COMMENT

The Sound of Silence: The Constitutionality of the Prosecution's Use of Prearrest Silence in Its Case-in-Chief

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INTRODUCTION

Suppose that a woman named Jane is violently raped by a masked assailant.[1] Jane informs police that she did not see the perpetrator's face, but she does remember that the offender was male and wore a Chevron gas station work shirt. The shirt had the name "Steve" embroidered on the front left corner. After the rape, the police receive information that a man matching that description works at a Chevron gas station in town. An officer goes to the gas station and attempts to question the suspect. The officer does not place the suspect under arrest or read him his rights.[2] When questioned by the officer, the suspect refuses to answer the officer's questions.[3]

After conducting further investigation and analyzing the physical evidence, officers arrest the suspect, Steve, and charge him with rape. At Steve's trial, the prosecutor calls, as part of his case-in-chief, the officer who first attempted to question Steve. The prosecutor asks the officer if Steve provided any information during the initial questioning at the gas station. The officer testifies that Steve refused to answer any of his questions. Steve's counsel objects to the question on the ground that the prosecution may not use pre-

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[1] This is a hypothetical.

[2] The rights referred to are *Miranda* warnings. *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966) (setting forth warnings that officers must give suspects during custodial interrogation). Officers must inform criminal suspects of the right to remain silent, the right to have an attorney present during questioning, and the right to an appointed attorney. *See id.* Officers also must warn suspects that anything they say can be used against them at trial. *See id.*

[3] This is an example of prearrest silence. *See, e.g.*, United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996) (discussing defendant's reluctance to speak with customs agents); Coppola v. Powell, 878 F.2d 1562, 1563 (1st Cir. 1989) (discussing defendant's response to officer's questions before arrest).

arrest silence in its case-in-chief. Whether the trial judge should grant or deny the motion to exclude prearrest silence is an issue not yet resolved by the United States Supreme Court and on which lower courts have disagreed.[4]

During its case-in-chief, the prosecution usually does not know if the defendant will testify on his own behalf during the defense case-in-chief.[5] If the defendant does not testify during the defense case-in-chief, the prosecution cannot use evidence of prearrest silence to impeach the defendant on the witness stand.[6] The prosecution wants to introduce evidence of a defendant's prearrest silence at some point in the trial to strengthen the circumstantial evidence of the defendant's guilt.[7] But the jury may never learn about the prearrest behavior of the defendant if the prosecution cannot use evidence of prearrest silence during its case-in-chief.[8]

Courts that have not yet decided whether to allow the prosecution to use prearrest silence in its case-in-chief have two options. The court can admit prearrest silence evidence during the prosecution's case-in-chief unless the government has compelled the

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[4] *Compare* United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991) (ruling that evidence of prearrest silence is admissible in prosecution's case-in-chief), *with* United States v. Burson, 952 F.2d 1196, 1200-01 (10th Cir. 1991) (holding that evidence of prearrest silence is inadmissible in prosecution's case-in-chief). *See generally* Barbara Rook Snyder, *A Due Process Analysis of the Impeachment Use of Silence in Criminal Trials*, 29 WM. & MARY L. REV. 285, 285 (1988) (discussing problems courts have historically encountered when dealing with issues concerning privilege against self-incrimination); Michael R. Patrick, Note, *Toward the Constitutional Protection of a Non-Testifying Defendant's Prearrest Silence*, 63 BROOK. L. REV. 897, 898-99 (1997) (stating that courts are split on issue of whether court should admit prearrest silence evidence in prosecution's case-in-chief).

[5] *See, e.g.*, Brooks v. Tennessee, 406 U.S. 605, 612-13 (1972) (holding that defendant can testify at any time during defense case-in-chief); United States v. Pennycooke, 65 F.3d 9, 11 (3d Cir. 1995) (stating that criminal defendants can decide to testify at any point in trial). Defendants can decide whether to take the witness stand after the prosecution has finished presenting its case-in-chief. *See* Michigan v. Harvey, 494 U.S. 344, 351 (1990).

[6] *See* RONALD L. CARLSON & EDWARD J. IMWINKELRIED, DYNAMICS OF TRIAL PRACTICE § 8.1 (1995) (explaining that impeachment takes place during cross-examination); *see also* Harris v. New York, 401 U.S. 222, 225 (1971) (suggesting that impeachment is limited to matters discussed during direct examination).

[7] *See* Doyle v. Ohio, 426 U.S. 610, 617 (1976) (stating that prosecution has interest in presenting relevant evidence to rebut defendant's exculpatory story); *see also* United States v. Maggitt, 784 F.2d 590, 596-98 (5th Cir. 1986) (discussing prosecution's interest in presenting evidence of defendant's prior criminal convictions); United States v. Leichtman, 742 F.2d 598, 603-05 (11th Cir. 1984) (discussing prosecutor's interest in introducing evidence to establish motive in kidnapping case).

[8] Because a criminal defendant is not required to introduce evidence, the trial may end with the prosecution's case-in-chief. *See* United States v. Sutherland, 929 F.2d 765, 774 (1st Cir. 1991) (stating that defendants are not required to present evidence).

defendant to remain silent during prearrest questioning.[9] Alternatively, the court can refuse to admit evidence of the defendant's prearrest silence during the prosecution's case-in-chief.[10] Thus, the court would only admit prearrest silence evidence for impeachment purposes if the defendant takes the stand during the defense's case-in-chief.[11]

This Comment proposes that the prosecution's use of evidence of a defendant's prearrest silence in its case-in-chief is constitutional. Part I presents the background of the law of self-incrimination based upon the Fifth Amendment of the United States Constitution.[12] Part II examines the current state of the law. Circuit courts have split over whether to allow the prosecution to present evidence of a defendant's prearrest silence during its case-in-chief.[13] Part III asserts that a court may admit evidence of a criminal defendant's prearrest silence without violating the accused's Fifth Amendment privilege against self-incrimination because the privilege does not generally attach until the accused is in police custody. This solution should apply whether or not the defendant chooses to testify.

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[9] *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); *Rivera*, 944 F.2d at 1569.

[10] *See* United States v. Burson, 952 F.2d 1196, 1200-01 (10th Cir. 1991) (holding that evidence of prearrest silence is inadmissible in prosecution's case-in-chief); Coppola v. Powell, 878 F.2d 1562, 1568 (1st Cir. 1989) (stating that prosecutors cannot comment on defendants' prearrest silence during their cases-in-chief); United States *ex rel.* Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987) (holding that prosecutors cannot use defendants' prearrest silence as evidence of guilt).

[11] *See* Jenkins v. Anderson, 447 U.S. 231, 238 (1980) (holding that prosecution can use prearrest silence evidence to impeach testifying criminal defendant); *Burson*, 952 F.2d at 1200-01; *Coppola*, 878 F.2d at 1568; *Lane*, 832 F.2d at 1017.

[12] U.S. CONST. amend. V.

[13] *Compare Oplinger*, 150 F.3d at 1065-67 (expressing desire to adopt rule stating that evidence of prearrest silence is admissible in prosecution's case-in-chief), United States v. Thompson, 82 F.3d 849, 854-56 (9th Cir. 1996) (holding that prosecutorial use of prearrest silence does not prejudice defendant), *Zanabria*, 74 F.3d at 593 (holding that evidence of prearrest silence is admissible as evidence of guilt), *and Rivera*, 944 F.2d at 1567-69 (holding that prosecution may use evidence of prearrest silence in its case-in-chief), *with Burson*, 952 F.2d at 1200-01 (holding that prosecutorial use of prearrest silence as evidence of guilt is unconstitutional and prejudicial), *Coppola*, 878 F.2d at 1564-66 (holding that prosecutors cannot use evidence of prearrest silence in their cases-in-chief), *and Lane*, 832 F.2d at 1018-20 (holding that evidence of defendants' prearrest silence is inadmissible when used in prosecution's case-in-chief).

I. BACKGROUND OF THE LAW

The United States Supreme Court has yet to determine whether, under the Fifth Amendment, the prosecution can use evidence of a criminal defendant's prearrest silence in its case-in-chief.[14] The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself . . . ."[15] This phrase in the Fifth Amendment, also known as the privilege against self-incrimination, prohibits the government from compelling a defendant to make statements implicating the defendant in criminal activity.[16] A government official violates a criminal suspect's privilege against self-incrimination by forcing the suspect, through words or actions, to provide incriminating testimonial information.[17] Criminal suspects provide testimonial information when

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[14] *See* Jane Elinor Notz, Comment, *Prearrest Silence as Evidence of Guilt: What You Don't Say Shouldn't Be Used Against You*, 64 U. CHI. L. REV 1009, 1010-11 (1997) (discussing cases in which interpretations of Fifth Amendment govern analysis); Patrick, *supra* note 4, at 899 (asserting that cases involving Fifth Amendment privileges are basis for analysis of prearrest silence); Aaron R. Pettit, Comment, *Should the Prosecution Be Allowed to Comment on a Defendant's Prearrest Silence in Its Case-in-Chief?*, 29 LOY. U. CHI. L.J. 181, 183-92 (1997) (tracing origin of privilege against self-incrimination and discussing application of Fifth Amendment to prearrest silence).

[15] U.S. CONST. amend. V.

[16] *See* Miranda v. Arizona, 384 U.S. 436, 478 (1966) (stating that purpose of Fifth Amendment is to protect defendants from making incriminating statements as result of governmental compulsion); Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (stating that policies behind privilege against self-incrimination include protection of innocent and not assisting prosecution prove its case); Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2625-28 (1996) (discussing modern and historical definitions of compulsion); Donald A. Dripps, *Supreme Court Review: Foreword: Against Police Interrogation and the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 701-11 (1988) (discussing concept of compulsion in context of voluntary confessions); John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1063-64 (1994) (discussing origin of concept of compulsion).

[17] *See* Schmerber v. California, 384 U.S. 757, 761-65 (1966) (discussing what constitutes governmental compulsion under Fifth Amendment privilege against self-incrimination). For example, if an officer tells a criminal suspect that if the suspect does not confess the officer will injure him, the officer has used words to compel the suspect to speak. *See id.* If an officer physically straps a criminal suspect to a polygraph machine and asks the suspect questions to determine if the suspect is lying, the officer has used actions to compel the suspect to speak. *See id.*; *see also* Alschuler, *supra* note 16, at 2626-27 n.6 (discussing physical compulsion); Dripps, *supra* note 16, at 700-11 (differentiating between physical and psychological compulsion and discussing psychologists' definition of compulsion); Langbein, *supra* note 16, at 1064 (stating that physical compulsion was more prevalent at common law).

they make a statement or act in a communicative nature regardless of whether or not they use words.[18]

Although there is no case on point yet, Supreme Court decisions interpreting the privilege against self-incrimination provide a framework for deciding whether to permit the prosecution to introduce evidence of a defendant's prearrest silence in its case-in-chief.[19] The background of self-incrimination law consists of three main categories of cases: a defendant's privilege against self-incrimination, the prosecution's use of postarrest silence in its case-in-chief, and the prosecution's use of prearrest silence for impeachment purposes.[20]

A. Self-Incrimination

The Supreme Court has held that the privilege against self-incrimination applies in criminal as well as civil contexts whenever an individual's testimony may lead to criminal sanctions.[21] In addition, a witness may assert the privilege against self-incrimination in

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[18] *See* Doe v. United States, 487 U.S. 201, 209-11 (1988) (discussing concept of testimony). For example, criminal suspects may claim the privilege against self-incrimination when subpoenaed to produce personal documents or records. *See* Boyd v. United States, 116 U.S. 616, 638 (1886). The Supreme Court held that criminal suspects are communicating when they produce such materials. *See id.* However, suspects cannot claim the privilege against self-incrimination when they are the source of real or physical evidence. *See Schmerber*, 384 U.S. at 764. Thus, a suspect cannot refuse to be fingerprinted, photographed, or measured. *See id.* A suspect also cannot refuse to write or speak for identification purposes, to appear in court, to walk, or to make a certain gesture. *See id.*

[19] *See* Notz, *supra* note 14, at 1010-12 (discussing cases dealing with self-incrimination and implying that these cases are appropriate places to begin analysis); Patrick, *supra* note 4, at 899 (using privilege against self-incrimination to govern analysis of prosecution's use of prearrest silence in its case-in-chief); Pettit, *supra* note 14, at 183 (asserting that privilege against self-incrimination forms basis for decisions concerning prosecution's use of prearrest silence evidence in its case-in-chief); *see also* Jenkins v. Anderson, 447 U.S. 231, 240-41 (1980) (holding that prosecution can use evidence of prearrest silence for impeachment); Doyle v. Ohio, 426 U.S. 610, 619-20 (1976) (holding that prosecution cannot use defendant's postarrest silence for impeachment); *Miranda*, 384 U.S. at 478-79 (holding that prosecution cannot introduce evidence of involuntary confessions).

[20] *See Jenkins*, 447 U.S. at 240-41 (holding that prosecution can use prearrest silence for impeachment); *Miranda*, 384 U.S. at 478-79 (holding that privilege against self-incrimination applies during custodial interrogation); Griffin v. California, 380 U.S. 609, 615 (1965); *see also* Pettit, *supra* note 14, at 192-98 (discussing development of concept of silence in Fifth Amendment context).

[21] *See* Allen v. Illinois, 478 U.S. 364, 368 (1986) (noting that privilege applies in civil proceedings when answers might incriminate in later criminal proceedings); *Miranda*, 384 U.S. at 478-79 (applying privilege against self-incrimination in criminal context); McMorrow v. Little, 103 F.3d 704, 706-08 (8th Cir. 1997) (applying privilege against self-incrimination in civil context).

both administrative and judicial proceedings.[22] In 1966, the Supreme Court established that an accused person also has certain rights during a custodial interrogation conducted by government officials.[23]

Custodial interrogation occurs when an officer attempts to elicit an incriminating testimonial response from the criminal suspect[24] in a police-dominated setting while significantly depriving the criminal suspect of freedom of movement.[25] Although the subjective perceptions of suspects partly define whether a police-dominated setting exists, certain objective factors must also be present to corroborate these perceptions.[26] For example, using the hypothetical from the Introduction, Steve was not in custody when initially questioned by officers because he was in a public setting and the officers did not restrict his freedom.[27] If, however, the officers had questioned Steve either at gunpoint, placed in handcuffs,

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[22] *See* Kastigar v. United States, 406 U.S. 441, 444 (1972) (applying privilege against self-incrimination in judicial proceeding); Bigby v. INS, 21 F.3d 1059, 1061-63 (11th Cir. 1994) (applying privilege against self-incrimination in administrative proceeding).

[23] *See Miranda*, 384 U.S. at 478-79. Law enforcement must warn criminal suspects in a custodial interrogation that they have the right to remain silent, the right to an attorney, and the right for the government to provide an attorney if they are unable to pay. *See id.* Officers must also inform criminal suspects that anything they say can be used against them in court. *See id.*

[24] *See* Pennsylvania v. Muniz, 496 U.S. 582, 601-02 (1990) (suggesting that any questions other than those necessary for routine booking constitute interrogation); Arizona v. Mauro, 481 U.S. 520, 526-27 (1987) (stating that interrogation includes any words or actions that officers should know are likely to elicit incriminating response from suspect); Harryman v. Estelle, 616 F.2d 870, 874 (5th Cir. 1980) (stating that interrogation encompasses any statement made by officers that is likely to have force of question on suspect). *But see* Rhode Island v. Innis, 446 U.S. 291, 302-03 (1980) (stating that officers do not interrogate suspect if inadvertent comments from one officer to another elicit incriminating response from suspect).

[25] *See* Orozco v. Texas, 394 U.S. 324, 325-27 (1969) (holding that officers significantly hindered defendant's freedom of movement when officers questioned defendant in bedroom at 4:00 a.m.). *But see* Berkemer v. McCarty, 468 U.S. 420, 437-40 (1984) (holding that routine traffic stop does not constitute significant deprivation of freedom and does not require *Miranda* warnings); Minnesota v. Murphy, 465 U.S. 420, 433 (1984) (explaining that mandatory meeting with probation officer does not constitute significant deprivation of freedom); Oregon v. Mathiason, 429 U.S. 492, 494-95 (1977) (holding that government does not significantly deprive defendants of freedom of movement when defendants voluntarily go to police stations to confess).

[26] *See* Stansbury v. California, 511 U.S. 318, 323 (1994) (per curiam) (stating that court must find that objective factors are present to determine suspect is in custody); *Murphy*, 465 U.S. at 433-34 (asserting that defendant's subjective belief during probation interview that he was in police-dominated setting is not sufficient for court to find that defendant was in custody).

[27] *See Miranda*, 384 U.S. at 444 (stating that suspects are only in custody when officers limit suspects' freedom of movement in significant way).

placed in the back of the police car, or after he arrived at the police station, Steve would have been in custody at the time of the questioning.[28] *Miranda v. Arizona* established a set of warnings that government agents must give to criminal suspects before conducting a custodial interrogation.[29] *Miranda* is the landmark case protecting a criminal suspect's right to the Fifth Amendment's guarantees against self-incrimination.[30] The rationale of the *Miranda* decision is important in determining the use of prearrest silence because *Miranda* defines the point at which the accused is entitled to protection under the privilege against self-incrimination.[31]

In *Miranda*, officers interrogated the defendants in isolated rooms at a police station.[32] The Supreme Court found that the defendant's confessions were the result of the officers' coercive tactics during the interrogation.[33] The prosecution later used these confessions against the defendants at trial.[34] The *Miranda* Court held that when officers subject criminal suspects to custodial interrogation, they must inform the suspects of their rights.[35] Specifically, officers must inform criminal suspects of their right to remain silent, their right to an attorney, their right to an appointed

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[28] *See* New York v. Quarles, 467 U.S. 649, 655 (1984) (stating that defendants are in custody and are significantly deprived of freedom in scenarios similar to formal arrest).

[29] *See Miranda*, 384 U.S. at 444 (stating that law enforcement must warn criminal suspects that they have right to remain silent, right to attorney, right for government to provide attorney if they are unable to pay, and that government can use anything they say against them in court).

[30] *See* Rhonda Y. Cline, Comment, *Equivocal Requests for Counsel: A Balance of Competing Policy Considerations*, 55 U. CIN. L. REV. 767, 767-68 (1987) (stating that *Miranda* established importance of protecting Fifth Amendment privilege against self-incrimination); Notz, *supra* note 14, at 1009 (noting importance of *Miranda*).

[31] *See, e.g.*, Arizona v. Roberson, 486 U.S. 675, 679-80 (1988) (discussing purpose of *Miranda* decision and indicating that privilege against self-incrimination attaches during custodial interrogation); Beckwith v. United States, 425 U.S. 341, 347 (1976) (noting that right to remain silent attaches after person has been taken into custody).

[32] *See Miranda*, 384 U.S. at 491-92.

[33] *See id.* at 457; *see also* Lynumn v. Illinois, 372 U.S. 528, 535 (1963) (stating that officers used coercive tactics when they told suspect that if she did not cooperate, authorities would take her children); Payne v. Arkansas, 356 U.S. 560, 564-65, 567 (1958) (describing police officers' exercise of coercion when they told suspect with fifth grade education that mob would beat suspect if he did not confess); Brown v. Mississippi, 297 U.S. 278, 284-86 (1936) (noting that physical coercion occurs when officers beat criminal suspects to elicit incriminating response); Bram v. United States, 168 U.S. 532, 561-65 (1897) (explaining impropriety of police officers' lying to suspects to obtain confessions).

[34] *See Miranda*, 384 U.S. at 492.

[35] *See id.* at 478-79.

attorney if they cannot afford one, and their right to the warning that anything they say can be used against them at trial.[36]

In *Miranda*, the Supreme Court based its decision on the need for procedural safeguards to protect the rights of criminal suspects.[37] During a custodial interrogation, a defendant is in a police-dominated atmosphere and may feel compelled to speak to the interviewing officers.[38] A suspect may perceive the atmosphere of the interrogation room and the display of the officers' authority as psychologically coercive.[39] The *Miranda* Court stated that notifying the accused of the right to remain silent and the right to an attorney counteracts the inherently coercive environment typical of police interrogations.[40]

Under *Miranda*, if criminal suspects invoke their right to an attorney or their right to remain silent after arrest, government agents must stop questioning the suspects.[41] The prosecution, in its case-in-chief, can not present evidence that a suspect invoked *Miranda* rights.[42] After arresting criminal suspects, officers must warn the suspects that anything they say can be used against them in court.[43] Therefore, *Miranda* warnings imply that the government cannot use criminal suspects' postarrest silence against them at trial.[44]

B. Postarrest Silence

The Supreme Court has decided that the prosecution cannot use evidence of a defendant's post-*Miranda* silence in its case-in-chief

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[36] *See id.*

[37] *See id.* More recently, the Court has credited *Miranda* with providing valuable procedural safeguards for criminal suspects. *See, e.g.*, Duckworth v. Eagan, 492 U.S. 195, 201-03 (1989); California v. Prysock, 453 U.S. 355, 359-61 (1981).

[38] *See Miranda*, 384 U.S. at 461 (discussing possible subjective interpretations during custodial interrogation); *see also* Schneckloth v. Bustamonte, 412 U.S. 218, 223-26 (1973) (discussing coercive nature of custodial interrogations).

[39] *See* Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (suggesting that criminal suspects are threatened and psychologically coerced when officers place them in interrogation room and question them).

[40] *See Miranda*, 384 U.S. at 442-45.

[41] *See id.* at 444-45; *see also* Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) (holding that after suspect invokes *Miranda* rights officers must stop questioning suspect until attorney arrives).

[42] *See* Doyle v. Ohio, 426 U.S. 610, 617-18 (1976); Griffin v. California, 380 U.S. 609, 615 (1965).

[43] *See Miranda*, 384 U.S. at 444.

[44] *See Doyle*, 426 U.S. at 617-18 (stating that criminal suspects infer that if they invoke right to remain silent, prosecution cannot reference postarrest silence at trial).

or for impeachment purposes.[45] One difference between the prosecution using evidence of postarrest silence in its case-in-chief and using postarrest silence for impeachment is the timing at which the prosecution presents the evidence.[46] The prosecution attempts to meet its burden of proof against the defendant by presenting evidence during its case-in-chief.[47] Impeachment, on the other hand, occurs when the prosecutor cross-examines witnesses during the defense's case-in-chief.[48]

The Supreme Court has held that the prosecution cannot use evidence of a defendant's postarrest silence for impeachment or as circumstantial evidence of guilt during its case-in-chief.[49] In *Doyle v. Ohio*, officers arrested the defendants, charged them with selling narcotics to a narcotics bureau informant, and read them *Miranda* warnings.[50] Doyle invoked his right to remain silent during the custodial interrogation.[51] At trial, Doyle testified that the narcotics informant framed them.[52] During cross-examination, the prosecutor asked Doyle why he had remained silent after arrest and had not told the arresting agent that someone framed the defendants.[53]

The *Doyle* Court specifically stated that the prosecution may not use evidence of defendants' postarrest silence to impeach their credibility.[54] The *Doyle* Court further held that the prosecution cannot introduce evidence of postarrest silence as evidence of guilt.[55] The Court stated that allowing this type of evidence would

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[45] *See* Fletcher v. Weir, 455 U.S. 603, 606 (1982) (reiterating that purpose of privilege against self-incrimination prohibits prosecution from commenting on post-*Miranda*, postarrest silence); *Doyle*, 426 U.S. at 617-18 (asserting that prosecutorial comment on postarrest silence undermines purposes of Fifth Amendment privileges); *see also Miranda*, 384 U.S. at 444-45 (holding that criminal suspects may claim privilege against self-incrimination at any time after officers read *Miranda* warnings).

[46] *See generally* CARLSON & IMWINKELRIED, *supra* note 6, §§ 8.1, 8.2 (indicating that cross-examination is time in trial when impeachment occurs); BLACK'S LAW DICTIONARY 216 (6th ed. 1990) (defining case-in-chief as part of case in which party to lawsuit that carries initial burden of proof presents its case).

[47] *See generally* CARLSON & IMWINKELRIED, *supra* note 6, § 9.2(A); BLACK'S LAW DICTIONARY, *supra* note 46, at 216 (defining case-in-chief).

[48] *See* CARLSON & IMWINKELRIED, *supra* note 6, § 8.1; EDWARD J. IMWINKELRIED ET AL., CALIFORNIA EVIDENTIARY FOUNDATIONS 139-40 (2d ed. 1994).

[49] *See Doyle*, 426 U.S. at 618-19 (holding that prosecution cannot introduce evidence that defendant invoked *Miranda* rights during custodial interrogation).

[50] *See id.* at 611-12. The defendants appealed the lower court's judgment. *See id.* at 615.

[51] *See id.* at 614-15 n.5.

[52] *See id.* at 613.

[53] *See id.* at 613-14.

[54] *See id.* at 618-20.

[55] *See id.* at 619 (citing United States v. Hale, 422 U.S. 171, 182-83 (1975)).

violate both the defendant's rights of fundamental fairness and the standards of due process.[56] Because *Miranda* warnings give defendants the right to remain silent,[57] the government violates the defendant's due process rights by using the defendant's exercise of the right as circumstantial evidence of guilt.[58] Thus, the *Miranda* warnings themselves imply that the prosecution cannot use postarrest silence against defendants at trial.[59] Furthermore, the *Doyle* Court reasoned that because post-*Miranda* silence is nothing more than an exercise of the defendant's right to remain silent, it is fundamentally unfair for the prosecution to use evidence of that postarrest silence at trial as an inference of guilt.[60]

C. *The Use of Prearrest, Pre-*Miranda *Silence for Impeachment Purposes*

Unlike postarrest silence, the prosecution can use prearrest silence to impeach defendants that testify on the witness stand.[61] However, if criminal defendants decide not to testify, the prosecution cannot call them as witnesses or compel them to testify.[62] Thus, the prosecution cannot impeach nontestifying defendants.[63]

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[56] *See id.* at 618; *cf.* Wainwright v. Greenfield, 474 U.S. 284, 292-95 (1986) (holding that evidence of postarrest silence used against defendant that pleads not guilty by reason of insanity is not admissible to challenge insanity).

[57] *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[58] *See Doyle*, 426 U.S. at 617 (noting that state did not contend that postarrest silence is admissible as evidence of guilt). If the prosecution comments on a defendant's exercise of the right to remain silent, the prosecutor draws attention to the defendant's postarrest silence and produces an improper inference of guilt. *See id.* at 617-18.

[59] *See id.* at 617-18.

[60] *See id.* The Court's rationale in *Doyle* is analogous to that of the Supreme Court's earlier decision in Griffin v. California, 380 U.S. 609 (1965). In *Griffin*, the defendant was charged with murder. *See id.* at 609. The defendant chose not to testify in the guilt phase of the trial. *See id.* During closing arguments, the prosecutor commented on the defendant's failure to take the witness stand. *See id.* at 610-11.

The *Griffin* Court held that the prosecution cannot comment on a defendant's failure to take the stand. *See id.* at 615. The Court reasoned that if evidence of constitutionally privileged silence and defendant's unwillingness to take the witness stand were admissible, juries would penalize the defendant for invoking such privilege and remaining silent. *See id.* at 614.

[61] *See* Jenkins v. Anderson, 447 U.S. 231, 240-41 (1980).

[62] *See* U.S. CONST. amend. V (stating that government cannot force defendant in criminal trial to testify against himself); *see also* Lakeside v. Oregon, 435 U.S. 333, 336-40 (1978) (indicating that courts cannot admit testimony alluding to defendant's decision not to testify); Reagan v. United States, 157 U.S. 301, 304-05 (1895) (recognizing that defendant can waive privilege to testify at trial).

[63] *See generally* IMWINKELRIED ET AL., *supra* note 48, at 139-40. By not testifying, defendants are not exposing themselves to cross-examination. *See id.* The prosecution can only impeach a defense witness during cross-examination. *See id.*

The Supreme Court has held that defendants that choose to testify waive their Fifth Amendment privilege against self-incrimination.[64] Once defendants elect to testify they must answer all questions and cannot reclaim the privilege against self-incrimination.[65] Moreover, the Court has distinguished between prearrest and postarrest silence;[66] unlike postarrest silence, defendants' prearrest silence occurs before police officers have assured criminal defendants that the government will not use the defendants' silence against them.[67] Consequently, the Court has approved prosecutorial use of defendants' prearrest, pre-*Miranda* silence to impeach defendants' credibility if they choose to testify.[68]

In *Jenkins v. Anderson*, the Supreme Court held that the prosecution may use evidence of defendants' prearrest silence to impeach their trial testimony.[69] During his trial for first degree murder, Jenkins testified on his own behalf and claimed that he killed in self-defense.[70] On cross-examination, the prosecution asked the defendant why he remained silent and waited two weeks before turning himself in to police.[71] The jury ultimately convicted the defendant of manslaughter.[72] The defendant appealed to the Supreme Court, asserting that the prosecution improperly used evidence of prearrest silence to impeach his credibility.[73]

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[64] *See Jenkins*, 447 U.S. at 235-38; *see also* Fletcher v. Weir, 455 U.S. 603, 604-07 (1982) (resting decision on assumption that defendant's privilege against self-incrimination is waived when he takes witness stand); Raffel v. United States, 271 U.S. 494, 497 (1926) (asserting that when defendant testifies, he waives privilege against self-incrimination); Fitzpatrick v. United States, 178 U.S. 304, 315-16 (1900) (holding that defendants who voluntarily take witness stand cannot refuse to answer questions on cross-examination if questions are reasonably related to subject matter of direct examination); Brown v. Walker, 161 U.S. 591, 597-98 (1896) (stating that defendants that choose to testify cannot claim privilege against self-incrimination when cross-examined by prosecution).

[65] *See Raffel*, 271 U.S. at 497.

[66] *See Jenkins*, 447 U.S. at 239-40.

[67] *See id.*

[68] *See id.* at 240-41.

[69] *See id.*

[70] *See id.* at 233. The defendant, Jenkins, testified that a man named Redding robbed his sister and her boyfriend the night before the murder. *See id.* at 232-33. The next day Redding accused Jenkins of telling the police about the robbery. *See id.* According to Jenkins's testimony, Redding then attacked him with a knife, the two men struggled, and Jenkins pushed the knife into Redding as far as it would go. *See id.* at 233.

[71] *See id.*

[72] *See id.* at 232.

[73] *See id.* at 234-35

The *Jenkins* Court held that the prosecution's use of evidence of prearrest silence for impeachment was proper.[74] The Court stated that the government violates a defendant's Fifth Amendment privilege against self-incrimination only when the governmental practice used at trial substantially impairs the defendant's ability to exercise the privilege against self-incrimination.[75] For example, the defendant's privilege against self-incrimination is substantially impaired when the prosecution subpoenas the defendant to testify at trial.[76] However, the government does not compel criminal defendants who choose to take the stand and testify.[77] The *Jenkins* Court stated that because the defendant chose to testify he subjected himself to questioning and possible impeachment by the prosecution.[78] The Court reasoned further that the threat of impeachment by the prosecution did not substantially impair the defendant's right to testify on his own behalf.[79] If the defendant had chosen not to take the witness stand, the prosecution could not have impeached him with his prearrest silence.[80]

To determine whether the prosecution substantially impaired Jenkins's ability to exercise his privilege against self-incrimination, the *Jenkins* Court utilized a two-prong impermissible burden test.[81] The impermissible burden test balances the reasonableness of the government's actions against the impairment of the policies underlying the privilege against self-incrimination.[82]

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[74] *See id.* at 238.

[75] *See id.* at 236-38.

[76] *See* U.S. CONST. amend. V (stating that government cannot compel criminal defendants to be witnesses against themselves); Lakeside v. Oregon, 435 U.S. 333, 342-43 (1978) (Stewart, J., dissenting) (noting importance of "absolute" right of defendant to choose to remain silent); Reagan v. United States, 157 U.S. 301, 304-05 (1895) (noting possible avenues of attack to defendant is exposed to if testifying).

[77] *See Jenkins*, 447 U.S. at 237-38 (citing Harris v. New York, 401 U.S. 222, 225 (1971)). Criminal defendants that take the witness stand waive their privilege against self-incrimination. *See id*; Raffel v. United States, 271 U.S. 494, 496 (1925). Many defendants feel considerable pressure to take the witness stand anyway because they want the jury to hear their version of events. *See Jenkins*, 447 U.S. at 238 n.3; *Raffel*, 271 U.S. at 499.

[78] *See Jenkins*, 447 U.S. at 238.

[79] *See id.* at 237-38 (quoting Harris v. New York, 401 U.S. 222, 225 (1971)).

[80] *See id.* at 238.

[81] *See id.* at 236-38 (analyzing burden on defendant, determining reasonableness of government action, and then weighing one against other); *see also* Notz, *supra* note 14, at 1018-22 (elucidating and clarifying test); Patrick, *supra* note 4, at 912.

[82] *See Jenkins*, 447 U.S. at 236-38; *see also* Notz, *supra* note 14, at 1018-22.

Under the first prong, the court must examine the reasonableness of the prosecutor's interest in presenting evidence.[83] On the facts of *Jenkins*, impeachment of Jenkins might have been unreasonable if the prosecutor, for example, had failed to disclose the evidence used for impeachment to the defense before the cross-examination of Jenkins.[84] Impeachment of Jenkins might have been unreasonable if a police officer compelled prearrest silence by confronting Jenkins with accusatory statements or physically assaulting Jenkins.[85] However, the Court found that prosecutorial impeachment of Jenkins was reasonable because government officials did not compel Jenkins to remain silent[86] and the proffered evidence assisted the trier of fact in its search for the truth.[87]

Under the second prong of the *Jenkins* test, the Court must evaluate whether the prosecution's use of prearrest silence for impeachment purposes violates the general policies underlying the privilege against self-incrimination.[88] These polices include fairness to the accused, the duty of the prosecution to prove its case beyond a reasonable doubt without help from the defendant, and protection of the innocent.[89] Turning again to the facts of *Jenkins*, Jenkins's privilege against self-incrimination might have been impaired if government officials physically assaulted him and injured

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[83] *See Jenkins*, 447 U.S. at 238.

[84] *See* United States v. Bagley, 473 U.S. 667, 675-76 (1985) (holding that defendants are entitled to discover impeachment materials before cross-examination if such information is material to their defenses).

[85] For example, starting with the facts of *Jenkins*, 447 U.S. at 232-33, suppose officers physically assaulted Jenkins before he could answer prearrest questions about the murder and broke Jenkins's jaw so that he was in so much pain afterwards that he could not speak. Suppose further that at trial, Jenkins took the witness stand and the prosecutor asked him, "You didn't even answer the officers' questions, did you?" Impeaching Jenkins with this information would be unreasonable because officers had effectively compelled Jenkins, through use of physical force, to remain silent. *See* Miranda v. Arizona, 384 U.S. 436, 445-48 (1966 (stating that brutality deprives criminal suspects of free choice whether to speak). Because these hypothetical officers' coercive tactics would have induced Jenkins to remain silent, a trial judge would most likely exclude the evidence. *See* Wong Sun v. United States, 371 U.S. 471, 484-85 (1963) (holding that courts must exclude all illegally obtained evidence from trial). The "fruit of the poisonous tree" doctrine states that courts must exclude any and all evidence obtained through a violation of a defendant's constitutional rights. *See id.* at 484-46 (establishing "fruit of the poisonous tree" doctrine).

[86] *See Jenkins*, 447 U.S. at 240.

[87] *See id.* at 238.

[88] *See id.* at 236-37.

[89] *See* Quinn v. United States, 349 U.S. 155, 161-62 (1955) (discussing safeguards against unfounded prosecutions and protection of innocent parties); *see also* Grunewald v. United States, 353 U.S. 391, 421 (1957) (asserting that one basic function of privilege against self-incrimination is protection of innocent individuals).

him so severely that he could not speak.[90] Impairment would also have existed if, before arresting Jenkins, police used illegal investigation tactics and recovered incriminating evidence.[91] If the police officers confronted Jenkins prearrest with the incriminating evidence, they may have compelled Jenkins to remain silent.[92] However, the government did not impair Jenkins's privilege against self-incrimination because Jenkins chose to remain silent before arrest.[93] Because the probative value of the prosecutor's questions outweighed the impairment of Jenkins's privilege against self-incrimination, the Supreme Court held that it was proper for the prosecution to use evidence of prearrest, pre-*Miranda* silence for impeachment.[94] In summary, when defendants testify, prosecutors may use their prearrest silence for impeachment if the government did not compel the silence and the evidence of silence is more helpful to the jury than harmful to the defendant.[95]

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[90] *See Jenkins*, 447 U.S. at 240 (reasoning that privilege against self-incrimination cannot be impaired absent some governmental action inducing defendant to remain silent); *see also Miranda*, 384 U.S. at 464-65 (stating that governmental compulsion exists if officers' interrogation practices in any manner exert such pressure on defendants as to disable them from making a free and rational choice to speak).

[91] *See* Stein v. New York, 346 U.S. 156, 182 (1953) (recognizing possible inadmissibility of evidence or confessions gained through use of illegal tactics including physical violence, prolonged and unremitting coercive interrogation, and illegal detention). *But see* United States v. Havens, 446 U.S. 620, 628 (1980) (allowing illegal seized evidence to be used for impeachment purposes).

[92] *See* United States v. Pepe, 367 F. Supp. 1365, 1368-70 (D. Conn. 1973) (recognizing that individual would have been inclined to remain silent in grand jury proceedings had he known that his testimony would be used to incriminate him as potential defendant). Similarly, if officers confront criminal suspects with fabricated information designed to elicit an incriminating response, the government may be deemed to have compelled the suspect to speak. *See* Escobedo v. Illinois, 378 U.S. 478, 490 n.13 (1964) (noting that criminal suspects may be under unconstitutional compulsion when confronted with accusatory comments by law enforcement while in custody).

[93] *See Jenkins*, 447 U.S. at 233-34 (noting no prearrest contact with police); *see also* Oregon v. Elstad, 470 U.S. 298, 309 (1985) (stating that compulsion does not ordinarily exist when officers ask noncustodial questions); *Miranda*, 384 U.S. at 477-78 (asserting that officers do not violate defendants' privilege against self-incrimination when they engage in "[g]eneral on-the-scene questioning").

[94] *See Jenkins*, 447 U.S. at 238 (noting balancing test from Brown v. United States, 356 U.S. 148, 156 (1958)).

[95] *See id.*

II. THE CURRENT STATE OF THE LAW — THE CIRCUIT COURT SPLIT

Lower courts have conflicting views concerning the prosecution's use of prearrest silence in its case-in-chief.[96] Some circuits hold that the Fifth Amendment applies to prearrest, pre-*Miranda* silence, thus prohibiting its use by the prosecution.[97] Other circuits assert that criminal suspects are not entitled to the privilege against self-incrimination before police interrogate the suspects in custody and give them *Miranda* warnings.[98] The crux of the split is the time at which the privilege against self-incrimination attaches.[99]

A. Circuits Holding Prearrest Silence Is Inadmissible Evidence

Several circuits have ruled that, in its case-in-chief, the prosecution cannot use as evidence of guilt a defendant's prearrest silence.[100] These circuits base their decisions on three primary ra-

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[96] *Compare* United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996) (holding that unobjected use of prearrest silence in prosecutor's case-in-chief was not plain error), *and* United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991) (asserting that government may use prearrest silence in its case-in-chief), *with* United States v. Burson, 952 F.2d 1196, 1200-01 (10th Cir. 1991) (providing that prosecution may not use silence in prearrest criminal interrogation, whether of suspect or nonsuspect, in its case-in-chief), Coppola v. Powell, 878 F.2d 1562, 1567-68 (1st Cir. 1989) (stating that prosecution may not use prearrest refusal to confess in its case-in-chief), *and* United States *ex rel.* Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987) (providing that prearrest silence of criminal defendant may not be used in case-in-chief). *See generally* Oplinger, 150 F.3d 1061, 1067 (9th Cir. 1998) (surveying circuit court split on prearrest silence); Notz, *supra* note 14, at 1009-11 (same); Patrick, *supra* note 4, at 914-24 (examining circuit court split); Pettit, *supra* note 14, at 199-212 (discussing disparate treatment of prearrest silence in circuit courts).

[97] *See Burson*, 952 F.2d at 1200-01; *Coppola*, 878 F.2d at 1567-68; *Lane*, 832 F.2d at 1017. State courts have also held that the prosecution cannot use evidence of a defendant's prearrest silence in its case-in-chief. *See* State v. Rowland, 452 N.W.2d 758, 762-63 (Neb. 1990); State v. Palmer, 860 P.2d 339, 349-50 (Utah Ct. App. 1993); State v. Easter, 922 P.2d 1285, 1288-92 (Wash. 1996); Tortolito v. State, 901 P.2d 387, 390 (Wyo. 1995).

[98] *See Zanabria*, 74 F.3d at 593; *Rivera*, 944 F.2d at 1568. Some state courts have also held that the prosecution can use evidence of a defendant's prearrest silence in its case-in-chief for limited purposes. *See* Idaho v. Moore, 965 P.2d 174, 180-81 (Idaho 1998) (noting that prosecution may use prearrest silence in its case-in-chief to prove flight, but not directly to prove guilt); Coates v. United States, 705 A.2d 1100, 1104-06 (D.C. 1998) (finding that allowing comment upon unanswered question by prosecutor concerning prearrest silence in prosecutor's case-in-chief was not plain error).

[99] *Compare Rivera*, 944 F.2d at 1568 (holding that privilege against self-incrimination does not attach until custodial *Miranda* warning), *with Burson*, 952 F.2d at 1201 (holding that defendant's reliance on privilege against self-incrimination determines when privilege attaches). *See generally* Notz, *supra* note 14, at 1010-11 (indicating that differing Fifth Amendment standards exist); Pettit, *supra* note 14, at 188-91 (noting that Fifth Amendment issues, including prearrest silence, are subject to various interpretations).

[100] *See Burson*, 952 F.2d at 1200-01; *Coppola*, 878 F.2d at 1568; *Lane*, 832 F.2d at 1017; *accord Moore*, 965 P.2d at 180-81.

tionales. First, the defendants subjectively rely on the privilege against self-incrimination prearrest.[101] Second, the privilege against self-incrimination is applicable to criminal suspects.[102] Finally, cases using prearrest silence as evidence of guilt and cases using prearrest silence for impeachment are distinguishable.[103]

1. Defendants' Reliance on the Privilege Against Self-Incrimination

One rationale for holding that the prosecution cannot use evidence of a defendant's prearrest silence in its case-in-chief is that suspects rely on the privilege against self-incrimination during prearrest questioning.[104] In these cases, the courts base their holdings on the criminal suspect's subjective state of mind.[105] In each of the cases utilizing this rationale, the defendant relied on the privilege against self-incrimination even though he was not yet informed of his *Miranda* warnings.[106] However, because a defendant's privilege against self-incrimination under the Fifth Amendment does not attach before custodial interrogation, courts base this rationale on an analogy to defendants' postarrest rights — rights that prearrest questioning does not trigger.[107]

In *Coppola v. Powell*, the court rested its decision on a defendant's subjective reliance on the contents of *Miranda* warnings.[108] The

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[101] *See Burson*, 952 F.2d at 1200-01; *Coppola*, 878 F.2d at 1568.

[102] *See Burson*, 952 F.2d at 1200-01; *Lane*, 832 F.2d at 1017.

[103] *See Coppola*, 878 F.2d at 1568; *Lane*, 832 F.2d at 1017-18.

[104] *See Coppola*, 878 F.2d at 1567 (holding prearrest refusal to confess inadmissible because defendant was relying on privilege against self-incrimination at time); *see also* Fencl v. Abrahamson, 841 F.2d 760, 767-69 (7th Cir. 1988) (suggesting that defendants may be entitled to protection under privilege against self-incrimination unless and until they choose to take stand).

[105] *See Burson*, 952 F.2d at 1200-01; *Coppola*, 878 F.2d at 1567-68; *Lane*, 832 F.2d at 1017; *see also Fencl*, 841 F.2d at 767-69 (suggesting that defendants may be entitled to claim privilege against self-incrimination prearrest).

[106] *See Burson*, 952 F.2d at 1200-01 (discussing defendant's unwillingness to answer IRS investigators' questions); *Coppola*, 878 F.2d at 1563 (discussing defendant's assertion that he would not confess); *see also Lane*, 832 F.2d at 1017 (discussing defendant's statement that he did not want to talk to officers).

[107] *See* United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996) (implying that defendant's reliance on privilege against self-incrimination was misplaced because no government compulsion was yet present); United States v. Rivera, 944 F.2d 1563, 1566 (11th Cir. 1991) (stating that privilege against self-incrimination does not apply to pre-*Miranda* silence).

[108] *See Coppola*, 878 F.2d at 1567-68; *see also* Pettit, *supra* note 14, at 204-05 (stating that *Coppola* illustrates that Fifth Amendment rights attach when defendant relies on their protection).

prosecution eventually charged Coppola with rape and burglary.[109] When the police initially questioned Coppola before arrest, he refused to cooperate without first speaking with a lawyer.[110] The police had not read Coppola his *Miranda* rights because he was not yet in police custody during the questioning.[111] Because the circumstances did not amount to custodial interrogation, no *Miranda* warnings were required.[112] During the prosecution's case-in-chief, the officer that conducted Coppola's prearrest questioning testified that Coppola refused to answer questions before speaking to an attorney.[113] The trial judge allowed the officer's testimony and the Supreme Court of New Hampshire affirmed the trial court's ruling.[114]

On the defendant's habeas appeal to the First Circuit, however, the court held that evidence of Coppola's silence was inadmissible.[115] The First Circuit concluded that, during the prearrest police questioning, Coppola relied on protections ultimately given to defendants through *Miranda* warnings.[116] In fact, Coppola requested an attorney before speaking to police.[117] The court reasoned that

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[109] *See Coppola*, 878 F.2d at 1563. The defendant, Coppola, broke into Jessica Hodgins's home after midnight. *See id.* Coppola overpowered Hodgins, dragged her into her bedroom, and raped her. *See id.* Hodgins called the police and an officer came to her house to take a statement from her. *See id.* Hodgins gave a description of the rapist and a description of a suspicious car parked across the street at the time of the rape. *See id.* As a result of further investigation of the suspicious car, the police sought to question the defendant regarding possible involvement or knowledge of the crime. *See id.* Six weeks later he was arrested and charged. *See id.*

[110] *See id.* at 1568.

[111] *See id.* at 1567. Police officers went to Coppola's home and knocked on the door. *See id.* Coppola answered the door, but did not allow the officers to enter his residence. *See id.* at 1563. When the officers asked Coppola if he would answer a few questions, Coppola refused to answer and closed the door. *See id.* Because the officers did not significantly hinder Coppola's freedom of movement, the court found that officers did not place Coppola in custody. *See id.* at 1567.

[112] *See id.* at 1563; *see also* Miranda v. Arizona, 384 U.S. 436, 467 (1966).

[113] *See Coppola*, 878 F.2d at 1564.

[114] *See id.* at 1563. However, the judge suppressed testimony concerning defendant's statement that he would say no more without counsel. *See id.*

[115] *See id.* at 1568. The court reasoned that, although the defendant stated that he wanted a lawyer, the court should treat Coppola's statement as silence. *See id.* The *Coppola* court asserted that when suspects state that they will not talk until they speak to a lawyer, they are, in effect, remaining silent for Fifth Amendment purposes and are thus invoking their privilege against self-incrimination. *See id.*

[116] *See id.*

[117] *See id.* at 1564. Coppola's exact words, according to the state trooper's testimony, were: "Let me tell you something. I'm not one of your country bumpkins. I grew up on the streets of Providence, Rhode Island. And if you think I'm going to confess to you, you're crazy." *Id.* Coppola then stated that he wanted a lawyer. *See id.* at 1568. The *Coppola* court

although the officers had neither arrested Coppola nor read him *Miranda* warnings, Coppola knew of the *Miranda* warnings and relied on them to avoid incriminating himself.[118] The court stated that because Coppola relied on protections contained in *Miranda* warnings, the prosecutor's mention of Coppola's prearrest silence violated his constitutional rights.[119]

2. The Fifth Amendment Privilege Against Self-Incrimination Applies When Labeled a Suspect

Rather than relying on defendants' subjective expectation of Fifth Amendment protections, other courts have held that evidence of prearrest silence is inadmissible because the privilege against self-incrimination applies to criminal suspects.[120] These courts hold that protections afforded by *Miranda* warnings attach as early as the preliminary investigation.[121]

In *United States ex rel. Savory v. Lane*, for example, the Seventh Circuit held that the Fifth Amendment privilege against self-incrimination applies both before and after a defendant is taken into custody.[122] The defendant in *Lane* was not in custody when the officers questioned him.[123] Therefore, officers did not need to administer *Miranda* warnings.[124] When approached by officers, the defendant refused to cooperate.[125] At trial, the officers testified that the defendant would not answer prearrest questions.[126] The

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stated that, in essence, Coppola invoked his privilege against self-incrimination. *See id.* at 1567.

[118] *See id.* at 1567.

[119] *See id.* at 1567-68; *see also* United States v. Caro, 637 F.2d 869, 876 (2d Cir. 1981) (suggesting assumption exists that defendants are entitled to Fifth Amendment protections when they rely on them).

[120] *See* United States v. Burson, 952 F.2d 1196, 1200-01 (10th Cir. 1991); United States *ex rel.* Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987).

[121] *See Burson*, 952 F.2d at 1200-01; *Lane*, 832 F.2d at 1017.

[122] *See Lane*, 832 F.2d at 1017.

[123] *See id.* Police officers wanted to question the defendant concerning two "brutal[] murder[s]." *See id.* at 1012. A week after the murders, police officers went to the defendant's school to speak with him. *See id.* at 1015. The officers approached the defendant in public at 3:30 p.m. *See id.* Defendant did not challenge the finding of the court below that defendant was not in custody at the time of this initial questioning. *See id.*

[124] *See supra* note 112.

[125] *See Lane*, 832 F.2d at 1015. The defendant indicated that he did not wish to speak with police officers. *See id.*

[126] *See id.*

prosecution further accentuated the defendant's silence in closing argument.[127]

On appeal, the Seventh Circuit found that admitting evidence of prearrest silence violated the Fifth Amendment's privilege against self-incrimination.[128] To evaluate the propriety of the prosecutor's use of evidence of prearrest silence in its case-in-chief, the *Lane* court looked to the stage in a criminal investigation when the privilege against self-incrimination attaches.[129] The *Lane* court held that the right to remain silent attaches even before the government implements formal adversary proceedings.[130] The *Lane* court stated that the right to counsel under *Miranda* attaches when the defendant becomes the primary suspect, and the right to remain silent attaches sometime before the defendant becomes the primary suspect.[131] The *Lane* court further concluded that the stage in the investigation before the defendant becomes the primary suspect is the preliminary investigation.[132] Therefore, the court deduced that the Fifth Amendment privilege against self-incrimination attaches during the preliminary investigation.[133] Because the defendant in *Lane* was questioned during the preliminary investigation, he was entitled to his Fifth Amendment privilege against self-incrimination.[134] Thus, the court held that the privilege against self-incrimination applies prior to arrest.[135] The *Lane* court further found that the defendant invoked his privilege against self-incrimination.[136] Consequently, because the prosecution cannot comment on silence when a suspect defendant has invoked his right to remain silent, the court stated that prosecutorial comment

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[127] *See id.*

[128] *See id.* at 1018.

[129] *See id.* at 1017.

[130] *See id.*; *see also* Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964) (stating that Fifth and Sixth Amendment protections become applicable when focus of investigation centers on particular suspect).

[131] *See Lane*, 832 F.2d at 1017. A difference exists between a primary suspect and an accused individual. Government officials label an individual "primary suspect" when they believe that it is likely that the individual committed a crime. *See* BLACK'S LAW DICTIONARY, *supra* note 46, at 1446 (6th ed. 1990). The government labels an individual "accused" when the government blames the person for committing a crime and files criminal charges. *See id.* at 23.

[132] *See Lane*, 832 F.2d at 1017.

[133] *See id.*

[134] *See id.*

[135] *See id.*

[136] *See id.*

on prearrest silence is inadmissible at trial.[137] Other courts have refused to admit evidence of prearrest silence on the ground that the prosecution's comment on a defendant's prearrest silence was comparable to a comment on a defendant's failure to testify at trial.[138] In *Griffin v. California*, the Supreme Court held that the prosecution cannot comment on a defendant's decision not to take the witness stand.[139] The Seventh Circuit has interpreted the *Griffin* holding broadly, equating the nontestifying defendant's silence at trial with the suspect's silence prior to arrest.[140] In effect, the Seventh Circuit created a broad category of silence, all of which is protected by the privilege against self-incrimination.[141]

3. Distinguishing the Use of Prearrest Silence as Evidence of Guilt from the Use of Prearrest Silence as Evidence Used for Impeachment Purposes

In addition to asserting that the Fifth Amendment privilege against self-incrimination applies before arrest, the Seventh Circuit distinguished cases in which the prosecution impeached a defendant with prearrest silence.[142] The *Lane* court concluded that prearrest silence is inadmissible in the prosecution's case-in-chief.[143] Because the Supreme Court has not ruled on the prosecution's use of a defendant's prearrest silence in its case-in-chief, courts look to other Supreme Court decisions dealing with issues of self-

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[137] *See id.*

[138] *See* Coppola v. Powell, 878 F.2d 1562, 1568 (1st Cir. 1989); *see also* Griffin v. California, 380 U.S. 609, 615 (1965) (holding that prosecutors cannot comment on defendant's failure to testify at trial).

[139] *See Griffin*, 380 U.S. at 615. The *Griffin* Court stated that it is improper for prosecutors to mention that the defendant has invoked his constitutional privilege against self-incrimination. *See id.* The Court reasoned that if evidence of post-*Miranda* silence and defendant's unwillingness to take the witness stand were admissible, juries would penalize the defendant for invoking a constitutional privilege and remaining silent. *See id.* at 614.

[140] *See Lane*, 832 F.2d at 1017 (discussing similarities between prearrest and postarrest silence).

[141] *See id.* at 1017 (asserting that courts should treat all silence in same manner).

[142] *See id.* at 1017-18 (distinguishing Fletcher v. Weir, 455 U.S. 603 (1982) and Jenkins v. Anderson, 447 U.S. 231 (1980)).

[143] *See id.* at 1017 (finding error in referring to defendant's silence constitutional in magnitude). The First Circuit also applied this rationale. *See Coppola*, 878 F.2d at 1566 (holding that use of prearrest silence for impeachment and use of prearrest silence as evidence of guilt are two separate issues, thus, inferring that courts should treat them differently).

incrimination for guidance.[144] The Supreme Court has held that when a defendant invokes the privilege against self-incrimination, the prosecution can only comment on the defendant's silence if the defendant chooses to take the witness stand.[145] Thus, the First and Seventh Circuits have held that when defendants do not elect to testify and invoke their privilege against self-incrimination, the prosecution cannot comment on their prearrest silence.[146]

The Seventh Circuit, in *Lane*, reasoned that in cases dealing with impeachment, defendants waive their Fifth Amendment privilege against self-incrimination when they take the witness stand.[147] Under these circumstances, defendants subject themselves to possible impeachment by the prosecution and assume that risk by taking the stand.[148] In contrast, when the defendant does not take the

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[144] *See Lane*, 832 F.2d at 1017 (citing Griffin v. California, 380 U.S. 609 (1965)). Courts holding that the prosecution can use evidence of prearrest silence in its case-in-chief rely on *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980), which held that the prosecution can use evidence of prearrest silence for impeachment. *See* United States v. Oplinger, 150 F.3d 1061, 1066 (9th Cir. 1998); United States v. Thompson, 82 F.3d 849, 855 (9th Cir. 1996); United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991). Courts holding that the prosecution cannot use evidence of prearrest silence in its case-in-chief rely on *Griffin v. California*, 380 U.S. 609, 615 (1965), which held that the prosecution cannot comment on a defendant's failure to take the witness stand in its case-in-chief. *See* United States v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991); *Coppola*, 878 F.2d at 1568; *Lane*, 832 F.2d at 1017.

[145] *See* Fletcher v. Weir, 455 U.S. 603, 607 (1982) (stating that state does not violate due process when it permits cross examination as to postarrest silence when defendant chooses to take witness stand); Raffel v. United States, 271 U.S. 464, 496-97 (1926) (asserting that when defendant testifies, he waives privilege against self-incrimination); Fitzpatrick v. United States, 178 U.S. 304, 315 (1900) (holding that defendants that voluntarily take witness stand cannot refuse to answer questions on cross-examination if questions are reasonably related to subject matter of direct examination); Brown v. Walker, 161 U.S. 591, 597-98 (1896) (stating that defendants that choose to testify cannot claim privilege against self-incrimination when cross-examined by prosecution).

[146] *See Coppola*, 878 F.2d at 1568; *Lane*, 832 F.2d at 1018.

[147] *See Lane*, 832 F.2d at 1017-18; *see also Fletcher*, 455 U.S. at 607 (holding that prosecutors can impeach defendants that choose to testify at trial with evidence of post-*Miranda* silence in some circumstances); *Jenkins*, 447 U.S. at 238 (stating that one reason why courts allow prosecutors to use prearrest silence for impeachment is that defendants waive privilege against self-incrimination when taking witness stand); *Coppola*, 878 F.2d at 1566 (asserting that when defendants do not take witness stand, they do not waive their privilege against self-incrimination).

[148] *See Lane*, 832 F.2d at 1017-18; *see also Fletcher*, 455 U.S. at 607 (resting decision on assumption that defendants waive Fifth Amendment protections when taking witness stand); *Jenkins*, 447 U.S. at 238 (stating that when defendants take witness stand they assume risk of prosecutorial impeachment); *Coppola*, 878 F.2d at 1567-68 (stating that defendants expose themselves to impeachment when taking witness stand).

witness stand, the Fifth Amendment privilege against self-incrimination still applies to protect the defendant.[149]

B. *Circuits Holding that Prearrest Silence Evidence Is Admissible*

The Fifth and Eleventh Circuits have held that the privilege against self-incrimination does not apply before custodial interrogation.[150] These circuits have asserted that the Fifth Amendment privileges only apply to compelled self-incrimination.[151] Government-compelled self-incrimination occurs when governmental agents, through actions or words, force suspects to behave in certain ways that may have adverse effects on the suspects' penal interests.[152] The Fifth and Eleventh Circuits base their decisions on two primary rationales: the absence of governmental compulsion before arrest[153] and harmless error.[154]

1. Absence of Governmental Compulsion Before Arrest

Circuits holding that the prosecution can use evidence of a defendant's prearrest silence in its case-in-chief all rely on the plain text of the Fifth Amendment,[155] which, as noted above, provides that no person "shall be compelled in any criminal case to be a witness against himself . . ."[156] Therefore, an important factor for

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[149] *See Lane*, 832 F.2d at 1017-18; *see also Coppola*, 878 F.2d at 1566 (asserting that defendants who choose not to take witness stand deserve Fifth Amendment protections).

[150] *See* United States v. Oplinger, 150 F.3d 1061, 1067 (9th Cir. 1998); United States v. Thompson, 82 F.3d 849, 855 (9th Cir. 1996); United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996); United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991).

[151] *See Oplinger*, 150 F.3d at 1067; *Zanabria*, 74 F.3d at 593; *Rivera*, 944 F.2d at 1569 (stating that prosecutor was clearly entitled to comment on defendant's demeanor when she was first approached at luggage carousel and later when luggage was initially being searched).

[152] *See* Miranda v. Arizona, 384 U.S. 436, 476 (1966) (stating that governmental compulsion exists if officers physically force defendants to act in particular ways or give particular responses). For example, if officers conduct an illegal search of a suspect or his property and uncover incriminating evidence, the officers have compelled the suspect to explain why the suspect possesses the incriminating evidence. *See* United States v. Pepe, 367 F. Supp. 1365, 1368 n.4 (D. Conn. 1973) (noting that criminal suspects feel compelled to explain themselves when confronted by officers with an accusation of criminal activity). Similarly, if an officer confronts a criminal suspect with false information designed to elicit an incriminating response, the government has compelled the suspect to speak. *See* Escobedo v. Illinois, 378 U.S. 478, 484-85 (1964) (holding that criminal suspects are compelled to speak when confronted with accusatory comments by law enforcement and explaining that accusatory comments have same force and purpose as questions).

[153] *See Zanabria*, 74 F.3d at 593; *Rivera*, 944 F.2d at 1569.

[154] *See Zanabria*, 74 F.3d at 593; *Rivera*, 944 F.2d at 1569.

[155] *See Oplinger*, 150 F.3d at 1067; *Zanabria*, 74 F.3d at 593; *Rivera*, 944 F.2d at 1568.

[156] U.S. CONST. amend. V.

these circuits is the absence of governmental compulsion.[157] The Fifth and Eleventh Circuits hold that the prosecution can use evidence of prearrest silence in its case-in-chief as long as the government agent did not compel the defendant to remain silent.[158] For example, in *United States v. Zanabria*, the Fifth Circuit held that the accused's privilege against self-incrimination does not apply prearrest.[159]

In *Zanabria*, the government charged the defendant with possession of cocaine.[160] At trial, defense counsel claimed that the defendant was in possession of cocaine as a result of duress.[161] When initially questioned by customs agents, the defendant did not mention that he was under duress.[162] To rebut Zanabria's duress defense, the prosecution introduced evidence that the defendant did not inform the custom's agents that someone was forcing him to carry the narcotics.[163] The interviewing custom's official testified that the defendant remained silent and did not mention that he was under duress.[164] The prosecution also mentioned the defendant's silence in its closing argument.[165]

The *Zanabria* court allowed the evidence and reasoned that the privilege against self-incrimination did not attach because the government did not compel the defendant's prearrest silence.[166] The

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[157] *See Oplinger*, 150 F.3d at 1067 (asserting that courts should not admit evidence of prearrest silence resulting from governmental compulsion); *Zanabria*, 74 F.3d at 593 (stating that governmental compulsion activates Fifth Amendment protections); *Rivera*, 944 F.2d at 1568 (implying that governmental compulsion is important to analysis of prearrest silence issue).

[158] *See Zanabria*, 74 F.3d at 593; *Rivera*, 944 F.2d at 1568-69; *see also Oplinger*, 150 F.3d at 1067 (expressing desire to follow Fifth and Eleventh Circuits and stating that courts should not admit evidence of prearrest silence resulting from governmental compulsion).

[159] *See Zanabria*, 74 F.3d at 593.

[160] *See id.* at 591. The government specifically charged Zanabria with possession of cocaine with intent to distribute and unlawful transportation of cocaine. *See id.*

[161] *See id.* at 592. Duress, in this context, is the threat of harm used as a tool to force individuals to commit acts against their will and better judgment. *See* Snyder v. Rosenbaum, 215 U.S. 261, 263-65 (1909) (defining duress as fraudulent confinement of person); WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., CRIMINAL LAW 433 (2d ed. 1986); BLACK'S LAW DICTIONARY, *supra* note 46, at 504. *See generally* Garrity v. New Jersey, 385 U.S. 493, 496-98 (1967) (providing discussion of duress, including examples).

[162] *See Zanabria*, 74 F.3d at 593. The court regarded this as silence. *See id.*

[163] *See id.*

[164] *See id.*

[165] *See id.*

[166] *See id.* Because officers only asked investigatory questions before they arrested Zanabria, the court found that officers did not compel Zanabria to remain silent. *See id.* The court specifically found that Zanabria's silence was neither in response to nor induced by a government agent. *See id.*

court stated that the privilege against self-incrimination does not preclude prosecutors from presenting relevant evidence of a communication or lack thereof that gives rise to an incriminating inference.[167]

The Eleventh Circuit reached a similar result in *United States v. Rivera*.[168] In that case, a customs agent stopped the defendant, Vila, in the airport because of suspicious circumstances.[169] The customs agent then led Vila into a room and began searching her suitcase.[170] While the customs agent was searching Vila's suitcase, Vila remained silent and had an emotionless expression on her face.[171] At this point, the customs agent had not yet read Vila the *Miranda* warnings because he had not yet placed her in custody.[172] The

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[167] *See id.* Supreme Court cases interpreting the privilege against self-incrimination only prohibit prosecutorial comment when a defendant has invoked the privilege against self-incrimination after officers have read the defendant *Miranda* rights. *See* Fletcher v. Weir, 455 U.S. 603, 606-07 (1982); Doyle v. Ohio, 426 U.S. 610, 619-20 (1976). However, the Supreme Court has not interpreted the Fifth Amendment as precluding courts from admitting evidence of communication of silence occurring before the privilege against self-incrimination attaches. *Compare* United States v. Rivera, 944 F.2d 1563, 1569 (11th Cir. 1991) (ruling that evidence of prearrest silence is admissible in prosecution's case-in-chief), *with* United States v. Burson, 952 F.2d 1196, 1200-01 (10th Cir. 1991) (holding that evidence of prearrest silence is inadmissible in prosecution's case-in-chief). *See generally* Patrick, *supra* note 4, at 898-99 (stating that courts are split on issue of whether court should admit prearrest silence evidence in prosecution's case-in-chief); Snyder, *supra* note 4, at 285-86 (discussing evolution of courts' treatment of privilege against self-incrimination).

[168] *See Rivera*, 944 F.2d at 1569.

[169] *See id.* at 1565. There were actually three defendants in this case, Vila, Rivera, and Stroud. *See id.* The custom's agent noticed many suspicious circumstances surrounding the defendants' arrival at the airport. *See id.* The group arrived from Columbia, a known source for cocaine, although nobody in the group was Columbian. *See id.* All defendants spoke English and had no accent. *See id.* The same travel agency handled the group's travel plans and their itinerary had very recently changed. *See id.* Both Rivera and Stroud had gotten passports just a few days before the trip. *See id.* Officers thought that the group changed their travel plans because Rivera and Stroud did not have passports at the time the group was originally supposed to depart. *See id.* The defendants told the custom's agent that they had gone to Columbia on vacation, but the agent knew that the area they visited was not a common tourist destination. *See id.*

[170] *See id.* at 1565-66.

[171] *See id.* Vila was unemotional and indifferent to law enforcement while they searched her suitcase. *See id.* The testifying officer referred to Vila's expression as "deadpan." *See id.*

[172] *See id.* at 1566. During a border search, only reasonable suspicion is needed to search an individuals or their suitcases. *See* United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985) (stating that totality of suspicious circumstances surrounding defendant's trip to United States from Columbia was enough to establish reasonable suspicion to conduct border search). The standard of proof at the border is lessened because of the concern for national security. *See id.* at 538. When custom's agents detained and searched Vila, it only amounted to a border search. *See Rivera*, 944 F.2d at 1566. Therefore, the search was not classified as a custodial interrogation by the court and *Miranda* warnings were not applica-

prosecution used Vila's prearrest silence and demeanor in its case-in-chief as evidence that Vila had an indifferent attitude toward law enforcement.[173] The customs agent testified about Vila's silence and the prosecution again referred to Vila's silence in its closing argument.[174]

The *Rivera* court cited the *Jenkins* case for the proposition that the government can comment on defendants' prearrest silence.[175] The court stated that the *Jenkins* rationale applied because the government did not compel the defendant to remain silent.[176] Therefore, the Eleventh Circuit determined that when the government does not compel prearrest silence, the privilege against self-incrimination does not apply.[177]

2. Prejudice May Not Rise to Reversible Error

To allow a piece of relevant evidence in a criminal trial after an objection by the defense, the court must determine that the proffered evidence is not harmfully prejudicial.[178] Harmful prejudice occurs if the probative value of the proffered evidence is significantly outweighed by its prejudicial effect.[179] If evidence assists the jury in deliberations and does not significantly prejudice the defendant, the court will admit the evidence.[180] Consequently, circuits permitting the prosecution's use of prearrest silence during its case-in-chief over defendants' objections also tend to hold that evidence of prearrest silence does not constitute reversible error.[181]

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ble. *See id.* (stating that government counsel asked jury to infer that indifference had been prearranged reaction in event smuggling was detected).

[173] *See Rivera*, 944 F.2d. at 1567.

[174] *See id.*

[175] *See id.* at 1568 (citing Jenkins v. Anderson, 447 U.S. 231, 238 (1980)).

[176] *See id.* at 1567.

[177] *See id.* at 1568.

[178] *See* FED. R. EVID. 403 (stating that trial judges have discretion to exclude prejudicial evidence); *see also* Steven T. Halasz, Annotation, *Propriety Under Rule 403 of the Federal Rules of Evidence; Permitting Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time; of Attack on Credibility of Witness for Party*, 48 A.L.R. FED. 390, 396 (1980) (describing purpose of excluding prejudicial evidence and discussing standard judges use to determine if evidence is prejudicial).

[179] *See* FED. R. EVID. 403 (stating that courts should exclude evidence if its probative value is significantly outweighed by its prejudicial effect); *see also* FED. R. EVID. 609(a)(1) (stating that courts should admit evidence of prior convictions only if their probative value is significantly outweighed by their prejudicial effect).

[180] *See generally* FED. R. EVID. 401 (defining relevant evidence).

[181] *See Rivera*, 944 F.2d at 1569-70 (stating that government's comment on prearrest silence is harmless error beyond a reasonable doubt); United States v. Oplinger, 150 F.3d

To hold that admission of a piece of evidence is not a reversible error, a court must find that the introduction of the evidence inflicted insubstantial harm on the defendant.[182] For example, the Eleventh Circuit in *Rivera* found that admission of a defendant's post-*Miranda* silence was not reversible error.[183] The court held that the prosecution could refer to the defendant's silence prior to arrest in its closing argument.[184] The court reasoned that because the prosecution could comment on prearrest silence and demeanor in the trial during closing argument, the admission of the evidence in the prosecution's case-in-chief could not rise to the level of reversible error.[185] Thus, the Fifth and Eleventh Circuits have held that evidence of prearrest silence is admissible in the prosecution's case-in-chief.[186]

III. ANALYSIS

The Fifth and Eleventh Circuits' rule that the prosecution can use evidence of prearrest silence in its case-in-chief is preferable to a rule barring all such evidence from the guilt phase of a criminal trial.[187] Courts should allow the prosecution to present evidence of a defendant's prearrest silence during its case-in-chief for two reasons. First, *Miranda* and more recent Supreme Court cases interpreting the Fifth Amendment hold that the privilege against self-

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1061, 1067 (9th Cir. 1998) (holding that government did not prejudice defendant by introducing evidence of prearrest silence).

[182] *See Rivera*, 944 F.2d at 1569-70 (applying this standard); *Oplinger*, 150 F.3d at 1066-67 (discussing application of this standard to issue of prearrest silence).

[183] *See Rivera*, 944 F.2d at 1569-70 (stating that appellate court will reverse trial court's decision only if prosecution harmed defendant by introducing evidence of prearrest silence).

[184] *See id.* Closing argument is the stage in a trial when the prosecution combines all the evidence relevant to the case into one argument. *See* James H. Seckinger, *Closing Argument*, 19 AM. J. TRIAL ADVOC. 51 (1995). During closing argument, the prosecutor summarizes all facts of the case, introduces the law, and attempts to convince the jury to convict the defendant. *See id.* at 55. Because closing argument is the only stage in the trial when the jury hears the prosecution's view of the facts of the case all at once, one commentator argues that it is one of the most important parts of a trial. *See id.* at 52. Thus, evidence of a defendant's prearrest silence may have more of an impact on the jury during closing argument than it would during direct examination of a police officer. *See Rivera*, 944 F.2d at 1568.

[185] *See Rivera*, 944 F.2d at 1570.

[186] *See* United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996); *Rivera*, 944 F.2d at 1568; *see also Oplinger*, 150 F.3d at 1066 (holding that court may allow use of prearrest silence evidence by prosecution in its case-in-chief).

[187] *See Zanabria*, 74 F.3d at 593 (holding that prosecution can use evidence of prearrest silence in case-in-chief); *Rivera*, 944 F.2d at 1568 (holding that evidence of prearrest silence is admissible in prosecution's case-in-chief).

incrimination does not apply prearrest.[188] Under this analysis, the prosecution's use of prearrest silence in its case-in-chief does not violate any Fifth Amendment protections.[189] Second, evidence of prearrest silence is not different from other types of circumstantial evidence presented by the prosecution.[190] The prosecution does not force the defendant to testify or compel the defendant to help the prosecution prove its case.[191] Furthermore, the prosecution's use of evidence of prearrest silence as circumstantial evidence of guilt only minimally increases the risk of convicting innocent parties.[192] Therefore, under the *Jenkins* impermissible burden test, courts may allow evidence of a defendant's prearrest silence.[193]

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[188] *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (implying that privilege against self-incrimination applies only when suspect is in custody and is interrogated by officers). Supreme Court decisions since *Miranda* similarly have held that the privilege against self-incrimination only becomes applicable when a police officer interrogates a criminal suspect in police custody. *See* Illinois v. Perkins, 496 U.S. 292, 296-97 (1990); Minnesota v. Murphy, 465 U.S. 420, 429-30 (1984); Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980); *see also* Massiah v. United States, 377 U.S. 201, 206 (1964) (asserting that criminal suspects are entitled to privilege against self-incrimination during interrogation); Bram v. United States, 168 U.S. 532, 556-65 (1897) (holding that criminal suspects deserve Fifth Amendment protections when interrogated in coercive atmosphere).

[189] *See Oplinger*, 150 F.3d at 1067; *Zanabria*, 74 F.3d at 593.

[190] For example, courts allow the prosecution to present evidence that a defendant fled from police in its case-in-chief. *See* Alberty v. United States, 162 U.S. 499, 510 (1896); Hickory v. United States, 160 U.S. 408, 416-18 (1896); United States v. Ballard, 423 F.2d 127, 133 (5th Cir. 1970) (stating that law is well settled that prosecution can introduce evidence of defendant's flight in case-in-chief). Similarly, courts allow the prosecution to present evidence of a defendant's demeanor prior to arrest. *See* Gray v. Netherland, 518 U.S. 152, 179 (1996) (Ginsburg, J., dissenting) (accepting propriety of prosecution's use of evidence of defendant's prearrest demeanor in its case-in-chief); Pennsylvania v. Muniz, 496 U.S. 582, 603 n.17 (1990) (allowing officer to testify as to defendant's demeanor in drunk-driving context).

[191] *See Oplinger*, 150 F.3d at 1067 (holding that privilege against compelled self-incrimination does not generally extend to prearrest silence); *Zanabria*, 74 F.3d at 593; *Rivera*, 944 F.2d at 1568.

[192] *See Oplinger*, 150 F.3d at 1067 (noting defendant's rights not violated by admitting evidence of prearrest silence); *Zanabria*, 74 F.3d at 593 (finding no error in prosecutor's use of prearrest silence); *Rivera*, 944 F.2d at 1569-70 (concluding that prosecution's comment on defendant's silence was harmless).

[193] *See* Jenkins v. Anderson, 447 U.S. 231, 236-38 (explaining impermissible burden analysis); *see also* Sherbert v. Verner, 374 U.S. 398, 406-09 (1963) (applying impermissible burden test in First Amendment context); *Oplinger*, 150 F.3d at 1067 (finding no rights violation where compulsion is not shown); *Zanabria*, 74 F.3d at 593 (declining to find error); *Rivera*, 944 F.2d at 1569-70 (declining to find error).

A. Analysis Under Current Fifth Amendment Decisions

Based on the *Miranda* holding, courts should allow the use of prearrest silence by the prosecution in its case-in-chief.[194] The circuits holding that prearrest silence is admissible only for impeachment purposes state that if defendants subjectively rely on the privilege against self-incrimination, they are entitled to the privileges' protections.[195] However, precedent concerning the privilege against self-incrimination does not support the validity of a subjective application of this right.[196]

In *Miranda*, the Supreme Court held that the privilege against self-incrimination does not apply to prearrest, precustodial questioning by governmental agents.[197] *Miranda* established that the policy underlying the privilege against self-incrimination is to protect criminal suspects from governmental compulsion in custodial interrogation.[198] Therefore, the privilege against self-incrimination applies when the government limits the suspect's freedom of movement[199] and exerts some kind of force or pressure

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[194] The *Miranda* Court held that officers must give certain warnings to suspects before questioning the suspects in a custodial setting. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966). These warnings include the right to remain silent, the right to an appointed attorney, and that the prosecution may use anything the suspect says against him in court. *See id.* at 467-73. The *Miranda* Court established these warnings because of criminal suspects' need for procedural safeguards in a custodial setting. *See id. Miranda* warnings are only given to criminal suspects when officers substantially impair suspects' freedom of movement and deliberately attempt to elicit incriminating responses. *See id.* at 477. Where these circumstances are not present prearrest, no official compulsion is present, and the privilege against self-incrimination, whether by speech or by silence, does not apply. *See Oplinger*, 150 F.3d at 1066-67.

[195] *See* United States v. Burson, 952 F.2d 1196, 1200-01 (10th Cir. 1991); Coppola v. Powell, 878 F.2d 1562, 1566 (1st Cir. 1989); United States *ex rel.* Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987).

[196] *See* Stansbury v. California, 511 U.S. 318, 323 (1994) (per curiam) (stating that court must determine that objective factors are present to find defendant in custody); Berkemer v. McCarty, 468 U.S. 420, 442 (1984) (stating that "only relevant inquiry is how a reasonable man in suspect's position would have understood his situation"); Beckwith v. United States, 425 U.S. 341, 346-47 (1976) (explaining that it is custodial nature of investigation that triggers need for *Miranda* warnings).

[197] *See Miranda*, 384 U.S. at 477-78 (stating that general questioning of citizens during investigation does not require *Miranda* warnings).

[198] *See id.* at 469-70; *see also Berkemer*, 468 U.S. at 433 (stating that purpose of *Miranda* holding is to ensure that police do not trick suspects into confessing).

[199] *See* New York v. Quarles, 467 U.S. 649, 655 (1984) (citing California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam)); Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam)). For example, officers can limit suspects' freedom of movement by placing them in the back of the police car or placing them in handcuffs. *See Quarles*, 467 U.S. at 655; Rhode Island v. Innis, 446 U.S. 291, 298 (1980); *see also Miranda*, 384 U.S. at 477 (explaining that protection is necessary when individual is deprived of his "freedom of action").

on the defendant resulting from governmental authority.[200]

In situations involving prearrest questioning, the criminal suspect is not yet in custody.[201] Before arrest, criminal suspects have several choices when officers try to elicit information.[202] A criminal suspect may choose to remain silent, walk away, tell the truth, or lie.[203] Because suspects are not in custody and do not yet require the protections afforded while in a police-dominated atmosphere, the privilege against self-incrimination does not yet apply.[204]

The privilege against self-incrimination is also inapplicable prearrest because criminal suspects are not coerced when confronted with prearrest questions by officers.[205] One commentator opposing the prosecution's use of prearrest silence evidence in its case-in-chief argues that both prearrest and postarrest contact with police are inherently coercive situations.[206] This commentator asserts that individuals would not feel as if they could walk away when approached by officers of the law,[207] but instead would likely assume that the officers would compel them to stay if they attempted to

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[200] The government must both satisfy both conditions to place a suspect in custody. *See Berkemer*, 468 U.S. at 428; Minnesota v. Murphy, 465 U.S. 420, 429-33 (1984); California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam); *Mathiason*, 429 U.S. at 494-95; *Miranda*, 384 U.S. at 478.

[201] *See Miranda*, 384 U.S. at 444 (defining custody and implying that defendants are not entitled to Fifth Amendment protections until government places them in custody).

[202] *See* Oregon v. Elstad, 470 U.S. 298, 308 (1985) (noting that suspects are capable of deciding what to say once warned by law enforcement officers); United States v. Salvo, 133 F.3d 943, 950 (6th Cir. 1998) (implying that suspect is free to leave scene of prearrest questioning).

[203] *See Elstad*, 470 U.S. at 308; *Salvo*, 133 F.3d at 950.

[204] *See* Beckwith v. United States, 425 U.S. 341, 347-48 (1976) (holding that Fifth Amendment does not entitle defendants who are focus of investigation, but not yet placed in custody, to *Miranda* protections); United States v. Oplinger, 150 F.3d 1061, 1066-67 (9th Cir. 1998) (holding that Fifth Amendment does not entitle criminal suspects privilege against prearrest self-incrimination because government has not yet compelled defendant to do or say anything).

[205] *See Beckwith*, 425 U.S. at 347-48 (recognizing that interviews with government agents are not as "inherently coercive" as custodial interrogations and that, therefore, *Miranda* does not apply); *see also* Jenkins v. Anderson, 447 U.S. 231, 236 n.2 (1980) (stating that Court's holding does not cover prearrest questioning). Even though the majority in *Jenkins* expressly withheld opinion on the applicability of the Fifth Amendment privilege on prearrest silence, Justice Stevens, in concurrence, reasoned that he would reject such a claim as irrelevant because a defendant, prearrest, would not be under any compulsion to speak. *See id.* at 243-44 (Stevens, J., concurring).

[206] *See* Pettit, *supra* note 14, at 216 (arguing that individuals may feel compelled to speak when confronted by police prearrest). *See generally Miranda*, 384 U.S. at 461 (implying sense of "informal compulsion" in custodial interrogation).

[207] *See* Pettit, *supra* note 14, at 216 (asserting that most citizens would feel as if they must cooperate with officers).

walk off.[208] However, this line of reasoning does not justify excluding evidence of prearrest silence from the prosecution's case-in-chief.

Despite the pressure individuals may feel when confronted by officers, they are completely free to walk away at any time.[209] Individuals in our society are presumed to know the law.[210] The criminal justice system holds people accountable for breaking the law whether or not they know that the particular law exists.[211] Therefore, it is appropriate to presume that when people are merely questioned by a law enforcement officer they know that they can walk away at any time.[212] Because individuals are not compelled by the government to act in any particular way before arrest, the Fifth Amendment's privilege against self-incrimination is inapplicable.[213]

The widely recognized rule that prearrest statements by criminal defendants are admissible in the prosecution's case-in-chief strengthens the position that the privilege against self-incrimination does not apply prearrest.[214] The law allows prosecutors, in their cases-in-chief, to refer to statements that defendants made prearrest.[215] This shows that *Miranda* is inapplicable before custodial interrogation.[216] If *Miranda* did apply prior to arrest, a

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[208] *See id.* (stating that government compulsion exists prearrest).

[209] *See* United States v. Salvo, 133 F.3d 943, 950-51 (6th Cir. 1998) (suggesting that criminal suspects may leave scene of prearrest questioning).

[210] *See* Hamling v. United States, 418 U.S. 87, 123-24 (1974); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910). *But see* Cheek v. United States, 498 U.S. 192, 199-200 (1991) (stating that good faith misunderstanding can negate specific intent).

[211] *See supra* note 210 and accompanying text.

[212] *See Salvo*, 133 F.3d at 950 (implying that reasonable people should feel free to leave scene of prearrest questioning).

[213] *See* United States v. Oplinger, 150 F.3d 1061, 1066-67 (9th Cir. 1998) (stating that Fifth Amendment does not entitle criminal suspects to privilege against self-incrimination prearrest because government has not yet compelled individual to say anything); *see also* Oregon v. Elstad 470 U.S. 298, 306-07 (1985) (holding that courts should exclude defendants' statements in prosecution's case-in-chief only if statements are result of compulsion).

[214] *See* Stansbury v. California, 511 U.S. 318, 322 (1994) (per curiam) (indicating that suspect must have been in custody for court to exclude statements under *Miranda*); Beckwith v. United States, 425 U.S. 341, 344-46 (1976) (stating that court must find defendant in custody to exclude statements from trial). Moreover, other types of prearrest evidence are admissible in the prosecution's case-in-chief. *See, e.g.*, Gray v. Netherland, 518 U.S. 152, 179 n.6 (1996) (Ginsburg, J., dissenting) (providing example of prosecution commenting on prearrest demeanor); United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991) (asserting that government may comment on prearrest demeanor).

[215] *See Stansbury*, 511 U.S. at 322 (per curiam); *Beckwith*, 425 U.S. at 344-46.

[216] *See Stansbury*, 511 U.S. at 322 (per curiam) (implying that *Miranda* does not apply to prearrest situations); *Beckwith*, 425 U.S. at 346 (holding that *Miranda* does not apply when suspects are not in custody).

prosecutor could not use the defendant's prearrest statements against the defendant in court.[217] Just as *Miranda* protections do not apply to criminal suspects' prearrest statements, *Miranda* protections also should not apply to criminal suspects' prearrest silence.[218] Both prearrest statements and prearrest silence occur before the privilege against self-incrimination attaches.[219]

In addition to asserting that *Miranda* protections apply prearrest, commentators opposing the prosecution's use of prearrest silence as evidence of guilt also have argued that prosecutors compel defendants to testify when they introduce such evidence.[220] They have argued that when the government introduces evidence of defendants prearrest silence, it compels criminal defendants to explain themselves on the witness stand.[221] Commentators have asserted that because the Fifth Amendment protects against compelled self-incrimination during a criminal trial, the prosecution should not use evidence of prearrest silence in its case-in-chief.[222] Courts have held, however, that defendants are not forced to take the stand when the prosecution presents incriminating evidence.[223]

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[217] *See Stansbury*, 511 U.S. at 322 (per curiam) (stating that defendant must be in custody when questioned for court to exclude statements); *Beckwith*, 425 U.S. at 344 (stating that privilege against self-incrimination does not apply when suspects are not in custody). Furthermore, if *Miranda* applied prearrest, then *a fortiori* prosecutors could also not comment on a defendant's prearrest demeanor. *See Gray*, 518 U.S. at 179 n.6 (Ginsburg, J., dissenting) (providing example of demeanor evidence); *see also* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (defining circumstances under which *Miranda* warning requirements apply). The *Miranda* Court meant for its holding to only apply to "custodial interrogations." *See id.* at 444. The Supreme Court historically has only applied the *Miranda* decision to postarrest circumstances. *See* Doyle v. Ohio, 426 U.S. 610, 619 (1976) (holding that prosecutors cannot seek to impeach defendants by their invocation of their *Miranda* rights).

[218] *See, e.g., Stansbury*, 511 U.S. at 323-26 (suggesting that prosecution can refer to defendants' prearrest statements as evidence of guilt); *Beckwith*, 425 U.S. at 347-48 (suggesting that prosecution can introduce evidence concerning defendants' prearrest statements in case-in-chief because privilege against self-incrimination does not apply prearrest); *Miranda*, 384 U.S. at 478-79 (holding that coerced statements made by defendants during custodial interrogations are inadmissible).

[219] *See Stansbury*, 511 U.S. at 323-24 (per curiam) (suggesting that prosecution can use defendant's prearrest statements as evidence of guilt because privilege against self-incrimination attaches during custodial interrogation); *Beckwith*, 425 U.S. at 347-48 (suggesting that prosecution can introduce evidence of defendant's prearrest statements in case-in-chief because privilege against self-incrimination does not apply prearrest).

[220] *See* Notz, *supra* note 14, at 1035; Pettit, *supra* note 14, at 218-19.

[221] *See* Notz, *supra* note 14, at 1035; Pettit, *supra* note 14, at 218-20.

[222] *See supra* note 221.

[223] *See* Doe v. United States, 487 U.S. 201, 207 (1988) (stating that no person can be compelled to be witness against himself); Griffin v. California, 380 U.S. 609, 615 (1965) (holding that because defendant exercised his right not to testify Fifth Amendment also

Proponents of the prosecution's use of prearrest silence in its case-in-chief assert that juries infer guilt from many types of circumstantial evidence, such as evidence that defendants fled from officers.[224] They agree that if prosecutors present evidence showing that defendants ran from police, defendants may feel as if they must testify to explain their actions.[225] But despite the pressure that defendants may feel to testify, courts still allow the prosecution to present evidence of defendants' flight from law enforcement in its case-in-chief.[226] For example, the Fifth Circuit held that defendants may feel compelled to take the stand to explain why they fled, but stated that the pressure defendants may feel is insufficient to justify excluding the evidence.[227] Evidence that a defendant remained silent during prearrest questioning may be less incriminating than evidence that the defendant fled from police.[228] Therefore, courts should not exclude evidence of prearrest silence in the prosecution's case-in-chief simply because prearrest silence evidence may cause some defendants to testify and explain why they were silent.

B. Impermissible Burden Analysis

The practice of permitting prosecutors to use a defendant's prearrest silence in its case-of-chief is also justified under the impermissible burden analysis set forth in *Jenkins v. Anderson*; the governmental interest in presenting evidence of prearrest silence out-

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forbids comment by prosecution on defendant's silence that such silence is evidence of guilt); *see also* U.S. CONST. amend. V, cl. 3 (Self-Incrimination Clause).

[224] *See* Alberty v. United States, 162 U.S. 499, 511 (1896) (asserting that juries can infer guilt from evidence of flight); United States v. Ballard, 423 F.2d 127, 133 (5th Cir. 1970) (asserting that law is well settled that evidence of defendant's flight is competent evidence against him); 2 WIGMORE, EVIDENCE § 276, at 122 (Chadbourn rev. 1979) (asserting that evidence of flight, resistance to arrest, concealment, assumption of a false name, and related conduct are admissible as evidence of consciousness of guilt).

[225] *See* Notz, *supra* note 14, at 1035; Pettit, *supra* note 14, at 218-19.

[226] *See Alberty*, 162 U.S. at 510-11; Hickory v. United States, 160 U.S. 408, 416-18 (1896); *Ballard*, 423 F.2d at 133.

[227] *See Ballard*, 423 F.2d at 133.

[228] *See* United States v. York, 830 F.2d 885, 895-96 (8th Cir. 1987) (per curiam) (implying that silence was significantly probative merely as circumstantial evidence for alleged flight); United States v. Cardenas Alvarado, 806 F.2d 566, 575 (5th Cir. 1986) (contrasting harmless error of admission of pretrial silence in prosecution's closing argument with flight evidence which was "strong evidence of . . . guilt"); *see also* Snyder, *supra* note 4, at 298-99 (pointing out that both silence and flight constitute evidence of varying probity depending on context, but only that latter is universally admissible).

weighs any harm to the policies underlying the Fifth Amendment.[229]

1. Significant Governmental Interest

The government has a significant interest in presenting all relevant circumstantial evidence at trial to strengthen its case.[230] However, courts holding that the prosecution cannot use prearrest silence as evidence of guilt state that the prosecution's practice of questioning witnesses about defendants' prearrest silence is not legitimate.[231] These courts assert that evidence of prearrest silence does not assist the jury and creates an unfair bias against the defendant.[232] Thus, they assert that evidence of silence is not probative and can be highly prejudicial to the defendant.[233]

The prosecution has a significant interest in presenting relevant evidence of a defendant's guilt at trial.[234] The prosecution's pur-

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[229] *See* Jenkins v. Anderson, 447 U.S. 231, 236-38 (1980) (balancing need for prosecutor's questions at trial concerning prearrest silence against impairment of policies behind Fifth Amendment privilege against self-incrimination).

[230] *See id.* at 238 (stating that impeachment on cross-examination allows prosecutors to test credibility of witnesses); *see also* Donnie L. Kidd, Jr., Note, *Pretending to Upset the Balance:* Old Chief v. United States *and Exclusion of Prior Felony Conviction Evidence Under Federal Rule of Evidence 403*, 32 U. RICH. L. REV. 231, 231-32 (1998) (discussing prosecution's desire to tell its "story" and present all relevant evidence at trial).

[231] *See* United States v. Burson, 952 F.2d 1196, 1200-01 (10th Cir. 1991) (stating that defendant's silence during noncustodial interrogation was invocation of privilege against self-incrimination and, therefore, admission into evidence of interrogation concerning defendant's silence was plain error); Coppola v. Powell, 878 F.2d 1562, 1567-68 (1st Cir. 1989) (holding that defendant's constitutional rights were violated by use of his prearrest statement that he was not going to testify in prosecution's case-in-chief).

[232] *See Burson*, 952 F.2d at 1200-01 (holding that on facts that evidence of prearrest silence did not affect jury's verdict); *Coppola*, 878 F.2d at 1568 (asserting that use of prearrest silence evidence violates due process under Fifth Amendment).

[233] *See Burson*, 952 F.2d at 1201-02 (holding that on facts evidence of prearrest silence is more prejudicial than probative); *Coppola*, 878 F.2d at 1568-71 (holding that on facts that evidence of prearrest silence is prejudicial and use of such evidence in case-in-chief constitutes violation of defendant's constitutional rights); United States *ex rel.* Savory v. Lane, 832 F.2d 1011, 1017-18 (7th Cir. 1987) (holding that prosecutor's invitation to jury to use evidence of silence to infer guilt violated due process standards). *But see Jenkins*, 447 U.S. at 239-40 (stating that prosecutorial use of prearrest silence evidence for *impeachment* may be more probative than prejudicial and therefore not violative of due process rights).

[234] *See* Doyle v. Ohio, 426 U.S. 610, 617 (1976) (stating that prosecution has interest in presenting all relevant evidence to rebut defendant's exculpatory story); *see also* United States v. Maggitt, 784 F.2d 590, 596-98 (5th Cir. 1986) (discussing prosecution's "probative" interest in presenting "prejudicial" evidence of defendant's prior criminal convictions); United States v. Leichtman, 742 F.2d 598, 603-05 (11th Cir. 1984) (discussing prosecutor's "probative" interest in introducing "prejudicial" evidence to establish motive in kidnapping case).

pose is to convict guilty parties.[235] In *Jenkins*, one of the government's concerns was to advance the truth finding function of the jury.[236] Similarly, in cases involving prosecutorial use of prearrest silence, the government has a significant interest in providing the jury with all available evidence to assist with its deliberation.[237]

Prosecutorial use of prearrest silence will provide additional relevant evidence to the jury, thus assisting the jury in its search for the truth.[238] Law enforcement agents need to question individuals in regard to their possible involvement in criminal activity.[239] If the suspect remains silent, an agent may believe that the suspect knows something about the crime and investigate the suspect further.[240] Individuals' actions and their demeanor give government agents reason to label particular individuals as "suspects."[241] Government agents' reasons for focusing their investigation on certain individuals may be important for the jury to hear when evaluating the facts of a particular case.[242]

Furthermore, circumstantial evidence of prearrest silence is not significantly different from other circumstantial evidence used at trial.[243] For example, in its case-in-chief, the prosecution may in-

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[235] *See* BLACK'S LAW DICTIONARY, *supra* note 46, at 1221 (defining prosecutors as individuals who "prosecute another for a crime in the name of the government"); Henry L. Chambers, Jr., *Reasonable Certainty and Reasonable Doubt*, 81 MARQ. L. REV. 655, 656 (1998) (listing "[to] convict the guilty" as goal of criminal justice system).

[236] *See Jenkins*, 447 U.S. at 238 (quoting Brown v. United States, 356 U.S. 148, 156 (1958) (stating that once defendant decides to testify, truth prevails in balance against self-incrimination)).

[237] Evidence of prearrest silence can be significant to the prosecutor's case-in-chief. *See* United States v. Oplinger, 150 F.3d 1061, 1065-67 (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).

[238] *See* United States v. Rincon, 28 F.3d 921, 923-25 (9th Cir. 1994) (discussing importance of providing jury with all evidence admissible under Federal Rules of Evidence and relevant to case) (citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)).

[239] *See* CHARLES R. SWANSON ET AL., CRIMINAL INVESTIGATION 28 (6th ed. 1996) (asserting that officers must necessarily ask questions of individuals in course of criminal investigation).

[240] *See id.* at 242-45 (emphasizing importance of suspicious nonverbal signals when questioning individuals during investigation).

[241] *See* Milton J. Horowitz, Ph.D., *More Psychology of Interrogations*, *in* CRIMINAL INVESTIGATION AND INTERROGATION 271, 275-80 (Samuel R. Gerber et al. eds., 1962).

[242] *See* WAYNE W. BENNETT & KAREN M. HESS, CRIMINAL INVESTIGATION 453-54 (1981). *But see* Kyles v. Whitley, 514 U.S. 419, 453-54 (1995) (asserting that jury might not have convicted defendant if allowed to hear evidence of circumstances surrounding identification of suspect).

[243] *See* United States v. Rivera, 944 F.2d 1563, 1569 (11th Cir. 1991) (likening prearrest silence to prearrest demeanor).

troduce evidence that the defendant fled from the police.[244] If a jury learns that a defendant fled from police, they will most likely draw an inference of guilt, on the assumption that people usually run because they have something to hide.[245] Prearrest silence and flight are similar because they both indicate unwillingness to cooperate with law enforcement and produce inferences of guilt.[246] Therefore, evidence of a defendant's prearrest silence should be admissible as evidence of guilt because courts accept that evidence of flight is admissible as evidence of guilt.[247]

Moreover, courts generally allow the prosecution to question witnesses concerning a defendant's demeanor.[248] Prosecution witnesses can testify to a defendant's unusual behavior.[249] This does not differ significantly from an officer testifying to a defendant's silence during prearrest investigatory questioning.[250] Officers' tes-

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[244] *See* United States v. Ballard, 423 F.2d 127, 133 (5th Cir. 1970) (asserting that law is well settled that evidence of defendant's flight is admissible evidence against him); 2 WIGMORE, *supra* note 224, § 276 at 122 (asserting that evidence of flight is admissible as circumstantial evidence of guilt).

[245] *See Ballard*, 423 F.2d at 133; 2 WIGMORE, *supra* note 224, § 276 at 122 (asserting that flight is evidence of consciousness of guilt, and therefore, by inference, of guilt).

[246] *See Rivera*, 944 F.2d at 1567-68 (stating that defendant's prearrest silence is admissible and likening it to prearrest demeanor evidence); Coppola v. Powell, 878 F.2d 1562, 1566 (1st Cir. 1989) (asserting that refusal to speak to police raises inference that person has something to hide); 2 WIGMORE, *supra* note 224, § 276 at 122 (stating that defendant's prearrest flight from officers is circumstantial evidence of guilt).

[247] *See* 2 WIGMORE, *supra* note 224, § 276 at 122.

[248] *See* Pennsylvania v. Muniz, 496 U.S. 582, 585-87 (1990) (providing example of prosecutor asking demeanor questions in drunk-driving context); *see also* United States v. Shaw, 701 F.2d 367, 384-85 (5th Cir. 1983) (asserting that prosecution can comment on defendant's demeanor after defendant waives *Miranda* rights).

[249] *See Muniz*, 496 U.S. at 590-92. In *Muniz*, an officer saw a motorist, Muniz, stopped by the side of the road. *See id.* at 585. The officer stopped to ask Muniz if he needed assistance. *See id.* Muniz told the officer that he just stopped to urinate. *See id.* The officer smelled alcohol on Muniz's breath, saw that Muniz's eyes were bloodshot, noticed that Muniz was not steady on his feet, and observed that Muniz's speech was slurred. *See id.* at 585-86. The officer suspected that Muniz was under the influence of alcohol and told Muniz to remain parked until his condition improved. *See id.* at 585. Muniz ignored the officer's instructions and drove off. *See id.* The officer stopped Muniz and administered field sobriety tests to determine if Muniz was under the influence of alcohol. *See id.* At trial, the prosecutor asked the officer to describe Muniz's demeanor and actions during the initial contact and after the officer stopped Muniz. *See id.* at 587. The defense attorney filed a motion for new trial asserting, inter alia, that prosecutorial comment on Muniz's prearrest demeanor and actions violated Muniz's privilege against self-incrimination. *See id.* On appeal, the Supreme Court recognized that prosecutors can introduce evidence of a defendant's demeanor before arrest. *See id.* at 604-05; *see also Shaw*, 701 F.2d at 384-85 (discussing admissibility of prosecution witness testimony regarding defendant's prearrest demeanor).

[250] *See Rivera*, 944 F.2d at 1567-68 (comparing evidence of defendant's prearrest silence to evidence of defendant's prearrest demeanor).

timony concerning prearrest silence and prearrest demeanor both reference defendants' unspoken actions. Furthermore, officers' testimony regarding prearrest silence and prearrest demeanor may give rise to an inference of guilt.[251] Therefore, because no significant difference exists between demeanor and prearrest silence evidence, a court should allow evidence of a defendant's prearrest silence in the prosecution's case-in-chief.[252]

2. Insufficient Violation of Fifth Amendment Protections

Courts opposing the use of prearrest silence as evidence of guilt state that it undermines the policies of the Fifth Amendment's privilege against self-incrimination.[253] One commentator reasons that defendants help the prosecution prove its case through their reluctance to speak with law enforcement officers.[254] But the prosecution does not sufficiently violate the policies behind the Fifth Amendment's privilege against self-incrimination by introducing evidence of prearrest silence.[255] Courts should not exclude such evidence from the prosecution's case-in-chief.[256] Policies protected by the privilege against self-incrimination include the fair-

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[251] *See id.* at 1568-69 (implying that any comment on silence may create inference of guilt); *see also* Doyle v. Ohio, 426 U.S. 610, 634-35 (1976) (Stevens, J., dissenting) (noting impropriety of prosecutor asking jury to infer guilt from silence because it creates inference that silence is inconsistent with innocence).

[252] *See Rivera*, 944 F.2d at 1568-69.

[253] *See* United States v. Burson, 952 F.2d 1196, 1200-01 (10th Cir. 1991); Coppola v. Powell, 878 F.2d 1562, 1564-67 (1st Cir. 1989); *see also* Patrick, *supra* note 4, at 945 (asserting that prosecutors negatively affect policies behind Fifth Amendment by introducing evidence of prearrest silence in their cases-in-chief).

[254] *See* Patrick, *supra* note 4, at 950-51 (stating that prosecution's comment on prearrest silence may have prejudicial effect on jury).

[255] *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (stating that policies behind privilege against self-incrimination include protection of innocent and not assisting prosecution prove its case); *see also* Jenkins v. Anderson, 447 U.S. 231, 235-38 (1980) (holding that government may comment on defendant's prearrest silence without offending Fifth Amendment privilege); United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996) (suggesting that courts will not violate policies behind privilege against self-incrimination by allowing prosecution to introduce evidence of defendants' prearrest silence); *Rivera*, 944 F.2d at 1568-69 (stating that courts will not heighten risk of convicting innocent parties by admitting evidence of prearrest silence in prosecution's case-in-chief).

[256] *See Zanabria*, 74 F.3d at 593 (providing that allowing use of prearrest silence as evidence of guilt is not error where record clearly shows that government agents did not cause silence in question); *Rivera*, 944 F.2d at 1569. (explaining that prosecutor's closing statements regarding defendant's prearrest silence and demeanor did not constitute error).

ness to defendants of not forcing them to assist the prosecution in proving its case, and the protection of the innocent.[257]

a. The Defendant Is Not Helping the Prosecution Prove Guilt

The prosecution can use evidence of a criminal defendant's prearrest silence in its case-in-chief without causing the defendant to help the government prove its case.[258] Evidence of the crime itself and evidence linking a suspect to the crime are the basis for the prosecutor's case.[259] Evidence of prearrest silence only provides circumstantial evidence,[260] suggesting that the defendant knows something about the crime.[261] The inference is that if defendants remain silent, they know something that they are not willing to share with police.[262] Knowledge that someone committed an unlawful act is not usually an element of a criminal offense.[263] Rather, defendants must have the intent to commit a particular unlawful act.[264] Because circumstantial evidence of prearrest si-

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[257] *See Murphy*, 378 U.S. at 55; Quinn v. United States, 349 U.S. 155, 161-62 (1955); *see also* Grunewald v. United States, 353 U.S. 391, 421 (1957) (asserting that one basic function of privilege against self-incrimination is protection of innocent individuals).

[258] *See* Fencl v. Abrahmson, 841 F.2d 760, 766-69 (7th Cir. 1988) (holding that use of prearrest silence evidence in prosecutor's case-in-chief can be harmless error).

[259] *See* United States v. Bentvena, 319 F.2d 916, 921-24 (2d Cir. 1963) (including extensive discussion of crime and evidence linking suspect to crime that formed basis for prosecution's case in narcotics prosecution).

[260] *See Rivera*, 944 F.2d at 1568 (providing example of circumstantial evidence used by prosecution in trial). Some criminal cases are composed entirely of circumstantial evidence. *See, e.g.*, California v. White, 69 Cal. 2d 751, 761-62, 446 P.2d 993, 998 (1968) (providing example of case completely composed of circumstantial evidence).

[261] *See Rivera*, 944 F.2d at 1569 (asserting that evidence of defendants' prearrest silence coupled with evidence of defendant's prearrest demeanor may give rise to inference of guilt).

[262] *See id.*

[263] *See* LAFAVE & SCOTT, *supra* note 161, at 216-18. Most criminal statutes include the element of "intent," but no explicit element of "knowledge." *See id.* at 216. The modern trend is to distinguish between the two. *See id.* Knowledge is the awareness of a fact or condition. *See* BLACK'S LAW DICTIONARY, *supra* note 46, at 872; *see also* LAFAVE & SCOTT, *supra* note 161, at 218-20 (noting difference between intent and knowledge).

[264] *See* LAFAVE & SCOTT, *supra* note 161, at 218. Intent is a state of mind included in an unlawful act. *See* BLACK'S LAW DICTIONARY, *supra* note 46, at 810; *see also* LAFAVE & SCOTT, *supra* note 161, at 218. For example, the federal crime of mail fraud requires intent. *See* 18 U.S.C. § 1341 (1994). To sustain a conviction for mail fraud, the prosecution must show that the defendant intended to devise a scheme which he perpetrated through use of the mail for the purpose of defrauding the victim. *See id.*

Suppose a defendant mails a letter for his employer and knows that the employer is sending the letter for the purpose of fraudulently obtaining money. The defendant does not personally intend to defraud the victim. Therefore, the prosecution cannot convict him of mail fraud. *See* United States v. D'Amato, 39 F.3d 1249, 1256-57 (2d Cir. 1994) (stating

lence only shows that the defendant may know something about a crime, the defendant is not assisting the prosecution in proving intent to commit the charged offense.

b. Protection of the Innocent

The Fifth Amendment's privilege against self-incrimination also seeks to protect the innocent.[265] The duty to protect innocent individuals from a conviction for a criminal action rests with juries.[266] Juries have a duty to evaluate criminal cases on the basis of law.[267] Our judicial system entrusts juries with the task of fairly evaluating the facts of a case and deciding whether the defendant is guilty or innocent.[268] The prosecution and defense introduce many pieces of evidence in a criminal trial, some of it difficult for the jury to understand.[269] Nevertheless, our judicial system has faith that a jury will acquit the defendant if the prosecution has not proved beyond a reasonable doubt that a defendant committed the charged offense.[270] The jury will not automatically conclude that the defendant is guilty when hearing that the defendant did not wish to answer officer's questions.[271] Juries may draw some inference of guilt,

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that individual that deposits letter in mailbox must have intent to defraud victim). If the police questioned this defendant and he remained silent, the prosecution may be able to prove knowledge, but the prosecution could not prove intent. Therefore, the defendant would not be convicted of mail fraud. *See id.*

[265] *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (stating that privilege, while occasionally aiding guilty, is important because it also protects innocent); Quinn v. United States, 349 U.S. 155, 162 (1955).

[266] *See* United States v. Gaudin, 515 U.S. 506, 510-11 (1995); Nebraska v. Beers, 271 N.W.2d 842, 848 (Neb. 1978) (noting that if jury believed defendant's story, then he is innocent and it is their duty to acquit him); *see also* Wood v. Georgia, 370 U.S. 375, 390 (1962) (attributing this function even more emphatically to grand juries).

[267] *See Gaudin*, 515 U.S. at 513; Sparf v. United States, 156 U.S. 51, 105-06 (1895).

[268] *See Gaudin*, 515 U.S. at 512-13; *Sparf*, 156 U.S. at 106.

[269] *See* United States v. Rincon, 28 F.3d 921, 926-27 (9th Cir. 1994) (discussing dependence of jury's fact-finding on quantity and quality of evidence presented to jury); *see also* FED. R. EVID. 403 (stating that trial judges can exclude relevant evidence if it unduly confuses jury).

[270] *See Gaudin*, 515 U.S. at 510; *In re* Winship, 397 U.S. 358, 362-64 (1970) (requiring proving elements of crime to fact finder beyond reasonable doubt for all criminal convictions); Chambers, *supra* note 235, at 656 (emphasizing that each separate juror must be convinced beyond reasonable doubt of guilt); Adrian A.S. Zuckerman, *Law, Fact or Justice?*, 66 B.U. L. REV. 487, 496 (1986) (emphasizing communities' trust in juries). The standard of proof for all criminal prosecutions is beyond a reasonable doubt. *See In re* Winship, 397 U.S. at 364; LAFAVE & SCOTT, *supra* note 161, at 16; Chambers, *supra* note 235, at 656.

[271] *See* United States v. Rivera, 944 F.2d 1563, 1568-69 (11th Cir. 1991) (explaining that there can be many types of silence); Pettit, *supra* note 14, at 219 (explaining multiple possi-

but will weigh the circumstantial evidence of prearrest silence with the rest of the evidence in the case.[272]

Evidence of prearrest silence alone will not be enough to convict a defendant beyond a reasonable doubt.[273] Because silence does not prove any element of a crime, the prosecution must rely on much more for a conviction than the fact that the suspect chose not to speak when questioned by police.[274] If a suspect is innocent, silence will not be sufficient evidence to cross the "beyond a reasonable doubt" threshold.[275]

CONCLUSION

The Fifth Amendment does not apply prior to arrest unless government agents compel statements or silence.[276] Therefore, evidence of prearrest silence not compelled by law enforcement does not violate the privilege against self-incrimination. In addition, courts would assist the fact finding duty of the jury by admitting evidence of a defendant's behavior before arrest. Furthermore, it is unlikely that juries will convict a defendant based on evidence of prearrest silence if the prosecution has not adequately proven its case.[277]

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ble inferences from prearrest silence, including fear of police, lack of understanding, and protecting someone else).

[272] *See* United States v. Burson, 952 F.2d 1196, 1201-02 (10th Cir. 1991) (holding introduction of prearrest silence harmless given other evidence); *Rivera*, 944 F.2d at 1569 (holding introduction of prearrest silence harmless in face of other overwhelming evidence of guilt).

[273] *See Burson*, 952 F.2d at 1201 (characterizing silence as being of little probative value); Pettit, *supra* note 14, at 219 (asserting that mere silence alone is generally ambiguous). *But see* Patrick, *supra* note 4, at 931 (suggesting that silence in face of questioning may constitute tacit admission under doctrine of "assenting silence").

[274] *See Burson*, 952 F.2d at 1201 (asserting that prearrest silence alone did not prove prosecution's case). If evidence of prearrest silence were the only competent evidence against the defendant, the judge should dismiss the case. *See* FED. R. CRIM. P. 29(a) (stating that federal trial judge has authority to dismiss case if there is insufficient evidence to support charges against defendant); *see also* Burks v. United States, 437 U.S. 1, 11 n.5 (1978) (requiring federal trial judges to direct acquittal for insufficient evidence).

[275] *See Burson*, 952 F.2d at 1201-02 (holding sub silentio that silence by itself can never be dispositive). *But see* Patrick, *supra* note 4, at 931 (suggesting potential application of doctrine of "assenting silence").

[276] *See* Miranda v. Arizona, 384 U.S. 436, 477 (1966) (defining time at which privilege against self-incrimination applies to criminal defendants as point at which defendant's freedom of action was curtailed in any way); United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996) (asserting that privilege reaches only compelled self-incrimination and not all self-incrimination); *Rivera*, 944 F.2d at 1569 (equating silence with demeanor, and thus mooting "voluntariness" issue, in some situations).

[277] *See Burson*, 952 F.2d at 1201.

The criminal justice system requires defendants to make many difficult choices.[278] Therefore, courts should not exclude relevant circumstantial evidence simply because it may influence defendants to take the stand. The jury should hear all evidence that may assist with deliberations. For all these reasons, courts should allow the prosecution to use evidence of a defendant's noncompelled prearrest silence in its case-in-chief.

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[278] *See* South Dakota v. Neville, 459 U.S. 553, 564 (1983) (stating that criminal defendants must often make difficult choices). In *Neville*, officers pulled the defendant over for running a stop sign. *See id.* at 554. When the officers observed signs of intoxication and arrested defendant, the defendant had to choose between taking a blood-alcohol test and refusing the test. *See id.* at 555. If the defendant had taken the blood-alcohol test, its result could have been used by the officer to determine whether the defendant had been driving under the influence. *See id.* When the defendant refused to take the blood-alcohol test, the prosecution sought to introduce the defendant's refusal to take the test as evidence against him at trial. *See id.* at 556. Overruling the court below, the *Neville* Court stated that because the defendant had a choice, albeit a difficult one, the officers did not compel the defendant to take the test and, therefore, the privilege against self-incrimination did not apply. *See id.* at 564.