No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2020

OUTHDORM ROS, Petitioner

v.

PEOPLE OF THE STATE OF CALIFORNIA, Respondent

On Petition for Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division One

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QUESTIONS PRESENTED FOR REVIEW

1. In a criminal prosecution, can a suspect's silence after he is arrested, but before he is questioned or read his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d (1966) be admitted during the prosecution case-in-chief and commented upon during closing argument to prove his guilt?

2. Can an arrested suspect's sua sponte invocation of his Fifth Amendment right against self-incrimination, and subsequent silence, be admitted to prove his guilt when the defendant has not been read his *Miranda* rights?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were Defendant and Petitioner OUTHDORM ROS and Plaintiff and Respondent the People of the State of California.

ALL PROCEEDINGS IN STATE AND FEDERAL TRIAL AND APPELLATE COURT

On August 13, 2019, in People v. Ros, San Diego Superior Court case No. SCD279952, a San Diego Superior Court jury found Petitioner guilty of making a criminal threat in violation of California Penal Code section 422 and possessing a controlled substance in violation of California Health and Safety Code section 11377, subdivision (a). 6RT 605-606. On September 20, 2019, Petitioner was sentenced to 11 years in California State Prison. 7RT 726-730.

The California Court of Appeal, Fourth Appellate District, Division One, affirmed the judgment on December 31, 2020. *People v. Ros*, 2020 Cal. Unpub. LEXIS 8668 (2020); Appendix Ex. A.

Petitioner's petition for review to the California Supreme Court, People v. Ros, case number S266748, was denied on March 24, 2021. Appendix Ex. B

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2020

OUTHDORM ROS, Petitioner

v.

PEOPLE OF THE STATE OF CALIFORNIA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

Petitioner OUTHDORM ROS, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division One, decided on December 31, 2020. Petitioner's petition for review to the California Supreme Court was denied on March 24, 2021.

OPINION BELOW

The opinion of the Court of Appeal, Fourth Appellate District, Division One, is printed in the appendix. The opinion was not published in the official reporter of opinions for the State of California. The Lexis citation is *People v. Ros*, 2020 Cal. Unpub. LEXIS 8668 (2020); Appendix Ex A. The California Supreme Court's order denying discretionary review is unreported, case No. S266748. Appendix Ex. B.

JURISDICTION

On August 13, 2019, a San Diego Superior Court jury found Petitioner guilty of making a criminal threat in violation of California Penal Code section 422 and

possessing a controlled substance in violation of California Health and Safety Code section 11377, subdivision (a). 6RT 605-606. On September 20, 2019, Petitioner was sentenced to 11 years in California State Prison. 7RT 726-730. The opinion of the California Court of Appeal, Fourth Appellate District, Division One, was issued on December 31, 2020: Appendix, Ex. A. The California Supreme Court denied discretionary review on March 24, 2021. Appendix, Ex. B. The jurisdiction of this Court to review the judgment of the San Diego Superior Court, and opinion of the Court of Appeal, Fourth Appellate District, Division One, is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Federal Constitutional Provisions.

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

The Fourteenth Amendment of the United States Constitution provides in part, "[n]o state shall . . . deprive any person of life, liberty, or property without due process of law . . . ."

2. State Statutory Provisions.

The relevant statutes are California Penal Code section 422 and Health and Safety Code section 11377, subdivision (a). The text of the statutes are Exhibit C in

the Appendix.

STATEMENT OF THE CASE

A. HOW THE FEDERAL QUESTIONS WERE PRESENTED.

The federal questions that are the subject of this Petition for Writ of Certiorari were raised by an objection during Petitioner's jury trial in the San Diego Superior Court. The issues were argued in Petitioner's direct appeal to the Fourth Appellate District, Division One. The federal questions were further raised in a petition for review to the California Supreme Court which denied review.

B. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT.

1. The Prosecution Case-in-Chief.

Jacqueline F. was at a laundromat on University Avenue in San Diego in the early morning hours of December 18, 2018. 4RT 226. Petitioner entered the laundromat, climbed into a dryer, and closed the door. 4RT 230, 238-240. He got out a minute later, sat on a bench, and mumbled. 4RT 239-240. Petitioner followed Jacqueline around the laundromat three times. 4RT 250. Jacqueline was concerned about Petitioner's behavior. She retrieved her cell phone from her vehicle and walked back in the laundromat. 4RT 250-251. Petitioner stood two feet from Jacqueline and said, "don't lie to me or I'll slit your throat and rob you and everybody." He then said "I'm going to slit your throat." 4RT 254-255, 277. The laundromat attendant called 911. 4RT 256-258.

City of San Diego Police Officer Daniel Almond responded to the laundromat. Petitioner walked to the rear of the laundromat. Almond told him to come forward. Petitioner turned and dropped something. Almond ordered Petitioner to the ground. Petitioner complied and was handcuffed. 4RT 318-320. A knife and methamphetamine were found and seized. 4RT 320-321. Almond's body camera recorded his interaction with Petitioner. The video was played for the jury. 4RT 325-326; exhibit 20. The transcript was exhibit 21A. RT 325-326; CT 58-60. The following exchange occurred:

> ROS: Hey' I'm gonna remain silent right now. I know my rights are gonna be read, but I said today, I'm gonna invoke my rights right now.
>
> ALMOND: Your what?
>
> ROS: I said my *Miranda* rights uh being read to me and told me, and as you say it to me, I'm gonna remain silent right now.

CT 59. Petitioner was transported to Scripps Mercy Hospital where the physician's differential diagnosis was malingering for secondary gain. 4RT 341-349, 356.

2. The Defense Case.

A forensic psychologist testified Petitioner suffered from amphetamine induced psychosis when he threatened Jacqueline F. 5RT 393, 398-399. The condition can cause delusions and irrational and illogical thinking. 5RT 399-401.

3. The Prosecution Rebuttal Case.

The nurse who performed the intake process for Petitioner at the county jail

testified that he denied using drugs prior to his arrest. 5RT 453-454.

Petitioner did not testify at this trial.

4. The Objections to the Admission into Evidence of Petitioner's Statement that he was Asserting his *Miranda* Right and Would be Silent.

Petitioner's trial counsel, during litigation of pretrial motions, objected to the admission of evidence Petitioner had invoked his right to silence when Almond arrested him. 1RT 128. The trial court asked whether the evidence could be admitted to prove Petitioner's state of mind and awareness. (1RT 128.) The defense counsel stated that could be a theory of relevance, but case law, including *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), and *Doyle v. Ohio* (1976) 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), precluded admitting Petitioner's invocation of his Fifth Amendment right to silence for any purpose. 1RT 128-129.

The hearing was continued to the next day for the trial court to review the transcript from Almond's body-worn camera. 2RT 171-172. The trial court noted Petitioner had volunteered he was invoking his right to silence. 2RT 172. Defense counsel argued the statement was not admissible even if it was relevant to Petitioner's level of cognitive functioning. 2RT 172-173.

The prosecutor responded she intended to use Petitioner's assertion of his right to silence to prove his state of mind, i.e., Petitioner was aware of his

surroundings and able to control his behavior. The prosecutor claimed this did not mean she would be arguing Petitioner was guilty based on his election to remain silent. 2RT 176-177.

The trial court concluded Petitioner's assertion of his right to silence was admissible because: (1) Petitioner had not received *Miranda* warnings when he stated he wanted to be silent; and (2) the evidence was relevant to prove his state of mind. 1RT 179.

5. The Prosecutor's Argument Regarding Petitioner's Silence.

The prosecutor, during closing argument, exploited Petitioner's post-arrest, voluntary assertion of his right to silence to argue he was capable of forming the specific intent required for making a criminal threat:

> This is the important part. He says, "I'm going to remain silent right now. I know my rights are going to be read, but I said today I'm invoke my rights right now." 'Your what?" "I said Miranda rights being read to me and told me. And as you say to me, I'm going to remain silent right now." Okay.
>
> First and foremost, I will never ever argue that his invocation of his rights shows that he's guilty in any way because he invokes them. Every individual in this United States has that right and that's not what you are allowed to use it for. The judge had told you numerous times. I'm going to tell you.
>
> This is what you can use it for. Without being asked, this individual, Mr. Ros, who apparently going through a hallucination, has thoughts of his *Miranda* right himself.

> He has. This isn't a case where he's being asked "Do you want to remain silent?" "These are your rights." If that was the case, we would have never read it to you or told you about this, but he's thought of them himself. He realized, remember, that that's an option you have when you get arrested. He knows those are rights that he has. And he says, you know what, I'm going to invoke them. This is the thought process in his head without being asked. Who does he tell them to, though? An officer. He tell them to an officer. He knows he's being arrested, and he knows he's speaking to an officer now.
>
> Think about this. Does he say these words, "I'm going to invoke *Miranda* to Ms. [F.]? No. Does he tell the reverse? Does he tell the officer, "I'm going to slit your throat?" No. He knows who he's talking to. He's going to slit the throat of the women who can't protect herself, but then he tells the officer, I want to invoke my Miranda rights. He knows who he's talking to.

5RT 516-518.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A SUSPECT'S POST-ARREST SILENCE, AND ASSERTION OF HIS RIGHT AGAINST SELF-INCRIMINATION, ARE ADMISSIBLE INTO EVIDENCE DURING THE PROSECUTION CASE-IN-CHIEF AND SUBJECT TO COMMENT DURING CLOSING ARGUMENT, WHEN THE DEFENDANT HAS NOT BEEN READ HIS RIGHTS UNDER *MIRANDA V. ARIZONA*, 384 U.S. 436, 86 S.CT. 1602, 16 L.ED.2D 694 (1966)

A. Introduction.

In a plurality decision, this Court held a suspect's non-custodial silence during

an investigation may be used against him during the prosecution's case-in-chief if the suspect fails to expressly invoke the Fifth Amendment privilege against self-incrimination. *Salinas v. Texas*, 570 U.S. 178, 186-187, 133 S.Ct. 2174, 186 L.Ed.2d 376 (2013). The California Supreme Court subsequently applied this rationale behind *Salinas v. Texas* to suspects in custody. The court held in a divided opinion that an arrested suspect's silence — before the suspect is questioned and before *Miranda* warnings are given — may also be used in the prosecution's case-in-chief if the suspect fails to expressly invoke the privilege. *People v. Tom*, 59 Cal.4th 1210, 1236 (2014).

Justice Goodwin Liu dissented in *People v. Tom*. "[R]emaining silent after being placed under arrest" should be "enough to exercise one's right to remain silent." *Tom*, 59 Cal.4th at p. 1242 [dis. opn of J. Liu]. This is because requiring an express invocation of the privilege creates a perverse incentive for police officers to delay *Miranda* warnings. *Id.* at pp. 1242, 1253. It unfairly requires arrestees to know in advance that this constitutional right must be affirmatively invoked or it is waived, which is counter-intuitive to everything that an average layperson "knows" from popular culture about the right to remain silent. *Id.* at p. 1241, 1253. It is also difficult to understand how the rule is supposed to work, as a practical matter, during an ongoing police investigation because it appears to envision "that a suspect, immediately after being arrested, will take the initiative to get a police officer's

attention and declare his desire to invoke the Fifth Amendment privilege." *Id.* at pp. 1253-1254.

The circuit courts are split on the use of post-arrest, pre-*Miranda* silence by the prosecution in its case-in-chief. Compare *United States v. Cabezas-Montana*, 949 F.3d 567, 595 (11th Cir. 2020); *United States v. Love*, 767 F.2d 1052 (4th Cir. 1985) (both cases approving the admission of post-arrest and pre-*Miranda* silence) with *Coppola v. Powell*, 878 F.2d 1562, 1567 (1st Cir. 1989) (disapproving of the admission of post-arrest and pre-*Miranda* silence). Compounding the problem created by this split in the law, the California Court of Appeal adopted a rule in the instant case which now places arrestees in a Catch-22 situation when they are arrested.

Petitioner expressly invoked the right to remain silent as he was being arrested: "Hey, I'm gonna remain silent right now. I know my rights are gonna be read, but I said today, I'm gonna invoke my rights now." CT 59. The California Court of Appeal allowed this express invocation of the right against self-incrimination to be used against Petitioner during the prosecution case-in-chief. (*People v. Ros*, 2020 Cal.App. Unpub. LEXIS at pp. 22-25.)[1] Yet, under *Salinas v. Texas* and *People v. Tom*, an express invocation of the right to remain silent was required to prevent post-arrest, pre-*Miranda* silence from being used at evidence of guilt at trial. *Salinas*

[1] The page citation is to the internal pagination in the Lexis document.

v. Texas, 570 U.S. at pp. 186-188; *People v. Tom* at p. 1236. So how was Petitioner to have refrained from speaking to police after his arrest without having that silence used against him at his trial?

The circuit courts that have addressed this companion issue have come to the opposite and correct conclusion, finding a suspect's pre-*Miranda* assertion of the right to silence inadmissible during the prosecution's case-in-chief. E.g., *Coppola v. Powell*, 878 F.2d at pp. 1567-1568.

The California Court of Appeal concluded Petitioner's assertion of his *Miranda* rights were not admitted to prove guilt, but to prove his state of mind. *People v. Ros*, 2020 Cal.App. Unpub. LEXIS at p. 29.) This alternative holding for finding Petitioner's statement admissible does not obviate the need for clarity because it was wrong. The reasoning created a distinction without a meaning. Petitioner's statement to police invoking his rights was admitted to show that he was not so impaired by drug use that he was unable to form the specific intent element of the charged crime of making a criminal threat. *People v. Ros*, 2020 Cal.App. Lexis at pp. 17-22. Under California law, an element of making a criminal threat is that the defendant harbored specific intent that his communication be taken as a threat by the victim. *In re George T.*, 233 Cal.4th 620, 630 (2004). The holding that the evidence was admitted to prove intent, and not guilt, thus fails to provide alternate state grounds for upholding the admission of Petitioner's statement asserting his right against self-incrimination.

The opinion also erred by relying on cases where a defendant's silence was used to impeach the testimony he gave during his defense case. *People v. Ros*, 2020 Cal.App. Lexis at pp. 25, citing *Jenkins v. Anderson*, 447 U.S. 231 239–240, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980); see *Combs v. Coyle* 205 F.3d 269, 283 (6th Cir. 2000); cf., *Wainwright v. Greenfield*, 474 U.S. 284, 292–293, 106 S.Ct. 634, 639, 88 L.Ed.2d 623 (1986). Petitioner did not testify and those cases have no application to his claim of constitutional error.

Rule 10, subdivision (c), provides certiorari may be granted when "a state court or a United States courts of appeals has decided an important question of federal law that has not been, but should be, settled by this Court . . . ." The issue raised herein present an important question of federal law which should be settled by this Court. The issues raised by Petitioner are also the subject of conflicting opinions by the United States Courts of Appeal and state courts.

B. This Court's Relevant Decisions Addressing the Fifth Amendment Right Against Self-Incrimination and *Miranda v. Arizona*.

"The privilege against self-incrimination is one of the great landmarks in man's struggle to make himself civilized." Erwin N. Griswold, *The Fifth Amendment Today*: Three Speeches 7 (1955). This case involves one more step in that struggle.

Miranda v. Arizona was decided in 1966. Fifty-five years have since elapsed. This Court has sculpted the scope of that holding in several decisions establishing

the following rules:

- The defendant's silence following the giving of *Miranda* warnings may not be admitted into evidence during the prosecution case-in-chief to prove the defendant's guilt. *Doyle v. Ohio*, 426 U.S. at pp. 617-618. The rationale was that, "while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested persons silence to be used to impeach an explanation subsequently offered at trial." *Doyle v. Ohio*, 426 U.S. at p. 618;

- There is no Fifth or Fourteenth Amendment violation when the defendant's pre-arrest silence is used to impeach his credibility when he testifies at trial. *Jenkins v. Anderson*, 447 U.S. at pp. 238-239; but *cf. United States v. Hale*, 422 U.S. 171, 176-181, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975) (holding pursuant to this Court's supervisory powers over the federal courts that a defendant could not be impeached with his silence following arrest). *Jenkins v. Anderson* reached its conclusion because the common law traditionally allowed a witness to be impeached by his or her failure to speak, *Jenkins v. Anderson*, 447 U.S. at page 239, and "no governmental action induced petitioner to remain silent before arrest. The failure to speak occurred before the petitioner was taken into custody and given *Miranda* warnings. Consequently,

the fundamental unfairness present in *Doyle* is not present in this case." *Id.* at p. 240.

Significantly, here, because the defendant in *Jenkins v. Anderson* testified, the Court's decision did not "consider whether or under what circumstances prearrest silence may be protected by the Fifth Amendment." *Id.* at p. 236, n. 2. That issue is now before the Court in this case.

- There is no Fifth Amendment violation when the defendant's post-arrest silence is used to impeach his credibility as long as the defendant's *Miranda* rights have not yet been read to him. *Fletcher v. Weir*, 455 U.S. 603, 606-607, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982). The reason is that, "[i]n the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." *Fletcher v. Weir*, 455 U.S. at p. 607.

- A defendant given *Miranda* warnings must unambiguously assert his right to silence or right to counsel in order to require law enforcement to cease interrogation. *Davis v. United States*, 512 U.S 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994) ("the suspect must unambiguously request counsel."); *Berghuis v. Thompkins*, 560 U.S. 370, 381-382, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010) (there is no reason to not apply the *Davis* standard to assertion of the right to counsel); see also *Salinas v. Texas*, 570 U.S. at pp. 186-187 (plurality opinion holding that defendant's silence prior to being placed in custody or read his *Miranda* rights was

admissible to prove his guilt because the privilege against self-incrimination was not self-executing and the defendant had failed to assert it).

C. This Case Presents an Important Question of Federal Law Which this Court Should Decide.

Despite the passing of 55 years, this Court has not yet resolved issues pertaining to the Fifth Amendment right to silence and due process of law in the following context:

1. May the prosecution comment at trial on a defendant's silence after his arrest, but before he is questioned by police and before he is read his *Miranda* rights?

2. May the prosecution use a defendant's invocation of the right to remain right silent, and subsequent silence, as substantive evidence of guilt under these same circumstances?

It is clear under the above authorities a defendant who testifies at trial may have his credibility impeached with his: (1) non-custodial silence; and (2) his post-arrest, but pre-*Miranda*, silence. Petitioner did not testify at his trial. Petitioner asserted at the time of his arrest his right to silence before he had been read his *Miranda* rights. Nevertheless, the trial court admitted Petitioner's assertion of his right to silence, and silence, as evidence during the prosecution case-in-chief to prove his guilt. As noted, the federal and state courts are in conflict about how to deal with

the situation when a defendant's silence, or his invocation of the right to remain silent at the time or after arrest, is offered as substantive evidence of guilt during the prosecution case-in-chief.

As summarized below, five circuits and the District of Columbia have held that a defendant's post-arrest silence prior to the reading of *Miranda* rights may not be admitted as substantive evidence of the defendant's guilt during the prosecution case-in-chief. Three circuit courts have reached the opposite conclusion. The conflict extends from at least since 1985. The state courts decisions are also in conflict. Legal scholars have criticized the cases permitting admission of post-arrest and pre-*Miranda* silence because they do not adequately protect the Fifth Amendment right against self-incrimination. This Court needs to provide guidance.

1. Circuit Court Decisions Which Do not Permit Admission as Substantive Evidence of Guilt the Defendant's Post-Arrest Silence Prior to the Reading of Miranda Rights.

The First, Second, Sixth, Seventh, Ninth and District of Columbia circuits have concluded that a defendant's silence prior to the reading of *Miranda* rights may not be admitted as substantive evidence of guilt.

The First Circuit: The defendant in *Coppola v. Powell*, 878 F.2d 1562, was suspected of committing a rape. A police officer went to the defendant's home. The officer did not read *Miranda* warnings. The defendant told the officer he was crazy if the officer thought he would confess. He shortly thereafter said he would not talk

without an attorney. The prosecution admitted during its case-in-chief the defendant's statement that he was not going to confess. The defendant did not testify during the trial. The Court construed the defendant's statement he was not going to confess was an assertion of his right to silence. *Coppola v. Powell*, 878 F.2d at p. 1567. It concluded, "[p]etitoner relied on the protection guaranteed by the fifth amendment from the first police interrogation through trial. Petitioner's constitutional rights were violated by the use of his statement in the prosecutor's case-in-chief." *Id.* at p. 1568).

The Second Circuit: The defendant in *United States v. Okatan*, 728 F.3d 111 (2nd Cir. 2013), was apprehended near the Canadian border while engaged in a plot to smuggle aliens into the United States. A border patrol agent confronted the defendant. The agent reminded the defendant that lying to a law enforcement officer was a crime. The defendant said he wanted an attorney. The prosecutor during his case-in-chief elicited from a witness that the defendant had requested an attorney. A motion for a mistrial was denied.

The Court first stated the defendant's request for an attorney was also an assertion of the right to silence. *United States v. Okatan*, 728 F.3d at p. 118-119. It then concluded "that, where, as here, an individual is interrogated by an officer, even prior to arrest, his invocation of the privilege against self-incrimination and his subsequent silence cannot be used by the government in its case-in-chief as

substantive evidence of guilt." *Id* at p. 120; see also *United States v. Caro*, 637 F.2d 869, 876 (2nd. Cir. 1981) (stating in dicta that the court was not aware of any decision permitting the use of silence, even a suspect who has been given no Miranda warnings and was not entitled to them, to be used as part of the prosecution's direct case.)

The Sixth Circuit: The defendant in *Combs v. Coyle*, 205 F.3d 269, shot two people in a hotel parking lot. An off-duty police witnessed the incident and shot the defendant multiple times. The defendant was being put in an ambulance when another officer asked him what happened. The defendant told the officer to talk to his attorney. This statement was admitted into evidence during the prosecution case-in-chief to show the defendant's level of cognitive functioning and rebut his diminished mental state defense. *Combs v. Coyle*, 205 F.3d at pp. 273, 279. The jury was given a limiting instruction that it could not infer guilt because the defendant said he would not speak without an attorney, but could use that statement to show his purpose and prior calculation. The Court "agree[d] with the reasoning expressed in the opinions of the Seventh, First, and Tenth Circuits, and today we join those circuits in holding that the use of a defendant's prearrest silence as substantive evidence of guilt violates the Fifth Amendment's privilege against self-incrimination. . . application of the privilege is not limited to persons in custody or charged with a crime; it may also be asserted by a suspect who is questioned during the investigation of a crime." *Combs v. Coyle*, 205 F.3d at p. 283.

The Seventh Circuit: In *United States v. Hernandez*, 948 F.2d 316 (7th Cir. 1991), a law officer approached the defendant's vehicle and ordered him out. The defendant did not say anything at that time. The defendant had not yet been read his *Miranda* rights. The trial court admitted testimony about the defendant's silence. The Court concluded error had occurred because, "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." *United States v. Hernandez*, 948 F.2d at p. 322; see also *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1018 (7th Cir. 1987) ("we believe that the state's suggestion that use of a defendant's silence to impeach his trial testimony presents a constitutional issue, but use of his silence to imply guilt does not, is nothing short of incredible.")

The Ninth Circuit: The defendant in *United States v. Whitehead*, 200 F.3d 634 (9th Cir.), cert denied, 531 U.S. 885 (2000), was arrested at the border smuggling marijuana in from Mexico. Whitehead was not read his *Miranda* rights, but remained silent when his vehicle was searched. A prosecution witness testified about the defendant's silence during the vehicle search. The prosecutor argued the defendant was silent because he knew he was guilty. The Court concluded "when the district court admitted evidence of Whitehead's post-arrest, pre-*Miranda* silence, and when it allowed the government to comment on this silence in closing argument, it plainly infringed upon Whitehead's privilege against self-incrimination." *United States v.*

Whitehead, 200 F.3d at p. 639. The Ninth Circuit followed this holding in *United States v. Velarde-Gomez*, 269 F.3d 1023, 1031-1033 (9th Cir. 2001). Earlier Ninth Circuit precedent had approved use of the defendant's silence as substantive evidence of guilt during the prosecution case-in-chief, but had done so in the context of pre-arrest interrogation. *United States v. Oplinger*, 150 F.3d 1061, 1066-1067 (9th Cir. 1998).

The D.C. Circuit: The defendant in *United State v. Moore*, 104 F.3d 377 (D.C. Cir. 1997), ran several red lights. The defendant was stopped, arrested, and his vehicle searched. Contraband was found. A prosecution witness testified the defendant said nothing when the car was being searched. The prosecutor argued to the jury the defendant would have claimed lack of knowledge of the contraband when it was found if he did not know about.

The *Moore* court itself was split, but affirmed the judgment because any error was harmless. The lead opinion by Justice Sentelle concluded, "[a]lthough in the present case, interrogation per se had not begun, 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. While a defendant who chooses to volunteer an unsolicited admission or statement to police before questioning may be held to have waived the protection of that right, the defendant who stands silent must be treated as having asserted it. Prosecutorial comment upon that assertion

would unduly burden the Fifth Amendment privilege." *United States v. Moore*, 104 F.3d at p. 385. Hence, "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." *Ibid.* Justice Sentelle concluded, "It simply cannot be the case that a citizen's protection against self-incrimination only attaches when officers recite a certain litany of his rights." *Id.* at p. 387.

Justice Silberman disagreed with the majority's reasoning because, "[i]t is simply impossible to understand why the Constitution should be read as permitting a prosecutor to produce evidence that a defendant in this situation sua sponte admitted that the drugs and guns were his but not that he remained silent under circumstances where an innocent man would surely have said or done something reflecting shocked surprise." *United States v. Moore*, 104 F.3d at p. 394 (Silberman, J., concurring). Justice Tatel concurred with Justice Sentelle: "Here, because Moore did not take the stand, the prosecution's reference in summation to his failure to offer exculpatory statements to police officers at the time of his arrest impermissibly penalized him for exercising his Fifth Amendment privilege." *United States v. Moore*, 104 F.3d at p. 396 (Tatel, J., concurring).

2. Circuit Court Decisions Permitting Admission as Substantive Evidence of Guilt the Defendant's Silence Prior to the Reading of *Miranda* Rights.

The Fourth, Eighth, and Eleventh Circuits permit a defendant's post-arrest

silence prior to the reading of *Miranda* rights to be admitted as substantive evidence of guilt.

The Fourth Circuit: The defendants in *United States v. Love*, 767 F.2d 1052, were arrested following a RICO investigation. An agent testified the defendants made no effort to explain their presence at a farm associated with narcotics trafficking. The court, in reliance on *Fletcher v. Weir*, concluded, "[i]n this case neither Love nor Youngblood had been given any *Miranda* warnings at the time Agent Hill observed their silence. As a result, under *Doyle* and *Fletcher*, Agent Hill's testimony was properly admitted." *United States v. Love*, 767 F.2d at p. 1063.

The Eighth Circuit: The defendant in *United States v. Frazier*, 408 F.3d 1102 (8th Cir. 2005) was arrested for possession of pseudoephedrine. His vehicle was stopped by law enforcement based on suspicion of narcotics trafficking. The vehicle was searched and the contraband found. The defendant did not react or say anything when arrested. He was not read his *Miranda* rights. The prosecutor introduced into evidence during his case-in-chief the defendant's failure to say anything when arrested and argued it was proof of the defendants guilt. The Court found no violation of the defendant's constitutional rights:

> The more precise issue is whether Frazier was under any compulsion to speak at the time of his silence. He was not. Although Frazier was under arrest, there was no governmental action at that point inducing his silence. Thus he was under no government-imposed compulsion to

> speak. It is not as if Frazier refused to answer questions in the face of interrogation. We are speaking in this case only of the defendant's silence during and just after his arrest. . . an arrest by itself is not governmental action that implicitly induces a defendant to remain silent. *Fletcher*, 455 U.S. at 606. Therefore, on these facts, the use of Frazier's silence in the government's case-in-chief as evidence of guilt did not violate his Fifth Amendment rights.

(*United States v. Frazier*, 408 F.3d at p. 1111.)

The Eleventh Circuit: The defendants in *United States v. Rivera*, 944 F.2d 1563 (11th Cir. 1991) were stopped at the Miami airport on suspicion of narcotics trafficking. A law enforcement officer punctured their luggage with a screwdriver and found cocaine. Nobody from the group showed surprise, agitation, or said anything. The defendants argued their silence had been erroneously admitted. The Court concluded, "In addition, the government may comment on a defendant's silence when it occurs after arrest, but before *Miranda* warnings are given. The record does not state whether Vila was in custody at the time that she and the others had been directed by Schor to an inspection area. Yet, even if she was in custody at that time, the government could comment on her silence as she viewed Schor's inspection of Stroud's suitcase because she had not yet been given her *Miranda* warnings." *United States v. Rivera*, 944 F.2d at p. 1568.

The defendants in *United States v. Cabezas-Montana*, 949 F.3d 567 were intercepted by the Coast Guard smuggling narcotics. The majority opinion relied on

United States v. Rivera to hold that the District Court had not erred by admitting the defendant's post-arrest and pre-*Miranda* silence, as evidence of guilt. *United States v. Cabezas-Montana*, 949 F.3d at p. 595.

Justice Rosenbaum's concurring opinion concluded *United States v. Rivera* was incorrectly decided. He concluded, "allowing a detainee's silence while in custody, but before the administration of this procedure, to be used against that person in the government's case-in-chief eviscerates the purpose of *Miranda*." *United States v. Cabezas-Montana*, 949 F.3d at p. 613 (Rosenbaum, J., concurring).

3. The Federal Courts are Also Split Regarding the Use of the Defendant's Pre-arrest Silence as Substantive Evidence of Guilt During the Prosecution Case-in-Chief.

The circuit courts have reached conflicting results regarding the admission of the defendant's pre-arrest silence as substantive evidence of guilt. One line of cases have disapproved of the admission of this evidence. E.g. *Combs v. Coyle*, 205 F.3d 269, 286 (6th Cir. 2000) (where defendant invoked the privilege against self-incrimination the prosecutor's comment on his prearrest silence in its case-in-chief, and the instruction permitting the jury to use his silence as substantive evidence of guilt, violated the Fifth Amendment); *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991) (once a defendant invokes his right to remain silent it is impermissible for the prosecution to refer to any Fifth Amendments rights he expressed; it was error to admit an agent's testimony about the defendant's silence).

Another line of cases have reached the opposite conclusion. (E.g. *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996) (finding constitutional prosecutor's use of evidence that prior to arrest defendant did not indicate that he was under duress because the Fifth Amendment protects against compelled self-incrimination but does not preclude the proper evidentiary use and prosecutorial comment about every communication or lack thereof by the defendant which may give rise to an incriminating inference).

4. The Conflicts in the Decisions of the State Courts.

Petitioner will discuss a sampling of state court cases addressing his claim. The defendant in *State v. Mainaaupo*, 117 Haw. 235 (S.Ct. Haw. 2008), was arrested for driving a stolen vehicle. He made a statement to the officer about his custody of the car and who owned it. There was no evidence *Miranda* warnings were read when the defendant was arrested. During argument, the prosecutor argued about what an innocent person would have told the officer. The Hawaii Supreme Court noted, "the right against self-incrimination attached at least as of the time of the arrest 'because the right to remain silent derives from the Constitution and not from the *Miranda* warnings themselves'." *State v. Mainaaupo*, 117 Haw. at p. 252, quoting *United States v. Velarde-Gomez*, 269 F.3d at p. 1029. Hence, the prosecutor's comment about the defendant's post-arrest silence was error. *Id.* at p. 254.

In *Ordway v. Commonwealth*, 391 S.W.3d 762 (S.Ct. Ky., 2013), the defendant

was arrested for murder. His defense was self-defense because the victims were trying to rob him. The defendant was arrested and taken to jail. The defendant told a detective, prior to the start of interrogation or the reading of *Miranda* rights, "I got fuckin' nothing for you." This statement was admitted into evidence during the prosecution case-in-chief. The court construed the statement as an invocation of the defendant's right to silence. The court found no error because "[a]ppellant's spontaneous, pre-*Miranda* statement was not induced by any government action." *Ordway v. Commonwealth*, 391 S.W.2d at p. 778.)

The defendant in *People v. Schollaert*, 194 Mich. App. 158 (Ct. App. Mi., 1992), was taken into custody by law enforcement at his home between 3:30 and 4:00 a.m. A prosecution witness testified the defendant failed to ask the police why they were at his residence. The prosecutor during closing argument used the defendant's silence to infer guilt. The court found no error: "[D]efendant's silence or nonresponsive conduct did not occur during a custodial interrogation situation, nor was it in reliance on the *Miranda* warnings. Therefore, we believe that defendant's silence, like the `silence' of the defendant in *McReavy*, was not a constitutionally protected silence." *People v. Schollaert*, 194 Mich. App. at p. 166.

5. The Legal Scholars

Legal scholars have criticized the cases permitting the defendant's pre-*Miranda* silence to be used as substantive evidence of guilt because they fail to

provide adequate protection to the defendant's right to silence. Gee, *Salinas v. Texas: Pre-Miranda Silence Can Be Used Against a Defendant* (2014) 47 Suffolk U.L. Rev. 727, noted silence is too ambiguous to permit an inference of guilt:

> Upon reflection, while the prosecutor in *Salinas* professed to the jury that an innocent person would have answered the accusation with a statement, as opposed to not answering, this is not necessarily true. An innocent individual in that situation could have also remained silent or refused to answer on the basis that they may simply choose not to do so. Also, an innocent person may be at a loss for words due to the shock of being accused of a crime. Another person could feel insulted, and not want to dignify the question with a response, while another individual could have been too emotionally upset to speak. An individual could be introverted, and may use different ways to digest complex information, and could be used to listening before speaking. What if the suspect comes from a different cultural background than the interrogator? The possibilities are virtually endless.

Gee, *Salinas v. Texas: Pre-Miranda Silence Can Be Used Against a Defendant*, 47 Suffolk U.L. Rev. at p. 756.

Herrman & Speer, *Standing Mute at Arrest As Evidence of Guilt; The "Right to Silence" Under Attack* (2007) 35 Am. J. Crim. L. 1, discussed the flaws with several of the cases that permitted post-arrest and pre-*Miranda* silence to be admitted as substantive evidence of guilt. The Fourth Circuit decision in *United States v. Love* erred because "it shows no recognition of the distinction, critical to both *Doyle* and *Weir*, between evidence used for the limited purpose of impeachment

of a defendant as a witness and evidence used substantively in the government's case to prove the defendant's guilt." *Standing Mute at Arrest As Evidence of Guilt; The "Right to Silence" Under Attack*, 35 Am. J. Crim. L. at p. 17. The author criticized the Eleventh Circuit decision in *United States v. Rivera* as flawed for the same reason: 'there is no judicial awareness that *Weir* deals solely with the impeachment use of an arrested defendant's pre-*Miranda* silence, and not its substantive use as evidence of a defendant's guilt." *Id.* at p. 18.

United States v. Frazier, conversely, recognized the above distinction. *Id* at pp. 18-19. Its holding was flawed, however, because: (1) there is no rule that postpones the defendant's right of silence until he is under official compulsion to speak; and (2) it provided an incentive to law enforcement to delay giving *Miranda* warnings so the defendant's silence will raise an inference of guilt. *Id.* at pp. 19-20.

CONCLUSION

These issues are ripe for certiorari to be granted. The issues are important. There are numerous lower court cases which have discussed the admission, to infer guilt of: (1) a defendant's pre-*Miranda* silence; and (2) a defendant's pre-*Miranda* invocation of his right to remain silent. Scholars have discussed the issue and called for a resolution. Improper use of a defendant's silence to infer guilt is likely to lead to unreliable convictions. "In most circumstances silence is so ambiguous that it is of little probative force." *United States v. Hale*, 422 U.S. at p. 176. This observation

is especially true when a defendant has been arrested and is aware the machinery of the state is moving against him. The state of the law in California creates a Catch-22 for defendants. The suspect's post-arrest silence can be used to infer guilt. The suspect's assertion to the police that he does not want to talk can also be used to infer guilt. This conundrum creates no means for a suspect to exercise his right against self-incrimination. The suspect's exercise of either option results in an inference of guilt at trial. It is time for a gaping hole in this Court's guidance regarding defendant's right to silence to be filled. Certiorari should be granted.

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