playing a stupid game" with Victim and that he was "sorry."

In testifying that the death was a homicide, the medical examiner testified that the wound was a contact wound caused by a gun being pressed directly on Victim's forehead. Further, the firearms examiner noted that the shooting was not the result of an accidental or malfunctioning gun. Thus, Appellant was alone with Victim in her room "playing a stupid game" together that involved a loaded gun pressed against Victim's forehead, and Victim was shot and killed as a result of the game. Further, despite opportunities immediately following the shooting and before police arrived, Appellant never stated the shooting was accidental or self-inflicted. The evidence and reasonable inferences therefrom demonstrate that Appellant acted recklessly and with a conscious disregard of a substantial and unjustifiable risk that he would cause Victim's death.

Reviewing the evidence in the light most favorable to the verdict, we cannot say that there was insufficient evidence for a reasonable juror to determine that Appellant was guilty beyond a reasonable doubt of involuntary manslaughter. The trial court did not err in denying Appellant's motion for judgment of acquittal for involuntary manslaughter. Appellant's second point is denied.

C. Doyle Violation

Appellant's third and fourth points argue that the trial court erred in admitting Mother and Stepfather's testimony, and related references by the State during its opening statement and closing argument, regarding Appellant's refusal to answer guilt-seeking questions while he was in custody and being recorded by the St. Louis County jail. Appellant argues that admission of his silence was a violation of his Miranda rights. Although the questions were not asked by police or investigators, Appellant claims that Mother and Stepfather were the equivalent of state actors because their interests aligned with the State and their accusatory questioning was the functional equivalent of a custodial interrogation.

Specifically, Appellant alleges four instances of inadmissible use of Appellant's silence: (1) Stepfather's testimony that Appellant refused to tell him what happened to Victim; (2) Mother's testimony that Appellant never told her what happened to Victim; (3) the State's reference to Mother's anticipated testimony regarding Appellant's silence during its opening statements; (4) the State's reference to Mother and Stepfather's testimony during its closing argument. Appellant argues that the admitted references to Appellant's post-Miranda silences were a violation of his Fifth Amendment right against self-incrimination and were highly prejudicial. We disagree.

1. Standard of Review

Appellant acknowledges his failure to object to the State's references to Appellant's silence during opening statement and closing argument; thus, we review those specific statements only for plain error.

Rule 30.20. Plain error review is discretionary, sparingly used, and may not be used to justify a review of every point that was not properly preserved for appellate review. State v. Jones, 427 S.W.3d 191, 195 (Mo. banc 2014). An Appellant's point will be reviewed only when the request for plain error review establishes facially substantial ground for believing that the trial court's error was "evident, obvious, and clear" or a "manifest injustice or miscarriage of justice has resulted." Id. A manifest injustice is determined by the facts and circumstances of the case, and the appellant bears the burden of establishing the existence of manifest injustice. State. v. Baxter, 204 S.W.3d 650, 652 (Mo. banc 2006).

Appellant's remaining alleged error – Mother and Stepfather's testimony regarding Appellant's silence to questions about Victim's death – were properly preserved for review. While Appellant asserts that the proper standard of review of a Doyle violation is the harmless-beyond-a-reasonable-doubt standard, this standard is only required "[o]nce a Doyle violation has been found." State v. Brooks, 304 S.W.3d 130, 137 (Mo. banc 2010). Because no Doyle violation was found, we are not bound by this standard of review.

Instead, we review Appellant's argument that the trial court erred in admitting Mother and Stepfather's testimony for abuse of discretion: "The trial court has broad discretion in determining the admissibility of evidence and this Court will reverse the trial court's judgment only upon a clear abuse of that discretion." State v. Battle, 415 S.W.3d 783, 787 (Mo App. E.D. 2013). This discretion is abused when a ruling "clearly offends the logic of the circumstances

or appears arbitrary and unreasonable.” State v. Hughes, 497 S.W.3d 400, 403 (quoting State v. Patton, 419 S.W.3d 125, 133 (Mo. App. E.D. 2013)). We will reverse a conviction only if the evidentiary error was so prejudicial that it deprived the defendant of a fair trial. Battle, 415 S.W.3d at 787.

2. Analysis

“The Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.” Miranda v. Arizona, 384 U.S. 436, 467 (1966).

In Doyle v. Ohio, 426 U.S. 610, 618 (1976), the Supreme Court held that following an arrest and advisement of an arrestee’s Miranda rights, “it would be fundamentally unfair and a deprivation of due process to allow the arrested person’s silence to be used to impeach an explanation subsequently offered at trial.” The Court explained that because any silence after a Miranda warning may be nothing more than the arrestee’s exercise of his Miranda rights, “every post-arrest silence is insolubly ambiguous.” Id. “Missouri cases have enforced a defendant’s right not to have his post-arrest silence used against him where the defendant is questioned by police officers or other state actors shortly after the defendant is arrested and read his Miranda rights.” State v. Mahan, 971 S.W.2d 307, 314 (Mo. 1998). However, “[i]n the absence of evidence, or an offer of proof, of Miranda warnings and silence, there is nothing to show that the question about...previous silence [is] a violation of

constitutional guarantees.” State v. Myers, 997 S.W.3d 26, 31 (Mo. App. S.D. 1999).

Applying Doyle, the Missouri Supreme Court stressed the distinction between silence elicited from private individuals and silence induced by a state actor. State v. Mahan, 971 S.W.2d 307, 314 (Mo. 1998). In Mahan, the defendant was convicted of creating a grave and unjustifiable risk of HIV infection by exposing the victim to HIV without disclosure. The victim sent the defendant a letter while he was in jail asking how long the defendant was aware that he was HIV-positive, but the defendant never responded. This post-arrest silence was admitted over objection. The Court noted a jurisdictional split on the issue of silence elicited from private individuals and did not ultimately conclude that such silence was universally admissible.³ Id. However, in examining the defendant’s lack of response to the victim, the Mahan court emphasized the Fourth Circuit’s interpretation of Doyle: “Doyle does not create a *per se* rule rendering inadmissible any reference to the post-arrest silence of a criminal defendant. Rather, Doyle is expressly limited to the use of silence ‘at the time of arrest and after receiving Miranda warnings.’” Id. (quoting Folston v. Allsbrook, 691 F.2d 184, 187 (4th Cir. 1982)). The court stressed that the silence was “markedly difference” because it lacked any relation to a Miranda warning and was not in response to coercive activity by state officials. Id. 314-15. The Court further stated that the victim’s letter to defendant was a “legitimate and

³ The Court affirmed the admission of the silence determining that admission of the silence was not prejudicial considering the ample evidence of guilt contained within the record. Id.

understandable effort of a frightened individual to learn of the circumstances of her potential infection.” Id. at 316.

This Court has extended the characterization of state actors to private individuals when the private individual’s “interests were so integrated and closely aligned with the police that his role in the case was adversarial in nature and his conduct and questions directed at appellant were accusatory in character.” State v. Perkins, 753 S.W.2d 567, 573 (*sic*). In Perkins, the defendant’s brother worked with the police after a \$10,000 reward was offered for information leading to the defendant’s arrest. Id. at 570. The brother called the defendant and elicited incriminating information through a taped conversation, for which he was ultimately paid by the police. Id. This Court determined that the brother’s interests were so intertwined with state actors that questioning of the defendant amounted to the functional equivalent of direct police interrogation. Id. at 573.

Conversely, this Court affirmed the trial court’s admission of testimony that a defendant was silent regarding his innocence when talking with his friend who was present during the arrest and visited the defendant while in jail. Burton v. State, 68 S.W.3d 490, 494-96 (Mo. App. E.D. 2001). The Court concluded that the testimony did not deal with the defendant’s post-arrest silence because the silence was not in response to questions by police officers or other state actors. Id. at 496. Because the friend’s questioning was not intentionally created by the State to induce the defendant to make incriminating statements or remain incriminatingly silent, the court determined that the silence occurred during a

conversation with a private individual and was not an instrument of the police. Id. Comparing the circumstances to admissible discussions with a neutral fellow inmate, this Court stressed that the friend was not asked to converse with the defendant that the State did not intentionally create a situation in which the defendant was likely to make incriminating statements or remain incriminatingly silent. Id.

Here, Appellant failed to make an offer of proof as to when he was given his Miranda warning or that his silences were reliant on any Miranda warning. Therefore, this is no indication that Appellant's silences during conversations with Mother and Stepfather in jail were in reliance of any Miranda warning. Further, Mother and Stepfather's interests during these conversations with Appellant while he was in jail were neither integrated nor closely aligned with the police. Appellant initiated phone calls to Mother while in jail and Mother would often attempt to avoid discussion about Victim's death. Appellant lived in Mother's house at the time of Victim's death and Mother stated that she treated him like one of her own kids. There is no indication that Mother and Stepfather were acting in alignment with the police or that their discussions with Appellant were an integrated or intertwined aspect of the police's interrogation. Instead, similar to the letter in Mahan, Mother and Stepfather's questions of Appellant were nothing more than a legitimate and understandable effort to learn the circumstances of Victim's death. The mere shared questioning of what caused Victim's death, without any integration with the police, is not enough to make Victim's parents state actors. Victim's silence to questions asked by private individuals

completely disconnected from any possible Miranda warning or police involvement is insufficient to establish a Doyle violation.

Even assuming, *arguendo*, that the trial court erred in admitting Mother and Stepfather's testimony regarding Appellant's silence, the error was not prejudicial and did not result in a manifest injustice against Appellant. The record shows that Appellant was silent immediately following the shooting and was not forthcoming about what caused Victim's death. Stepfather and Mother repeatedly asked Appellant what happened before 911 assistance arrived, but Appellant never claimed the shooting was accidental or self-inflicted by the Victim. Instead, he deflected and falsely implicated others who were not present during the shooting. These silences were immediately after the shooting and prior to Appellant's arrest or possible Miranda warning and similarly demonstrated Appellant's reluctance to assert innocence. The admitted silences pose no possible Doyle or Miranda violation and present the same indication of guilt by declining the natural opportunity to assert that the shooting was accidental or self-inflicted. Appellant was not prejudiced by any error in admitting the testimony of his post-arrest silence to questions about the cause of Victim's death. Thus, the trial court did not err, plainly or otherwise, in admitting the testimony of Mother and Stepfather and the State's related references to the testimony in its opening statement and closing arguments. Appellant's third and fourth points are denied.

E. Jury Instruction of Voluntary Intoxication

Appellant claims the trial court erred in submitting a voluntary intoxication jury instruction because there was no evidence that Appellant had been heavily drinking or using drugs. Appellant argues that this instruction misled and confused the jury. We disagree.

1. Standard or Review

When reviewing claims of instructional error, we reverse the trial court's decision only if the instructional error misled the jury and prejudiced the defendant. State v Zetina-Torres, 482 S.W.3d 801, 810 (Mo. banc 2016). "Reversal is only warranted when the instructional error is so prejudicial that it deprived the defendant of a fair trial." Id. There is no prejudice when an instruction is an accurate statement of law and the instruction is supported by the evidence. Id.

2. Analysis.

An instruction of voluntary intoxication based on MAI—CR3d 310.50 ensures that the jury understands that intoxication is not a defense or an explanation that excuses the defendant of responsibility for his conduct. State v. Burnett, 481 S.W.3d 91, 96 (Mo. App. E.D. 2016). "To support submission of such an instruction, it is only necessary for there to be evidence that the defendant was voluntarily intoxicated." Id. When evidence of alcohol consumption is presented, an instruction is necessary as it prevents the jury from guessing as to the legal effect of the evidence. State v Avery, 275 S.W.3d 231, 235 (Mo banc 2009). The Court further noted that evidence of impairment is not necessary to support submission of a voluntary intoxication instruction. Id.

(citing State v. Owsley, 959 S.W.2d 789 (Mo. banc 1997)).

Here, the State instructed the jury based on MAI-CR 3d 310.50 regarding Appellant's intoxication:

The State must prove every element of the crime beyond a reasonable doubt. However, in determining the defendant's guilt or innocence, you are instructed that an intoxicated or a drugged condition whether from alcohol or drugs will not relieve a person of responsibility for his conduct.

In support of the submitted instruction, the State presented evidence that Appellant was drinking alcohol the afternoon before the shooting, took four Xanax pills later the same day, and drank a margarita the same night. Considering the abundance of presented evidence regarding Appellant's alcohol and drug consumption throughout the day of Victim's death, an instruction on voluntary intoxication was necessary to inform the jury of the legal effect of the evidence. Without the State's instruction, the jury would have been confused regarding what legal significance to give that evidence. Appellant stressed the lack of evidence of heavy drinking, however, evidence of impairment is not a requirement for submission of a voluntary intoxication instruction. Thus, the trial court did not err in submitting the voluntary intoxication instruction. Appellant's fifth point is denied.

III. Conclusion

The judgment of the trial court is affirmed pursuant to 30.25(b).

19a

**In the
Missouri Court of Appeals
Eastern District**

DIVISION TWO

**STATE OF MISSOURI,
Respondent,
Vs.
BENJAMIN WILKINSON,
Appellant**

No. ED103997

**Appeal from the Circuit Court of St. Louis County
Honorable Colleen M. Dolan**

FILED: August 22, 2017

**Before Lisa P. Page, P.J., Roy L. Richter, J., and
Philip M. Hess, J.**

**PER CURIAM
ORDER**

Benjamin Wilkinson (“Appellant”) appeals from the trial court’s judgment following a jury trial convicting him of involuntary manslaughter in the first degree, in violation of Section 565.024 (RSMo. 2000), and armed criminal action, in violation of Section 571.015. Appellant was sentenced to seven years’ imprisonment for involuntary manslaughter and ten years’ imprisonment for armed criminal action, to be served consecutively for a total sentence of 17 years.

We have reviewed the briefs of the parties and the record on appeal and find no error of law. No jurisprudential purpose would be served by a written opinion. However, the parties have been furnished with a memorandum for their information only, setting forth the facts and reasons for this order.

The judgment is affirmed pursuant to Rule 30.25(b).

21a

In the Missouri Court of Appeals Eastern District

STATE OF MISSOURI,
RESPONDENT,

v.

BENJAMIN J. WILKINSON,
APPELLANT.

No. ED103997

ORDER

Appellant's Motion for Rehearing and/or Application
for Transfer to Missouri Supreme Court is denied.

SO ORDERED.

DATED: 9/25/2017

/s/ Zel Fischer

Chief Judge

Missouri Court of Appeals Eastern District

22a

In the Missouri Court of Appeals Eastern District

STATE OF MISSOURI,
RESPONDENT,
vs. BENJAMIN J. WILKINSON,
APPELLANT.

No. ED103997

ORDER

Appellant's Motion to Publish is denied.

SO ORDERED.

DATED: 9/25/17

/s/ Zel Fisher

Chief Judge

Missouri Court of Appeals Eastern District

Supreme Court of Missouri
en banc
SC96725
ED103997

September Session, 2017

State of Missouri,
Respondent,

vs. (TRANSFER)

Benjamin Wilkinson,
Appellant.

Now at this day, on consideration of the Appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Eastern District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Betsy AuBuchon, Clerk of the Supreme Court of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session, 2017, and on the 21st day of November, 2017, in the above-entitled cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of said Court, at my office in the City of Jefferson, this 21st day of November, 2017.

/s/	/s/
Clerk	Deputy Clerk