

Supreme Court, U.S.
FILED

07-893 JAN 2 - 2008

OFFICE OF THE CLERK

No. 07-_____

IN THE
Supreme Court of the United States

JUAN ANGEL PANDO FRANCO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

DAVID J. SCHENCK
(Counsel of Record)

DAVID L. HORAN

ANDREW O. WIRMANI

JONES DAY

2727 N. Harwood Street
Dallas, Texas 75201-1515
(214) 220-3939

Counsel for Petitioner

QUESTIONS PRESENTED

1) In the decision below, the Fifth Circuit Court of Appeals recognized and expanded a division among the circuits and the states on the following question: Does the Fifth Amendment right of silence prohibit the government from introducing a defendant's pre-*Miranda* silence as substantive evidence of guilt in its case-in-chief where the defense has lodged a timely, specific objection?

2) The Fifth Circuit's decision also creates a further split among the circuits on the closely related question of whether a defendant's waiver of *Miranda* rights applies retroactively to cure any constitutional infirmity in using his pre-*Miranda* silence as substantive evidence of guilt?

PARTIES TO THE PROCEEDING

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit were Juan Angel Pando Franco, Petitioner-Appellant, and the United States of America, Respondent-Appellee.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
PERTINENT CONSTITUTIONAL PROVISION	1
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE PETITION.....	4
I. THE LOWER FEDERAL COURTS AND STATE COURTS ARE BOTH DEEPLY DIVIDED OVER THE CONSTITUTIONALITY OF USING A DEFENDANT'S PRE- <i>MIRANDA</i> SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT ...	6
A. A Majority Of The Lower Federal Courts Have Correctly Held That The Fifth Amendment Right To Remain Silent Forbids The Government From Using The Defendant's Pre- <i>Miranda</i> Silence As Substantive Evidence Of Guilt	6

TABLE OF CONTENTS
(Continued)

	Page
B. In Direct Conflict With The Majority View, the Fourth, Eleventh, Eighth, and Fifth Circuits Have Held That A Defendant's Pre- <i>Miranda</i> Silence, Even Following Arrest, May Be Used As Substantive Evidence Of Guilt At Trial.....	10
C. State Courts Are Also Deeply Divided On The Substantive Use Of Pre- <i>Miranda</i> Silence.....	12
II. IN AVOIDING THE PRE- <i>MIRANDA</i> ISSUE, THE PANEL CREATED A CIRCUIT SPLIT ON THE EFFECT OF A DEFENDANT'S <i>MIRANDA</i> WAIVER ON THE USE OF HIS PRE- <i>MIRANDA</i> SILENCE AS EVIDENCE OF GUILT	14
A. The Seventh And Ninth Circuits Have Both Rejected Retroactive Application Of <i>Miranda</i> Waivers	15
B. The Fifth Circuit's Decision In This Case Cannot Stand Without Extension Of The Existing Conflict And Creation Of A New One.....	16
CONCLUSION	20
APPENDIX	
503 F.3d 389	1a
U.S. CONST., amend. V	15a

TABLE OF AUTHORITIES

	Page
Federal Cases	
<i>Combs v. Coyle</i> , 205 F.3d 269 (6th Cir. 2000)	8, 9
<i>Coppola v. Powell</i> , 878 F.2d 1562 (1st Cir. 1989)	8
<i>Douglas v. Cupp</i> , 578 F.2d 266 (9th Cir. 1978)	9
<i>Doyle v. Ohio</i> , 426 U.S. 610 (1976)	8, 19
<i>Fletcher v. Weir</i> , 455 U.S. 603 (1982).....	11
<i>Griffin v. California</i> , 380 U.S. 609 (1965)..	4, 7, 14, 19
<i>Jenkins v. Anderson</i> , 447 U.S. 231 (1980).....	8
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	<i>passim</i>
<i>Oregon v. Elstad</i> , 470 U.S. 298 (1985).....	6, 14, 15
<i>Raffel v. United States</i> , 271 U.S. 494 (1926)	8
<i>United States ex rel. Savory v. Lane</i> , 832 F.2d 1011 (7th Cir. 1987).....	7, 8
<i>United States v. Burns</i> , 276 F.3d 439 (8th Cir. 2002).....	18
<i>United States v. Burson</i> , 952 F.2d 1196 (10th Cir. 1991).....	9
<i>United States v. Caro</i> , 637 F.2d 869 (2d Cir. 1981)	10
<i>United States v. Frazier</i> , 408 F.3d 1102 (8th Cir. 2005), <i>cert.</i> <i>denied</i> , 546 U.S. 1151 (2006).....	11, 12
<i>United States v. Goldman</i> , 563 F.2d 501 (1st Cir. 1977)	18
<i>United States v. Hernandez</i> , 948 F.2d 316 (7th Cir. 1991).....	15, 16, 18

TABLE OF AUTHORITIES
(Continued)

	Page
<i>United States v. Love</i> , 767 F.2d 1052 (4th Cir. 1985).....	11
<i>United States v. Moore</i> , 104 F.3d 377 (D.C. Cir. 1997).....	10
<i>United States v. Oplinger</i> , 150 F.3d 1061 (9th Cir. 1998).....	10
<i>United States v. Rivera</i> , 944 F.2d 1563 (11th Cir. 1991).....	11
<i>United States v. Thierman</i> , 678 F.2d 1331 (9th Cir. 1982).....	18
<i>United States v. Velarde-Gomez</i> , 269 F.3d 1023 (9th Cir. 2001).....	16, 18
<i>United States v. Whitehead</i> , 200 F.3d 634 (9th Cir. 2000).....	9
<i>United States v. Zanabria</i> , 74 F.3d 590 (5th Cir. 1996).....	12
State Cases	
<i>Commonwealth v. Andujar</i> , 57 Mass. App. Ct. 529, 784 N.E.2d 646 (2003)	13
<i>Commonwealth v. Turner</i> , 499 Pa. 579, 454 A.2d 537 (1982)	13
<i>Dorman v. State</i> , 622 P.2d 448 (Alaska 1981).....	13
<i>Kosh v. State</i> , 382 Md. 218, 854 A.2d 1259 (2004)	13
<i>Mallory v. State</i> , 261 Ga. 625, 409 S.E.2d 839 (1991)	13

TABLE OF AUTHORITIES
(Continued)

	Page
<i>Morris v. State</i> , 112 Nev. 260, 913 P.2d 1264 (1996)	13
<i>People v. Conyers</i> , 52 N.Y.2d 454, 420 N.E.2d 933 (1981)	13
<i>People v. Quintana</i> , 665 P.2d 605 (Colo. 1983)	13
<i>People v. Patillo</i> , No. 262689, 2006 WL 3421769 (Mich. Ct. App. Nov. 28, 2006)	13
<i>People v. Sasser</i> , No. B148168, 2002 WL 259949 (Cal. Ct. App. Feb. 25, 2002)	13
<i>People v. Strong</i> , 215 Ill. App. 3d 484, 574 N.E.2d 1271 (1991)	13
<i>State v. Armour</i> , No. E2005-01242-CCA-R3- CD, 2006 WL 2497816 (Tenn. Crim. App. Aug. 30, 2006).....	13
<i>State v. Combs</i> , 62 Ohio St. 3d 278, 581 N.E.2d 1071 (1991).....	13
<i>State v. Davis</i> , 686 P.2d 1143 (Wash. Ct. App. 1984).....	13
<i>State v. Graves</i> , 27 S.W.3d 806 (Mo. Ct. App. 2000)	13
<i>State v. Hill</i> , 146 N.H. 568, 781 A.2d 979 (2001)	13
<i>State v. Hoggins</i> , 718 So. 2d 761 (Fla. 1998).....	13
<i>State v. Kuranko</i> , 71 Conn. App. 703, 803 A.2d 383 (2002)	13
<i>State v. Lanoi</i> , 570 N.W.2d 911 (Wis. Ct. App. 1997).....	13

TABLE OF AUTHORITIES
(Continued)

	Page
<i>State v. Lopez</i> , 141 Idaho 575, 114 P.3d 133 (Idaho Ct. App. 2005).....	13
<i>State v. Mitchell</i> , 317 N.C. 661, 346 S.E.2d 458 (1986).....	13
<i>State v. Muhammad</i> , 182 N.J. 551, 868 A.2d 302 (2005)	13
<i>State v. Ramirez</i> , 178 Ariz. 116, 871 P.2d 237 (1994).....	13
<i>State v. Rogers</i> , No. A04-378, 2004 WL 2939667 (Minn. Ct. App. Dec. 21, 2004)	13
<i>State v. Rowland</i> , 243 Neb. 872, 452 N.W.2d 758 (1990).....	13
<i>Wyborny v. State</i> , 209 S.W.3d 285 (Tex. Ct. App. 2006)	13
Constitution & Statutes	
U.S. CONST. amend. V	<i>passim</i>
18 U.S.C. § 1001	18
28 U.S.C. § 1254(1)	1

PETITION FOR A WRIT OF CERTIORARI

Juan Angel Pando Franco respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 503 F.3d 389 and reprinted at Pet. App. 1a.

JURISDICTION

The judgment of the Fifth Circuit was entered on October 4, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISION

The Fifth Amendment of the United States Constitution provides, *inter alia*, that: “No person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V. The full text of the Fifth Amendment is reproduced at Pet. App. 15a.

STATEMENT OF THE CASE

Petitioner, Juan Angel Pando Franco, owns a transportation company, which transports goods and passengers to and from Mexico. Pet. App. 2a. While attempting to enter the United States at Presidio, Texas, Port of Entry, he was referred to a secondary inspection area where the contents of his van were searched. Pet. App. 1a. Located within a wooden table, officers discovered 17.4 kilograms of marijuana. Pet. App. 2a. Petitioner was handcuffed and placed under arrest. Pet. App. 4a. Officers described him as being “calm, cooperative and quiet”

during the arrest. Pet. App. 2a. “He didn’t say anything.” *Id.*

After two hours in holding, Petitioner was removed and read his *Miranda* rights. *Id.* He signed a waiver of those rights and was then interviewed. *Id.* During the interview, officers asked him numerous questions about his failure to ask why he had been arrested, detained, and was currently being interviewed. Pet. App. 3a-4a. Officers also asked him why he never asked if there was a problem with the table. *Id.* In response to these questions, Petitioner simply stated “table must contain drugs.” Pet. App. 4a. When asked what type of drugs, he responded, “cocaine?” *Id.* Petitioner was ultimately charged with aiding and abetting the importation of less than 50 kilograms of marijuana into the United States and aiding and abetting the possession with intent to distribute less than 50 kilograms of marijuana. Pet. App. 5a.

At trial, Petitioner’s principle defense was that he had unwittingly transported the drugs and therefore did not have the requisite *mens rea* to support conviction of the charged offenses. During its case-in-chief, the government made several references to, and elicited testimony concerning, Petitioner’s pre-*Miranda* silence. Specifically, one of the arresting officers testified: “[T]hroughout the duration of the interview with him, not once had he bothered asking why he was being interviewed . . . not once during the whole course of his detention — not once had he bothered to ask why he had been handcuffed, detained and was now being presently interviewed.” Pet. App. 11a. Petitioner promptly objected to this

testimony, but, after a brief sidebar, the court overruled the objection. Pet. App. 4a.

During closing argument, the prosecution again referenced Petitioner's pre-*Miranda* silence: "If somebody goes to handcuff you, what is going to be your reaction? If you've got guilty knowledge, if you know you're committing an offense that's illegal, maybe it wouldn't bother you at all. . . . Why do you think he sat there very calmly and stayed quiet? Ladies and gentleman, he knew exactly why he was being detained. He knew, whether it was marijuana or cocaine or heroin or stolen jewelry, whatever it was, it was in that table." Pet. App. 5a. Petitioner again objected to these statements, but the objection was again overruled. *Id.* He was ultimately convicted of the charged offenses. *Id.*

The Fifth Circuit affirmed on appeal. Pet. App. 1a. The panel characterized the challenged testimony and statements as comments on both Petitioner's pre- and post-*Miranda* silence. Pet. App. 11a. Although the panel noted the circuit split on the use of a defendant's pre-*Miranda* silence as evidence of guilt, it attempted to avoid a direct holding on the issue by pointing to the Petitioner's *Miranda* waiver and subsequent response to questions about his silence. Pet. App. 11a n.1, 13a. In so doing, however, the Fifth Circuit created yet another division among the circuits. Both the Seventh and Ninth Circuits have held a defendant's waiver of *Miranda* rights has no retroactive effect on the admissibility of pre-*Miranda* silence. Pet. App. 14a n.3.

REASONS FOR GRANTING THE PETITION

To give full effect to the Fifth Amendment's protection against self-incrimination, this Court has held that "the Fifth Amendment forbids . . . either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California*, 380 U.S. 609, 615 (1965). *Griffin* proscribed prosecutorial comment on a criminal defendant's failure to testify in his own defense. This Court's subsequent decision in *Miranda v. Arizona* recognizes that this protection applies backward at least to the time of custodial interrogation and requires that the accused be informed of his right to remain silent. 384 U.S. 436, 468 n.37 (1966). The central question presented by this petition is the logical consequence of those decisions and one over which the circuits have been divided for years: Does the Fifth Amendment prohibit the government from introducing a defendant's pre-*Miranda* silence as substantive evidence of guilt in its case-in-chief?

The First, Sixth, Seventh, and Tenth Circuits have correctly held that comment on a defendant's exercise of the right of silence is unconstitutional, regardless of whether *Miranda* warnings have been given, because the right of silence derives directly from the protections of the Fifth Amendment and does not originate with the *Miranda* warnings themselves. The Ninth and District of Columbia Circuits are in general agreement, although the Ninth Circuit holds that the right of silence extends backward only to the point of arrest, while the District of Columbia Circuit has never decided the pre-arrest issue. The Second Circuit has also assumed that prosecutorial use of

pre-*Miranda* silence is impermissible, but it has not been forced to decide the issue squarely. In direct conflict with this majority view, the Fourth, Fifth, Eighth, and Eleventh Circuits have allowed the prosecution to point to a defendant's pre-*Miranda* silence as substantive evidence of guilt, although the Eighth Circuit has left open the possibility that the use of such silence may be impermissible if the defendant was under some form of official compulsion to speak at the time. Thus, depending on the circuit, a defendant's Fifth Amendment right of silence exists throughout the investigatory process, only after arrest, only after *Miranda* warnings have been given, or only when the defendant "feels compelled" to speak.

State courts are in a similar state of disarray. More than half of the states have now confronted the issue. While a clear majority construe the Fifth Amendment to prohibit the prosecution's reference to silence at trial, at least six hold to the contrary.

In light of this deep division among the circuits and state courts, the Court should grant the petition and definitely resolve this important constitutional question. This case is a particularly well-suited vehicle to resolve the circuit split. The prosecution commented on and elicited explicit testimony concerning Petitioner's pre-*Miranda* silence and Petitioner promptly objected and obtained a ruling. Pet. App. 11a-12a. Instead of directly addressing the constitutionality of admitting this evidence, however, the Fifth Circuit held that, by waiving his *Miranda* rights, and then answering questions about his pre-*Miranda* silence, Petitioner waived any constitutional challenge to the substantive use of his silence. *Id.* In

so doing, the panel ignored this Court's implicit holding in *Oregon v. Elstad* that would preclude admission of un-*Mirandized* statements despite a subsequent waiver of *Miranda* rights. 470 U.S. 298, 318 (1985). More importantly, this aspect of the Fifth Circuit's decision creates yet another circuit split with the Seventh and Ninth Circuits, which have both held, on facts virtually identical to these, that a defendant's waiver of *Miranda* rights has no retroactive effect on his pre-*Miranda* silence. Accordingly, granting the petition would provide the Court with an opportunity to resolve two circuit splits on questions of central importance to Fifth Amendment jurisprudence.

I. THE LOWER FEDERAL COURTS AND STATE COURTS ARE BOTH DEEPLY DIVIDED OVER THE CONSTITUTIONALITY OF USING A DEFENDANT'S PRE-MIRANDA SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT.

A. A Majority Of The Lower Federal Courts Have Correctly Held That The Fifth Amendment Right To Remain Silent Forbids The Government From Using The Defendant's Pre-*Miranda* Silence As Substantive Evidence Of Guilt.

Four circuits have directly addressed the pre-*Miranda* silence issue and properly held that, regardless of whether *Miranda* warnings are actually given, comment on the defendant's exercise of his right of silence violates the Fifth Amendment. These circuits recognize that, while *Miranda* warnings are an important means of safeguarding Fifth Amendment rights, they are not the genesis of those rights. Thus, they can be invoked at any stage in a

criminal investigation. The Second Circuit has also assumed that these circuits are correct although it has not had an opportunity to squarely address the issue. Two others, the Ninth and District of Columbia Circuits, have also correctly held that a defendant's right of silence is not contingent on the provision of *Miranda* warnings. The limited scopes' of their holdings, however, operate to further confuse the issue and highlight the need for this Court's guidance.

The Seventh, First, Sixth, and Tenth Circuits have each squarely held that pre-*Miranda* silence cannot be used as substantive evidence of guilt. The Seventh Circuit has held that prosecutorial comment on a defendant's invocation of the right to silence violates the Fifth Amendment privilege against self-incrimination. *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017-18 (7th Cir. 1987). In *Savory*, the defendant challenged the admission of evidence of and the prosecutor's comments on his refusal to talk to police when first asked about the crimes at issue. *Id.* at 1015. The court grounded its decision in this Court's holding in *Griffin*, 380 U.S. 609, which held that neither "the prosecutor nor the court may invite the jury to draw an inference of guilt from an accused's failure to take the stand." *Savory*, 832 F.2d at 1017. While the court acknowledged that *Griffin* had involved governmental use of the defendant's silence at trial, it did not believe this distinction was relevant because "[t]he right to remain silent . . . attaches before the institution of formal adversary proceedings." *See id.* The court also noted, "[w]hile the presence of *Miranda* warnings might [have] provid[ed] an additional reason for disallowing use of

the defendant's silence as evidence of guilt, they [were] not a necessary condition to such a prohibition." *Id.* at 1018.

In *Coppola v. Powell*, the First Circuit held that the Fifth Amendment prohibited the prosecution from eliciting testimony in its case-in-chief concerning the defendant's pre-arrest invocation of his right to silence. 878 F.2d 1562, 1568 (1st Cir. 1989). The court began with the principle that "[t]he right to remain silent, unlike the right to counsel, attaches before institution of formal adversary proceedings." *Id.* at 1565 (quoting *Lane*, 832 F.2d at 1017). The court then distinguished this Court's prior holdings that had permitted the use of a defendant's pre-arrest silence solely for the purpose of impeaching credibility. *Id.* at 1566-68 (citing *Raffel v. United States*, 271 U.S. 494 (1926), and *Jenkins v. Anderson*, 447 U.S. 231 (1980)).

Similarly, the Sixth Circuit in *Combs v. Coyle* held that "the use of a defendant's prearrest silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination." 205 F.3d 269, 283 (6th Cir. 2000). Notably, the court rejected the defendant's assertion that this issue was controlled by this Court's decision in *Doyle v. Ohio*, 426 U.S. 610, 619 (1976), which held that use of a defendant's post-*Miranda* silence even for the purposes of impeachment is fundamentally unfair because *Miranda* warnings contain an implicit assurance that the defendant's silence will not be used against him. *Combs*, 205 F.3d at 280. While agreeing that the substantive use of silence in this situation was unconstitutional, the court rejected the premise that the right of silence is contingent on the

provision of *Miranda* warnings. *Id.* Rather, the court concluded that a defendant's right of silence derives directly from the Fifth Amendment. *Id.*

In *United States v. Burson*, the Tenth Circuit held that testimony in the prosecution's case-in-chief concerning the defendant's lack of response to the questions of law enforcement, which were asked two-and-a-half years before he was indicted, violated his Fifth Amendment right of silence. 952 F.2d 1196, 1201 (10th Cir. 1991). The court concluded that "[t]he general rule of law is that once a defendant invokes his right to remain silent, it is impermissible for the prosecution to refer to any Fifth Amendment rights which [the] defendant exercised." *Id.* While "exceptions exist to this rule, such as the use of silence for impeachment in certain circumstances," these exceptions have no applicability when silence is used as substantive evidence of guilt. *Id.*

The Ninth Circuit has also introduced a further refinement to the conflict that would extend the right of silence to the point of arrest but not before. In *Douglas v. Cupp*, the Ninth Circuit held that the fact of silence in the face of arrest cannot be used as substantive evidence of guilt, because that would act as an impressible penalty on the exercise of the right to remain silent. 578 F.2d 266, 267 (9th Cir. 1978). A subsequent Ninth Circuit panel found the import of *Douglas* to be plain: "regardless [of] whether [] *Miranda* warnings [are] actually given, comment on [a] defendant's exercise of his right to remain silent [is] unconstitutional." *United States v. Whitehead*, 200 F.3d 634, 638 (9th Cir. 2000). Thus, the right of silence clearly applies to post-arrest, pre-*Miranda* silence. *Id.* at 638-39. Two years earlier, however, a

prior Ninth Circuit panel held that a defendant's privilege against self-incrimination does not extend to out-of-court, pre-arrest silence because these situations do not involve governmental efforts to compel the defendant to speak. *United States v. Oplinger*, 150 F.3d 1061, 1067 (9th Cir. 1998).

The District of Columbia Circuit has also held that the right of silence applies in the post-arrest, pre-*Miranda* context, although it explicitly foregone deciding the pre-arrest issue. *United States v. Moore*, 104 F.3d 377, 389 (D.C. Cir. 1997).

The Second Circuit has assumed, without deciding, that the Fifth Amendment proscribes substantive use of silence. *United States v. Caro*, 637 F.2d 869, 876 (2d Cir. 1981).

B. In Direct Conflict With The Majority View, the Fourth, Eleventh, Eighth, and Fifth Circuits Have Held That A Defendant's Pre-*Miranda* Silence, Even Following Arrest, May Be Used As Substantive Evidence Of Guilt At Trial.

In direct conflict with the majority view, two circuits have squarely held that the substantive use of a defendant's pre-*Miranda* silence as evidence of guilt does not violate the Fifth Amendment. Additionally, one circuit generally allows the substantive use of pre-*Miranda* silence, although it has left open the possibility that the use of officially "compelled" silence may violate the Constitution. Finally, the Fifth Circuit, in this case and previous panel decisions, has joined this minority view.

In *United States v. Love*, a police officer testified at trial that the two defendants made no effort to explain their presence at the crime scene on the night

of their arrest. 767 F.2d 1052, 1063 (4th Cir. 1985). In holding this testimony permissible, the Fourth Circuit noted that this Court has “permit[ted] testimony concerning a defendant’s silence where the defendant has not ‘received any *Miranda* warnings during the period in which he remained silent immediately after his arrest.’” *Id.* (quoting *Fletcher v. Weir*, 455 U.S. 603, 605 (1982)). Despite the fact *Fletcher* involved the use of silence for purposes of impeachment after the defendant had waived his right to silence at trial, the Fourth Circuit found it controlling. The Fourth Circuit also noted that the defendants “had [not] been given any *Miranda* warnings at the time [officers] observed their silence,” and thus the “testimony was properly admitted.” *Id.*

The Eleventh Circuit reached the same result in *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991). As in *Love*, the Eleventh Circuit relied on *Fletcher* in concluding that the prosecution may freely comment on a defendant’s pre-*Miranda* silence. *Id.*

In *United States v. Frazier*, the Eighth Circuit held that post-arrest, pre-*Miranda* silence is admissible as substantive evidence of guilt. 408 F.3d 1102, 1111 (8th Cir. 2005), *cert. denied*, 546 U.S. 1151 (2006). At trial, the arresting officer testified that the defendant remained silent during and immediately after his arrest but before receiving *Miranda* warnings. *Id.* at 1109. The prosecution also made reference to this testimony during its closing argument. *Id.* Although the court had previously held that “receipt of *Miranda* warnings is determinative of the constitutional issue,” it noted that the more precise

question “is whether [the defendant] was under any . . . government-imposed compulsion to speak” at the time of his silence. *Id.* at 1111 (internal quotation marks omitted). The court held that “an arrest by itself is not governmental action that implicitly induces a defendant to remain silent,” and thus the admission of the testimony as proof of guilt and the prosecutor’s subsequent comments on that testimony were both proper. *Id.* However, the court limited its holding to the facts of the case and explicitly stated that it was not deciding “whether compulsion may exist under any other postarrest, pre-*Miranda* circumstances,” short of custodial interrogation. *Id.*

In *United States v. Zanabria*, the Fifth Circuit held that a defendant’s Fifth Amendment rights do not extend to pre-arrest silence that is “neither induced by nor a response to any action by a government agent.” 74 F.3d 590, 593 (5th Cir. 1996). By characterizing the testimony at issue in this case as evidence of Petitioner’s post-arrest, pre-*Miranda* silence, but nevertheless affirming Petitioner’s conviction, the Fifth Circuit effectively extended its decision in *Zanabria* to all instances of a defendant’s pre-*Miranda* silence, as the Fourth and Eleventh Circuits have. The Fifth Circuit’s attempt to avoid the issue by applying a *Miranda* waiver retroactively only creates another division among the circuits and makes its judgment in this case dependent on this Court’s endorsement of its rule.

C. State Courts Are Also Deeply Divided On The Substantive Use Of Pre-*Miranda* Silence

The states that have considered the issue are similarly split. Courts in Alaska, California, Colorado, Florida, Georgia, Idaho, Illinois, Maryland,

Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New York, Ohio, Pennsylvania, Texas, Washington, and Wisconsin have all forbidden substantive prosecutorial use of a defendant's pre-*Miranda* silence.¹ Courts in Arizona, Connecticut, Michigan, New Hampshire, North Carolina, and Tennessee have reached the contrary conclusion.²

In sum, depending on the circuit, the Fifth Amendment right of silence exists throughout the

¹ *Dorman v. State*, 622 P.2d 448 (Alaska 1981); *People v. Sasser*, No. B148168, 2002 WL 259949 (Cal. Ct. App. Feb. 25, 2002); *People v. Quintana*, 665 P.2d 605 (Colo. 1983) (en banc); *State v. Hoggins*, 718 So. 2d 761 (Fla. 1998); *Mallory v. State*, 261 Ga. 625, 409 S.E.2d 839 (1991); *State v. Lopez*, 141 Idaho 575, 114 P.3d 133 (Idaho Ct. App. 2005); *People v. Strong*, 215 Ill. App. 3d 484, 574 N.E.2d 1271 (1991); *Kosh v. State*, 382 Md. 218, 854 A.2d 1259 (2004); *Commonwealth v. Andujar*, 57 Mass. App. Ct. 529, 784 N.E.2d 646 (2003); *State v. Rogers*, No. A04-378, 2004 WL 2939667 (Minn. Ct. App. Dec. 21, 2004); *State v. Graves*, 27 S.W.3d 806 (Mo. Ct. App. 2000); *State v. Rowland*, 243 Neb. 872, 452 N.W.2d 758 (1990); *Morris v. State*, 112 Nev. 260, 913 P.2d 1264 (1996); *State v. Muhammad*, 182 N.J. 551, 868 A.2d 302 (2005); *People v. Conyers*, 52 N.Y.2d 454, 420 N.E.2d 933 (1981); *State v. Combs*, 62 Ohio St. 3d 278, 581 N.E.2d 1071 (1991); *Commonwealth v. Turner*, 499 Pa. 579, 454 A.2d 537 (1982); *Wyborny v. State*, 209 S.W.3d 285 (Tex. Ct. App. 2006); *State v. Davis*, 686 P.2d 1143 (Wash. Ct. App. 1984); *State v. Lanoi*, 570 N.W.2d 911 (Wis. Ct. App. 1997).

² *State v. Ramirez*, 178 Ariz. 116, 871 P.2d 237 (1994); *State v. Kuranko*, 71 Conn. App. 703, 803 A.2d 383 (2002); *People v. Patillo*, No. 262689, 2006 WL 3421769 (Mich. Ct. App. Nov. 28, 2006); *State v. Hill*, 146 N.H. 568, 781 A.2d 979 (2001); *State v. Mitchell*, 317 N.C. 661, 346 S.E.2d 458 (1986); *State v. Armour*, No. E2005-01242-CCA-R3-CD, 2006 WL 2497816 (Tenn. Crim. App. Aug. 30, 2006).

investigatory process, only after arrest, only after the provision of *Miranda* warnings, or only when the defendant is compelled to speak by some official action. State courts are in similar disarray. The right of silence recognized by this Court in *Griffin* and *Miranda* is rendered entirely meaningless if it exists, as the minority view holds, only when law enforcement tells a defendant that he has that right. In all events, the issue has percolated in the circuits for years and is fully ripe for this Court's review.

II. IN AVOIDING THE PRE-MIRANDA ISSUE, THE PANEL CREATED A CIRCUIT SPLIT ON THE EFFECT OF A DEFENDANT'S MIRANDA WAIVER ON THE USE OF HIS PRE-MIRANDA SILENCE AS EVIDENCE OF GUILT.

After concluding the "record reveals that the Government in this case referenced . . . [the Petitioner's] post-arrest, pre-*Miranda* silence," and then noting that the substantive use of such silence has "split the circuit courts," the Fifth Circuit nevertheless affirmed Petitioner's conviction because he answered questions about his pre- and post-*Miranda* silence after waiving his *Miranda* rights. Pet. App. 11a-14a. In so doing, the panel completely ignored this Court's implicit holding in *Oregon v. Elstad* that un-*Mirandized* statements are not cured by a subsequent waiver of *Miranda* rights. 470 U.S. at 318. In *Elstad*, the defendant made several incriminating statements after being placed in custody but before being read his *Miranda* rights. *Id.* After being *Mirandized*, however, he made several additional statements that the prosecution used against him at trial. *Id.* Although this Court held that law enforcement's failure to immediately

administer the *Miranda* warnings did not “taint” the defendant’s post-*Miranda* statements, it held the pre-*Miranda* statements had to be excluded. *Id.* (“We find that the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are satisfied in the circumstances of this case by barring use of the unwarned statements in the case in chief.”).

More importantly, the panel’s decision creates a circuit split with the Seventh and Ninth Circuits, which have both held that a defendant’s waiver of *Miranda* rights does not cure the unconstitutionality of introducing his pre-*Miranda* silence into evidence on facts virtually identical to those in this case. Accordingly, the panel’s attempt to avoid the issue of pre-*Miranda* silence makes this an ideal vehicle for resolving the multiple conflicts surrounding whether and when a defendant’s Fifth Amendment right to silence attaches before trial.

A. The Seventh And Ninth Circuits Have Both Rejected Retroactive Application Of *Miranda* Waivers

In *United States v. Hernandez*, the Seventh Circuit held that a subsequent waiver of *Miranda* rights has no effect on the admissibility of post-arrest, pre-*Miranda* silence. 948 F.2d 316 (7th Cir. 1991). There, the prosecution had elicited testimony from the arresting officer as to the defendant’s post-arrest, pre-*Miranda* silence, asking whether “at the time [the defendant] was placed under arrest, did he make any immediate response?” *Id.* at 322. The officer answered “No.” *Id.* The court concluded that regardless of his subsequent waiver and later statements, the prosecutor’s reference to the

defendant's pre-*Miranda* silence violated the defendant's Fifth Amendment rights. *Id.* at 322-23.

The Ninth Circuit reached the same result in *United States v. Velarde-Gomez*, holding that the defendant's subsequent *Miranda* waiver and confession to the offense did not cure the improper admission of his pre-*Miranda* silence. 269 F.3d 1023, 1033 (9th Cir. 2001).

B. The Fifth Circuit's Decision In This Case Cannot Stand Without Extension Of The Existing Conflict And Creation Of A New One

Although the Fifth Circuit here cited both *Hernandez* and *Velarde-Gomez*, it nevertheless held that Petitioner waived any right to challenge use of his pre-*Miranda* silence because, following his *Miranda* waiver, he provided a single response to multiple questions about his pre- and post-*Miranda* silence. Pet. App. 13a-14a. Specifically, the panel noted that, in response to inquiries during an interview about "why he never questioned the fact he was being detained and interviewed or if there was a problem with the table," Petitioner simply stated "table must contain drugs." Pet. App. 13a.

The panel's reliance on this isolated statement as a fact that distinguishes the case from *Hernandez* and *Velarde-Gomez* is unavailing. Indeed, despite the panel's assertions to the contrary, it effectively held, in direct conflict with both these cases, that *Miranda* waivers may be applied retroactively to permit the prosecution's use of pre-*Miranda* silence as evidence of guilt. When a defendant waives his *Miranda* rights he agrees to do precisely what the Petitioner did here — answer questions. The fact that an

answer to one of these questions incidentally touches upon his pre-existing, pre-*Miranda* silence should not open the flood gates and allow the prosecution to suggest to the jury that silence during arrest is synonymous with guilt, especially when the answer provided is perfectly consistent with the defendant's defense at trial, as it was here. That is, of course, unless *Miranda* waivers operate retroactively – the very question the panel claimed not to be deciding.

The sole purpose of the testimony at issue was to invite the jury to draw the inference that, because Petitioner remained silent, he must have been guilty. Perhaps, the panel's distinction would be relevant if the testifying officer had simply repeated the questions posed to Petitioner about his pre-*Miranda* silence and then reiterated the answers provided to the jury. But the record makes clear that the prosecution had no interest in Petitioner's actual response to the questions posed. Rather, the government put this testimony before the jury to hold Petitioner accountable for not adequately protesting his arrest and detention, either when they took place or during the interview that ensued. This singular purpose is illustrated by the prosecutor's closing argument. There, the prosecutor did not emphasize the Petitioner's response to questions about his pre-*Miranda* silence — “table must contain drugs” — but rather told the jury that an innocent man would not stand silent in the face of arrest. Indeed, by the time Petitioner was *Mirandized*, his silence was an established fact. By the Fifth Circuit's view, any answer Petitioner gave — or refused to give — after his *Miranda* warning would only expose him to

further jeopardy under the Fifth Circuit's decision and 18 U.S.C. § 1001.

The fallacy of the panel's reasoning is illustrated by the cases on which it relies. Although *Hernandez* and *Velarde-Gomez* address virtually identical factual scenarios, the panel chose not to embrace those decisions. Instead, the panel cited two cases dealing with the selective invocation of the right of silence following a *Miranda* waiver. See *United States v. Burns*, 276 F.3d 439, 442 (8th Cir. 2002) (“[W]e have held that where the accused initially waives his or her right to remain silent and agrees to questioning, but subsequently refuses to answer further questions, the prosecution may note the refusal because it now constitutes part of an otherwise admissible conversation between the police and the accused”) (internal quotation marks omitted); *United States v. Goldman*, 563 F.2d 501, 503-04 (1st Cir. 1977) (prosecution's use of defendant's post-*Miranda* silence in response to two questions permissible because of *Miranda* waiver). Whatever the merit of these decisions, they have no bearing on the impact of a defendant's *Miranda* waiver on the admissibility of his pre-*Miranda* silence. And even if this Court deems them relevant in some way, other circuits have reached the opposite conclusion. See *United States v. Thierman*, 678 F.2d 1331, 1335 (9th Cir. 1982) (holding a defendant may selectively invoke her *Miranda* rights by agreeing to answer some questions and not others).

At bottom, the panel's decision is simply a holding that a defendant's waiver of *Miranda* rights operates retroactively to cure any constitutional problems that may exist in introducing his pre-*Miranda* silence into

evidence. Two circuits have squarely and directly held otherwise. Accordingly, the panel's failure to reach the principle question in this petition, far from being an impediment to review, acts only to enhance the case's value as a vehicle for resolving lingering questions about the proper scope of a defendant's Fifth Amendment right of silence.

This Court should grant the petition and hold that "the Fifth Amendment . . . forbids . . . comment by the prosecution on the accused's silence," *Griffin*, 380 U.S. at 615 n.37, regardless of whether the silence occurred before or after a defendant was read his *Miranda* rights. The Court should also hold that a defendant's waiver of *Miranda* rights cannot apply retroactively to his pre-*Miranda* silence. The Fifth Amendment's protections cannot possibly turn on when law enforcement chooses to read the defendant a list of judicially created statements that were merely intended as prudential protections of the substantive right. As this Court has held, "[t]he warnings mandated by [*Miranda* are] a prophylactic means of safeguarding Fifth Amendment rights," *Doyle*, 426 U.S. at 617 — they are not the genesis of those rights. This Court should use this case as a vehicle to confirm this basic and long-standing principle.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

DAVID J. SCHENCK
(Counsel of Record)
DAVID L. HORAN
ANDREW O. WIRMANI
JONES DAY
2727 N. Harwood Street
Dallas, Texas 75201-1515
(214) 220-3939
Counsel for Petitioner

January 2, 2008
