No. 07-1452

IN THE

Supreme Court of the United States

CHRIS YANAI, Warden,

Petitioner,

v.

ROBERT GIRTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether it is reversible error for an appellate court to utilize Fourteenth Amendment due process analysis to determine whether, in a trial for aggravated murder based on circumstantial evidence, a prosecutor's repeated suggestions to the jury that the defendant's decision not to testify should be taken as proof of his guilt violated the defendant's Fifth Amendment rights.

II. Whether the standard for evaluating a prosecutor's comment on a defendant's pre-arrest, pre-*Miranda* silence is worthy of consideration by this Court in a case where a Fifth Amendment violation was found based on multiple improper comments by the prosecutor.

LIST OF PARTIES

The Petitioner is Chris Yanai, the former Warden of the Oakwood Correctional Facility and an official of the Ohio Department of Rehabilitation and Correction.

The Respondent is Robert Girts, a prisoner in the Ohio Department of Rehabilitation and Correction's custody.

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STATEMENT OF THE CASE

Respondent incorporates the Statement of Facts from the decision below as if fully restated herein.

The State of Ohio has twice tried Respondent Robert Girts for the aggravated murder of Diane Girts, and twice its convictions have been overturned due to the State's prosecutorial misconduct. During Respondent's second trial, at which he chose not to testify, the prosecutor's closing argument repeatedly emphasized to the jury Respondent's decision not to testify in his defense and suggested that his silence should be taken as proof of his guilt. The prosecutor first recounted testimony from three witnesses who purported to describe statements made by Respondent and emphasized that their testimony had been "unrefuted" and "uncontroverted:"

> Again these are his words. And the words that you heard from these folks supplied by him are unrefuted, and they are uncontroverted. There has been no evidence at all to say that these people are incorrect. None at all.

App. 3a. The prosecutor followed that statement by commenting on Respondent's failure to volunteer information to police investigators: "with respect to the source [of the cyanide], the defendant had no less than three occasions to tell the police that he had ordered the cyanide." App. 3a-4a. Finally, with no doubt

remaining as to the prosecutor's intent to call attention to Respondent's decision not to testify, the prosecutor stated:

> Ladies and gentlemen, we don't have to tell you how it was introduced into her system. We know that it was ingested. ***And there is only one person that can tell you how it was introduced, and that's the defendant.***

App. 4a (emphasis added). These repeated statements were found flagrant and improper by both the United States District Court for the Northern District of Ohio and the United States Court of Appeals for the Sixth Circuit,[1] and the Sixth Circuit granted Respondent's petition for a writ of habeas corpus.

The State, throughout its petition, characterizes the prosecutor's statements as "indirect" comments on Respondent's decision not to testify. But only the first of the three comments could reasonably be described as indirect—no inference is needed to understand the meaning of the other two. Moreover, taken together, the prosecutor's comments on Respondent's silence

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[1] Respondent's counsel failed to object to these statements at trial. Although the United States District Court for the Northern District of Ohio found the statements to be flagrant and improper, it incorrectly deferred to the State appellate court's decision that Respondent could not sufficiently satisfy the prejudice requirement under *Strickland v. Washington*, 466 U.S. 668 (1984), and thus procedurally defaulted his claims. App. 28a n. 1. In its petition for certiorari, the state of Ohio apparently abandons its assertion that Respondent procedurally defaulted his prosecutorial misconduct claims.

manifest a clear intention for the jury to take notice of Respondent's decision not to testify and consider such behavior to be evidence of guilt. As the court below emphasized, "[t]he multiple statements strongly suggests that Petitioner's silence was a central theme in the prosecutor's closing argument. The comments came in relatively close sequence and were some of the last statements heard by the jury before deliberations." App. 34a. Far from indirect, the prosecutor's comments were repeated, deliberate, and made in a case that was based entirely on circumstantial evidence, thus denying petitioner his constitutional right to a fair trial, as recognized by both federal courts below.

There is no confusion in the lower courts and there is no significant split of authority amongst the circuits that would conceivably affect the outcome given the glaring example of prosecutorial misconduct; rather, this case involves a simple and straightforward application of federal law, and the court below properly applied the law and rendered the proper decision.

REASONS FOR DENYING THE PETITION

The Court should deny the petition because this case, in addition to being properly decided by the court below, does not present the Court with a genuine circuit split or an issue of sufficient importance.

The State's first argument seeks to put at issue the use of two slightly different tests to evaluate claims of prosecutorial misconduct based on the prosecutor's comments to the jury regarding a defendant's decision not to testify. The State's petition fails for three

separate and important reasons: (1) there is no substantive circuit split in applying the standards, (2) there are no tangible differences between the two tests, and (3) if any differences did exist between the two tests, the application of either test would result in a finding of prosecutorial misconduct and reversal of Respondent's conviction.

The second argument advanced by the State is that it should be entitled to use Respondent's pre-arrest, pre-*Miranda* statements as substantive evidence of guilt. This contention, if adopted, would turn Respondent's Fifth Amendment silence privilege on its head and force Respondent to choose between silence and comment, while knowing that either response will be used by the State as substantive evidence of guilt. Moreover, even if there was a legitimate rationale for allowing such comments, such a rule would not affect the outcome here, since the violation of Respondent's Fifth Amendment rights was premised on the cumulative effect of multiple comments. Accordingly, the State's petition for writ of certiorari should be denied.

A. The Sixth Circuit's Decision is Not in Conflict With Any Other Circuit and Does Not Warrant Review by This Court.

The Fifth Amendment is the source of a defendant's right not to testify in his own defense and the correlated right not to have this fact used as substantive evidence of his guilt. U.S. CONST. amend. V, § 3 ("nor shall be compelled in any criminal case to be a witness against himself"); *Wilson v. United States*, 149 U.S. 60 (1893); *Griffin v. California*, 380 U.S. 609, 615 (1965) (holding

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"). In turn, the Fourteenth Amendment makes this right available to defendants in state courts by "secur[ing] against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). Therefore, because both the Fifth and Fourteenth Amendments secure to defendants the same substantive rights (but merely in different fora) there should be no substantive difference in assessing prosecutorial misconduct under either Amendment. Both the Sixth Circuit below and other circuits have recognized this and have properly used the separate prosecutorial misconduct tests developed under Fifth and Fourteenth Amendment jurisprudence interchangeably.

1. The Sixth Circuit Correctly Analyzed Respondent's Claims.

The court below used the Fourteenth Amendment *Carroll*[2] flagrancy test to determine whether the prosecutor's comments resulted in a due process violation. A court using the *Carroll* test engages in a two-step analysis. The first step is to determine whether

[2] Although this test is referred to by different names in different circuits, the Sixth Circuit in the opinion below has referred to the test as the *Carroll* test or the *Carroll-Carter* test. For ease of reference, we will refer to all iterations of this test as "*Carroll*" tests or "*Carroll*-type" tests.

the prosecutor's conduct and remarks were improper. App. 31a (citing *United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001)). If the prosecutor's remarks are found to be improper, then the court proceeds to evaluate the comments in a four-factor rubric to determine whether the remarks are flagrant and thus reach constitutional error. The four factors are: (1) the likelihood that the remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) the total strength of the evidence against the defendant. *United States v. Carroll*, 26 F.3d 1380, 1385-87 (6th Cir. 1994).

The State argues that the lower court's use of the *Carroll* test was reversible error and the court should have employed instead the *Morrison-Knowles* test, Petition at 17, which contains substantively identical points of analysis:

> "(1) [W]ere the comments 'manifestly intended' to reflect the accused's silence or of such a character that the jury would 'naturally and necessarily' take them as such; (2) [w]ere the remarks isolated or extensive; (3) [w]as the evidence of guilt otherwise overwhelming, and (4) [w]hat curative instructions were given, and when."

Byrd v. Collins, 209 F.3d 486, 533-34 (6th Cir. 2000). As illustrated in the discussion below, the several courts of appeals, properly following this Court's clear guidance, have utilized the *Carroll* test to judge the constitutionality of a prosecutor's comments, and the

court below correctly applied the test in deciding Respondent's claims.

Despite the State's assertion that lower courts are fractured on the proper use of the two tests, courts have used *Carroll*-type tests interchangeably with the *Morrison-Knowles* test, often without comment. *See, e.g., United States v. Davis*, 63 Fed. Appx. 76, 79 (4th Cir. 2003) (using prosecutorial misconduct test to evaluate prosecutor's comments on defendant's silence); *United States v. Cox*, 752 F.2d 741, 745 (1st. Cir. 1985) (Breyer, J.) (using similar test to evaluate a prosecutorial comment on silence) (quoting *United States v. Capone*, 683 F.2d 582, 586 (1st Cir. 1982)); *see also Durr v. Mitchell*, 487 F.3d 423, 439 (6th. Cir. 2007). The reason that this Court has not yet addressed this seeming inconsistency is simple: the two tests are substantively identical. Indeed, the cases cited by the State actually establish that the *Carroll* test is perfectly appropriate to evaluate a prosecutor's comments for potential misconduct.

The State's petition relies heavily on *United States v. Cotnam*, 88 F.3d 487 (7th Cir. 1996). While the *Cotnam* court recognized that prosecutorial statements regarding a defendant's decision not to testify are prohibited by the Fifth Amendment, the Court acknowledged that such statements would *also* result in a Fourteenth Amendment due process violation. The State's petition quoted language from *Cotnam* stating that the Fifth Amendment test is preferred, Petition at 16, but the State omitted the first clause of the very same sentence, which emphasized the overlap between the *Morrison-Knowles* test and the Fourteenth

Amendment analysis used by the Sixth Circuit below. The full quote from *Cotnam* is:

> While the appellants in these cases may have framed their appeals as due process claims, and recognizing that a violation of a defendant's right not to testify would also result in a denial of due process, a claim that a prosecutor improperly commented upon the defendant's failure to testify is most properly considered first under the traditional Fifth Amendment test outlined above.

Cotnam, 88 F.3d at 498 n. 11.

Further, even accepting the State's erroneous contention that the use of a Fourteenth Amendment test in silence-related prosecutorial misconduct claims might lead to reversible error in some cases, the State's case law in support of this theory is simply not analogous to the situation presented in Respondent's trial.[3] In the present case, for instance, the prosecutor's impermissible comments were repeated and made in close succession during closing arguments, shortly before the jury retired. App. 34a. However, in *Barrientes v. Johnson*, 221 F.3d 741, 778-81 (5th Cir. 2000), only one comment regarding defendant's silence was made throughout the entire trial. Furthermore, unlike the prison disciplinary proceedings that this Court reviewed in *Baxter v. Palmigiano*, 425 U.S. 308, 317 (1976), the

[3] A determination of the constitutionality of a prosecutor's comments requires an examination of the specific circumstances of a trial. *See Lockett v. Ohio*, 438 U.S. 586, 595 (1978).

proceedings in the case below were criminal in nature, thus requiring different constitutional analysis. Finally, in contrast to the present case, the prosecutors' comments in *Butler v. Rose*, 686 F.2d 1163, 1172 (6th Cir. 1982), and *Lockett v. Ohio*, 438 U.S. 586, 595 (1978), for example, were found not to violate constitutional prohibitions specifically because defense counsel in both cases first drew their jury's attention to defendants' decision not to testify. Here, defense counsel made no such comments. In short, none of the cases cited by the State to support its position are analogous here, and the Sixth Circuit's decision correctly applied the law after carefully evaluating the specific facts of this case.

2. The Fourteenth Amendment and Fifth Amendment Tests Are Indistinguishable

"To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection." *Malinski v. New York*, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring). Indeed, proving Justice Frankfurter correct, the State's petition is nothing more than an exercise in attempted hair-splitting between the nearly identical analytical frameworks arising under each Amendment: as acknowledged in *Cotnam*, the Fourteenth and Fifth Amendment due process tests vary only "slightly." 88 F.3d at 497.

The State attempts to magnify this "slight" difference by exaggerating the linguistic differences between the two tests. For instance, the State's petition argues that "[t]he *Morrison Knowles* test is better than

the test that the court below used because the 'manifest intent' and 'natural and necessary' factors ensure that verdicts are not set aside for words taken out of context." Petition at 17-18. But this terminological distinction does not hold up when the court's actual analysis is considered. In applying the *Carroll* test, the court below specifically considered the context and apparent intent of the prosecutor's statements and their impact on the jury. *See* App. 34a. ("The multiple statements strongly suggest that [Respondent's] silence was a central theme in the prosecutor's closing argument."); App. 35a, ("Repeated comments demonstrate that the errors were not inadvertent .... [T]he prosecutor intended to comment (especially with regard to the third statement) on [Respondent's] failure to testify *and . . . the jury likely understood the comments to have been offered for that purpose.*") (emphasis added). The court's analysis below gives the lie to the State's contention that the *Morrison-Knowles* and *Carroll* tests are materially different. Both tests logically require an examination of the context to ascertain the prosecutor's intent and the jury's understanding of the comments, and that is precisely what happened here.

Moreover, a close reading of both tests shows that they are substantively identical. The *Carroll* flagrancy test, cited earlier, follows two steps. The first step is to determine whether the prosecutor's conduct and remarks were improper. App. 31a (citing *United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001)). If the remarks are found to be improper, then the court proceeds to the four-factor test in determining whether the remarks are flagrant and thus require reversal.

The State's argument that there is a meaningful distinction between the two tests completely ignores the first half of the *Carroll* test, which requires a court to determine whether the statements were improper. *Carter*, 236 F.3d at 783. Only after a statement is found to be improper will the court proceed to analyze the flagrancy of the comment under the four-factor test. Because the first step of the *Carroll* test requires a court to assess whether an argument was improper, the state's assertion that a prosecutor's "legitimate point," Petition at 20, could be held to be constitutional error and "steer[] the court to the wrong result" is mistaken. The very first step of the *Carroll* test determines whether the statement was legitimate.

Further, even if the first part of the *Carroll* test did not exist, the operation of the four-factor test itself ensures that legitimate comments will not be deemed improper. The State's assertion that "[l]egitimate statements might well be flagrant, because prosecutors can and do make them openly," Petition at 20, might well be a valid point if the meaning of flagrant were "openly;" however, it is not. *See* WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 538 (1992) (defining "flagrant" as "outrageously glaring" or "notorious; scandalous"). The concept of flagrancy includes an element of wrongfulness and intent—just as the *Morrison-Knowles* test does. In short, the *Morrison-Knowles* and *Carroll* tests are substantively identical both on their face and as applied, and the State's argument that the two tests are markedly different is unconvincing.

3. The Application of the *Morrison-Knowles* Test to the Facts in This Case Would Not Change the Result.

Because the *Morrison-Knowles* and the *Carroll* tests are essentially the same, the State has not, and cannot, make any reasonable showing that the Sixth Circuit would have reached a different result if a different standard had been used. Because the prosecutor both intended to comment about the defendant's silence to the jury and those comments were prejudicial, either test would result in a determination that the prosecutor's comments violated Respondent's right not to testify against himself.

The *Morrison-Knowles* factors are easily satisfied under the present facts. Clearly, the prosecutor "manifestly intended" to comment on Respondent's silence by stating: "we don't have to tell you how it was introduced into her system. We know that it was ingested. And there is only one person that can tell you how it was introduced, and that is the defendant." App. 24a. As noted at the district court, this "statement is anything but a comment on the evidence." App. 98a. The Sixth Circuit echoed this sentiment, finding that "[t]he prosecutor intended to comment . . . on [Respondent's] failure to testify and that the jury likely understood the comments to have been offered for that purpose." App. 35a. This third comment was a direct and unequivocal statement regarding Respondent's decision not to testify and alone would satisfy the first *Morrison-Knowles* factor.

Further, even standing alone, the third statement would be considered "extensive" and violative of Respondent's Fifth Amendment right, but it is particularly so when analyzed in light of the prosecutor's two other inappropriate comments relating to Respondent's silence that were made during closing argument, so the second *Morrison-Knowles* factor is also satisfied.

Finally, the last two *Morrison-Knowles* factors are satisfied based on the court's analysis below in finding that the evidence of Respondent's guilt was not overwhelming and that the trial court did not issue a curative instruction to the jury regarding the prosecutor's inappropriate comments. App. 35a-36a; App. 33a.

Ultimately, using either the *Carroll* or *Morrison-Knowles* test, a court would have found that the prosecutor's comments constituted prosecutorial misconduct. The test used below substantively mirrors the test suggested by the State and analysis under either test would lead to the same result: that the State, for a second time, violated Respondent's Fifth and Fourteenth Amendment rights. Accordingly, because the court below properly analyzed the issue and because the State's proposed test would not result in a different result, this Court should deny the State's petition for certiorari.

B. The Issue of Respondent's Pre-Arrest Silence is Not Central to the Outcome of This Case and Should Not be Considered by This Court.

1. This Case Does Not Present a Clear Set of Facts for the Court's Resolution.

While the State correctly asserts that this Court has yet to definitively resolve the issue of whether pre-arrest silence can be used as substantive evidence of guilt, this case is not worthy of review by this Court because of the unique factual circumstances presented. The State's petition claims that "the certworthiness of this case . . . is not in any way diminished by the fact that the pre-arrest silence issue arose in conjunction with the two other purportedly improper prosecutorial statements," Petition at 27, but it is difficult to imagine how the presence of the two additional statements would not needlessly muddy the Court's review of this issue. This is particularly so given the cumulative effect of the statements and that the courts below emphasized that the prosecutor's most egregious statement was his third statement, App. 35a, which dealt not with pre-arrest silence, but rather with the State's claim that "only one person . . . can tell you how [the cyanide] was introduced, and that's the [Respondent]."

2. The Sixth Circuit's Decision Below was Correct.

Despite the State's characterization of the lower courts as "badly split on this issue," Petition at 25, many federal and state courts that have analyzed the issue, including Ohio, have found that the Fifth Amendment

necessarily protects pre-arrest statements. This makes perfect sense; to hold otherwise would create a catch-22 for defendants: remain silent and face the prospect of that silence being used as substantive evidence of guilt, or speak to investigators and risk having one's own words introduced as incriminating evidence at trial. *See, e.g., Coppola v. Powell*, 878 F.2d 1562, 1565 (1st Cir. 1989); *United States v. Caro*, 637 F.2d 869, 874-75 (2d Cir. 1981); *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000); *Savory v. Lane*, 832 F.2d 1011, 1017 (7th Cir. 1987); *United States v. Burson*, 952 F.2d 1196, 1200-01 (10th Cir. 1991); *see also Ohio v. Leach*, 807 N.E.2d 335, 340-41 (Ohio 2004); *cf. United States v. Hernandez*, 476 F.3d 791, 796 (9th Cir. 2007) (holding that post-arrest, pre-*Miranda* silence cannot be used as substantive evidence of guilt).

The court below followed the established rule for good reason: following the State's argument to its logical conclusion would effectively nullify the Fifth Amendment's protections against self-incrimination. Not only would a defendant be faced with the Morton's Fork described above, but adoption of this rule would also encourage gamesmanship by the State during its investigation, for such a result would create an incentive to unnecessarily delay arrest (and thus delay reading of *Miranda* warnings) with the understanding that no matter the defendant's actions, he will incriminate himself, either by remaining silent or by speaking. Because the decision below correctly decided the issue, this Court need not grant the State's petition.

3. The AEDPA's Presumption Does Not Apply to the Facts of This Case.

The State correctly notes that this is an AEDPA case, but the statute applies only to those claims that were "adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). If a state court's analysis of a particular claim omitted or failed to consider one or more elements of a federal constitutional claim, each element that the state court failed to consider must be reviewed *de novo*. *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (finding that federal court could examine prejudice issue *de novo* because state court never reached it). Here, the state court below did not reach the merits of [Respondent's] claim that the prosecutor's comments regarding his pre-arrest silence amounted to a violation of his due process rights under the Fifth Amendment. *See State v. Girts*, 700 N.E.2d 395, 414 (Ohio Ct. App. 1997). The state appellate court devoted a mere two paragraphs to the prosecutor's second statement in its opinion, and it found only that "the statement was an accurate summation of the evidence." *Id.* Whether the evidence is accurately summarized is not the issue because it does not address the merits of Respondent's constitutional claim because it does not address whether Respondent's Fifth Amendment rights were violated. Because the state appellate court "neither asked nor answered the right question," a court's habeas review must proceed *de novo*. *See Medellin v. Dretke*, 544 U.S. 660, 680 (2005) (*de novo* consideration was proper because state court did not ask or answer the right question) (O'Connor, J., dissenting from dismissal of *certiorari* as improvidently granted); *Clinkscale v. Carter*, 375 F.3d 430, 436 (6th Cir.

2004). Accordingly, the AEDPA does not properly govern Respondent's claims relating to the State's use of his pre-arrest silence as substantive evidence of guilt and the Sixth Circuit properly considered this claim *de novo.*

CONCLUSION

For the foregoing reasons, the Court should deny the State of Ohio's petition for writ of certiorari.

Respectfully submitted,

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