No. 16-1063

IN THE

Supreme Court of the United States

MARIO WILCHCOMBE, NATHANIEL ERSKINE ROLLE, AND ALTEME HIBERDIEU BEAUPLANT,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

The Government's Brief in Opposition confirms that this Court's review is necessary. The Government concedes that the two questions presented by the petition—(1) whether the Government may use post-arrest, pre-*Miranda* silence as substantive evidence of guilt in its case-in-chief, and (2) whether the Maritime Drug Law Enforcement Act ("MDLEA") may constitutionally be applied in a foreign-bound case without a sufficient nexus to the United States—have openly divided the lower courts. That concession alone strongly supports review.

On the first question, the Government acknowledges that this Court previously granted certiorari to resolve the split in the lower courts, and does not dispute that the issue is important and should be resolved. Instead, the Government claims that review is not warranted because the lower courts could change their minds after this Court's decision in *Salinas v. Texas*, 133 S. Ct. 2174 (2013) (plurality op.). But lower courts have continued to split after *Salinas*, demonstrating that this Court's review is still necessary. The Government's vehicle arguments fare no better.

On the second question, the Government claims that the circuit split is not important because it has not had a practical impact on any reported case. But that is wrong. *See United States v. Perlaza*, 439 F.3d 1149, 1168-69 (9th Cir. 2006). And the split affects this case as well: in those courts where a "substantial nexus" is required, Petitioners could not have been convicted under the MDLEA.

This Court's review is warranted.

ARGUMENT

I. REVIEW IS NECESSARY TO RESOLVE THE SPLIT OVER WHETHER THE GOVERNMENT MAY USE POST-ARREST, PRE-*MIRANDA* SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT IN ITS CASE-IN-CHIEF

Four years ago, this Court granted certiorari in *Salinas* to resolve the first question presented here: whether the Government may use post-arrest, pre-*Miranda* silence as substantive evidence of a defendant's guilt in its case-in-chief. Because the Court decided *Salinas* on other grounds, it left intact the entrenched circuit split over this question. This Court should grant certiorari again to resolve this split.

1. In their opening brief, Petitioners established that at least two circuits and two states have explicitly held that the Fifth Amendment prohibits the Government from using post-arrest, pre-*Miranda* silence as evidence of guilt, while at least three circuits and three states have taken the opposite approach. Pet. at 10-14. Petitioners demonstrated that this question has a substantial impact on criminal investigations and prosecutions, explaining why numerous states have called for this Court to resolve the split. *Id.* at 16.

2. In its Opposition, the Government admits the lower courts are split and does not dispute that the issue is important. Opp'n at 7-13. Instead, the Government argues that this Court should wait to resolve this split because some lower courts may

change their views after *Salinas* (part a), and that this case is a poor vehicle because the Government's use of Petitioners' post-arrest, pre-*Miranda* silence did not affect Petitioners' convictions (part b). *Id.* at 13-17. The Government is wrong on both counts.

a. No further percolation is necessary. The split in the lower courts was well-established when this Court granted certiorari in *Salinas* (part i). *Salinas* did nothing to resolve the split (part ii). And the split has gotten worse, not better, after *Salinas* (part iii).

i. The Government agrees that the lower courts were intractably split before *Salinas* over whether the prosecution could use a defendant's post-arrest, pre-*Miranda* silence as evidence of his guilt in its case-in-chief. *See* Opp'n at 12-13. Before *Salinas*, at least two circuits and two states had expressly held that the Fifth Amendment barred the prosecution from using a defendant's post-arrest, pre-*Miranda* silence. *See United States v. Hernandez*, 476 F.3d 791, 796-97 (9th Cir. 2007), *United States v. Moore*, 104 F.3d 377, 389 (D.C. Cir. 1997), *Hartigan v. Commonwealth*, 522 S.E.2d 406, 409-10 (Va. Ct. App. 1999), *Akard v. State*, 924 N.E.2d 202, 209 (Ind. Ct. App.), *aff'd in part and rev'd in part on other grounds*, 937 N.E.2d 811 (Ind. 2010). Three circuits had explicitly come to the opposite conclusion. *See United States v. Cornwell*, 418 F. App'x 224, 227 (4th Cir. 2011) (per curiam); *United States v. Frazier*, 408 F.3d 1102, 1110-11 (8th Cir. 2005); *United States v. Rivera*, 944 F.2d 1563, 1567-68 (11th Cir. 1991).

ii. *Salinas* was granted to resolve this split. Ultimately, this Court found that it was "unnecessary" to do so because the case could be

decided on different grounds: whether, in a *pre*-arrest interview, Salinas had adequately invoked his right to remain silent when he did not do so expressly. *Salinas*, 133 S. Ct. at 2179. The Court's resolution of that question had no impact on the lower court split the Court had originally granted certiorari to resolve, because that split involved *post*-arrest silence. That the defendants were in custody when they chose to remain silent in the cases on both sides of the split makes all the difference in the analysis.[1]

iii. The split that *Salinas* sought to resolve is getting worse, not better. The Government does not dispute that after *Salinas* both state and federal lower courts have continued to split over the use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt in the Government's case-in-chief. *Compare, e.g.*, *United States v. Okatan*, 728 F.3d 111, 120 (2d Cir. 2013), *State v. Lovejoy*, 89 A.3d 1066, 1073-75 (Me. 2014), *State v. Horwitz*, 191 So. 3d 429, 442 (Fla. 2016), and *Commonwealth v. Molina*, 104 A.3d 430, 432 (Pa. 2014) (post-*Salinas*, Government may not use pre-*Miranda* silence in its case-in-chief), *with, e.g.*, Pet. App. 19a, *State v. Fisher*, 373 P.3d 781, 790 (Kan. 2016), *State v. Mitchell*, 876 N.W.2d 1, 11-12 (Neb. Ct. App. 2016), and *Crayton v. State*, 463 S.W.3d 531, 535 (Tex. Crim. App. 2015), (post-

[1] The Government suggests that after *Salinas*, a distinction could be drawn between custody and interrogation, *see* Opp'n at 14 & n.3, but no court has ever drawn that distinction. And, indeed, as to the relevant question about police coercion, the answer is not in doubt here where Petitioners were being held against their will, in shackles, and at gunpoint, for five days.

Salinas, Government may use post-arrest, pre-*Miranda* silence as evidence of guilt). Thus, post-*Salinas*, the courts are demonstrating the continued need for this Court's guidance.

b. This case presents an excellent vehicle for reviewing whether the Government may use a defendant's post-arrest, pre-*Miranda* silence as evidence of his guilt in its case-in-chief. Petitioners' objection to the Government's error was preserved at every level of review, fully briefed, and actually decided by the Eleventh Circuit. Pet. at 17-18. The panel's judges agreed that Petitioners' post-arrest, pre-*Miranda* silence while they were held at gunpoint should not be used against them under the Fifth Amendment's protections, but were bound to hold otherwise by prior Eleventh Circuit precedent. *Id.* at 18.

The Government argues that this case would be a poor vehicle for two reasons: first, because the prosecution may comment on silence when doing so would be a "fair response to a claim made by defendant or his counsel," under *United States v. Robinson* (part i), and second, any error was harmless (part ii). The Government is wrong on both counts.

i. *United States v. Robinson* and the other cases cited by the Government, which allow the prosecution to comment on a defendant's silence in certain circumstances, are inapposite. *Robinson*, for example, involved a claim by defense counsel during closing statements "that the Government had not allowed [his client] to explain his side of the story," which opened the door to the prosecution to tell the

jury that the defendant, in fact, could have testified if he had wanted to. 485 U.S. 25, 26 (1988). The prosecution in *Robinson* "did not treat the defendant's silence as substantive evidence of guilt, but instead referred to the possibility of testifying as one of several opportunities which the defendant was afforded, contrary to the statement of his counsel, to explain his side of the case." *Id.* at 32.

Here, by contrast, the Government used Petitioners' silence as evidence of their guilt in committing the substantive offenses with which they had been charged. The Government repeatedly used Petitioners' silence to argue, for example, "that, had [Messrs. Beauplant and Wilchcombe] not been involved in the drug-smuggling venture, they would have said something to the Coast Guard officers after they were arrested and while they were at sea." Pet. App. 25a (Jordan, J., concurring). Unlike *Robinson*, the Government was not commenting on the Petitioners' silence to dispute an accusation that it had prevented Petitioners from telling their side of the story or putting on an effective defense at trial.[2] 485 U.S. at 26. Rather, the Government used Petitioners' silence to undermine their substantive

[2] *Robinson* is also distinguishable because it involved a statement made by defense counsel in closing, whereas here the Government tries to justify its use of Petitioners' silence based on statements one of Petitioners' counsel made during *opening* statements. No case has ever held that pre-*Miranda* silence can be introduced to rebut an opening statement, which is not evidence. *See United States v. Smith*, 918 F.2d 1551, 1562 (11th Cir. 1990) ("statements and arguments of counsel are not evidence").

defense to the charge—that is, as evidence of their guilt.

The other cases the Government cites are similarly inapposite. *See, e.g.*, *United States v. Norwood*, 603 F.3d 1063, 1070 (9th Cir. 2010) (noting that "prosecutor's comment was made to defend the police officers' decision not to test the marijuana blunts, not to suggest that Norwood's silence was substantive evidence of his guilt" where defense counsel had implied that officers had committed misconduct in their investigation); *United States v. Smith*, 41 F.3d 1565, 1569 (D.C. Cir. 1994) (does not involve pre-*Miranda* silence; prosecutor did not directly comment on the defendant's silence at all).

ii. Finally, the Government claims that review is not warranted because the Eleventh Circuit held in the alternative that the Government's error was harmless. Pet. at 18-20. Not true.

First, the Government does not dispute in its Opposition that forcing a defendant to decide between remaining silent and being punished for that decision is a structural error that infects an entire trial, rendering irrelevant the sufficiency of the evidence. *See id.* at 19-20. But even if harmless error analysis does apply, the Government did not show that its error was harmless beyond a reasonable doubt. If "there is a reasonable possibility that the evidence complained of might have contributed to the conviction," then the error is not harmless. *Chapman v. California*, 386 U.S. 18, 23 (1967) (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)).

The Eleventh Circuit's decision notes in three sentences that there appeared to be sufficient

evidence to convict without the Government's evidence of the Petitioners' silence. *See* Pet. App. 19a-20a. The panel's decision does not discuss the harmless error test, nor does it hold that the Government has met its burden under that rigorous standard.

Nor could it have, because the Government's error was not harmless. The Government introduced the Petitioners' silence in order to prove Petitioners' guilt: The Government's evidence in this case was that a quantity of drugs had been onboard the vessel that Petitioners were on, and had been tossed overboard by some unidentifiable individuals on the boat. Mr. Beauplant was a stowaway on that boat—there was no evidence presented to the contrary—and his defense was that he was unaware of the drugs and played no part in their transport. Likewise, Messrs. Rolle and Wilchcombe's defense was that they were, in essence, hostages held at gunpoint by the drugrunners. The Government's main evidence that Petitioners were involved with the drug smuggling operation was their post-arrest, pre-*Miranda* silence. *See* Pet. App. 25a (noting that the Government argued that had Petitioners "not been involved in the drug-smuggling venture, they would have said something to the Coast Guard officers after they were arrested and while they were at sea").

This put Petitioners to the untenable choice of either testifying or having their silence used against them. Pet. at 19. Mr. Rolle chose the former, Messrs. Beauplant and Wilchcombe the latter. But it is the choice itself that violates the Fifth Amendment. *See Griffin v. California*, 380 U.S. 609, 614 (1965); *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

The Government did not prove beyond a reasonable doubt that the jury did not rely on the evidence of Petitioners' silence to convict, and therefore did not prove beyond a reasonable doubt that its error was harmless.

II. REVIEW IS NECESSARY TO RESOLVE THE SPLIT OVER WHETHER DUE PROCESS REQUIRES THAT CRIMINAL CONVICTIONS UNDER THE MDLEA HAVE A NEXUS TO THE UNITED STATES

This Court should also resolve the circuit split over the due process limitations on extraterritorial criminal prosecutions under the MDLEA. The Ninth Circuit and lower courts in the Second Circuit have held that the Government must demonstrate that a criminal prosecution under the MDLEA has a "sufficient nexus" to the United States to comport with due process, while four circuits have rejected the "sufficient nexus" test.

The Government acknowledges that there is a split over whether the Government must demonstrate a nexus to the United States for a conviction under the MDLEA. Opp'n at 17-20.[3] But it nevertheless argues that review is not warranted because the split "has yet to be of serious practical significance,"

[3] Although the Government acknowledges the split, it attempts to minimize it by claiming that only the Ninth Circuit has required a nexus. Opp'n at 17-20. Not so. As Petitioners demonstrated, lower courts in the Second Circuit have joined the Ninth Circuit in requiring a nexus, and both the Second and Fourth Circuits have suggested that a nexus may be required. *See* Pet. at 24-25.

because courts that require a nexus have heretofore been able to find one. *Id.* at 20.

That is both not true, *see Perlaza*, 439 F.3d at 1168-69 (reversing conviction under MDLEA where district court did not require Government to demonstrate sufficient nexus and Government conceded it had failed to make such a showing), and no obstacle to review here, where the Government failed to demonstrate a sufficient nexus between Petitioners and the United States. Under the Ninth Circuit's nexus requirement, there is a sufficient nexus to the United States if, for example, the "attempted transaction is aimed at causing criminal acts within the United States." *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998). But here, the drugs were being transported for sale in the Bahamas, not the United States. Pet. App. 7a. Likewise, while the Ninth Circuit has found that the Government can establish a sufficient nexus to the United States using evidence that the vessel appeared to be heading towards the United States, carried charts showing routes to the United States, and carried drugs with packages bearing markings like those previously found in the United States, *see United States v. Zakharov*, 468 F.3d 1171, 1179 (9th Cir. 2006), none of those indicia is present here. Petitioners here were on a boat that was transporting foreign-purchased drugs for sale in a foreign country. Pet. App. 3a, 7a, 24a. No navigational charts or routes taken demonstrated that Petitioners were heading to the United States—unsurprising, as it is undisputed that the Petitioners were traveling to the Bahamas.

To demonstrate a nexus, the Government cites to its Eleventh Circuit brief, in which it argued that a cooperating witness testified at trial that he guessed that the drugs being transported might eventually end up in the United States because the quantity of drugs on the boat seemed to him to be too large to be destined just for the Bahamas. Opp'n at 21 (citing Gov't C.A. Br. 15). But that cooperating witness's testimony was nothing more than his own speculation and conjecture. *See* Trial Tr. 256:16-21 (July 30, 2014) (explaining that he thought the drugs would leave the Bahamas and go to the United States solely "because they cannot sell that amount of drugs in the Bahamas. Freeport only got like 40,000 people."). There is nothing in the record indicating that the drugs in fact were destined for the United States, and even if they were, that any of the Petitioners were aware of that. *Cf. United States v. Sidorenko*, 102 F. Supp. 3d 1124, 1133 (N.D. Cal. 2015) (dismissing indictment for failure to demonstrate sufficient nexus between the defendants and the United States for prosecution under other criminal statutes, because there was "nothing in the Indictment to support the proposition that any of the Defendants knew that the conduct alleged even involved the United States").

Likewise, the expert testimony cited by the Government in its opposition was only general testimony that "most of the cocaine coming through the Bahamas is destined for South Florida." Opp'n at 21. There, too, the testimony was not tied to the drugs the Petitioners were charged with transporting—least of all because most of the drugs tossed off of the boat were marijuana, not cocaine.

Id. at 3 (packages contained 860 kilograms of marijuana, but only 35 kilograms of cocaine). The Government's expert made no effort to demonstrate a substantial nexus between the marijuana and the United States—indeed, he suggested the opposite, that there was "a local market for [marijuana] or an appetite, if you will, for it in the Bahamas." Trial Tr. 357:25-358:7 (July 30, 2014).

Other than these two pieces of testimony, the Government made no effort to demonstrate a nexus to the United States. And these two pieces of testimony were insufficient to put Petitioners on notice that they might be haled into court here. *Cf. Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984) (holding as much for purposes of minimum contacts in civil litigation). If such scant evidence would be insufficient for a tort action, it should be insufficient for a criminal prosecution as well. Due process requires more.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MAY 2017

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