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No. 07-

IN THE

Supreme Court of the United States

MARIO ALFREDO SALINAS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the decision below, the court of appeals recognized a split among the circuits on the following question:

Whether a defendant's silence before he has received the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), is protected by the Fifth Amendment's privilege against self-incrimination such that his silence cannot be used as substantive evidence of guilt.

PARTIES TO THE PROCEEDING

Petitioner is Mario Alfredo Salinas, defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

A. Constitutional Background 2

B. Factual And Procedural Background 3

REASONS FOR GRANTING THE PETITION 8

I. THE CIRCUITS ARE DIVIDED ON WHETHER THE GOVERNMENT MAY USE A DEFENDANT'S PRE-*MIRANDA* SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT 9

A. The Seventh, Ninth and D.C. Circuits Have Properly Held That The Fifth Amendment Prevents the Government From Using Post-Arrest, Pre-*Miranda* Silence As Substantive Evidence Of Guilt 9

B. The First, Sixth and Tenth Circuits Have Properly Held That The Fifth Amendment Prevents The Government From Using Pre-Arrest, Pre-*Miranda* Silence As Substantive Evidence Of Guilt 11

C. The Fourth, Fifth, Eighth And Eleventh Circuits Have Allowed The Substantive Use Of Post-Arrest, Pre-*Miranda* Silence 12

D. State Courts Are Also Divided On The Use Of Pre-*Miranda* Silence 13

II. THIS CASE IS A PROPER VEHICLE TO CONSIDER THE QUESTION PRESENTED 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

CASES

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

Coppola v. Powell,
878 F.2d 1562 (1st Cir. 1989)......................................12

Doyle v. Ohio,
426 U.S. 610 (1976)...3, 9

Fletcher v. Weir,
455 U.S. 603 (1982)...3

Griffin v. California,
380 U.S. 609 (1965)...2

Jenkins v. Anderson,
447 U.S. 213 (1980)...12

Miranda v. Arizona,
384 U.S. 436 (1966)...2, 3

United States ex rel. Savory v. Lane,
832 F.2d 1011 (7th Cir. 1987)......................................12

United States v. Burson,
952 F.2d 1196 (10th Cir. 1991)................................7, 11

United States v. Caro,
637 F.2d 869 (2d Cir. 1981)...11

United States v. Edwards,
576 F.2d 1152 (5th Cir. 1978)................................10, 16

United States v. Frazier,
408 F.3d 1102 (8th Cir. 2005)................................12, 13

United States v. Hernandez,
948 F.2d 316 (7th Cir. 1991)..................................10, 12

United States v. Impson,
531 F.2d 274 (5th Cir. 1976).........................8, 10, 15, 16

United States v. Lauder,
409 F.3d 1254 (10th Cir. 2005)....................................12

United States v. Love,
767 F.2d 1052 (4th Cir. 1985)....................................13

United States v. Moore,
104 F.3d 377 (D.C. Cir. 1997)....................................10

United States v. Ramos,
932 F.2d 611 (7th Cir. 1991)......................................10

United States v. Rivera,
944 F.2d 1563 (11th Cir. 1991)...................................13

United States v. Teague,
443 F.3d 1310 (10th Cir. 2006)...................................16

United States v. Velarde-Gomez,
269 F.3d 1023 (9th Cir. 2001).......................................9

United States v. Whitehead,
200 F.3d 634 (9th Cir. 2000)...9

United States v. Williams,
53 F.3d 769 (6th Cir. 1995)..16

United States v. Zanabria,
74 F.3d 590 (5th Cir. 1996)..13

STATE CASES

Commonwealth v. Andujar,
57 Mass. App. Ct. 529, 784 N.E.2d 646
(2003)...14

Commonwealth v. Turner,
499 Pa. 579, 454 A.2d 537 (1982)...............................14

Dorman v. State,
622 P.2d 448 (Alaska 1981)..14

Kosh v. State,
382 Md. 218, 854 A.2d 1259 (2004)............................14

Mallory v. State,
261 Ga. 625, 409 S.E.2d 839 (1991)............................14

Morris v. State,
112 Nev. 260, 913 P.2d 1264 (1996)...........................14

People v. Conyers,
52 N.Y.2d 454, 420 N.E.2d 933 (1981)........................14

People v. Quintana,
665 P.2d 605 (Colo. 1983)..14

People v. Sasser,
No. B148168, 2002 WL 259949 (Cal. Ct. App. Feb. 25, 2002)..14

People v. Strong,
215 Ill. App. 3d 484, 574 N.E.2d 1271 (1991)..14

State v. Combs,
62 Ohio St. 3d 278, 581 N.E.2d 1071 (1991)..14

State v. Davis,
686 P.2d 1143 (Wash. 1984)..14

State v. Graves,
27 S.W.3d 806 (Mo. App. W.D. 2000)........................14

State v. Hill,
146 N.H. 568, 781 A.2d 979 (2001)............................14

State v. Hoggins,
718 So. 2d 761 (Fla. 1998)...14

State v. Kuranko,
71 Conn. App. 703, 803 A.2d 383 (2002)....................14

State v. Lanoi,
570 N.W.2d 911 (Wis. Ct. App. 1987)........................14

State v. Lopez,
141 Idaho 575, 114 P.3d 133 (Idaho Ct. App. 2005)..14

State v. Mitchell,
317 N.C. 661, 346 S.E.2d 458 (1986)..........................14

State v. Muhammad,
182 N.J. 551, 868 A.2d 302 (2005)..............................14

State v. Ramirez,
178 Ariz. 116, 874 P.2d 237 (1994).............................14

State v. Rogers,
No. A04-378, 2004 WL 2939667 (Minn. Ct. App. Dec. 21, 2004) 14

State v. Rowland,
243 Neb. 872, 452 N.W.2d 758 (1990) 14

Wyborny v. State,
209 S.W.3d 285 (Tex. Ct. App. 2006) 14

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 1, 2

STATUTES

18 U.S.C. § 922 .... 1, 4

18 U.S.C. § 924 .... 1, 4

28 U.S.C. § 1254 1

PETITION FOR A WRIT OF CERTIORARI

Petitioner Mario Alfredo Salinas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The court of appeals' decision is reported at 480 F.3d 750 and is reprinted in the Appendix to the Petition ("App.") at 1a-15a.

JURISDICTION

The court of appeals issued its decision on March 5, 2007. App. 1a. A timely petition for rehearing was denied on April 9, 2007. App. 16a-17a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides, *inter alia*, that: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The full text of the Fifth Amendment is reproduced at App. 18a.

STATEMENT OF THE CASE

Petitioner was charged with a single count of being a felon in possession of two firearms in violation of 18 U.S.C. §§ 922(g) and 924(a)(2). ROA 88-89.[1] His defense at trial was that he did not know that there were two guns hidden in the borrowed vehicle he was driving when he was arrested for driving without insurance. The government began its opening argument by stating that petitioner never denied ownership of the guns. The government then continuously elicited testimony during the direct examination of its first

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[1] Citations to "ROA" herein refer to the Record on Appeal filed with the lower court in this case. Citations to "Tr." refer to the trial transcript.

witness, the arresting officer, regarding petitioner's silence and used this silence as substantive evidence of guilt.

The Fifth Circuit has previously held that prosecutorial comment on a defendant's silence is impermissible even in the absence of the police informing a defendant of his right to remain silent under *Miranda v. Arizona*, 384 U.S. 436 (1966). Nevertheless, the panel in this case affirmed petitioner's conviction. Although it ignored its own precedent, the court of appeals described the deep circuit split on this issue, acknowledging that at least three other circuits have held that substantive use of post-arrest, pre-*Miranda* silence is impermissible under the Fifth Amendment (with some circuits similarly forbidding the use of pre-arrest, pre-*Miranda* silence), while three circuits have allowed such evidence. App. 12a. Review by this Court is warranted.

A. Constitutional Background

The Fifth Amendment prevents a defendant from being "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This Court consistently has given effect to this protection by carefully circumscribing the extent to which the government may substantively use a defendant's silence.

In *Griffin v. California*, 380 U.S. 609, 615 (1965), when faced with the question whether the prosecution may point to a defendant's failure to testify at trial, the Court held that "the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." The Court subsequently broadened this principle to include pre-trial silence, observing in *Miranda* that because "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege," "[t]he prosecution may not . . . use at trial the fact that he stood mute or claimed his privilege in the face of accusation." 384 U.S. at 468 n.37.

Nothing in this Court's Fifth Amendment case law suggests any distinction, for these purposes, between a defendant who invokes his right to silence after he receives his *Miranda* warnings and one who invokes before the warnings are given. Nevertheless, as discussed below, the federal courts of appeals are badly divided on the question whether a defendant's pre-*Miranda* silence may be used against him as substantive evidence of guilt, consistent with the Fifth Amendment.[2]

B. Factual And Procedural Background

1.a. While driving a GMC Yukon on the night of April 9, 2003, petitioner was pulled over by Officer Fulcher, of the Carrollton Police Department, for having a defective tail light. Tr. Vol. 2:210. Officer Fulcher asked petitioner for his driver's license and proof of insurance. Tr. Vol. 2:212. Petitioner provided his license but stated that he did not have proof of insurance because he was in the process of buying the vehicle. Tr. Vol. 2:213. Officer Fulcher then ran a warrant check, which revealed that petitioner's driver's license was valid, but nevertheless arrested petitioner for driving without insurance. Tr. Vol. 2:214-15. At no point,

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[2] It is important to distinguish the Fifth Amendment question presented by this case from the Due Process issue addressed in cases like *Doyle v. Ohio*, 426 U.S. 610 (1976). In *Doyle*, this Court held that the Due Process Clause prohibits use of a defendant's silence after *Miranda* warnings are given even for the limited purpose of impeachment, on the theory that the *Miranda* warnings carry an implicit promise that *no* use will be made of a defendant's silence. *Id.* at 619; *cf. Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (holding that there is no due process violation when a state permits cross-examination as to post-arrest, pre-*Miranda* silence when a defendant chooses to take the stand). *Doyle*'s emphasis on the giving of *Miranda* warnings is relevant only under a Due Process analysis; it has no bearing at all on the question of whether the Fifth Amendment is violated by use of a defendant's silence as substantive evidence of guilt.

even after the formal arrest, did Officer Fulcher read petitioner his *Miranda* rights. Tr. Vol. 2:229.

After petitioner's arrest, Special Agent Iber of the Bureau of Alcohol, Tobacco, Firearms, and Explosives and Agent Fountain of the Drug Enforcement Agency, both employed by the Carrollton Police Department on the date of petitioner's arrest, conducted an inventory search of the vehicle. Tr. Vol. 2:238, 265. Special Agent Iber testified at trial that he found, among other things, a brown paper sack containing $3,397.00 in cash between the driver's seat and the center console and a black leather case containing a Rossi .357 Magnum revolver underneath the front passenger seat. Tr. Vol. 2:240-41. Special Agent Iber testified that the only thing he saw between the driver's seat and the console was the brown paper sack and that the Rossi under the passenger seat was not plainly visible. Tr. Vol. 2:249-50. Agent Fountain testified that he found a Ruger handgun located between the driver's seat and the center console. Tr. Vol. 2:266-67. He also testified that he could only see the Ruger, which was located six to seven inches down from the top of the center console, with his flashlight. Tr. Vol. 2:266-67. Petitioner was ultimately charged with one count of unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a). ROA 88-89.

b. Petitioner's defense at trial was that he did not know the guns were hidden in the vehicle, which he had borrowed from his brother-in-law, Rosendo Moreno. Moreno testified that he bought the Rossi handgun found in the Yukon in March 2003 and that he bought the Ruger found in the vehicle from Carlos Hernandez at the end of March or in early April 2003. Tr. Vol. 3:95-96. Although Moreno did not have any documentation that he was the owner of either gun, Tr. Vol. 3:111-13, Hernandez testified that Moreno purchased the Ruger from him toward the end of March 2003. Tr. Vol. 3:140. At the time of petitioner's arrest,

Moreno confirmed that he owned both of the guns. Tr. Vol. 3:112-13.

Moreno stated that he purchased the Yukon on April 8, 2003 and drove it to a firing range later that day. Tr. Vol. 3:104, 113-14. He further testified that, after he finished target practice, he re-loaded the Ruger and the Rossi and stashed them in the Yukon—placing the Ruger between the driver's seat and the console and the Rossi in a black zipper bag between the passenger seat and the passenger seat console. Tr. Vol. 3:97, 116. After his trip to the firing range, Moreno took the vehicle to Big Rig Detailers, where petitioner worked, for some repairs. Tr. Vol. 3:91. Moreno stated that he had brought cash for the repairs, had taken out about $3,300.00 from his bank account, and had placed the money in a brown paper sack between the driver's seat and center console on top of the Ruger. Tr. Vol. 3:91-92, 98. While Moreno was at Big Rig Detailers, petitioner approached him and asked if he could borrow the Yukon because his car was in the shop. Tr. Vol. 3:92, 150-51. Moreno agreed. Tr. Vol. 3:92, 150-51. This conversation was witnessed by Christopher Cruz, the owner of Big Rig Detailers. Tr. Vol. 3:150. Moreno testified that when he heard that petitioner had been charged with possession of the two loaded weapons found in the vehicle, he "felt guilty. I mean, it was my fault." Tr. Vol. 3:93.

c. At trial, the government's case against petitioner relied heavily on petitioner's failure, after he was arrested and in the absence of any *Miranda* warnings, to offer any exculpatory account of the presence of weapons in the car. Specifically, the government used petitioner's silence during its opening argument and repeatedly elicited testimony about that silence during its case-in-chief. First, during opening arguments, the government stated:

> While the defendant was in custody and while the defendant was in the presence of Officer Fulcher

> back at Carrollton PD, the evidence is going to show that an officer by the name of Pace radioed to Fulcher telling Fulcher that Pace and others had found the two loaded weapons and had found the money in the brown paper bag in the vehicle.
>
> *At no time, at no time, the evidence is going to show, that the defendant denied ownership of the guns.*

Tr. Vol. 2:202 (emphasis added). Defense counsel objected to this line of argument to the extent "it gets into any kind of silence after arrest," Tr. Vol. 2:203, and the trial court sustained the objection.

Then, despite the court's previous ruling, the government questioned its first witness, Officer Fulcher, about the fact that another officer told him over the radio that two guns had been found in the vehicle. Tr. Vol. 2:218-19. When defense counsel objected, the government stated that it was offering this evidence "for the effect it had on the listener. . . . I'm going to ask the witness whether or not defendant heard that statement as well." Tr. Vol. 2:219. The court overruled this objection, instructed the jury that it could consider the testimony "for the limited purpose only of the impact it had on those people who heard the statement made," and allowed the government to proceed. Tr. Vol. 2:219-20.

The government continued its efforts to elicit testimony from Officer Fulcher regarding petitioner's silence. First, the government asked if petitioner was "close enough to have heard what Officer Pace relayed to" Officer Fulcher about the two guns found in the Yukon. Tr. Vol. 2:221. When Officer Fulcher answered that petitioner was close enough to have heard, the government next asked whether Officer Fulcher "recall[ed] how, if at all, the defendant reacted to the statement by Officer Pace." Tr. Vol. 2:221. Defense counsel's objection to this line of questioning was sustained. Undeterred, the prosecutor then asked a final

question: "Officer Fulcher, after the defendant's arrest, *at any time did he make any statements to you?*" Tr. Vol. 2:222 (emphasis added). The officer replied, "*No, sir*," Tr. Vol. 2:222 (emphasis added), before defense counsel had the opportunity to object. Defense counsel did object after Officer Fulcher answered the government's question. Tr. Vol. 2:222-23. The court sustained the objection and stated that it would consider whether to instruct the jury to disregard the testimony at a later time. Tr. Vol. 2:223 ("I'm not going to instruct at this time. I'll consider that later.").[3] Petitioner was ultimately convicted.

2. The Fifth Circuit (Garwood, Dennis, Owen) affirmed. The panel recognized that "there is a split among the other federal circuits as to whether a prosecutor's use of a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination." App. 12a. The court of appeals proceeded to describe the split, observing that "[t]he Seventh, Ninth, and D.C. Circuits have all squarely held that it does," that "[t]he First and Sixth Circuits have gone further and have held that the substantive use of even pre-arrest silence can violate the privilege,"[4] and that "[t]he Fourth, Eighth, and Eleventh Circuits have, on the other hand, found the substantive use of post-arrest, pre-*Miranda* silence during the prosecutor's case-in-chief permissible." App. 12a.

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[3] Despite this assurance, the trial court did not reconsider a jury instruction regarding Officer Fulcher's testimony before submitting the matter to the jury. Regardless, a jury instruction could not have cured the prejudice caused by the officer's testimony regarding petitioner's silence. *See* Section II, *infra*.

[4] As discussed below, the Tenth Circuit has also held that prosecutorial reference to a defendant's pre-arrest silence during its case-in-chief violates the Fifth Amendment, *see United States v. Burson*, 952 F.2d 1196 (10th Cir. 1991), but that decision was not discussed by the lower court.

The panel, however, attempted to avoid deciding the constitutional question by stating that "[b]ecause this circuit's law remains unsettled and the other federal circuits have reached divergent conclusions on this issue, even assuming that the prosecutor's comments were improper, Salinas cannot satisfy the second prong of the plain error test–that the error be clear under existing law." App. 13a. In so holding, the panel did not even mention the Fifth Circuit's controlling precedent on this issue, *United States v. Impson*, 531 F.2d 274, 279 (5th Cir. 1976), which held that the government's reference to a defendant's post-arrest, pre-*Miranda* silence during its case-in-chief was impermissible and "intolerably prejudicial" and thus aligned the Fifth Circuit with those circuits that have refused to allow substantive government use at trial of a defendant's post-arrest, pre-*Miranda* silence.

REASONS FOR GRANTING THE PETITION

As expressly recognized by the Fifth Circuit below, App. 12a, the circuits are deeply divided over whether substantive use of a defendant's pre-*Miranda* silence violates the Fifth Amendment privilege against self-incrimination. In the post-arrest context, the Seventh, Ninth and D.C. Circuits have all held that it does, while the First, Sixth and Tenth Circuits have reached the same conclusion in the context of comments on pre-arrest silence. The Fourth, Eighth and Eleventh Circuits (effectively joined by the panel in this case), on the other hand, have held that substantive use of pre-*Miranda* silence is permissible. The states that have addressed the issue are also divided. This Court's review is warranted to resolve the circuit split and clarify the confusion among the lower courts regarding the contours of this Court's Fifth Amendment jurisprudence.

I. THE CIRCUITS ARE DIVIDED ON WHETHER THE GOVERNMENT MAY USE A DEFENDANT'S PRE-*MIRANDA* SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT.

A. The Seventh, Ninth and D.C. Circuits Have Properly Held That The Fifth Amendment Prevents the Government From Using Post-Arrest, Pre-*Miranda* Silence As Substantive Evidence Of Guilt.

Three circuits have squarely and correctly held that substantive use of a defendant's post-arrest, pre-*Miranda* silence impermissibly burdens the defendant's Fifth Amendment privilege against self-incrimination. App. 12a.

In *United States v. Velarde-Gomez*, 269 F.3d 1023 (9th Cir. 2001), the Ninth Circuit sitting en banc reaffirmed its prior decisions holding that the admission of evidence of a defendant's post-arrest, pre-*Miranda* silence violates the privilege. *Id.* at 1029-30 (reaffirming *United States v. Whitehead*, 200 F.3d 634 (9th Cir. 2000)). In that case, the government elicited direct testimony from a customs agent regarding the defendant's non-responsiveness during an interview that took place following the agent's discovery of marijuana in the defendant's car but before he was read his *Miranda* rights. *Id.* at 1027. The Ninth Circuit reversed the conviction. Its holding was grounded in the basic principle that "the right to remain silent carries an 'implicit assurance' that silence will carry no penalty." *Id.* at 1028 (quoting *Doyle*, 426 U.S. at 618). The Ninth Circuit also reiterated its position that, in the post-arrest context, "regardless of whether the [*Miranda*] warnings are given, absent waiver, comment on the defendant's exercise of his right to silence violates the Fifth Amendment" because "the right to remain silent derives from the Constitution and not from the *Miranda* warnings themselves." *Id.* at 1029.

The D.C. Circuit had previously reached the same conclusion in *United States v. Moore*, 104 F.3d 377 (D.C. Cir. 1997), holding, based on this Court's decisions in *Griffin* and *Miranda*, that prosecutorial reliance on a defendant's silence after he was taken into custody was impermissible: "The silence of an arrested defendant, under *Griffin*, is an exercise of his Fifth Amendment rights which the Government cannot use to his prejudice." *Moore*, 104 F.3d at 387. Like the Ninth Circuit, the D.C. Circuit firmly stated that the fact that the defendant had not yet received his *Miranda* warnings was of no moment, observing that "[t]o hold . . . that the failure to give those . . . warnings permits the state to use a defendant's silence against him turns a whole realm of constitutional protection on its head." *Id.* at 386.

Similarly, the Seventh Circuit held that a defendant's Fifth Amendment rights were violated when a prosecutor "deliberately elicited" a reference to the defendant's post-arrest, pre-*Miranda* silence on direct examination of the arresting officer. *United States v. Hernandez*, 948 F.2d 316, 322, 324 (7th Cir. 1991) (reiterating prior precedent holding that "'it is a violation of the Fifth Amendment privilege against self-incrimination to allow a prosecutor to use as evidence of guilt a defendant's refusal to talk to the police'") (quoting *United States v. Ramos*, 932 F.2d 611, 616 (7th Cir. 1991)).

Until this case, precedent in the Fifth Circuit was squarely aligned with that of the other circuits holding that substantive use of a defendant's post-arrest, pre-*Miranda* silence by the government is impermissible. *See United States v. Impson*, 531 F.2d 274, 277-79 (5th Cir. 1976) (holding that prosecutorial reference to defendant's silence during the government's case "carried with it an intolerably prejudicial impact"); *see also United States v. Edwards*, 576 F.2d 1152, 1154 (5th Cir. 1978) (observing that it

"appear[ed] that the defendant's constitutional rights were violated by the prosecutor's comments on his silence at arrest" during closing argument).

B. The First, Sixth and Tenth Circuits Have Properly Held That The Fifth Amendment Prevents The Government From Using Pre-Arrest, Pre-*Miranda* Silence As Substantive Evidence Of Guilt.

The lower court correctly observed that some circuits have likewise held that the use of pre-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination. *See* App. 12a. In fact, three circuits have squarely and correctly reached this conclusion.[5] *See Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000) (holding that Fifth Amendment applies in pre-arrest setting and "that the use of a defendant's prearrest silence as substantive evidence of guilt violates the . . . privilege against self-incrimination"); *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991) (relying on *Griffin*'s "general rule . . . that once a defendant invokes his right to remain silent, it is impermissible for the prosecution to refer to any Fifth Amendment rights which defendant exercised" to hold that the government's substantive use of defendant's pre-arrest silence was plain error); *Coppola v.*

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[5] As the court of appeals noted, App. 12a, when faced with the question whether a defendant's right against self-incrimination was violated when the prosecution elicited testimony regarding the defendant's failure to protest when his suitcase was searched for counterfeit money, the Second Circuit also expressed doubt that evidence of pre-arrest silence can be used in the government's case-in-chief. *United States v. Caro*, 637 F.2d 869, 876 (2d Cir. 1981). The Second Circuit in that case "assume[d], without deciding, that even if [it held] that [the defendant] was not in custody . . . this would not necessarily carry the day for the prosecution in light of the fact that all of the cases permitting proof of silence . . . have involved impeachment or rebuttal of the defendant's testimony." *Id.*

Powell, 878 F.2d 1562, 1567-69 (1st Cir. 1989) ("We have found no cases by the United States Supreme Court holding or suggesting that a prearrest statement by a suspect during police interrogation that he is not going to confess can be used by the prosecutor in his case in chief.").

Logic dictates that these circuits also would not allow the substantive use of post-arrest, pre-*Miranda* silence. Indeed, the Seventh Circuit, which has disallowed the use of pre-arrest silence, *see United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017-18 (7th Cir. 1987), has also disallowed the use of post-arrest, pre-*Miranda* silence, as discussed above. *See Hernandez*, 948 F.2d at 322. The Tenth Circuit has also indicated that its prohibition on the use of pre-arrest silence would apply equally to post-arrest silence. *See United States v. Lauder*, 409 F.3d 1254, 1261 (10th Cir. 2005).

C. The Fourth, Fifth, Eighth And Eleventh Circuits Have Allowed The Substantive Use Of Post-Arrest, Pre-*Miranda* Silence.

In square conflict with the cases discussed above, four circuits, including the Fifth Circuit in this case, have held that the government may use a defendant's pre-*Miranda* silence as substantive evidence of guilt. App. 12a.

In *United States v. Frazier*, 408 F.3d 1102, 1109-11 (8th Cir. 2005), the Eighth Circuit held that substantive governmental use of the defendant's pre-*Miranda* silence does not violate the Fifth Amendment. It recognized the circuit split on this question but rejected the holdings of the Seventh, Ninth and D.C. Circuits, *id.* at 1110-11, reasoning that the Fifth Amendment privilege is "'irrelevant'" when an individual "'is under no official compulsion to speak'" and that the use of pre-*Miranda* silence is therefore permissible because such silence is not induced by any governmental action. *Id.* (quoting *Jenkins v. Anderson*, 447 U.S. 213, 241 (1980) (Stevens, J., concurring)).

Other circuits have also permitted governmental use of pre-*Miranda* silence. *See United States v. Rivera*, 944 F.2d 1563, 1568 & n.12 (11th Cir. 1991) (stating that "[t]he government may comment on a defendant's silence if it occurred prior to the time that he is arrested and given his *Miranda* warnings" and noting that the key question was "not when [the defendant] was arrested or technically in custody, but when she was given her *Miranda* warnings"); *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985) (holding that direct testimony of agents regarding defendants' post-arrest silence was properly admitted because the silence occurred before defendants had been given the *Miranda* warnings).

Although it claimed not to decide the issue, the panel below completely ignored the Fifth Circuit's decision in *Impson*, discussed above, and affirmed petitioner's conviction despite the government's use of his pre-*Miranda* silence as substantive evidence of guilt. App. 12a-13a. In doing so, the Fifth Circuit completed the reversal of course it began with its decision in *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996) (holding that, in certain circumstances, prosecutorial reference to pre-arrest silence did not violate the Fifth Amendment), and aligned itself with the circuits allowing substantive use of such silence.

D. State Courts Are Also Divided On The Use Of Pre-*Miranda* Silence.

The states that have considered the issue are similarly split. Courts in Alaska, California, Colorado, Florida, Georgia, Idaho, Illinois, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New York, Ohio, Pennsylvania, Texas, Washington and Wisconsin have forbidden substantive prosecutorial use of a defendant's pre-*Miranda* silence. Courts in Arizona, Connecticut, New Hampshire and North Carolina have reached the opposite conclusion. *Compare Dorman v. State*,

622 P.2d 448 (Alaska 1981); *People v. Sasser*, No. B148168, 2002 WL 259949 (Cal. Ct. App. Feb. 25, 2002); *People v. Quintana*, 665 P.2d 605 (Colo. 1983) (en banc); *State v. Hoggins*, 718 So. 2d 761 (Fla. 1998); *Mallory v. State*, 261 Ga. 625, 409 S.E.2d 839 (1991); *State v. Lopez*, 141 Idaho 575, 114 P.3d 133 (Idaho Ct. App. 2005); *People v. Strong*, 215 Ill. App. 3d 484, 574 N.E.2d 1271 (1991); *Kosh v. State*, 382 Md. 218, 854 A.2d 1259 (2004); *Commonwealth v. Andujar*, 57 Mass. App. Ct. 529, 784 N.E.2d 646 (2003); *State v. Rogers*, No. A04-378, 2004 WL 2939667 (Minn. Ct. App. Dec. 21, 2004); *State v. Graves*, 27 S.W.3d 806 (Mo. App. W.D. 2000); *State v. Rowland*, 243 Neb. 872, 452 N.W.2d 758 (1990); *Morris v. State*, 112 Nev. 260, 913 P.2d 1264 (1996); *State v. Muhammad*, 182 N.J. 551, 868 A.2d 302 (2005); *People v. Conyers*, 52 N.Y.2d 454, 420 N.E.2d 933 (1981); *State v. Combs*, 62 Ohio St. 3d 278, 581 N.E.2d 1071 (1991); *Commonwealth v. Turner*, 499 Pa. 579, 454 A.2d 537 (1982); *Wyborny v. State*, 209 S.W.3d 285 (Tex. Ct. App. 2006); *State v. Davis*, 686 P.2d 1143 (Wash. 1984); *State v. Lanoi*, 570 N.W.2d 911 (Wis. Ct. App. 1987) *with State v. Ramirez*, 178 Ariz. 116, 871 P.2d 237 (1994); *State v. Kuranko*, 71 Conn. App. 703, 803 A.2d 383 (2002); *State v. Hill*, 146 N.H. 568, 781 A.2d 979 (2001); *State v. Mitchell*, 317 N.C. 661, 346 S.E.2d 458 (1986).

* * *

In sum, three circuits (D.C., the Seventh and the Ninth) properly hold the Fifth Amendment is violated when the government points to a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt. Until its decision in this case, controlling precedent in the Fifth Circuit was aligned with these circuits. Three more circuits (the First, Sixth and Tenth) have reached the same conclusion with respect to pre-arrest, pre-*Miranda* silence. In direct and express conflict with those decisions, three other circuits (the Fourth, Eighth and Eleventh) hold that this practice is

permissible. Similar disarray marks state case law. The question presented is ripe for this Court's review.

II. THIS CASE IS A PROPER VEHICLE TO CONSIDER THE QUESTION PRESENTED.

This case is a proper vehicle to resolve the well-developed circuit split on the question presented here. Although the Fifth Circuit avoided expressly deciding this issue in this case on the ground that any error during the trial was not plain, App. 13a, that rationale is patently incorrect and thus presents no impediment to this Court's review.

According to the court of appeals, even assuming the prosecutor's comments were improper, petitioner could not establish that the error was clear under existing law because the circuit's own law "remain[ed] unsettled and the other federal circuits have reached divergent conclusions on this issue." App. 13a. The reality is precisely the opposite—the Fifth Circuit already has squarely decided that prosecutorial comment at trial on a defendant's post-arrest, pre-*Miranda* silence is impermissible. *See Impson*, 531 F.2d at 279. In *Impson*, the prosecutor elicited testimony regarding the defendant's post-arrest, pre-*Miranda* silence during his direct examination of the arresting officer. The court of appeals held that this testimony "carried with it an intolerably prejudicial impact." *Id.* In the process, it flatly rejected the same argument the government made in this case: that the mention of the defendant's silence was permissible simply because the testimony referred to events that occurred before the defendant had been read the *Miranda* warnings. *Id.* at 277-78 ("We discern no merit in the appellee's argument that silence in the absence of *Miranda* warnings raises a greater inference of guilt than silence following such warnings.").

Although the facts of this case are virtually identical to those in *Impson*, the court of appeals did not even mention that decision here. But, *Impson* is controlling precedent and makes clear both that the law on this issue in the Fifth

Circuit was settled at the time of petitioner's trial and that allowing such testimony is "intolerably prejudicial." *Id.* at 279. Because of this "intolerable prejudice," no jury instruction could have cured the unacceptable situation created by the prosecutor's use of petitioner's silence as evidence of guilt, both during his opening argument and during his repeated questioning of Officer Fulcher on this subject.[6] As the Fifth Circuit unequivocally stated in a case similar to *Impson*: "[T]he comment upon the silence of the accused is a crooked knife and one likely to turn in the prosecutor's hand. The circumstances under which it will not occasion a reversal are few and discrete." *Edwards*, 576 F.2d at 1155. There is no question but that the error in this case was plain.[7]

The Fifth Circuit's position as articulated in *Impson* is precisely aligned with that of the three circuits that have held that substantive use of post-arrest, pre-*Miranda* silence during the prosecutor's case-in-chief violates the Fifth Amendment privilege against self-incrimination. That question is squarely presented here, despite the court of appeals' effort to avoid it, and this Court should grant review

[6] As noted earlier, in ruling on defense counsel's objection to Officer Fulcher's testimony that petitioner did not make any statements after his arrest, the trial court stated that it would consider a curative jury instruction later in the case. Tr. Vol. 2:223. However, the court never reconsidered this issue.

[7] The fact that the views of other circuits diverge on this issue does not alter this conclusion. The notion that an error cannot be plain when a circuit split on the issue exists comes into play *only* if there is no controlling precedent from this Court or the relevant court of appeals. *See, e.g.*, *United States v. Teague*, 443 F.3d 1310, 1319 (10th Cir. 2006) (holding that circuit split precluded a finding of plain error when "neither the Supreme Court nor the Tenth Circuit ha[d] ruled on the issue"); *United States v. Williams*, 53 F.3d 769, 772 (6th Cir. 1995) (when issue was one of first impression in the circuit, "circuit split preclude[d] a finding of plain error").

to resolve the circuit split and provide clarity in this important area of the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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