No. 07-1452

In the Supreme Court of the United States

CHRIS YANAI, Warden,

Petitioner,

v.

ROBERT GIRTS,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities

REPLY BRIEF FOR THE PETITIONER

Respondent Girts's Brief in Opposition ("Opp.") confirms, rather than negates, the need for review here. The Petition seeks review on two critical issues regarding a prosecutor's indirect comments on a defendant's silence. First, the Court should resolve the confusion in the lower courts regarding the proper test for evaluating Fifth Amendment claims based on such comments. Second, the Court should resolve the circuit split over references to pre-arrest, pre-*Miranda* silence.

A. The Court should resolve the confusion over the proper test for resolving Fifth Amendment claims based on comments on a defendant's silence.

1. The Fifth Amendment test for comments on silence differs from the Fourteenth Amendment test for general prosecutorial misconduct.

Girts's attempts to minimize the differences between the two tests at issue—one under the Fifth Amendment, the other under the Fourteenth—are unavailing, because the two tests do differ, and the differences matter.

A claim that challenges a prosecutor's comments regarding a defendant's silence arises under the Fifth Amendment, and courts properly assess such comments under the *Morrison-Knowles* test. Pet. at 13 (citing *Griffin v. California*, 380 U.S. 609, 615 (1965); Pet. at 15 (citing *Morrison v. United States*, 6 F.2d 809, 811 (8th Cir. 1925); *Knowles v. United States*, 224 F.2d 168, 170 (10th Cir. 1955)) The *Morrison-Knowles* test asks if a remark was "manifestly intended" to refer to the defendant's

constitutionally protected silence or if, because of the remark's character, "the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify." *United States v. Stroman*, 500 F.3d 61, 65 (1st Cir. 2007). The test looks at *both* the prosecutor's intent and the jury's perception.

This Court has also held that a "reference to the defendant's failure to take the witness stand may, in context, be perfectly proper." *United States v. Robinson*, 485 U.S. 25, 33 n.5 (1988). Thus, "prosecutorial comments must be examined in context" to determine their propriety, *id.* at 33, and in particular, the Court noted that comments made in "fair response to a claim made by defendant or his counsel" are legitimate, *id.* at 32.

In *Robinson,* the Court expressly contrasted comments on silence, which may be proper depending on the context, with prosecutorial comments that violate due process and are never allowed. *Id.* at 33 n.5. Comments that "inflamed the jury, vouched for the credibility of witnesses, or offered the prosecutor's personal opinion as to the defendant's guilt were improper" regardless of context. Such comments might not always warrant reversal, depending on other factors, but they are always labeled "improper."

Courts have therefore developed a broader test to assess Fourteenth Amendment due process claims based on prosecutorial statements that *Robinson* says are generally disallowed. See Pet. at 11 (detailing test); 16-17 (citing *United States v. Cotnam*, 88 F.3d 487, 498 n.11 (7th Cir. 1996) and explaining difference between tests); see also Girts

Brief in Opposition ("Opp.") at 5-7 (detailing the "Fourteenth Amendment *Carroll* flagrancy test" and citing *United States v. Carroll*, 26 F.3d 1380 (6th Cir. 1994)).

2. The two tests are rooted in different constitutional guarantees and resolve fundamentally different claims.

Girts acknowledges that two separate tests exist. See Opp. at 5-7. But he tries to blur the differences not only between the tests, but also between the independent constitutional rights—the Fifth Amendment right against self-incrimination and the broader Fourteenth Amendment right to due process—that the tests protect. Girts says that "both the Fifth and Fourteenth Amendments secure to defendants the same substantive rights (but merely in different fora)," Opp. at 5, suggesting improperly that the Fourteenth Amendment right for comparison is merely the incorporated right against self-incrimination, as opposed to the due process right. Conversely, he elsewhere suggests that the comparison here is between the two Amendments' due process clauses. Opp. at 9. Girts then accuses the State of "hair-splitting between the nearly identical frameworks arising under each Amendment." Opp. at 9. But the Fifth Amendment test here is *not* a due process test; it is a right-to-silence test.

This categorization matters because the AEDPA scheme is organized around assessing a habeas petitioner's "claim," and that claim is typically labeled by the constitutional provision at a minimum, and usually even more specificity is required. First, a petitioner must show that he has

exhausted and has not defaulted a "claim," and courts have "held that the doctrine of exhaustion requires that a claim be presented to the state courts under the same theory in which it is later presented in federal court." *Wong v. Money*, 142 F.3d 313, 322 (6th Cir. 1998); *Williams v. Bagley*, 380 F.3d 932, 969 (6th Cir. 2004) (rejecting argument that preservation of one prosecutorial misconduct claim preserves all other claims under same label). That standard, which requires sticking to the same theory within one type of claim, is violated if a claim mutates from a Fifth Amendment self-incrimination claim on direct review to a Fourteenth Amendment claim in habeas.

Second, a federal court reviewing the correctness of a state court's ruling on a claim looks to whether the state court "identified the correct governing legal principle" before looking to whether the state court "unreasonably applie[d] that principle." *Rompilla v. Beard*, 545 U.S. 374, 380 (2005). That assessment is muddled if, as here, a state court properly identifies governing legal principles, but the federal habeas court then cites the *wrong* constitutional provision and body of law.

In short, the Sixth Circuit could not have applied the right test when it was not even dealing with the right constitutional provision.

3. The *Morrison-Knowles* test captures *Robinson's* instruction to weigh whether statements are improper; the *Carroll* test does not.

The specifics of the two tests vary in ways that reflect the principles of the Court's precedents and

consequently affect outcomes. *Robinson* explains that comments on silence may be perfectly proper, while statements that violate due process are always improper. Thus, when a defendant alleges that a statement violated due process, the first inquiry is merely whether the statement falls in the forbidden category and is automatically improper. See *Carroll*, 26 F.3d at 1387. The next question is whether the improper statement warrants reversal. *Id.* at 1389. The *Carroll* test follows that structure.

In sharp contrast, because comments about a defendant's silence are not improper merely because they point to that silence, another step is needed. The *Morrison-Knowles* inquiry, accordingly, looks at both the prosecutor's intent and the jury's perception. And that inquiry captures the teachings of *Robinson* and *Lockett v. Ohio,* 438 U.S. 586, 595 (1978). Those cases explain not only the need for a contextual inquiry and the recognition that some comments on silence are allowable, but also set specific rules, such as that response to a defense argument are generally acceptable and that descriptions of evidence as unrefuted may be permissible. See *Robinson,* 485 U.S. at 32-33; *Lockett,* 438 U.S. at 595 (holding that references to State's evidence as "unrefuted" and "uncontradicted" were not improper in context).

The "improper" prong of the *Carroll* test does not substitute for the *Morrison-Knowles* inquiry, then, because all *Carroll* violations are improper if they occurred at all, while comments on silence require contextual assessment and may be proper.

4. The Sixth's Circuit's mistaken use of the *Carroll* test led it to skip the contextual inquiry that *Robinson* and *Lockett* require.

Girts argues that the *Carroll* test captures the *Morrison-Knowles* concept primarily in *Carroll's* first half, in asking whether a statement is improper, before reaching the four-prong test about whether a statement warrants reversal. Opp. at 10-11. But the Sixth Circuit's decision shows otherwise.

The Sixth Circuit considered the "impropriety" of the three contested statements at two parts of the decision—as part of its cause-and-prejudice review,[1] Pet. App. 23a-25a, and on the merits, Pet. App. 29a-32a—and neither assessment shows full consideration of this Court's precedent on allowable statements. The court approached each statement as it would approach a due process violation under *Carroll,* treating each statement as improper per se without looking to whether it was the allowable type of comment on silence.

For example, the prosecutor's first statement described the testimony of witnesses who spoke with Girts as "unrefuted" and "uncontroverted." The

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[1] Girts's insistence notwithstanding, Ohio has not abandoned its arguments that Girts failed to show ineffectiveness and thus failed to show cause to overcome his default. Opp. at 2 n.1. The Petition noted that correcting the Sixth Circuit's analysis of the statements at issue would require re-assessment of the ineffectiveness and cause-and-prejudice steps. Pet. at 27. In any event, failure on the merits necessarily prevents a "cause" showing.

court said that "his comment points directly to [Girts's] failure to testify and suggests to the jury that [Girts] had an affirmative obligation to refute witness testimony." Pet. App. 23a-24a. Thus, the court concluded that the statement was per se improper because it noted Girts's failure to testify. *Robinson* and *Lockett*, however, point to the propriety of similar statements; indeed, *Lockett* approved comments that used the terms "unrefuted" and "uncontradicted." Further, in not following the *Morrison-Knowles* approach, the court failed to analyze *both* the prosecutor's intent *and* the jury's perception, with the latter focusing on whether the jury *necessarily* would view a remark as a criticism of the failure to testify. *Barrientes v. Johnson*, 221 F.3d 741, 780 (5th Cir. 2000) ("the question is not whether the jury might or probably would view the challenged remark in this manner, but whether it necessarily would have done so"). The court below described what it thought the comment "suggest[ed] to the jury," Pet. App. 23a-24a, but it never asked how the jury necessarily perceived it.

The Sixth Circuit's partial analysis continued when the court re-assessed the statements on the merits. At two different stages, the court summarily said the statements were "improper" without actually undertaking any analysis to reach that conclusion. First, the court concluded that the statements constituted "prosecutorial misconduct because Petitioner's silence cannot be used against him as substantive evidence." Pet. App. 29a. But the Fourteenth Amendment "prosecutorial misconduct" label attaches to statements or conduct that is always improper, not to statements that

might be improper depending on context and perception.

The court then repeated its mistake when it turned to the *Carroll* flagrancy test. The court noted that *Carroll* has a first step—asking if the remarks were improper—but it *never performed that step.* Pet. App. 31a. Instead, it listed the four-prong test that constitutes the *second step,* and then proceeded to march through those four factors. As a result, the court left out any analysis of whether the statements at issue were actually improper.

Girts says that even if *Carroll's* first step does not cover the missing *Morrison-Knowles* elements—and, as the Sixth Circuit's analysis shows, it does not—the four-prong test does double-duty, because the notion of flagrancy includes wrongful intent, not just openness. Opp. at 11. But Girts's own statement refers only to intent, and not to jury perception—missing half of the *Morrison-Knowles* test—and the Sixth Circuit analysis did the same. Nowhere in its assessment of the four factors did the court mention that some comments on silence are acceptable, let alone ask if the comments here were. The court looked only to whether the comments reflected silence, not whether they unfairly did so.

As an alternative to defending the mistaken use of the *Carroll* test, Girts also argues that application of the proper *Morrison-Knowles* test would have reached the same result—but his incomplete analysis falls short. See Opp. at 12-13. Notably, Girts fails to apply the full analysis to any one of the disputed statements. Instead, he selectively says that one *Morrison-Knowles* factor is satisfied by one statement, and another factor by another statement,

and so on. *Id.* (asserting that "third comment . . . alone would satisfy the first . . . factor."). But as the Petition detailed, proper application of the test would have allowed these statements. Pet. at 21-23.

5. The lower courts are split over the acceptability of comments virtually identical to the ones here.

Even assuming that the *Carroll* test and the *Morrison-Knowles* test are interchangeable—and, as explained above, they are not—a split of authority remains over whether comments of the type at issue warrant reversal, whatever the framework. The Petition noted precise splits on the first and third statements—regarding the "unrefuted" witnesses and Girts's exclusive knowledge of the method of cyanide delivery. On each, Girts failed to respond.

First, the lower courts have repeatedly addressed the issue whether a prosecutor may refer to a witness's statement as "unrefuted" when only the defendant could refute, and the outcomes are mixed. See Pet. at 21-22 (citing cases comprising split). Other cases also allow such statements, contrary to the approach below. See, e.g., *United States v. Francis*, 82 F.3d 77, 79 (4th Cir. 1996); *United States v. Davis*, 63 Fed. App'x 76, 79 (4th Cir. 2003) ("A prosecutor can characterize the evidence as 'uncontradicted,' even if the defendant was the only person who could have refuted such evidence.").

Here, the Sixth Circuit agreed with those courts that do not allow descriptions of evidence as uncontradicted when only the defendant could contradict. Regardless of whether the Sixth Circuit is on the right or wrong side of that split, the division

exists, and Girts does not at all respond to it. And the split is a recurring one, because this is a fairly typical prosecutorial comment. Prosecutors are therefore left unsure what they may and may not say.

The Petition also noted a division of authority over comments suggesting that only the defendant could know a certain fact. Here, the defense questioned the method of delivery of the cyanide, which the State did not pin down, and the prosecutor responded by saying that "only one person . . . can tell you how it was introduced, and that's the defendant." The court held that statement was improper, but in another case, the Second Circuit held that a nearly identical statement—that a defendant was "the only person that knows how that $600,000 got into the Cayman Island bank account"—was perfectly proper. *United States v. Knoll*, 16 F.3d 1313, 1323 (2d Cir. 1994). The Sixth Circuit, too, has approved a similar statement, in a case that applied *Morrison-Knowles*. See *Spalla v. Foltz*, 788 F.2d 400, 403-04 (6th Cir. 1986) (allowing prosecutor to say, "Who would know the motive? The killer would know . . . and the killer is the Defendant").

B. This case provides the opportunity to resolve a split of authority—which Girts does not deny—regarding comments on a defendant's pre-arrest silence.

Girts implicitly admits that the circuits are sharply divided on the question whether a defendant's pre-arrest silence can be used as substantive evidence of guilt. See Opp. at 14. Girts also implicitly admits the importance of the issue, by

arguing so strongly that his side is right. These points support, not negate, review. And Girts's other arguments—that this is a bad vehicle and that AEDPA does not apply—are mistaken.

First, Girts essentially admits that the issue is an important one, and he does not deny the split, nor could he: As the Sixth Circuit said in the case on which it relied in the decision below, "[t]he circuits that have considered whether the government may comment on a defendant's pre-arrest silence in its case in chief are equally divided." *Combs v. Coyle*, 205 F.3d 269, 282 (6th Cir. 2000). The division of authority is sharp, mature, and ripe for review.

The issue is also sufficiently significant to warrant review. Girts says that Ohio's view is so harmful that it could "effectively nullify the Fifth Amendment's protections against self-incrimination." Opp. at 15. But many courts have adopted Ohio's position. Thus, if the position is as destructive as Girts says it is, then this Court should grant review to resolve it in one direction or the other.

Girts also claims that this is a poor vehicle to resolve the issue, because the comment here coincided with two other improper comments, but he is wrong. The Court's resolution of the framework issue (discussed in Part A) would not prevent the Court from separately and cleanly resolving whether pre-arrest statements fall under the *Griffin* rule. In other words, regardless of whether the Court adopts the *Morrison-Knowles* test, or somehow merges it with the *Carroll* test, or creates a new test, the Court will still need separately to decide whether the pre-arrest statements are even subject to the test.

Finally, Girts is wrong to claim that AEDPA does not apply because the state court did not review this claim. First, the point is irrelevant to the extent that the split of authority predates AEDPA and occurs in direct review. The issue therefore needs resolution regardless. More to the point, the state court did review this claim. Girts's tenth assignment of error on direct appeal specifically raised this issue. *State v. Girts*, 700 N.E.2d 395, 413-14 (Ohio Ct. App. 1997), Pet. App. 150a-153a. After summarizing applicable federal law, including the *Morrison-Knowles* test, and quoting the prosecutor's comments on Girts's pre-arrest silence, the state appeals court concluded that the comments were "an accurate summation of the evidence" that "related to defendant's refusal to cooperate during the police investigation of decedent's death, not his failure to testify at trial." *Id.* at 414.

In sum, the second question presented warrants review as much as the first. And the combination here is a virtue, not a vice, as it allows the Court to resolve both issues and provide much-needed guidance to lower courts and especially to prosecutors, who must decide every day whether to self-censor legitimate statements because of the uncertainty over what they may or may not say.

CONCLUSION

For the above reasons, the Court should grant the Petition.

Respectfully submitted,

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