

No.

IN THE
SUPREME COURT OF THE UNITED STATES

PATRICK CANNELLA,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for Writ of Certiorari
to the Florida First District Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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A. QUESTION PRESENTED FOR REVIEW

Whether a criminal defendant's prearrest silence can be used by the prosecution at trial during the prosecution's case in chief.

B. PARTIES INVOLVED

The parties involved are identified in the style of
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The Petitioner, PATRICK CANNELLA, prays the Court to issue its writ of certiorari to review the judgment of the Florida First District Court of Appeal entered in this case on May 20, 2011. (A-1).¹

D. CITATION TO OPINION BELOW

Cannella v. State, 61 So. 3d 1115 (Fla. 1st DCA 2011).

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257 to review the final judgment of the Florida First District Court of Appeal rendered on May 20, 2011. (A-1).²

¹ References to the appendix to this petition will be made by the designation “A” followed by the appropriate page number.

² Because the state appellate court did not issue a written opinion, the Petitioner was not entitled to seek review in the Florida Supreme Court. See *Jenkins v. State*, 385 So. 2d 1356,

F. CONSTITUTIONAL PROVISIONS INVOLVED

A defendant's Fifth Amendment right against self-incrimination "is fulfilled only when a criminal defendant is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.'" *Estelle v. Smith*, 451 U.S. 454, 468 (1981) (quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964)). The Fifth Amendment's right to silence applies to a defendant in a state court proceeding under the Fourteenth Amendment. See *Griffin v. California*, 380 U.S. 609, 615 (1965).

G. STATEMENT OF THE CASE

In 2007, the Petitioner was charged in Florida with two counts of DUI³ manslaughter. The case proceeded to a jury trial. During the prosecution's case in chief, the prosecution presented the testimony of Detective Stephen Barrow – a detective who conducted a prearrest interview of the Petitioner following the vehicle accident in this case. During Detective Barrow's testimony, the prosecutor asked Detective Barrow whether the Petitioner admitted that he was intoxicated when he was interviewed by Detective Barrow:

Q Did Mr. Cannella ever tell you up to this point or through the end of this interview that he had been drinking to the extent that he had a 0.199 blood alcohol level?

³ Driving under the influence of alcohol.

A No, ma'am.

(A-14).⁴ Defense counsel objected, explaining that the testimony amounted to a “[c]omment[] on the defendant’s right to remain silent.” (A-15). The trial court overruled the objection. (A-15).⁵ Later, defense counsel moved for a mistrial, again arguing that Detective Barrow’s testimony amounted to an improper comment on the Petitioner’s constitutional right to remain silent. (A-18). The trial court denied the

⁴On cross-examination, Detective Barrow admitted the he did not even ask the Petitioner if he had been drinking during his prearrest interview of the Petitioner. (A-17).

⁵ After the trial court overruled defense counsel’s objections, the prosecutor repeated the question:

Q And nowhere in this voluntary statement when you are asking him if there is any other significant things or important things we should know about this crash, does he ever tell you that he had consumed enough alcohol – or any alcohol; is that correct?

A That is correct.
(A-16).

motion for a mistrial, explaining “I don’t think it was an inappropriate question or comment.” (A-20).⁶ Notably, the Petitioner did not testify during the trial.

At the conclusion of the trial, the jury found the Petitioner guilty as charged. The Petitioner was sentenced to twelve years’ imprisonment followed by eight years’ probation.

On direct appeal, the Petitioner argued that the trial court erred by overruling his objection and denying his motion for a mistrial after Detective Barrow impermissibly commented on the Petitioner’s exercise of his right to remain silent. In its direct appeal answer brief, the State of Florida took the position that Detective Barrow “did not impermissibly

⁶ Later during the trial, the trial court admonished the State to refrain from arguing in closing that Appellant Cannella failed to inform Detective Barrow that he had been drinking on the date of the accident.

comment on [the Petitioner's] exercise of his right to remain silent" because the Petitioner's silence occurred "before the police made any move toward arresting him" (i.e., the State argued that it can introduce a defendant's prearrest silence in its case in chief). (A-29). On May 20, 2011, the Florida First District Court of Appeal per curiam affirmed the Petitioner's convictions and sentence. (A-1).

H. REASON FOR GRANTING THE WRIT

There is a nationwide split over whether a criminal defendant's prearrest silence can be used as substantive evidence by the prosecution at trial during the prosecution's case in chief.

The issue in this case is whether a criminal defendant's prearrest silence can be used as substantive evidence by the prosecution at trial during the prosecution's case in chief. This question has never been directly answered by the Court. The Court has stated that: (1) a defendant's postarrest silence could not be introduced as substantive evidence against him at trial, see *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966) (dictum); (2) a defendant can be impeached with his prearrest silence, see *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980); and (3) a defendant can be impeached with his postarrest silence. See *Fletcher v. Weir*, 455

U.S. 603, 607 (1982) (per curiam).⁷ However, in Jenkins, “[t]he Court noted that it was not clear whether the Fifth Amendment protects prearrest silence,” *Portuondo v. Agard*, 529 U.S. 61, 70 (2000):

In *Raffel v. United States*, 271 U.S. 494 (1926)], the defendant’s decision not to testify at his first trial was an invocation of his right to remain silent protected by the Fifth Amendment. In this case, the petitioner remained silent before arrest, but chose to testify at his trial. Our decision today does not consider whether or under what circumstances prearrest silence may be protected by the Fifth Amendment. We simply do not reach that issue because the rule of *Raffel* clearly permits impeachment even if the prearrest silence were held to be an invocation of the Fifth

⁷ When a defendant testifies a trial, the Court has reasoned that the defendant waives the Fifth Amendment right to remain silent and therefore a defendant can be impeached with prearrest or postarrest silence (i.e., upon taking the stand, the defendant becomes subject to cross-examination impeaching his credibility just like any other witness). *Raffel v. United States*, 271 U.S. 494, 496-97 (1926). Notably, in the instant case, the Petitioner did not testify during the trial.

Amendment right to remain silent.

Jenkins, 447 U.S. at 236 n.2 (emphasis added).

The “use of a defendant’s prearrest silence as substantive evidence of guilt is significantly different than the use of prearrest silence to impeach a defendant’s credibility on the stand.” *Combs v. Coyle*, 205 F.3d 269, 281 (6th Cir. 2000). As explained below, courts around the country (both federal and state) are split on this issue.

Several courts around the country have concluded that “the use of a defendant’s prearrest silence as substantive evidence of guilt violates the Fifth Amendment’s privilege against self-incrimination.” *Combs*, 205 F.3d at 283. The First, Seventh, and Tenth Circuits have reached the same conclusion as the Sixth Circuit in *Combs*. See *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir.

1991); *Coppola v. Powell*, 878 F.2d 1562, 1567 (1st Cir. 1989) (“[W]here a defendant does not testify at trial it is impermissible to refer to any fifth amendment rights that defendant has exercised.”); *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017 (7th Cir. 1987) (“Because appellant did not take the stand, [] the state’s purpose in referring to appellant’s silence was to suggest that he was guilty (rather than to impeach his testimony)”). *Cf. United States v. Caro*, 637 F.2d 869, 876 (2d Cir. 1981) (“Whatever the future impact of *Jenkins* may be, we have found no decision permitting the use of silence, even the silence of a suspect who has been given no *Miranda* warnings and is entitled to none, as part of the Government’s direct case.”; “[W]e are not confident that *Jenkins* permits even evidence that a suspect remained silent before he was arrested or taken into custody to be used in the

Government's case in chief.”).

In contrast to these opinions, three circuits have reached the opposite conclusion. See *United States v. Oplinger*, 150 F.3d 1061, 1066–67 (9th Cir. 1998); *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996); *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991). In *Rivera*, the Eleventh Circuit held that “[t]he government may comment on a defendant’s silence [during the government’s case in chief] if it occurred prior to the time that he is arrested and given his Miranda warnings.” *Rivera*, 944 F.2d at 1568. The Fifth Circuit in *Zanabria* held that the Fifth Amendment did not protect the defendant’s prearrest silence because the silence at issue was not induced by the government. See *Zanabria*, 74 F.3d at 593. Most recently, the Ninth Circuit joined the Fifth and Eleventh Circuits in holding that the use of a

defendant's prearrest silence as substantive evidence of guilt does not violate the Fifth Amendment. See *Oplinger*, 150 F.3d at 1067.

State courts are also split on this issue. Some state courts have concluded that a defendant's prearrest silence cannot be used as substantive evidence by the prosecution at trial during the prosecution's case in chief. See *State v. Dunkel*, 466 N.W.2d 425, 428-29 (Minn. Ct. App. 1991); *State v. Rowland*, 452 N.W.2d 758, 763-64 (Neb. 1990); *People v. DeGeorge*, 541 N.E.2d 11, 13 (N.Y. 1989); *Hartigan v. Commonwealth*, 522 S.E.2d 406, 410 (Va. Ct. App. 1999); *State v. Easter*, 922 P.2d 1285, 1291-92 (Wash. 1996); *Tortolito v. State*, 901 P.2d 387, 390 (Wyo. 1995). Other state courts have reached the opposite conclusion. See *State v. Masslon*, 746 S.W.2d 618, 626 (Mo. Ct. App. 1988); *State v. Helgeson*, 303 N.W.2d

342, 348-49 (N.D. 1981).

By granting the petition for writ of certiorari in the instant case, the Court will have the opportunity to resolve this split and clarify whether a criminal defendant's prearrest silence can be used as substantive evidence by the prosecution at trial during the prosecution's case in chief. In light of the uncertainty around the country regarding this important issue, the Petitioner submits that guidance is needed from this Court. The Petitioner further submits that the question presented in this case is important and therefore merits consideration by the Court.

Accordingly, the Petitioner prays the Court to grant certiorari in this case in order to address this important issue.

I. CONCLUSION

The Petitioner requests the Court to grant the petition for writ of certiorari.

Respectfully Submitted,

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