

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF CONNECTICUT
Respondent

V.

JERMAINE E. REDDICK
Petitioner

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI

ROBERT E. BYRON
Robert E. Byron, LLC
53 Oak Street
Hartford, CT 06106
860-387-5098
rbyronlaw@gmail.com

Counsel of Record for the Petitioner

QUESTIONS PRESENTED

The petitioner was convicted of assault by a firearm: he shot a man. He was taken into custody shortly afterwards by a police officer with his weapon drawn. At trial, neither the arresting officer nor anyone else gave testimony as to whether the petitioner had been advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). The petitioner did not testify. In closing argument he claimed self-defense. The prosecutor adjured the jury to reject the petitioner's claim of self-defense because, he said, the petitioner had not made the claim to the arresting officer. The prosecutor, however, had produced no evidence that he had or had not. Nonetheless, he told the jury the petitioner had been silent and that his silence served to defeat his claim of self-defense. The Connecticut Appellate Court affirmed the conviction on the basis that the petitioner had not produced evidence that he had been advised of his right to remain silent. The court held the right to silence while in police custody inhered in the warning, which the *defendant* had the burden to prove had been given. The Connecticut Supreme Court denied the petitioner's petition for review, by order dated October 11, 2017.

The questions presented are:

(1) When a defendant's purported, if unestablished, silence while in police custody is put into issue by the prosecution, who has the burden to prove the *Miranda* warnings were given?

(2) If the burden is the prosecution's and that burden is not met, and the defendant does not testify, may the prosecution impute guilt to the defendant by reference to his purported silence?

LIST OF ALL PARTIES

All parties appear in the caption on the cover page.

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WHEN A POLICE OFFICER DRAWS HIS WEAPON UPON A PERSON, HE THEREBY TAKES THAT PERSON INTO CUSTODY AND THE PRINCIPLES OF CUSTODIAL INTERROGATION COME INTO FORCE. THE FIRST PRINCIPLE IS THAT A PERSON MUST BE WARNED OF HIS RIGHTS AND PERILS PURSUANT TO *MIRANDA V. ARIZONA*. AT TRIAL IT IS THE PROSECUTION, NOT THE DEFENSE, WHICH HAS THE BURDEN TO PROVE THE WARNING WAS GIVEN. IF IT DOES NOT, AND THE DEFENDANT DOES NOT TESTIFY, NOTHING THE DEFENDANT SAID OR DID NOT SAY WHILE IN CUSTODY MAY BE USED TO INCRIMINATE HIM

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OPINIONS BELOW

The opinion of the Appellate Court of the State of Connecticut affirming the petitioner's conviction appears at Appendix A and is reported at 174 Conn. App. 536, A.3d (2017).

The order from the Supreme Court of the State of Connecticut denying the petitioner's petition for certification to appeal from the decision of the Appellate Court, dated October 11, 2017, appears at Appendix B and is reported at 327 Conn. 921 (2017).

JURISDICTION

The Supreme Court of the State of Connecticut is the court of last resort in Connecticut. The order from that court denying discretionary review entered October 11, 2017. This petition is being filed within 90 days of that date and is thus timely filed per Supreme Court Rule 13.1. As well, the courts of review on this matter have decided an important federal question in a way that conflicts with relevant decisions of this Court, a consideration governing the decision to review under Supreme Court Rule 10(c).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

"No person . . . shall be compelled in any criminal case to be a witness against himself."

Officer Trotman testified that he had received a radio dispatch that a shooting had occurred nearby and was given a description of a car which left the scene. Id. 127. He said he soon thereafter saw a car which fit the description “perfectly.” He stopped it and approached it with his weapon drawn. Id. 133. He found two males in the front. He said he “locate[d]” a black handgun “between the passenger seat and the middle console.” Id. 130-131. He asked the petitioner where he was coming from. The petitioner said 38 Peck. The prosecutor asked him, “did Mr. Reddick indicate who that gun belonged to?” Trotman answered, “Yes, he said it was his.” Id. 131. After a question about the driver of the car (a Mr. Whitely) the prosecutor asked, “So at this point were both Mr. Whitely and Mr. Reddick – were they both detained and placed under arrest, sir?” Trotman said “Yes.” Id. 132.

Other witnesses testified to other circumstances of the event, the petitioner’s record, and the identification of the gun found with the petitioner with the one used to shoot Mr. Tillery. The petitioner did not testify and presented no witnesses.

The prosecutor began his closing argument by charging that Myesha Gainey, when she denied that the petitioner hit her, committed perjury. “Myesha Gainey appeared in court, took an oath to tell the truth, and she did not do that.” Tr. 4/23, 8. The prosecutor said that when Gainey, his own witness, testified that she was drunk and had hurt herself falling down stairs, she lied. “[W]e know that’s not true.” Id.

The prosecutor said there existed in this world people who are “pathological liars.” But, he said, “I’m not claiming Ms. Gainey is that type of person.” Id. Rather, “[h]er motivation for fabricating here in court about how she got hurt was because

she was trying to help Mr. Reddick.” Id. The prosecutor said Gainey’s testimony was a “fabrication” because, inter alia, “[s]he never asked to use the bathroom,” Id. 9. She was lying not because she was a pathological liar but because “[s]he’s blinded by her love for the petitioner.” Id.

After telling the jury Gainey was blinded by love, he belatedly informed them he was not then making the case for count one, assault first, but for count three, assault third. “I guess I should have told you, I’m going to go in reverse order.” Id., 9-10. He then argued the case for conviction as to count two, illegal possession of a firearm. He cited the testimony of Officer Bryce that the petitioner had a felony conviction on his record, as well as testimony that the firearm taken from the car in which the petitioner had been stopped was a 9 millimeter pistol that was operable. Id., 10. He followed this by telling the jury that if it were not for the physicians who treated Mr. Tillery, “you would be sitting here on a murder case.” Id., 10.

The prosecutor addressed the testimony of Officer Trotman, who said he had stopped the car the petitioner was riding in and took possession of the gun, and that the petitioner acknowledged the gun was his. (Trotman had testified that after stopping the car he had approached it and the occupants with his weapon drawn. Tr. 4/21, 133.)

The prosecutor then told the jury the petitioner was going to assert a defense of self-defense – “You know, this is somebody who is going to now claim that he was acting in self-defense.” Tr. 4/23, 11 – but that the jury should discount this claim because he did not make it to Officer Trotman. “I mean, did he say anything to

Officer Trotman, you know, geez, you know, I – I was just accosted by this madman and I had to shoot him.” Id., 11. The prosecutor adjured the jury to consider against him the petitioner’s silence about the shooting after Trotman took him into custody and then put him under arrest. “He didn’t mention the shooting at all.” Id. There was no testimony as to when, if ever, the petitioner was given a *Miranda* warning.

In making the case for conviction on count one, the prosecutor recounted the testimony of the Tillerys. He dismissed the inconsistency of their testimony regarding how they arrived at Peck Street – “There’s some dispute about that, big deal.” Id., 14. He said upon arriving at 38 Peck Marjorie saw the petitioner in the front passenger seat of a gray Ford Escort wagon and identified him to Mickey. Mickey went over to the car and grabbed the petitioner, who then “slipped out of his grasp.” Id., 16. He said that then “the window goes up and the door gets locked.” The prosecutor cited Mickey’s testimony that he backed away, and that the petitioner got out of the car and shot him. Id.

In summing up this part of his argument the prosecutor said the case was “another example of the unnecessary and senseless gun violence that’s become all too common in the city of New Haven. That’s what this is.” Tr. 4/23, 17.

In his closing argument, petitioner’s counsel described Mickey Tillery as “Marjorie Tillery’s weapon.” and that Marjorie had manipulated him and was trying to manipulate the jury. He said, “She’s lying to you.” Id. 19. He described Mickey Tillery as “not clever enough to make up a story,” which was why his testimony did not agree with Marjorie’s. Id. He said when the prosecutor discussed “lying and why

people lie, I thought he was actually talking about Marjorie.” Id. 20. He accused Marjorie of having a “guilty conscious [conscience]” about why she took Mickey to 38 Peck. “[S]he was going for vengeance. She was going to be a vigilante. She was taking things into her own hands. That’s why she lied.” Id.

Counsel cited the testimony of Mickey that he was angry, that he “lost it,” that he tried to pull the petitioner out of the car and that “during the “altercation” the petitioner shot him. Id., 21. Hence the defense of self-defense. Id., 22. He noted Mickey’s testimony that he was going to hit the petitioner until he “couldn’t hit him anymore.” Id. He noted the discrepancy in size between Mickey and the petitioner and the exigencies of the moment as they were perceived by the petitioner. Id. 23.

Counsel noted that “[t]his case is not a referendum on gun violence.” Id. 24. Rather, it was “about Mr. Reddick defending himself against someone who was going to cause him serious physical injury.” Id. 24.

On rebuttal, the prosecutor again appealed to the jury to consider the petitioner’s silence when he was stopped by Officer Trotman:

We do know that when the defendant was stopped by Officer Trotman, shortly after the shooting, you know, he didn’t say, geez, you know, I’m glad – you can’t believe what just happened to me. This madman was coming at me and I had to shoot him. I thought he was going to kill me. He doesn’t even mention to Officer Trotman that he shot anybody. So this wasn’t self-defense. If it was self-defense he would have told the police right then and there what had happened. Id. 25-26.

The prosecutor said there was “not a shred of evidence” the petitioner reasonably believed “Tillery was about to inflict great bodily harm.” Id. 27. He told the jury “this is not a typical self-defense claim” because “this petitioner put himself in

this situation by his own criminal conduct earlier in the evening.” Id. 28. He attributed to the petitioner the injuries sustained that evening by Myesha Gaines and said this created a reasonable expectation on his part that her family “wasn’t going to stand for that” and that there would be “consequences,” which expectation defeated his claim of self-defense. Id. 28-29. The prosecutor said, “[h]e was a convicted felon.” Id. 29. “He doesn’t care about the law. You think you cared (*sic*) about the law when his fists were smashed into his girlfriend’s face? He didn’t care. He doesn’t care.” Id.

On April 23, 2015, the jury convicted the petitioner on all three counts. Id. 94-97. On July 10, 2015, the court sentenced him to 23 years incarceration and three years special parole. Tr. 7/10, 18-19

The petitioner first raised the issue of his right to remain silent before the Appellate Court, framed as follows:

THE PROSECUTOR VIOLATED THE DEFENDANT’S RIGHT TO REMAIN SILENT WHEN HE TOLD THE JURY THAT THE DEFENDANT’S CLAIM OF SELF-DEFENSE SHOULD NOT BE CREDITED BECAUSE HE DID NOT MAKE THE CLAIM TO THE POLICE WHEN HE WAS ARRESTED. THE VIOLATION CONSTITUTES REVERSIBLE ERROR.

Because this issue had not been raised at trial, the petitioner began his argument by citing Connecticut law which provided for review of an unpreserved issue by reference to due process law controlling prosecutorial misconduct. After doing that, he argued

When the prosecutor said to the jury that the defendant “didn’t mention the shooting at all” to Officer Trotman, he did not distinguish between the time before and after Trotman put him under arrest. He encompassed the entirety of the time the defendant was under the custody of Trotman, which

period began from the beginning of their encounter, when Trotman approached the defendant with his weapon drawn. Tr. 4/21, 133.

A person in police custody has a fifth amendment right to remain silent. He has an corollary right to be advised of that right, pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Moreover, his right to remain silent attaches “independently of the fact of arrest.” *United States v. Nunez-Rios*, 622 F.2d 1093, 1100 (2d Cir. 1980.) Consistent with that right is the defendant’s right not to have his exercise of it used against him to impeach an explanation offered at trial: because “every post-arrest silence is insolubly ambiguous . . . it would be fundamentally unfair and a deprivation of due process to allow the arrested person’s silence to be used to impeach an explanation offered at trial.” *Doyle v. Ohio*, 426 U.S. 610, 617-18 (1976).

The right to silence post-arrest has the same Constitutional protection as the right not to testify, and “[i]t is well settled that comment by the prosecuting attorney . . . on the defendant’s failure to testify is prohibited by the fifth amendment to the United States constitution. *State v. A.M.*, 156 Conn. App. 138, 148 (2015), citing *Griffin v. California*, 387 U.S. 609, 615 (1965)

Defendant/Appellant’s brief, 9-10.

The petitioner went on to cite Connecticut law which held the same. Upon further argument regarding the evidentiary burdens of the claim of self-defense, he argued

Even if the state wants to split hairs as to whether the entirety of the time the defendant was under the control and in the custody of the police constituted an “arrest” or whether the “arrest” came after Trotman formally put him under that condition, there was a period under anyone’s definition of arrest during which the defendant was silent as to his exculpatory explanation, which period was encompassed by the prosecutor’s statements to the jury. The prosecutor’s statements to the jury, therefore, exhorting them to weigh the defendant’s silence against him, under any construction, violated the defendant’s fifth amendment right to remain silent.

The right to remain silent is not contingent upon any warning. “The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire

individual cases whether the defendant was aware of his rights without a warning being given.” *Miranda v. Arizona*, supra, 384 U.S. 468. There is “no difference in principle in the exercise by the defendant of his constitutional right not to testify and his constitutional right to remain silent and refrain from making either an inculpatory or exculpatory statement to the officers when taken into custody for a federal offense.” *United States v. Nolan*, 416 F.2d 588, 594 (10th Cir. 1969).

The court in *Nolan* found that for a prosecutor to tell a jury to hold such silence against a defendant constitutes an error “so plain, fundamental, and serious” that it merits reversal even if no objection is made at trial. *Id.*

The state argued against that in its brief. The state claimed that the petitioner could not assert a right of silence without demonstrating that he had received a *Miranda* warning. In his reply brief the petitioner framed that issue as follows:

THE DEFENDANT’S RIGHT TO REMAIN SILENT WHILE IN POLICE CUSTODY INHERES IN HIS CONSTITUTIONAL RIGHT TO NOT BE COMPELLED TO ACT AS A WITNESS AGAINST HIMSELF, NOT IN ANY WARNINGS THE POLICE MAY OR MAY NOT CHOOSE TO GIVE. THE PROSECUTOR’S ARGUMENT TO THE JURY THAT THE DEFENDANT’S SILENCE AS TO HIS DEFENSE OF SELF-DEFENSE WHILE IN POLICE CUSTODY CONSTITUTED EVIDENCE OF HIS GUILT ITSELF CONSTITUTED A VIOLATION OF THE DEFENDANT’S FIFTH AMENDMENT RIGHTS AND WARRANTS REVERSAL

He went on to argue:

The state has it backwards. *Miranda* does not create the right of a suspect to remain silent while under police custody, but rather protects that right, which right inheres in the Fifth Amendment. The right precedes *Miranda*, it is not contingent upon it.

Then,

The right to remain silent in police custody obtains whether or not *Miranda* warnings are given and whether or not a suspect invokes the privilege. *Salinas v. Texas*, __ U.S. __, 133 S.Ct. 2174, 2180 (2013): “[A] suspect who is subjected to the inherently compelling pressures of an unwarned custodial interrogation need not invoke the privilege.” (Internal quotation marks and citation omitted.) This from the three-Justice plurality

opinion of Justice Alito, a jurist not otherwise notorious for being pro-defendant. The four-Justice dissent went further, finding that “since it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation the prosecution may not use at trial *the fact that he stood mute* or claimed his privilege in the face of accusation.” (Emphasis in original; internal quotation marks and ellipsis omitted.) *Id.*, 2185, citing *Miranda v. Arizona*, *supra*, 384 U.S. 468, n. 37. “[W]here the Fifth Amendment is at issue, to allow comment on silence directly or indirectly can compel an individual to act as ‘a witness against himself’ – very much what the Fifth Amendment forbids.” *Salinas*, 2186.

Of course, in this case the prosecutor did not refer indirectly to the defendant’s silence but blatantly and repeatedly insisted to the jury that the defendant’s silence while in police custody in regard to his claim of self-defense constituted evidence of guilt:

I mean, did he say anything to Officer Trotman, you know, geez, you know, I – was just accosted by this madman and I had to shoot him

We do know that when the defendant was stopped by Officer Trotman, shortly after the shooting, you know, he didn’t say, geez, you know, I’m glad – you can’t believe what just happened to me. This madman was coming at me and I had to shoot him. I thought he was going to kill me. He doesn’t even mention to Officer Trotman that he shot anybody. So this wasn’t self-defense. If it was self-defense he would have told the police right then and there what had happened. Tr. 4/23/15, 11, 25-26; defendant’s brief, 5-7.

It bears noting that in *Doyle v. Ohio*, 426 U.S. 610, 617 (1975) the government “[did] not suggest petitioner’s silence could be used against him” but rather that it merited inclusion in cross-examination. The prosecution in that case seemed to recognize that for a suspect in custody silence per se can never constitute inculpatory evidence. *Doyle* noted, citing *United States v. Hale*, 422 U.S. 171, 177 (1975) that “silence at the time of arrest may be inherently ambiguous even apart from the effect of *Miranda* warnings, for in a given case there may be several explanations for the silence that are consistent with the existence of an exculpatory explanation.” *Doyle*, 617-18, n. 8. Fifth Amendment protections exist not to provide fodder for prosecutors to trap suspects for their silence in custody, but to protect innocent people caught in ambiguous circumstances. And contrary to what the prosecutor tried to convey to the jury, it is the case that as a matter of law, prior to conviction, all suspects are innocent.

The Appellate Court affirmed the conviction. It did so, however, by citing

decisions, including decisions of this Court, for propositions they do not support. He made that clear to the Connecticut Supreme Court in his Petition for Certification to Appeal, dated July 20, 2017, as follows:

Certification should be granted in this case because the Appellate Court cites U.S. Supreme Court cases for propositions they do not support. The first is *Salinas v. Texas*, __ U.S. __, 133 S. Ct. 2174, 186 L. Ed. 2d (2013). The Appellate Court, at 174 Conn. App. 554, cites *Salinas*, at 133 S. Ct. 2178, as follows: “it has long been settled that the privilege against self-incrimination generally is not self-executing and that a *witness* who desires its protection must claim it.” (Emphasis added; internal quotation marks and brackets omitted.)

First, the defendant was not a witness. He did not testify. Secondly, the fact situation in *Salinas* concerned a defendant whose “interview with the police was voluntary. As petitioner himself acknowledges, he agreed to accompany the officers to the station and ‘was free to leave at any time during the interview.’” *Salinas*, 2180. Mr. Reddick, on the other hand, as Officer Trotman testified, was put immediately under the officer’s weapon and quickly placed under arrest in the officer’s vehicle. He was in no way “free to leave.” As well, *Salinas* holds that “a suspect who is subjected to the inherently compelling pressures of an unwarned custodial interrogation need not invoke the privilege.” (Internal quotation marks and citation omitted.) *Salinas*, 2180. This from the three-Justice plurality opinion of Justice Alito, a jurist not otherwise notorious for being pro-defendant. The four-Justice dissent went further, finding that “since it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation the prosecution may not use at trial *the fact that he stood mute* or claimed his privilege in the face of accusation.” (Emphasis in original; internal quotation marks and ellipsis omitted.) *Id.*, 2185, citing *Miranda v. Arizona*, 384 U.S. 468, n. 37, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966): “[W]here the Fifth Amendment is at issue, to allow comment on silence directly or indirectly can compel an individual to act as ‘a witness against himself’ – very much what the Fifth Amendment forbids.” *Salinas*, 2186.

All of which means that when the prosecution does not demonstrate that a defendant voluntarily waived his Fifth Amendment right to remain silent while in police custody, and has not chosen to testify at trial, the prosecution cannot use his silence against him. Moreover, contrary to the Appellate Court’s rendering of *Salinas*, a person, even a witness, can assert his right to silence through silence itself: “And where assertion of the privilege would itself tend to incriminate, we have allowed witnesses to exercise the privilege through silence.” *Salinas*, 2180.

The second case the Court wrongly applied against the defendant was *Fletcher v. Weir*, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982). *Fletcher* concerned a defendant who had taken the stand in his own defense; *id.*, 603; again, something Mr. Reddick did not do. In the *Fletcher* kind of situation, as the Supreme Court noted, “[i]n the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe 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.” *Id.* 607. But *Fletcher* says nothing about a defendant does *not* choose to take the stand. The actual holding of *Fletcher*, which the Appellate Court does not cite, follows immediately the statement in *Fletcher* which the Appellate Court does cite – *Reddick*, 555 – which ends, “*Doyle* bars the use against a criminal defendant of silence maintained after receipt of government assurances.” *Fletcher*, 606. But *Fletcher* does not say it bars the use *only* after such assurances. That, however, is what the Appellate Court held. As well, the Court italicizes “after receipt of government assurances,” which *Fletcher* does not.

REASONS TO GRANT CERTIFICATION

The holding of the Appellate Court and its endorsement by the state's Supreme Court make the right to remain silent while in police custody contingent on a police officer telling the suspect he has that right. That cannot be the law and it isn't. The Appellate Court relies heavily on *Fletcher*, but *Fletcher* concerns rights which attach or don't attach to a petitioner as witness who testifies, not a petitioner who does not testify. Citing *Jenkins v. Anderson*, 447 U.S. 231, 239 (1980), *Fletcher* held: "Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted." 455 U. S. 606. Witnesses who testify, not petitioners who don't. *Fletcher* gives no endorsement to using a petitioner's silence against him when does not testify.

That point *Fletcher* made clear in the summing up: "In 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 post-arrest silence *when a defendant chooses to take the stand.*" (Emphasis added.) *Fletcher*, id., 607. *Fletcher* says a defendant who takes the stand may be impeached by his post-arrest silence. It does not say the state may impeach a defendant who does not take the stand.

Nor does *Salinas* and nor, certainly, does *Doyle*. As the petitioner argued to the Connecticut Supreme Court,

Nothing in *Fletcher*, nothing in *Salinas*, certainly nothing in *Doyle*, holds that the fundamental constitutional right of a suspect to remain silent vests in anyone but the suspect. The privilege is his to keep or to waive. If he chooses to waive the privilege, either before trial, as in *Salinas*, or during trial, as in *Fletcher*, then other rules begin to apply. But if he does not waive it, and especially if the state does not demonstrate that he waived it, his right to the protections of the privilege control, and his right not to have the exercise of that privilege used against him remains inviolable:

[W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized . . . He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney . . . The individual may knowingly and intelligently waive these rights . . . But unless and until such warnings are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." *Miranda v. Arizona*, supra, 384 U.S. 478-79.

The dissent in *Salinas* spoke to the fallacy underlining the idea that the right to remain silent is contingent on the advisement of the police:

This Court has recognized repeatedly that many, indeed most, Americans are aware that they have a constitutional right not to incriminate themselves by answering questions posed by the police during an interrogation conducted in order to figure out the perpetrator of a crime. *Salinas*, 2189.

If people already know it, query why they have to be told in order for the right to take effect. Especially in the case at bar, where the petitioner, as the prosecutor repeatedly told the jury, had prior personal experience with the criminal justice system. Where is the logic in abrogating his right not to be a witness against himself by force of his silence when *we know he knows* the perils of so doing? He's been through this before, he knows the game.

Perhaps that was the problem; perhaps the prosecution was frustrated by the petitioner's not making it easy for the state, as suspects often do. Perhaps that was

what he was used to, and facing the challenge of having to make his own case instead of the petitioner making it for him, he decided to change the rules, betting that the reviewing courts would support him. That is a bet he has to date won.

The “general principal that the Government has the right to everyone’s testimony” does not apply in two situations: one, when a defendant chooses not to testify at trial; and two, when a “suspect in custody claims the right to remain silent “after being suitably warned.” *Salinas v. Texas*, _ U.S. ___, 133 S.Ct. 2174, 2179-80 (2013).

The petitioner did not testify at trial. *State v. Reddick*, 174 Conn. App. 536, 549 (2017). His right as to that is not contested and is not at issue. What is at issue is the implication of “after being suitably warned.” The state courts found that the issuance of the warning had to be established by the petitioner for his right against self-incrimination to be in force, that the “necessity of establishing the *Miranda* warning” had been given fell on the petitioner. *Reddick*, 556-57.

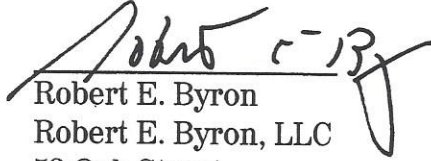
This Court, however, has found that burden falls on the prosecution. “The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless *it* demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.” (Emphasis added.) *Michigan v. Tucker*, 417 U.S. 433, 443 (1973). The prosecution here, however, demonstrated nothing as to *Miranda*. It did not meet its burden to demonstrate the petitioner had been warned, hence it did not bring the defendant’s case outside the ambit of protection assured by *Salinas*, et al.

The state court was correct in finding the petitioner did not establish that he had been warned. It was incorrect in finding this gave the prosecution carte blanche to impeach the petitioner for his putative silence on his claim of self-defense. The ruling renders void the protections of the Fifth Amendment by making the right to remain silent contingent upon a police officer's recitation of the right. Under the logic of this ruling, if the officer does not render the warning, a defendant's Fifth Amendment rights do not obtain, whether he testifies or not. Silence no longer becomes a right for the protection of the defendant but a means by which a prosecutor may impute, not prove, the defendant was silent while in police custody and then use that purported silence to incriminate him. He may do this under a construction of the law which says the defendant, not the prosecutor, has the burden to prove the *Miranda* warnings were given, and if he doesn't, it's Katy bar the door for his Fifth Amendment rights.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully,

A handwritten signature in black ink, appearing to read "Robert E. Byron", with a stylized flourish extending from the end.

Robert E. Byron
Robert E. Byron, LLC
53 Oak Street
Hartford, Ct 06106
860-387-5098
rbyronlaw@gmail.com

Counsel of Record for the Petitioner