

NO:

IN THE
SUPREME COURT OF THE UNITED STATES

TRINITY CABEZAS-MONTANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the prosecution violates the Fifth Amendment to the United States Constitution when they use a Defendant's pre-*Miranda*, post-arrest statements as evidence of guilt against him in the government's case in chief.

INTERESTED PARTIES

Petitioner Trinity Cabezas-Montano was the Appellant below, and Adalberto Palacio-Solis and Hector Guagua-Alaracon were co-appellees below.

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No:

TRINITY ROLANDO CABEZAS-MONTANO,

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PETITION FOR WRIT OF CERTIORARI

Trinity Rolando Cabezas-Montano respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 17-14294 in that court on January 30, 2020, *United States v. Trinity Rolando Cabezas-Montano, et al.*, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on January 30, 2020. This petition is timely filed pursuant to SUP. CT. R. 13.1, as extended by Memorandum dated March 30, 2020. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

The Fifth Amendment to the United States Constitution states, in relevant part that "[n]o person... shall be compelled in any criminal case to be a witness against himself."

STATEMENT OF THE CASE

This case presents an important and recurring question that has divided the circuits. May the prosecution use as evidence of guilt in its case-in-chief the silence of a criminal defendant after his is in custody, but before he is given *Miranda* warnings?

In its lengthy opinion, the Eleventh Circuit acknowledged the split on the issue, but held – in conformity with Circuit precedent – that the Constitution permits the prosecution's use of that silence. Judge Rosenbaum filed a concurring opinion. Therefore, this case raises, an acknowledged split that will not be resolved without this Court's intervention.

I. Relevant Factual and Procedural Background.

Petitioner Cabezas-Montano, along with co-defendants Palacios-Solis, and Guagua-Alarco, were twice tried and convicted after the second trial of violating the Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. §§ 70501-70508 for cocaine – related offenses. All three defendants were stopped on the high seas by a United States Coast Guard interceptor boat, and the officers boarded and instructed all three defendants to go to the front of the boat and began to ask right-of-visit questions to determine the nationality and master of the vessel. At no time did the officers read the three defendants their *Miranda* rights. The defendants initially remained silent and then co-defendant Palacio-Solis told the officers' the vessel's last port of call was Manta, Ecuador, and they had gone fishing, but had become lost at sea for 32 days. The Coast Guard then contacted Ecuador and got a statement of no objection, and conducted a full investigation ultimately finding bales of cocaine purportedly linked to the vessel.

At the trial (first trial resulted in a mistrial) the government used the defendants' silence as evidence in the case in chief. An officer testified that the defendants remained silent in response to questioning and were not "jumping for joy" to see the Coast Guard. Which the prosecutor then used in closing statement. The defendants challenged the use of the pre-*Miranda* silence in pre-trial motions, in Rule 29 motions, and on direct appeal.

The Eleventh Circuit Court of Appeals affirmed the convictions and cited binding precedent, but acknowledged a Circuit split on the question of whether the use of post-arrest pre-*Miranda* silence in the government's case in chief is a violation of the Fifth Amendment relying upon *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991). In *Rivera* the Court held that the government may use a defendant's pre-*Miranda* post-arrest silence as direct evidence in the government's case-in-chief.

REASONS FOR GRANTING THE WRIT

I. The Question Presented Has Divided the United States Courts of Appeals.

This Court explained many years ago in *Miranda v. Arizona*, "the prosecution may not ... use at trial the fact [a defendant] stood mute or claimed his privilege in the fact of accusation" while under police custodial interrogation." 384 U.S. 436, 468 n. 37 (1966). However, this Court has not resolved, whether the Fifth Amendment prohibits the prosecution from using in its case-in-chief, as evidence of guilt, a defendant's silence **after** he is arrested but **before** he receives *Miranda* warnings. And there is a deep split among the Courts of Appeals on this issue.

A. Three circuit courts – the Fourth, Eighth and Eleventh, have held that post-arrest, pre-*Miranda* silence may be used as substantive evidence in the government's case in chief. 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); and *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991). All of these courts have held that the "receipt of the *Miranda* warnings is determinative of the constitutional issue," not the arrest of the defendant. *United States v. Frazier*, 408 F.3d at 1111 (quoting *Vick v. Lockhart*, 952 F.2d 999, 1003 (8th Cir. 1991)). The Eleventh Circuit's holding to this effect relied upon *Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (*per curiam*), which permitted the use of the pre-*Miranda* silence **for**

impeachment – as its "sole authority" in concluding that the pre-*Miranda* silence may be used in the prosecution's case in chief. *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991).

B. On the other side of the split, the Sixth, Ninth, and D.C. Circuits have held that use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment silence as substantive evidence of guilt violates the Fifth Amendment. These courts agree with the logic in line with the text of the Constitution, that a "comment on the defendant's exercise of his right to remain silent [is] unconstitutional," which is true "regardless whether the *Miranda* warnings were actually given." *United States v. Whitehead*, 200 F.3d 634, 638 (9th Cir. 2000); *United States v. Moore*, 104 F.3d 377, 385 (D.C. Cir. 1997) ("[N]either *Miranda* nor any other case suggests that a defendant's protected right to remain silent attaches only upon commencement of questioning as opposed to custody...[T]he defendant who stands silent must be treated as having asserted it. Prosecutorial comment upon that assertion would unduly burden the Fifth Amendment privilege.").

II. The Question Presented Is Important.

The use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt violates a defendant's privilege against self-incrimination. Additionally, as recognized by Judge Rosenbaum in her concurring opinion, the prosecution's use of a defendant's post-arrest, pre-*Miranda* silence "eviscerates the purpose of *Miranda*." (Rosenbaum, J. concurring). The right against self-incrimination, as set forth in the

Constitution, is the "most important" exception to the general "testimonial duty," *Kastigar v. United States*, 406 U.S. 441, 444 (1972).

III. The Decision Below Was Incorrect.

The Eleventh Circuit erred when it held that post-arrest, pre-*Miranda* silence may be used in the Government's case-in-chief as evidence of guilt, notwithstanding the Fifth Amendment privilege against self-incrimination. See *Mitchell v. United States*, 526 U.S. 314, 338 n.2 (1999) (Scalia, J., dissenting) ("[W]e did say in *Miranda v. Arizona* that a defendant's post-arrest silence could not being introduced as substantive evidence against him at trial.") (citation omitted).

The text of the Constitution speaks of a right against self-incrimination and does not condition that right on the Government's having advised the detained person that he has those rights. And "neither *Miranda* nor any other case suggests that a defendant's protected right to remain silent attaches only upon the commencement of questioning as opposed to custody. *United States v. Moore*, 104 F.3d 377, 385 (D.C. Cir. 1997).

The fact that Mr. Cabezas-Montano had not yet been read his under *Miranda* at the time of his silence does not mean that those rights did not exist. The whole point of a *Miranda* warning is to *apprise* a suspect of his rights – it does not create rights that did not exist before. *Moore*, 104 F.3d at 386. The Eleventh Circuit's rule actually creates an incentive to delay reading the suspects their *Miranda* warnings so as to maximize the chances for obtaining a suggestive silence to use as

evidence of guilt at trial. See *United States v. Nunez-Rios*, 622 F.2d 1093, 1101 (2nd Cir. 1980) ("In the absence of such a prophylactic rule, police might have an incentive to delay *Miranda* warnings in order to observe the defendant's conduct."). That rule, as Judge Rosenbaum observed below, turns *Miranda* from a device to protect the Fifth Amendment right to remain silent into a technicality for law enforcement to manipulate to subvert that right. Such a rule makes no sense and illustrates that the Eleventh Circuit's rule must be wrong.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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June 29, 2020