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YOU HAVE THE RIGHT TO REMAIN SILENT, AND IT *CAN AND WILL BE* USED AGAINST YOU: ADDRESSING POST-ARREST PRE-MIRANDA SILENCE

Maria P. Hirakis[*]

"*In most circumstances, silence is so ambiguous that it is of little probative force.*"[1]
- Justice Thurgood Marshall

ABSTRACT

The right to remain silent has long been recognized by the Supreme Court as requiring a high degree of protection. Since *Miranda v. Arizona* was decided in 1966, procedural safeguards have been put in place to inform individuals of this right upon arrest. Yet, a gray area exists when it comes to the use of an individual's silence post-arrest. It may surprise some that a point in time exists when an individual has not yet been read their *Miranda* rights post-arrest. Several circuit courts have taken the position that any silence that follows arrest but precedes the reading of *Miranda* rights can be used against an individual as evidence of their guilt. The unresolved circuit split on the issue of post-arrest pre-*Miranda* silence continues to pose a threat to one of the most fundamental rights afforded to individuals. Resolution is not out of the Court's reach. By incorporating existing precedent and establishing a bright-line rule which would require formal arrest to immediately trigger *Miranda's* procedural safeguards,

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[1] United States v. Hale, 422 U.S. 176 (1975).

the Court can ensure that the constitutional guarantees which are so deeply rooted in our justice system may continue to prosper.

I. INTRODUCTION

Imagine that you are out with some friends, just taking a joy ride, trying to escape from what seems like a never-ending quarantine imposed by the Government to offset the global pandemic currently affecting most parts of the world. While in quarantine, you needed to find a way to supplement your income due to the job you lost and became a low-level drug dealer, selling small amounts of marijuana to your friends and associates. While on this joy ride, you happen to have a small amount of marijuana, enough to violate the possession laws of your state. You had no intention of making a sale tonight; you just wanted to get out of the house and get some fresh air. Regardless of your intentions, you have been pulled over by undercover narcotics police.

The arresting officers handcuff you, put you in the back of their vehicle, and drive you to the police station. The anomaly in this otherwise typical scenario is that you have not yet been read your *Miranda*[2] rights, but you know they *should* be read anytime soon. Regardless of the delayed reading, you are aware of your rights, so you choose to remain silent when questioned by the police officers as to why you were in possession of the marijuana at the time of your arrest. In your mind, you are exercising your constitutionally protected rights and cannot suffer any adverse consequences for doing so. However, in some states, your choice to remain silent can and will be used against you in a court of law.[3]

In movies and television shows, such as *Law and Order*,[4] once an individual has been placed into handcuffs, the reading of those famous rights is an automatic response by the arresting officers. A person would think that once they are handcuffed, they are officially in police custody and are therefore required to be read their rights.[5] The problem is, depending on where one lives, officers can willfully delay these readings and the arrestee's choice to remain silent can be

[2] Miranda v. Arizona, 384 U.S. 436 (1966).
[3] *See infra* Part IV.
[4] *Law & Order, Special Victims Unit*: *Bad Blood* (NBC television broadcast Jan. 14, 2000).
[5] *Miranda*, 384 U.S. at 444 ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney either retained or appointed.").

used against them as evidence of their guilt.[6] The issue of the use of *post*-arrest *pre-Miranda* silence as substantive evidence of a defendant's guilt has gone unresolved for so long and continues to cause a rift in our criminal justice system, where uniformity should be the norm.[7] Yet, Federal Circuit Courts across the United States remain split on the topic, creating the need for resolution by the Supreme Court now more than ever.[8]

The Supreme Court had the opportunity to resolve the split in June of 2020 by granting certiorari in *Palacios-Solis v. United States.*[9] Unfortunately, the Court denied the petition without issuing an opinion, missing the chance to address the issue of whether a defendant's silence after arrest, but before the reading of his *Miranda* rights, may be used as substantive evidence of guilt against him.[10] This Note argues that the Supreme Court erred by not granting certiorari in *Palacios* and that this denial will perpetuate the lack of uniformity in the lower courts on this specific issue. Part II of this Note begins with the historical background of the right to remain silent and its underpinnings in the Fifth Amendment of the Constitution.[11] Part III breaks down the evolution of *Miranda* rights into three subsections. The first subsection discusses how the Supreme Court dealt with silence prior to its holding in *Miranda v. Arizona.*[12] Subsection two discusses the seminal holding in *Miranda*. Subsection three discusses how the Court has defined "custody" and "interrogation" following *Miranda,* and explores the Court's application of *Miranda*, focusing on its invocation requirements and their relationship to pre-trial silence for impeachment purposes, as well as the use of pre-trial silence as substantive evidence of guilt.[13] This subsection discusses pre-trial silence and how it may or may not be used as substantive evidence of a defendant's guilt. This subsection also explores the circumstances in which the Court has addressed this issue, specifically pre-arrest pre-

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[6] Adam M. Hapner, *You Have the Right to Remain Silent, But Anything You Don't Say May Be Used Against You: The Admissibility of Silence as Evidence After Salinas v. Texas*, 66 FLA. L. REV. 1763, 1776 (2014).

[7] *See infra* Parts III and IV for a discussion on the current circuit split.

[8] Matthew J. Thompson Jr., *Salinas v. Texas: The Fifth Amendment Self-Incrimination Burden*, 43 CAP. U. L. REV. 19, 30 (2015).

[9] 949 F.3d 567 (11th Cir. 2020).

[10] Palacios-Solis v. United States, 141 S. Ct. 162 (2020).

[11] U.S. CONST. AMEND. V.

[12] 384 U.S. 436 (1966).

[13] *See infra* Part III Sub. A.

Miranda silence and post-arrest post-*Miranda* silence. Subsection three highlights the importance of the Court addressing the unresolved area of post-arrest pre-*Miranda* silence, that continues to cause a split in the lower courts.

Part IV begins the examination of the current circuit split. This part analyzes decisions of the Fourth,[14] Fifth,[15] Eighth,[16] and Eleventh[17] Circuit Courts, which held that post-arrest pre-*Miranda* silence is admissible as substantive evidence of guilt in the prosecution's case-in-chief. Part V continues the circuit split discussion by presenting cases from the Ninth,[18] Seventh,[19] and D.C.[20] Circuit Courts which have taken the opposite position, holding that post-arrest pre-*Miranda* silence may not be used as substantive evidence of the defendant's guilt.[21]

Part VI argues that the Supreme Court erred in not granting certiorari in *Palacios-Solis.*[22] The Court's decision to ignore this unresolved issue poses a grave threat to a defendant's right to remain silent. Currently, lower courts are free to dictate their own evidentiary rules that may unfairly prejudice a defendant by allowing his post-arrest pre-*Miranda* silence to be used against him as evidence of his guilt. As this Note demonstrates, *Miranda* requires that the police must read the *Miranda* rights to a person upon arrest. Specifically, that there should never be a point in time when a defendant is not immediately read his *Miranda* rights once he has been placed under arrest.

II. HISTORICAL BACKGROUND

Many people know that they have the right to remain silent during interrogation thanks, in part, to shows like *Law and Order*,

[14] United States v. Love, 767 F.2d 1052, 1063 (4th Cir. 1985).
[15] United States v. Garcia-Gil, 133 F. App'x 102, 108 (5th Cir. 2005).
[16] United States v. Fraizer, 394 F.3d 612, 619 (8th Cir. 2002).
[17] United States v. Rivera, 944 F.2d 1563, 1570 (11th Cir. 1991).
[18] United States v. Veldarde-Gomez, 269 F.3d 1023, 1028 (9th Cir. 2001); United States v. Whitehead, 200 F.3d 634, 639 (9th Cir. 2001).
[19] United States v. Hernandez, 948 F.2d 316, 323 (7th Cir. 1991).
[20] United States v. Moore, 104 F.3d 377, 385 (D.C. Cir. 1997).
[21] *See infra* Part V.
[22] *Palacios-Solis*, 141 S. Ct. at 162.

Special Victims Unit.[23] Popular criminal justice shows have helped individuals practically regurgitate the *Miranda* warnings, which has made the right to remain silent one of the most well-known constitutionally protected rights we have.[24] Chief Justice Rehnquist notably said that the *Miranda* warnings "have become part of our national culture."[25] However, while the historical holding in *Miranda v. Arizona* solidified protections of the right to remain silent, the Court's holding was not its origin.[26]

A. The Fifth Amendment

The constitutional underpinnings of the right to remain silent are seen throughout the Fifth Amendment, which was ratified in the Bill of Rights in 1791.[27] The Fifth Amendment states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[28] The plain text provides for protection against self-incrimination.[29] The need for this protection can be traced back to the maxim *nemo tenetur seipsum accusare*, or "no man is bound to accuse himself."[30] This maxim's recognition of the need for protections against self-incrimination stemmed from the "inquisitorial and manifestly unjust methods" of interrogation employed during the British rule.[31] The founders saw how tempting it could be to harass witnesses, intimidate them, and force them to confess to crimes they did not commit during interrogations.[32] The ease in which these concerns could come to fruition gave "rise to a demand for its total abolition."[33] These injustices of the English criminal procedure, which

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[23] *Law & Order, Special Victims Unit*: *Bad Blood* (NBC television broadcast January 14, 2000).
[24] *Miranda*, 384 U.S. at 436; Meaghan Elizabeth Ryan, *Do You Have the Right to Remain Silent? The Substantive Use of Pre-Miranda Silence*, 58 ALA. L. REV. 903, 903 (2007).
[25] Dickerson v. United States, 530 U.S. 428, 443 (2000).
[26] 384 U.S. 436; Andrew J. M. Bentz, *The Original Public Meaning of the Fifth Amendment and Pre-Miranda Silence*, 98 VA. L. REV. 897, 904 (2012).
[27] U.S. CONST. AMEND. V.
[28] *Id.*
[29] *Id.*
[30] Brown v. Walker, 161 U.S. 591, 596–97 (1896).
[31] *Id.*
[32] *Id.*
[33] *Id.*

were "mere rule[s] of evidence, became clothed in this country with the impregnability of a constitutional enactment."[34]

Though not expressly stated in the text of the Fifth Amendment, courts have interpreted that the right to remain silent is indirectly codified within the privilege against self-incrimination.[35] The Supreme Court has noted that the Fifth Amendment allows an individual to refuse to answer an officer's questions "where those answers might incriminate him in future criminal proceedings."[36]

III. THE EVOLUTION OF *MIRANDA*

A. A World Before *Miranda*

Though *Miranda* and its warnings protect silence when an individual is faced with custodial interrogation, it was not the first time the Supreme Court was presented with an issue involving the right to remain silent.[37] In 1926, the Supreme Court held in *Raffel v. United States*[38] that a defendant's privilege under the Fifth Amendment against self-incrimination may be waived when the defendant chooses to take the stand at trial in his own defense.[39] In this case, Raffel was indicted and tried twice for "conspiracy to violate the National Prohibition Act."[40] During the first trial, the jury heard testimony from a prohibition agent who testified that "after the search of a drinking place, Raffel admitted that the place belonged to him," implicating him in an illegal scheme in violation of the Act.[41] Raffel chose not to testify in his own defense during the first trial, but having already heard the testimony of the prosecution's witness, he took the stand during a second trial where he denied ever making any such admission.[42] Raffel

[34] *Id.*
[35] Malloy v. Hogan, 378 U.S. 1, 8 (1964) (holding that the Fifth Amendment "guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will …."). *See Miranda*, 384 U.S. at 461 ("In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.).
[36] Minnesota v. Murphy, 465 U.S. 420, 426 (1984).
[37] Raffel v. United States, 271 U.S. 494, 498 (1926).
[38] *Id.* at 498-99.
[39] *Id.*
[40] *Id*. at 495.
[41] *Id.*
[42] *Id.*

admitted that "he was present at the former trial, and that the same prosecuting witness had then given the same testimony."[43] This provoked the court to question Raffel about his silence and refusal to testify during the first trial, requiring him "to explain why he had not done so."[44]

On a writ of error, the Court was presented with a certification from the Sixth Circuit to resolve the issue of whether the trial court erred in requiring Raffel to disclose that he had not testified on his own behalf during the first trial.[45] The Court held that the Fifth Amendment protections against self-incrimination may be waived by a defendant "by offering himself as a witness" and that a defendant's silence may be used against him for the "purpose of impeaching his credibility."[46] The Court reasoned that the accused could not partially waive his right to remain silent, specifically stating that "having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing."[47] Thus, once a defendant testifies as a witness in his own defense, he waives the privileges and protections against self-incrimination under the Fifth Amendment, notwithstanding the fact that he previously invoked the right.[48] The Court inferred that the privilege of silence may not be as well protected as one would think; rather, it could very easily be lost and weaponized against the accused for impeachment purposes.[49]

Almost twenty years later, the Court in *Johnson v. United States*[50] began to lay the foundation for the assurances held within the *Miranda* warnings. In *Johnson*, the defendant was charged with federal tax evasion between 1936 and 1937.[51] After the defendant chose to take the stand in his own defense at trial, the prosecution cross-examined the defendant about situations that had occurred in 1938, which were not part of the indictment.[52] Counsel for the

[43] *Id.*
[44] *Id*.
[45] *Id*. at 496.
[46] *Id*. at 497.
[47] *Id.*
[48] *Id.* at 499 ("The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf, and not for those who do.").
[44] *Id.*
[50] 318 U.S. 189 (1943).
[51] *Id*. at 190.
[52] *Id.*

defendant objected on the ground of relevance, stating that the questions presented by the prosecution would cause the defendant to incriminate himself.[53] Defense counsel further argued that "cross-examination should be limited to the subjects opened up by the examination in chief."[54] The lower court overruled the objection, finding that the line of questioning presented by the prosecution was permissible "since it bore directly upon credibility."[55]

Counsel for the defendant tried to assert the privilege against self-incrimination on behalf of the defendant, but the court objected, stating that the privilege belonged to "the accused, not his counsel."[56] The court stated that counsel was permitted to inform his client of his rights and that "it is for [the defendant] to determine whether or not he wishes to take advantage of them."[57] Once informed of his right to remain silent, the defendant declined to answer the incriminating question, which resulted in the prosecutor making comments to the jury about the defendant's "assertion of his constitutional privilege."[58] The defendant was subsequently convicted and appealed the judgment of conviction to the Third Circuit.[59] The court affirmed, finding that the lower court's allowance of the comment was justified because it went towards the defendant's credibility.[60]

On review, the Supreme Court agreed that the questions implicating "incriminating circumstances and events already in evidence" were appropriate for relevancy purposes.[61] However, the Court found error in allowing the prosecutor to comment on defendant's assertion of his Fifth Amendment privilege.[62] The Court reasoned that, if a defendant is assured by the court that he may remain silent when faced with incriminating questions, and comments on his silence are later permitted, the court would essentially be entrapping

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[53] *Id*.
[54] *Id*. at 191-92.
[55] *Id.* at 192.
[56] *Id.*
[57] *Id.* (The lower court reiterated the holding in *Raffel* that the privilege against self-incrimination may be waived).
[58] *Id.*
[59] *Id.* at 195.
[60] *Id*.
[61] *Id.* (The Court alluded to the waiver of the privilege against self-incrimination when a defendant takes the stand as his own witness, stating that the defendant "may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence.").
[62] *Id*. at 196 ("[T]he requirements of fair trial may preclude any comment.").

him.[63] Here, the Court acknowledged that, if a defendant expressly invokes and is granted the right to remain silent, the assertion of that right cannot be used as evidence by the prosecution when submitting the case to the jury; any such allowance "would be a mockery of justice."[64]

One year before it decided *Miranda*, the Court ruled in *Griffin v. California*[65] that the prosecution was barred from using a defendant's refusal to testify on his own behalf at trial as substantive evidence of guilt.[66] The California Constitution allowed a defendant's failure to take the stand to be used as evidence of his guilt if the defendant could have been reasonably expected to explain or deny any adverse evidence or facts.[67] In *Griffin*, the defendant was charged with the murder of a woman who was last seen with him before her body was discovered.[68] Griffin challenged the constitutionality of the California provision, which allowed the prosecution to comment on his silence at trial, arguing that it violated his Fifth Amendment privilege against self-incrimination.[69] The Court agreed with the defendant and held that asserting the right to remain silent and refusal to testify at trial was a right afforded to everyone and could not be used against an accused as substantive evidence of guilt.[70]

The *Griffin* Court stated that there are several reasons why defendants would choose not to take the stand in their own defense at trial.[71] Should courts allow a defendant's silence to be commented upon, the exercise of the privilege would become "a penalty imposed

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[63] *Id*. at 197.
[64] *Id.* at 196-97.
[65] 380 U.S. 609 (1965).
[66] *Id*. at 615.
[67] *Id.* at 610 (Article I, § 13, of the California Constitution provides in part that "in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel and may be considered by the court or the jury.").
[68] *Id.*
[69] *Id*. at 613.
[70] *Id.*
[71] *Id.* ("Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not everyone, however, honest, who would therefore willingly be placed on the witness stand.") (quoting Wilson v. United States, 149 U.S. 60, 66 (1893)).

by the courts."[72] The Court recognized that it may be natural for a jury, *on its own*, to infer guilt from a defendant's failure to testify, and commenting upon that failure does not rise to the level of penalty.[73] What is unusual, however, is the inference that the jury may draw when *the court* "solemnizes the silence of the accused into evidence against him."[74]

While the Court addressed silence prior to *Miranda*, the topic was only discussed as it related to the use of silence during trial.[75] Prior to *Miranda*, a defendant could waive his Fifth Amendment if he took the stand in his own defense.[76] Once waived, a defendant's silence could be used against him, but solely for impeaching his credibility.[77] If a defendant chose to take the stand in his own defense and *expressly* invoked his Fifth Amendment privileges, the prosecution would be barred from using that invocation as substantive evidence of guilt.[78] Likewise, should a defendant *refuse* to testify at trial, the prosecution could not use the refusal as substantive evidence of guilt.[79]

B. Miranda v. Arizona

Miranda v. Arizona[80] was the result of a consolidation of four cases;[81] however, the Supreme Court decided to focus on the facts of Ernesto Miranda's case.[82] Miranda was arrested on March 13, 1963 following the alleged rape of an 18-year-old girl in Arizona.[83] Once arrested, police took Miranda to the station where the victim picked him out of a lineup.[84] Although he initially denied any involvement,

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[72] *Griffin*, 380 U.S. at 614 ("It cuts down on the privilege by making its assertion costly.").
[73] *Id*.
[74] *Id.*
[75] *Id.* at 615.
[76] Raffel v. United States, 271 U.S. 494, 498 (1926).
[77] *Id.*
[78] Johnson v. United States, 318 U.S. 189, 197 (1943).
[79] *Griffin*, 380 U.S. at 615.
[80] 384 U.S. 436, 518 (1966).
[81] People v. Vignera, 15 N.Y.2d 970 (1965); Westover v. United States, 342 F.2d 684 (9th Cir. 1965); People v. Stewart, 62 Cal. 2d 571 (1965).
[82] *Miranda*, 384 U.S. at 518.
[83] *Id*. (Court records indicate that at the time of his arrest, Miranda was indigent, had minimal education and was suffering from severe mental illness, such as schizophrenia.).
[84] *Id*.

Miranda confessed and signed a sworn statement admitting to and describing the crime after two hours of interrogation.[85] Although the Court noted that the interrogation served a legitimate purpose, was fair, and provided little risk of injustice, the Court ultimately held that the resulting confession was inadmissible.[86]

The Court addressed the issue of the "admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way."[87] The Court was concerned with preserving and safeguarding a defendant's Fifth Amendment privilege not to be compelled to incriminate himself.[88] As a result, new procedural safeguards were formed to be implemented during the custodial interrogation of any defendant, which would effectively serve to secure the privilege against self-incrimination.[89] This new rule required that:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.[90]

The Court defined custodial interrogation to mean "questioning initiated by law enforcement officers after a person has been taken into custody or *otherwise deprived of his freedom of action in a significant way*."[91] Noticeably absent from the Court's decision was a definition or standard for determining when an individual is considered to be taken into "custody," triggering these hallmark warnings.

C. A World After *Miranda*

After *Miranda*, it became evident that two important factors surrounding the protections of *Miranda* warnings were not clear from

[85] *Id.* (The Court noted that this was done without any force, threats or promises.).
[86] *Id*. at 519.
[87] *Id*. at 445.
[88] *Id*. at 439.
[89] *Id*. at 444.
[90] *Id.*
[91] *Id*. (emphasis added).

the Court's holding, namely when one is "in custody" and what types of questions would place a defendant in an "interrogation" for the purposes of *Miranda*. As a result, the Court began to distinguish when pre-trial silence is protected and when it is not, and how the prosecution's use of that silence can affect that outcome.

1. Defining "Custody" and "Interrogation"

Miranda provides protections against arbitrary methods of questioning while the accused is subject to custodial interrogation, but it seemingly applies the right to remain silent strictly to when someone is in "custody."[92] The Court's holding fell short by not clarifying when exactly someone is considered to be in "custody," entitling them to *Miranda* warnings. This distinction is an important one, since being placed into "custody" could be the factor that triggers Fifth Amendment protections.

Fortunately, the Supreme Court resolved this uncertainty in 1995 in *Thompson v. Keohane*,[93] where it developed a two-part test to determine whether a person is considered to be held in police custody, thereby entitling them to be *Mirandized*.[94] In *Thompson*, the defendant, Carl Thompson, was charged with first-degree murder for the murder of his ex-wife.[95] Thompson voluntarily appeared for questioning at police headquarters, where after two hours of questioning, Thompson confessed to the crime.[96] Thompson was not read his *Miranda* rights prior to the interrogation, which resulted in a confession.[97] The issue before the Court on a writ of habeas corpus was whether Thompson was considered to be in "custody" when the interrogation took place, thereby requiring the officers to read him his *Miranda* rights.[98]

The Court's two-part test requires two questions to be answered to determine whether someone is considered to be in custody for *Miranda* purposes:

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[92] *Miranda*, 384 U.S. at 444.
[93] 516 U.S. 99, 112 (1995).
[94] *Id.*
[95] *Id.* at 103.
[96] *Id.*
[97] *Id.* (Thompson was constantly assured that he was free to leave.).
[98] *Id.* ("*Miranda* warnings are due only when a suspect interrogated by the police is 'in custody.'").

> Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. [T]he court must apply an objective test to resolve "the ultimate inquiry": "[was] there a '*formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest*."[99]

Thus, the holding in *Thompson* requires an objective analysis, taking into consideration all the surrounding circumstances and determining whether a reasonable person would have felt that they were constrained and unable to leave the interrogation.[100]

Equally left unclear in *Miranda* were the methods of questioning that create a formal interrogation, putting the accused in the proper setting or environment to require law enforcement to read the suspects their *Miranda* rights.[101] In 1980, the Court in *Rhode Island v. Innis*[102] finally provided an answer. In *Innis*, the defendant was arrested and charged with kidnapping, robbery, and murder.[103] Upon his arrest, the defendant was read his *Miranda* rights not once, but four times.[104] When the defendant was read his rights by Captain Leyden the first time, he expressly stated that "he understood those rights and wanted to speak with a lawyer."[105] The defendant was placed in a police patrol car and accompanied by three officers who were all instructed by their Captain "not to question the respondent or intimidate or coerce him in any way."[106]

Two of the officers began talking amongst themselves about their concerns for local handicapped children in the area, fearing that they might stumble upon the unrecovered gun used during the alleged

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[99] *Id.* at 112 (emphasis added) (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)).
[100] *Id.*
[101] Miranda v. Arizona, 384 U.S. 436 (1966).
[102] 466 U.S. 291 (1980).
[103] *Id*. at 295.
[104] *Id.* at 294 (The arresting officer placed the defendant under arrest and read him his *Miranda* rights. A Sergeant then arrived at the scene and read the defendant his rights a second time. The captain then arrived and read the defendant his rights for a third and fourth time.).
[105] *Id.*
[106] *Id.*

crimes and hurt themselves.[107] The defendant, overhearing the conversation and also growing concerned for the children's safety, urged the officers to turn their patrol car around so that "he could show them where the gun was located."[108] The question presented to the Court on review was whether the conversation between the two officers amounted to an interrogation.[109]

Instead of defining interrogation as strictly involving any express questioning, the Court was more concerned with the "interrogation environment."[110] The Court again developed an objective analysis for determining what constitutes an interrogation for *Miranda* purposes, holding that "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect."[111] Here, the Court chose to focus on the "perceptions of the suspect" and what actions the police should have known were objectively likely to lead to the suspect making incriminating statements.[112] In *Innis*, interrogation, for the purpose of warranting *Miranda* warnings, is defined as "any practice that the police should know is reasonably likely to evoke an incriminating response from a suspect."[113] Thus, under this objective standard, the actions of the arresting officers would likely trigger the need for the accused to be *Mirandized*.

2. How the Right to Remain Silent is Invoked

The procedural requirements in *Miranda* protect a defendant's right against self-incrimination; however, that right must be expressly invoked according to the Court in *Roberts v. United States.*[114] In that case, Roberts accompanied Cecilia Payne to the United States

[107] *Id.*
[108] *Id.*
[109] *Id.* at 298 (The Court chose not to define "interrogation" as narrowly as the *Miranda* Court did. The Court cited to the definition of custodial interrogation in *Miranda*, stating that "the *Miranda* rules were to apply only to those police interrogation practices that involve express questioning of a defendant while in custody.")
[110] *Id.* at 299.
[111] *Id.* at 301.
[112] *Id.*
[113] *Id.*
[114] 445 U.S. 552, 559 (1980).

Attorney's office on suspected drug trafficking charges.[115] Payne suggested that investigators ask Roberts about the activities since she occasionally lent her car to Roberts.[116] Roberts voluntarily agreed to answer the investigator's questions, was read his *Miranda* rights, and was advised that he was free to leave at any time.[117] After confessing to the alleged crimes, Roberts refused to cooperate with the investigation any further.[118] Roberts appealed his sentence, arguing that it should not have been based on his refusal to cooperate with the investigation.[119] The Court rejected Roberts' claim, holding that a defendant must expressly invoke the privilege against self-incrimination in order to be afforded its protection, reasoning that the privilege is "not self-executing."[120] Therefore, under *Roberts*, mere silence does not invoke one's Fifth Amendment privilege against self-incrimination.[121]

3. Pre-Trial Silence for Impeachment Purposes

In 1976, the Court granted certiorari in *Doyle v. Ohio*.[122] The defendants in *Doyle* challenged the constitutionality of the prosecution's comment upon their silence after they were arrested and received *Miranda* warnings.[123] Doyle and Wood were both arrested and charged with the sale of marijuana.[124] At trial, both defendants took the stand in their own defense and claimed, for the first time, that they were framed.[125] The prosecutor, on cross-examination, questioned the defendants as to why they had not told the arresting officers about this exculpatory information upon their arrest.[126] The defendants objected to this line of questioning and both objections were overruled.[127]

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[115] *Id.*
[116] *Id*. at 553.
[117] *Id*.
[118] *Id*. at 554.
[119] *Id*. at 556.
[120] *Id*. at 559.
[121] *Id*.
[122] 426 U.S. 610, 616 (1976).
[123] *Id*. at 611.
[124] *Id*.
[125] *Id*. at 613.
[126] *Id*.
[127] *Id*. at 614.

The Court of Appeals affirmed the subsequent convictions, finding that the use of the defendant's silence was permissible because it went to credibility and was not used as substantive evidence of guilt.[128] After the Supreme Court of Ohio denied review, the United States Supreme Court granted certiorari "to decide whether impeachment of a defendant's arrest silence violates any provision of the Constitution."[129] The State claimed that it was necessary to question the defendants about their story because the discrepancy and the time line would give "rise to an inference that the story was fabricated somewhere along the way."[130] The Court ultimately rejected this argument.[131]

Because the defendants' silence post-arrest was preceded by *Miranda* warnings, the Court explained that such silence "may be nothing more than the arrestee's exercise of these *Miranda* rights " and explained that "post-arrest silence is insolubly ambiguous."[132] The Court ultimately held that it would be "fundamentally unfair and a deprivation of due process" to allow the prosecutor to comment upon a defendant's silence post-arrest for impeachment purposes at trial.[133] While the Court held that post-arrest post-*Miranda* silence could not be used for impeachment purposes in *Doyle,* it came to the opposite conclusion when the case involved pre-arrest pre-*Miranda* silence in *Jenkins v. Anderson*,[134] and post-arrest pre-*Miranda* silence in *Fletcher v. Weir*.[135]

The defendant in *Jenkins* was charged with first-degree murder and claimed at his trial, for the first time, that he acted in self-defense.[136] The prosecutor questioned the defendant as to why he had not told anyone the self-defense story at any point prior to his surrender to the authorities two-weeks after the killing.[137] The defendant's pre-arrest silence was mentioned again during closing arguments in order to impeach his credibility "by suggesting that he would have spoken

[128] *Id.* at 615.
[129] *Id.* at 616.
[130] *Id.*
[131] *Id.*
[132] *Id.* at 618.
[133] *Id.* (The Court held that it was a violation of the Due Process Clause of the Fourteenth Amendment, not the Fifth Amendment.).
[134] 447 U.S. 231, 238 (1980).
[135] 455 U.S. 603, 607 (1983).
[136] *Jenkins*, 477 U.S. at 231.
[137] *Id.*

out if he had killed in self-defense."[138] The defendant was subsequently convicted and his constitutional challenge came before the Supreme Court on writ.[139] Relying on its holding in *Raffel*,[140] the Court held that the defendant's Fifth Amendment rights were not violated because he "voluntarily took the witness stand in his own defense" and was "impeached with his prior silence."[141] The Court supported its holding by finding that the fundamental fairness protection laid out in *Doyle* was not present because there was "no governmental action [which] induced petitioner to remain silent before arrest."[142]

Similarly, in *Fletcher*, the defendant claimed self-defense for the first time at trial.[143] The prosecution questioned the defendant as to why he did not offer the exculpatory statement at the time he was arrested.[144] The Court distinguished this case from *Doyle* because the record did not "indicate that respondent Weir received any *Miranda* warnings during the period in which he remained silent immediately after his arrest."[145] Since there were no "affirmative assurances" present which would lead the defendant to believe his silence would not be used against him, the Court held that there was no violation of the defendant's due process rights.[146]

It appears that the line the Court draws on the constitutionality of using silence for impeachment purposes turns on whether a defendant has been read his *Miranda* rights. The prosecution is therefore barred from using any pre-trial silence that follows *Miranda* warnings to impeach a defendant's credibility at trial. Any pre-trial silence which precedes *Miranda* warnings and its assurances is fair game for the prosecution to use against a defendant for impeachment purposes.[147]

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[138] *Id.*
[139] *Id.*
[140] Raffel v. United States, 271 U.S. 494, 499 (1926).
[141] *Jenkins*, 447 U.S. at 235.
[142] *Id.* at 240 (alteration in original).
[143] *Fletcher*, 455 U.S. at 604.
[144] *Id.* at 604.
[145] *Id.* at 605.
[146] *Id.* at 607.
[147] *See Jenkins*, 447 U.S. at 240; *see also Fletcher*, 455 U.S. at 607.

4. Pre-Trial Silence as Substantive Evidence of Guilt

This Note focuses on whether allowing the prosecution to use a defendant's silence as substantive evidence of guilt in their case-in-chief is a constitutional violation. Similarly, the Court has drawn distinctive lines on when the prosecution is permitted to use pre-trail silence in its case-in-chief for impeachment purposes.

The Court addressed the use of post-arrest post-*Miranda* silence as evidence of the defendant's sanity in *Wainwright v. Greenfield*.[148] After the defendant in *Wainwright* was accused of sexual battery and arrested, he was read his *Miranda* rights on three separate occasions.[149] On each occasion, the defendant stated that he understood these rights and requested that his attorney be present before making any statements.[150] The defendant pleaded "not guilty by reason of insanity."[151] In its case-in-chief and during closing arguments, the prosecution presented the testimony of the arresting officers "and suggested that respondent's repeated refusal to answer questions without first consulting an attorney demonstrated a degree of comprehension that was inconsistent with his claim of insanity."[152]

Relying on its reasoning in *Doyle*, the Court held that there were implicit assurances "contained in the *Miranda* warnings 'that silence will carry no penalty.'"[153] The fundamental unfairness in allowing post-arrest post-*Miranda* silence to be commented upon was extended to cases where it was used in the prosecution's case-in-chief.[154] Once a defendant has been assured that his silence would not be used against him, it would be a "breach" of that promise and assurance to allow the prosecution to impermissibly use the defendant's silence in its case-in-chief.[155]

The issue of using pre-arrest pre-*Miranda* silence as substantive evidence of guilt was brought before the Court in *Salinas v. Texas*.[156] The holding in *Salinas* highlighted the importance of

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[148] 474 U.S. 284, 286 (1986).
[149] *Id.*
[150] *Id.*
[151] *Id.* at 287.
[152] *Id.*
[153] *Id.* at 290 (citing Doyle v. Ohio, 426 U.S. 610, 618 (1976)).
[154] *Id.* at 294.
[155] *Id.* at 285.
[156] 570 U.S. 178, 179 (2013).

understanding when someone is in police custody.[157] Because the defendant in *Salinas* agreed to voluntarily accompany police officers to the station "and was free to leave at any time," the Court found that he was not in "custody" and was therefore not required to be *Mirandized*.[158] The defendant was cooperative during this "noncustodial" interview but refused to answer the officer when asked whether the bullets of his shotgun "would match the shells recovered at the scene of the murder."[159] During trial, the prosecutor used the defendant's silence during questioning as "evidence of his guilt" and he was subsequently found guilty.[160]

Certiorari was granted to address the issue of "whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief."[161] However, the Court found it was unnecessary to address the question "because the petitioner did not invoke the privilege during his interview."[162] This was the Court's chance to resolve the circuit split, but the majority believed that addressing that question was unnecessary because the case could be decided on different grounds.[163] The holding incorporated the rule in *Roberts*, which requires a defendant to *expressly* invoke his Fifth Amendment right to remain silent.[164] The exception to this rule, of course, is where the defendant is faced with an "unwarned custodial interrogation."[165]

The Court reasoned that, because the defendant voluntarily accompanied police to the station and was free to leave at any time, he was not in "custody."[166] Because he did not meet the exception laid out in *Miranda*, he was required to expressly invoke his Fifth Amendment protections.[167] As a result, the Court found that the prosecution's use of the defendant's noncustodial silence did not violate his Fifth Amendment rights.[168] Had the defendant been placed

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[157] *Id.* at 185.
[158] *Id.*
[159] *Id.* at 182.
[160] *Id.*
[161] *Id.* at 183.
[162] *Id.*
[163] *Id.*
[164] *Id. See* Roberts v. United States, 445 U.S. 552, 559 (1980).
[165] Miranda v. Arizona, 384 U.S. 436, 467 (1966).
[166] *Id.*
[167] Salinas v. Texas, 570 U.S. 178, 185 (2013).
[168] *Id.*

into "custody" prior to questioning, he would not have been required to affirmatively invoke his right to remain silent.

IV. THE WRONG SIDE OF THE CIRCUIT SPLIT

The Fourth, Fifth, Eighth, and Eleventh Circuit Courts have all taken the position that the prosecution's use of a defendant's post-arrest pre-*Miranda* silence as substantive evidence of guilt does not violate Fifth Amendment protections against self-incrimination.[169] The basis for each circuit court's opinion is uniform: receipt of *Miranda* warnings is the determinative factor for whether pre-trial silence is protected.[170] Absent the assurances that officers are required to read when arresting a suspect, that the accused has the right to remain silent, these courts have found that the use of post-arrest pre-*Miranda* statements is admissible to prove a defendant's guilt.[171]

The Fourth Circuit first addressed the issue in *United States v. Love*,[172] holding that in the absence of *Miranda* warnings, there was no error in allowing testimony concerning the defendant's pre-trial silence as evidence of the defendant's guilt.[173] In *Love*, three defendants were charged and convicted of a number of different drug related offenses, as well as violation of the federal racketeering statute ("RICO"), among other federal offenses.[174] The defendants presented a number of grounds for reversing their convictions, but the only one this Note is concerned with is the demand for a mistrial after the arresting officer was allowed to testify to the silence of two defendants the night they were arrested.[175] The Fourth Circuit relied on the Court's holding in *Fletcher*, where the prosecution was permitted to present testimony concerning a defendant's silence "where the defendant has not received any *Miranda* warnings during the period in

[169] United States v. Love, 767 F.2d 1052, 1063 (4th Cir. 1985); United States v. Garcia-Gil, 133 F. App'x 102, 108 (5th Cir. 2005); United States v. Fraizer, 394 F.3d 612, 619 (8th Cir. 2002); United States v. Rivera, 944 F.2d 1563, 1570 (11th Cir. 1991).

[170] Meaghan Elizabeth Ryan, *Do You Have the Right to Remain Silent?: The Substantive Use of Pre-Miranda Silence*, 58 ALA. L. REV. 903, 908 (2007).

[171] *Love*, 767 F.2d at 1063; *Garcia-Gil*, 133 F. App'x at 108; *Fraizer*, 394 F.3d at 619; *Rivera*, 944 F.2d at 1570.

[172] *Love*, 767 F.2d at 1063.

[173] *Id.* at 1063.

[174] *Id.* at 1054.

[175] *Id.* at 1063.

which he remained silent immediately after his arrest."[176] Although the holding in *Fletcher* applied exclusively to the use of pre-trial silence for impeachment purposes, the Fourth Circuit found that the Court's reasoning was appropriate since none of the defendants in *Love* had been given any *Miranda* warnings.[177] The Fourth Circuit court did not discuss whether the defendants in *Love* should have received Miranda warnings following their formal arrest.

The Eleventh Circuit soon followed in 1991 when it decided *United States v. Rivera.*[178] Defendants in *Rivera* were convicted of conspiracy to import, importation of, conspiracy to possess with intent to distribute, and possession with intent to distribute in excess of 500 grams of cocaine.[179] They subsequently appealed their convictions, requesting a mistrial on the ground that the government violated their Fifth Amendment rights by commenting on their silence at trial "after having been arrested and given warnings as required by *Miranda v. Arizona*."[180] The defendants were traveling to Miami from Colombia when they were stopped by United States Customs agents, who accused them of smugglings drugs into the country.[181] After conducting a quick search in the inspection area, the agent found cocaine in one of the defendant's luggage, which had been altered to include a false bottom.[182] The agent testified "that the group showed no surprise, agitation or protest while he was probing Stroud's luggage."[183] After placing the three suspects into separate rooms so their luggage could be inspected, the agent noticed all of the suitcases were identical to the one that contained a false bottom, where he subsequently founded cocaine.[184] Upon such examination, the agent informed all three suspects that they were under arrest and read them their *Miranda* rights.[185]

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[176] Fletcher v. Weir, 455 U.S. 603, 607 (1983).
[177] *Love*, 767 F.2d at 1063; *Fletcher*, 455 U.S. at 607.
[178] 944 F.3d 1563 (11th Cir. 1991).
[179] *Id.* at 1565.
[180] *Id.* at 1566 (One of the three defendants initially charged had pleaded guilty prior to trial.).
[181] *Id.*
[182] *Id.* (This case involved three defendants: Elena Vila, Johnny Rivera, and John Stroud. Stroud's suitcase contained the cocaine discovered during the initial inspection.).
[183] *Id.*
[184] *Id.* at 1566.
[185] *Id.*

The arresting agent testified as to the defendants' demeanors as he observed them at three different points, the first of which was the initial confrontation and the subsequent searches.[186] While the court found that any comment on the defendants' demeanors which was observed *after* they were read their *Miranda* rights was impermissible, any testimony as to their demeanors *before* such rights were read was not improper.[187] The court relied on the holding in *Fletcher*, finding that "the government may comment on a defendant's silence when it occurs after arrest, but before *Miranda* warnings are given," again ignoring that the holding in *Fletcher* applied only to the use of silence for impeachment purposes.[188]

The Fifth Circuit joined the split in 2005 with its decision in the case of *United States v. Garcia-Gil*.[189] The defendant in *Garcia* was convicted of conspiracy and possession with the intent to distribute more than twenty kilograms of cocaine after being stopped by Border Patrol Agents.[190] After searching his car, the agents told Garcia he was under arrest, at which time Garcia turned around, put his hands behind his back, and remained silent.[191] During Garcia's trial, despite the fact that the agents handcuffed him and read him his *Miranda* rights, the period of silence between when he put his hands behind his back and when he was handcuffed was presented as evidence.[192] The arresting agents both testified that Garcia did nothing more than put his head down and place his hands behind his back.[193] Garcia argued that the government's use of this brief period of silence seconds before being read his *Miranda* rights was a violation of his Fifth Amendment rights.[194] The Fifth Circuit disagreed, stating that "[u]se at trial of pre-*Miranda* silence is not necessarily unconstitutional.[195] Garcia argued that post-arrest pre-*Miranda* silence

[186] *Id.* at 1567.
[187] *Id.* at 1568.
[188] *Id.* (citing Fletcher v. Weir, 455 U.S. 603, 607 (1982)).
[189] 133 Fed. App'x 102 (5th Cir. 2005) (The Fifth Circuit also decided *Salinas v. Texas* in 2007 which made its way up to the Supreme Court, but the issue of post-arrest pre-*Miranda* silence was not addressed by the Court, which decided the case on other grounds, namely the express invocation requirement.). *See* Salinas v. Texas, 570 U.S. 178 (2013).
[190] *Id.* at 104.
[191] *Id.*
[192] *Id.* at 107.
[193] *Id.*
[194] *Id.*
[195] *Id.*

may only be used at trial for impeachment purposes; however, the Fifth Circuit had already decided the issue and provided precedent to support its ultimate decision to find no error in allowing the pre-*Miranda* silence.[196]

The Eighth Circuit joined its sister circuits the same year with its decision in *United States v. Fraizer*.[197] The defendant in *Fraizer* was charged and convicted on drug related charges.[198] The defendant appealed his conviction on several grounds, which focused on the government's use of post-arrest pre-*Miranda* silence as a violation of his Fifth Amendment right against self-incrimination.[199] The Eighth Circuit noted the Court's lack of guidance on this issue, stating that "[t]he use of silence in criminal cases has been addressed by the Court under almost all but the instant circumstances."[200] Similar to the agents in *Garcia*,[201] here the arresting officer testified to the defendant's silence during and right after his arrest, which the government noted as "one factor that could be indicative of guilt."[202] The Eighth Circuit relied on the Court's ruling in *Fletcher*, holding that Fraizer was under no government-imposed compulsion to speak (i.e. interrogation) which would induce a defendant to remain silent.[203] Because Fraizer was under no compulsion to speak at the time of his arrest, his choice to remain silent was irrelevant and thus, the court found that the admission of testimony as to his silence as substantive proof of his guilt did not violate his Fifth Amendment right against self-incrimination.[204]

V. THE RIGHT SIDE OF THE CIRCUIT SPLIT

The Seventh, Ninth, and D.C. Circuit Courts of Appeals have all held that the government's use of post-arrest pre-*Miranda* silence

[196] *Id* (citing United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996)).
[197] 394 F.3d 612 (8th Cir. 2005).
[198] *Id.* at 614.
[199] *Id.*
[200] *Id.* at 618 (The Eighth Circuit went on to cite the holdings in *Doyle* (Doyle v. Ohio, 426 U.S. 610, 619 (1976)), as well as *Wainwright* (Wainwright v. Greenfield, 474 U.S. 284, 286 (1986)). The court also noted the circuit split.).
[201] United States v. Garcia-Gil, 133 Fed. App'x 102, 107 (5th Cir. 2005)
[202] *Id.* at 618.
[203] *Id.* at 620 (citing Fletcher v. Weir, 455 U.S. 603, 606 (1983).
[204] *Id.*

as substantive evidence of a defendant's guilt violates the Fifth Amendment.[205]

The Seventh Circuit ruled on the issue in *United States v. Hernandez*,[206] though it nevertheless found the error in allowing testimony regarding the defendant's silence to be harmless.[207] The defendant in *Hernandez* was charged with conspiracy to possess and distribute cocaine after he was arrested following an encounter with an undercover agent.[208] The issue of the evidentiary use of the defendant's silence arose when the prosecutor asked the arresting officer whether the defendant had said anything in response to being told he was under arrest.[209] Defense counsel objected and addressed the issue of the pre-*Miranda* silence as well as statements made post-*Miranda*.[210] However, defense counsel did not pursue the pre-*Miranda* issue and the judge sustained the objection, which was limited only to any post-*Miranda* statements.[211] Although the prosecutor was told twice to "go into another area," the judge allowed the prosecutor to repeat the question to the jury, to which the arresting officer answered "No."[212] While the defendant objected and moved for a mistrial, the judge denied the motion and directed the prosecutor to move on, thereby allowing the silence to be admitted into evidence.[213]

Upon review, the Seventh Circuit began its discussion of the use of post-arrest silence by quoting precedent, where it previously held that "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 police."[214] The court found that the prosecutor deliberately intended to elicit direct reference to the defendant's silence when the witness was asked to recount the

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[205] United States v. Veldarde-Gomez, 269 F.3d 1023, 1029 (9th Cir. 2001); United States v. Whitehead, 200 F.3d 634, 639 (9th Cir. 2001); United States v. Hernandez, 948 F.2d 316, 324 (7th Cir. 1991); United States v. Moore, 104 F.3d 377, 385 (D.C. Cir. 1997).

[206] 948 F.2d 316, 324 (7th Cir. 1997).

[207] *Id.* at 324.

[208] *Id.* at 317.

[209] *Id.* at 322.

[210] *Id.*

[211] *Id.*

[212] *Id.* (The question asked by the prosecutor was whether the defendant had said anything in response after being told he was under arrest.).

[213] *Id.*

[214] *Id.* (quoting United States v. Ramos, 932 F.2d 611, 616 (7th Cir. 1991)).

defendant's response to police confrontation.[215] The court held that the lower court erroneously allowed the mention of the defendant's silence to be brought into evidence, but that the error was "harmless beyond a reasonable doubt."[216] Since the mention of the defendant's silence was only momentary and mentioned while discussing admissibility of other matters, when viewed in the context of the entire record, "the single reference to [the defendant's] silence was minor, and…its admission had no impact on the jury."[217] While the court ultimately held that the error was harmless, it was an error, nonetheless.[218]

The Ninth Circuit held that the prosecution's use of silence as evidence of guilt was prohibited and a violation of the Fifth Amendment in *United States v. Whitehead*.[219] The defendant in *Whitehead* was stopped and questioned by Immigration and Naturalization Service ("INS") officers as he attempted to enter California from the Mexico border.[220] Whitehead's nervous appearance and the suspicious appearance of the vehicle he was driving prompted INS officers to pull Whitehead into a secondary inspection lot, where a narcotics-detector dog screened Whitehead's car "and alerted to the rear of the vehicle," where a substantial amount of marijuana was recovered.[221] Whitehead and his brother, who was in the passenger's seat, were both placed into custody, but not yet read their *Miranda* rights.[222] While in custody, and when later placed into separate holding cells, Whitehead continued to remain silent.[223] At

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[215] *Id.* at 324.

[216] *Id.* (The Court considered three factors in determining that the error was harmless beyond a reasonable doubt where the evidence of guilt was not overwhelming and the "impact of the objectionable material was negligible." These factors include (1) the brevity of the prosecutor's references to the defendant's silence, (2) the weight of the silence compared to the entire record, and (3) the fact that most of the references to silence were made during the witness's testimony to show not that the defendant was silent, but that he told inconsistent stories.) (citing Fencl v. Abrahamson, 841 F.2d 760, 769 (7th Cir. 1988)).

[217] *Id*. at 325.

[218] *Id*.

[219] 200 F.3d 634, 639 (9th Cir. 2000).

[220] *Id.* at 636.

[221] *Id*.

[222] *Id.*

[223] *Id*. at 637 (The Court noted that it was "undisputed that after he was taken into custody for the purposes of *Miranda*, but before he was read the *Miranda* warnings, Whitehead exercised his right to remain silent.").

trial, the prosecutor asked the arresting officer several leading questions, soliciting responses that indicated that Whitehead had remained silent throughout the entire incident leading to his arrest.[224] During closing arguments "the prosecutor argued to the jury that Whitehead remained silent because he knew he was guilty."[225]

The court reviewed the claim under the plain-error standard and ultimately ruled that while "the district court committed 'error' that is 'plain', we cannot conclude that the error affected Whitehead's substantial rights."[226] Similar to the Seventh Circuit's holding in *Hernandez*, the Ninth Circuit held that the Whitehead's privilege against self-incrimination was infringed upon, but that this error did not affect the outcome of the proceeding because of the "overwhelming physical evidence of Whitehead's guilt."[227] The court nonetheless joined the circuit split by ruling that the prosecutor's use of the defendant's post-arrest pre-*Miranda* silence was improper and an infringement of his Fifth Amendment rights.[228]

The Ninth Circuit heard *United States v. Velarde-Gomez* (*Velarde*) a year later, a case similar to *Whitehead*.[229] The court relied on its precedent in *Whitehead*, finding that the defendant's Fifth Amendment protections against self-incrimination in *Velarde* were violated.[230] Like the defendant in *Whitehead*, Velarde was arrested while attempting to transport marijuana into the United States from Mexico, placed into custody, remained silent while in custody, and had an adverse inference drawn from his silence by the jury.[231] The government tried to argue that *Velarde* could be distinguished from

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[224] *Id.*

[225] *Id.* at 638 (The court found that there was "no question that an inference of guilt from silence was stressed to the jury in violation of Whitehead's constitutional rights.").

[226] *Id.* (The court reviewed Whitehead's claim for plain error because he did not property object in the district court. Nor did he "preserve his objection to the use of his silence through his pretrial motion in limine to suppress statements." Under the plain-error standard, there must be an "error," that is "plain," which ultimately affects substantial rights. If all three of these requirements are met, a court may exercise its discretion to "notice of forfeited error," but only if that error "seriously affects the fairness, integrity, or public reputation of judicial proceedings.") (quoting Johnson v. United States, 520 U.S. 461, 466-67 (1977)).

[227] *Id.* at 639.

[228] *Id.*

[229] 269 F.3d 1023 (9th Cir. 2001).

[230] *Id.* at 1029. *See* United States v. Whitehead, 200 F.3d 634, 639 (9th Cir. 2000).

[231] *Velarde*, 269 F.3d at 1029. *See Whitehead*, 200 F.3d at 639.

Whitehead because the government had commented on Velarde's "demeanor" – not his silence.[232]

Velarde attempted to enter California from Mexico when he was stopped at a primary inspection site.[233] Velarde told Customs Agent Rodriguez that he had just purchased the 1983 Grand Marquis he was driving twenty days earlier and had gone to Mexico "to do some drinking."[234] The title to the automobile remained in the prior owner's name, which caused Agent Rodriguez to become suspicious about the car's ownership, leading him to ask Velarde to proceed to a secondary inspection site.[235] There, the detection dog alerted Customs officials to the gas tank of the vehicle, where sixty-three pounds of marijuana were found.[236] Velarde was brought into an interview room where he was informed that the agents had found the marijuana in his gas tank.[237] However, "Velarde did not speak or physically respond."[238] Agent Salazar eventually read Velarde his *Miranda* rights, which Velarde subsequently waived, subjecting himself to questioning.[239]

Velarde filed a motion in limine to exclude evidence of his silence and demeanor, which the district court initially granted.[240] However, after the prosecution asked for clarification of the court's ruling regarding the inadmissibility of Velarde's post-arrest silence and demeanor, the district court reconsidered its previous ruling and allowed the government to introduce all of its "evidence of 'demeanor' both before and after Velarde waived his *Miranda* rights."[241] The government elicited Agent Salazar's testimony, over the defense's objection, as to Velarde's non-responsiveness during the initial interview after the marijuana was first discovered.[242] The prosecutor addressed the jury, stating that Velarde was the "perfect guy" for the job as a drug courier because he was "totally relaxed" and "showed no emotion."[243] While the government may have tried to distinguish

[232] *Velarde*, 269 F.3d at 1030.
[233] *Id*. at 1026.
[234] *Id.*
[235] *Id.*
[236] *Id.*
[237] *Id*.
[238] *Id*.
[239] *Id*.
[240] *Id*.
[241] *Id.* at 1026-27.
[242] *Id*.
[243] *Id.* at 1028.

"demeanor" evidence from silence, the circuit court rejected this argument.[244] Relying on precedent, the Ninth Circuit held that the district court erred in admitting any statements regarding such silence.[245]

The D.C. Circuit became the third federal court of appeals to hold that it is impermissible for the prosecutor to use post-arrest, pre-*Miranda* silence as substantive evidence of guilt, and doing so would violate a criminal defendant's Fifth Amendment privilege against self-incrimination.[246] In *United States v. Moore*,[247] the defendant was arrested on drug possession and weapons charges following a traffic stop.[248] The defendant appealed his conviction, citing multiple errors, most importantly prosecutorial misconduct following comments on his post-arrest silence by the prosecution.[249] During direct examination, the prosecutor asked the arresting officer if the defendants said anything when the illegal weapons were found in his car, to which defense counsel did not object.[250] The prosecutor commented upon the defendant's silence again during closing arguments, prompting counsel for the defense to object stating that the prosecutor was "improperly commenting upon post-arrest silence."[251]

On appeal, the D.C. Circuit was clear that custody, not interrogation, is the "triggering mechanism for the right of pretrial silence under *Miranda*."[252] The court reasoned that to hold differently would provide arresting officers with the incentive to delay interrogations in order to create "an intervening 'silence' that could then be used against the defendant."[253] Most importantly, the court pointed out the misconception which the circuit courts on the wrong

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[244] *Id.*

[245] *Id.* (The Circuit court held that the government's evidence of a lack of physical or emotional reaction was "tantamount" to evidence of silence and any admission of this evidence was a violation of Velarde's Fifth Amendment rights. The court distinguished "demeanor" evidence as involving an action or a physical response from silence, which is a mere non-reaction or a failure to speak.).

[246] 104 F.3d 377, 385 (D.C. Cir. 1997); Marty Skrapka, *Silence Should Be Golden: A Case Against the Use of a Defendant's Post-Arrest, Pre-Miranda Silence as Evidence of Guilt*, 59 OKLA. L. REV. 357, 382 (2006).

[247] 104 F.3d 377 (D.C. Cir. 1997).

[248] *Id.* at 380.

[249] *Id.* at 384.

[250] *Id.*

[251] *Id.*

[252] *Id.* at 385.

[253] *Id.*

side of the split so heavily rely on; that it in no way cannot be the case that the right against self-incrimination should only attach when officers recite *Miranda* warnings.[254] The court noted that, "to hold … that the failure to give those same warnings permits the state to use a defendant's silence against him turns a whole realm of constitutional protection on its head."[255] Ultimately, the D.C. Circuit held that "the silence of an *arrested* defendant, under *Griffin,* is an exercise of his Fifth Amendment rights which the Government cannot use to his prejudice."[256] In comparison to its sister circuits, the D.C. Circuit provides the strongest and the most substantive reasoning against using post-arrest pre-*Miranda* silence against defendants as evidence of their guilt.

VI. ARGUMENT

Since *Miranda,* criminal defendants have been afforded the right to remain silent to avoid making any incriminating statements during a pre-trial police interrogation.[257] The lack of clarity on when a criminal defendant has been placed into custody has resulted in a never-ending circuit split that *must be* resolved. The invocation of a defendant's right to remain silent, whether expressly read or not, should not be used against him once he is placed into police custody. To do so would place a defendant in an impossible situation where the choice to remain silent or speak up will land him in the same position – guilty. The Supreme Court has drawn upon a similar line of reasoning under the circumstances in *Johnson*, yet the need for uniformity on the constitutionality of the prosecution's use of post-arrest pre-*Miranda* silence persists.[258] The Court has the ability to resolve the split by setting a uniform rule, which would set arrest as the determinative factor for when a defendant is considered to be in custody, thereby triggering the right to remain silent and the assurances included in the reading of *Miranda* rights.

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[254] *Id.* at 386.
[255] *Id.*
[256] *Id.* at 387.
[257] Miranda v. Arizona, 384 U.S. 436, 444 (1966).
[258] Johnson v. United States, 318 U.S. 189, 197 (1943) (In Johnson, the Supreme Court held that a criminal defendant would be "entrapped" if he was guaranteed the right to remain silent and it was later used against him. The Court, however, emphasized that cases where the defendant expressly invokes his right to remain silent are distinguished from those where the defendant does not.).

While the Court has addressed post-arrest post-Miranda silence in *Wainwright*, and pre-arrest pre-Miranda silence in *Salinas*, post-arrest pre-Miranda silence has yet to be addressed. The need for a resolution of this gray area is evident. The Court was clear in *Salinas* that custody is the triggering mechanism which requires law enforcement to read a suspect the rights afforded to him as laid out in *Miranda*.[259] How could there ever be a time where a suspect is placed under arrest, in police custody, but has not yet been read his *Miranda* rights, leaving him open to attack if he chooses to remain silent in the face of interrogation? The problem lies in the lack of clarity as to when a defendant is in "custody" for the purposes of *Miranda* and a lack of consistency among lower courts when deciding to use formal arrest as the triggering factor.

All the cases which came out on the "wrong" side of the circuit split show uniformity in their reasoning for allowing the prosecution to use a defendant's post-arrest pre-*Miranda* silence in their case-in-chief. One common pattern is the reliance on the Court's holding in *Fletcher*.[260] Although each case notes that the holding in *Fletcher* applied to the use of pre-trial silence for impeachment purposes, they nonetheless extended *Fletcher*'s holding to allow for the use of pre-trial silence as substantive evidence of guilt simply because no *Miranda* warnings were given. Thus, this side of the split relies heavily on the absence of *Miranda* warnings to justify the damaging effect of allowing a defendant's pre-trial silence to be used against them in the prosecution's case-in-chief.[261] Such an unsubstantiated "justification" can lead to unfair prejudice against defendants, substantially affecting their due process rights. The error in the decisions of the circuit courts on the "wrong" side of the split is not in the courts' focus on whether *Miranda* warnings were read, but a lack of inquiry into why they were not. In all the cases where the defendants were placed under arrest, they should have been considered "in custody" and read their *Miranda* rights according to the Court's opinion in *Thompson.*[262]

The Fifth Amendment right against self-incrimination is one of those fundamental hallmarks that every United States citizen should be aware of. If a suspect is arrested, he should automatically be

[259] Salinas v. Texas, 570 U.S. 178, 185 (2013).
[260] Fletcher v. Weir, 455 U.S. 603, 607 (1983).
[261] *See supra* Part III.
[262] Thompson v. Keohane, 516 U.S. 99, 112 (1995).

considered "in custody" and should be read his *Miranda* rights. The Court established a bright line rule in *Thompson* for determining whether a suspect is "in custody" for purposes of *Miranda*. As previously discussed, the inquiry is whether a formal arrest or restraint on freedom of movement exists to the degree associated with a formal arrest.[263] Yet, the use of post-arrest silence as substantive evidence of guilt is an issue that continues to cloud our justice system.

It should be an extreme cause of concern that the topic of post-arrest pre-*Miranda* silence is one that has still gone unresolved. One of the basic and fundamental holdings in *Miranda* is that an individual's privilege against self-incrimination becomes jeopardized the minute he is taken into custody or otherwise deprived of his freedom by authorities in any significant way.[264] Applying the objective test provided by the Court in *Thompson*,[265] it would be reasonable for any person in the defendant's shoes to think that he would be restricted from freedom of movement as soon as he is placed in handcuffs. Thus, it should be equally reasonable that most people who are generally aware of their right to remain silent would choose to do so once they are placed under arrest. It seems easy enough for one to come to this conclusion, yet the Court's decision to ignore this gray area continues to jeopardize an individual's privileges against self-incrimination.

Therefore, if a suspect is arrested and chooses to remain silent because he is aware of the implicit assurance that his silene will carry no penalty, and he happens to be in a state which falls within the jurisdiction of the Fourth, Fifth, Eighth and Eleventh Circuit Courts, he cannot rely on that implicit assurance absent being read his *Miranda* rights.[266]

VII. CONCLUSION

Silence is indeed inherently ambiguous in most circumstances, as Justice Marshall said.[267] Using a defendant's post-arrest silence as substantive evidence of his guilt is highly problematic and poses a substantial threat to one of the most fundamental rights afforded to

[263] California v. Beheler, 463 U.S. 1121, 1125 (1983).
[264] Miranda v. Arizona, 384 U.S. 436, 478 (1966).
[265] Thomson v. Keohane, 516 U.S. 99, 112 (1995).
[266] *See supra* Part III.
[267] United States v. Hale, 422 U.S. 171, 176 (1975).

individuals. Should the issue of post-arrest pre-*Miranda* silence ever present itself again, which seems likely given the current circuit split still impeding our justice system, the Supreme Court should take the opportunity to recognize and settle the dispute by getting back to the basics and making it clear that there should never be any post-arrest instances where an individual is not apprised of the procedural safeguards that are so deeply rooted in our justice system.