No. _____

In the Supreme Court of the United States

Chris Yanai, Warden,

Petitioner,

v.

Robert Girts,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Has the Court clearly established, for AEDPA purposes, that the Fifth Amendment prohibits a prosecutor from summarizing evidence against a non-testifying defendant in a way that may indirectly reflect the defendant's silence, if the summary is not manifestly intended to comment on the defendant's silence and the jury would not naturally and necessarily understand it that way?

2. Has the Court clearly established, for AEDPA purposes, that the Fifth Amendment prohibits a prosecutor from commenting on pre-arrest, pre-*Miranda* communications with police, particularly when the defendant disclosed only exculpatory information during the communication?

LIST OF PARTIES

The Petitioner is Chris Yanai, the former Warden of Oakwood Correctional Facility and an official of the Ohio Department of Rehabilitation and Correction ("ODRC").

The Respondent is Robert Girts, a prisoner in ODRC's custody.

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JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its order denying the State's rehearing petition on February 19, 2008. The State timely filed this petition and invokes the Court's jurisdiction under 28 U.S.C. § 1254(1) (2003).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

2. Section 2254 of Title 28 of the United States Code provides in relevant part:

* * *

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

This case asks the Court to resolve lower-court confusion over two related issues regarding a prosecutor's purported commentary, during closing argument, on a defendant's failure to testify at trial. The first issue addresses the fundamental framework used to resolve such claims. The second asks whether a prosecutor may comment on a defendant's pre-arrest, pre-*Miranda* silence. The lower courts are confused on both issues, and they need to know whether the Court's precedent in the area amounts to "clearly established" law on the matter, sufficient to govern in habeas cases under AEDPA.

As a general rule, prosecutors may not directly criticize a defendant for failure to testify; they may not suggest that a defendant's silence is substantive evidence of guilt. *Griffin v. California*, 380 U.S. 609, 615 (1965). Doing so would violate the defendant's Fifth Amendment right not to testify. But the Court has rejected the notion that any comments *reflecting* on silence are forbidden. Comments that legitimately note the state of the evidence, even if they indirectly reflect silence, may be allowed, and even direct comments are allowable if they respond to a defendant's specific argument. *United States v.*

Robinson, 485 U.S. 25, 31-34 (1988). Much room for uncertainty exists between *Griffin* and *Robinson,* and the issues in this case lie in that gray area.

These issues require review for two reasons. First, they recur frequently in our courts. Second, at issue are statements that are perfectly legitimate under the Court's precedents. When lower courts err and vacate convictions based on a misreading of the law, those erroneous holdings deter prosecutors in countless other cases from using a valid tool in pursuit of conviction.

Here, the Sixth Circuit granted habeas relief to Respondent Robert Girts and invalidated his murder conviction for poisoning his wife, based on the court's mistaken view about when a prosecutor's comments can properly reflect a defendant's silence. As detailed below, this case is a textbook example of the kind of statements that are allowed under *Griffin* and *Robinson.*

The Court should grant the petition and review this case.

STATEMENT OF THE CASE

A. Girts's wife died of cyanide poisoning, and the investigation eventually led to murder charges against him.

An Ohio jury convicted Respondent Robert Girts of aggravated murder for killing his wife, Diane Girts, by poisoning her with cyanide. The investigation leading to that conviction took several turns.

When Diane Girts was found dead in a bathtub in her home in September 1992, her death was a mystery. App. 6a. The police found no signs of suicide or foul play, and Girts had not been home the night of his wife's death. App. 6a-7a. The coroner performed an autopsy, but she initially listed no cause of death. App. 7a.

Almost three weeks later, Girts contacted police and said he found a suicide note, in his wife's handwriting, underneath papers in his briefcase. App. 7a. He also said that she had been depressed over several issues, including their recent move to Cleveland, her weight, an unsuccessful job search, and fertility problems. App. 7a-8a.

About the same time, the Cuyahoga County coroner ordered further tests for possible poisons. App. 8a. By using different methodologies, the coroner eventually discovered cyanide. App. 8a. The coroner asked another county's coroner to run independent tests, and that coroner also found cyanide. App. 8a. The Cuyahoga County coroner then listed homicide as the cause of death. App. 8a.

The police then went to Girts's home to search for cyanide, and he seemed to cooperate fully with

the search. App. 8a. The police did not regard Girts, or anyone else, as a suspect at that time. The police told him that they were looking for cyanide. App. 8a. Because the Girts's home was also a funeral home, police asked the funeral home workers if cyanide was used at all in the embalming process. App. 8a. The answer was no, the funeral home had not obtained any cyanide. App. 8a-9a. Girts himself offered no information regarding cyanide at all.

The police had no suspects until a witness came forward in response to a televised plea for information. App. 9a. Girts's Army reserve commander contacted police, and she said that Girts had obtained cyanide from her. App. 9a. She was a chemist in her civilian job, and she had given him two grams of potassium cyanide on his request. App. 9a-10a. He had told her that he needed it to control groundhogs on his property. App. 9a.

When the police confronted Girts with the evidence that he had obtained cyanide, he told them he used it for groundhog control. App. 10a. But a funeral home employee said he did not know about any groundhog problems. App. 10a. The employee also had specific pest control records for the property, reflecting squirrel problems but no groundhogs. App. 10a. A city pest control officer also reported no groundhog problems in the area. App. 10a. A pest control company explained that cyanide had been used for pest control "well in the past," but it was not standard practice for at least a decade. App. 10a.

The police then pieced together several other pieces of evidence that pointed to Girts. For example, a business associate recalled a conversation in which Girts asked her if she could show him the

measurement of a gram; he said he needed to know how much medicine to give his dog. App. 10a-11a. A funeral home colleague recalled Girts's inconsistent speculations about whether and how his wife obtained cyanide. Once Girts told this colleague that she probably obtained it from "low lifes" near where she worked. App. 11a. Another time Girts told this colleague that the coroner's office probably spilled cyanide, "because they keep it there." App. 11a. In addition, the night his wife died, Girts urged paramedics to take his wife's body to Parma General Hospital, rather than to the coroner's office, even though she was indisputably dead. App. 11a. Girts had worked at a coroner's office in the past, and he knew that coroner autopsies were typically more thorough than hospital autopsies. App. 11a-12a.

The police also began to question the likelihood of suicide, as some of Mrs. Girts's friends said that she was not depressed and was in good spirits. App. 12a Some friends had spoken to her shortly before her death, and they saw nothing amiss. App. 12a. Her friends also said she was looking forward to moving into a new house. App. 12a. But one friend who had seen her in good spirits also recalled Mr. Girts telling the friend separately that Mrs. Girts was depressed. App. 12a.

Further, the police discovered possible motivations for Girts to kill his wife, coupled with other suspicious behavior of his. He had previously had an affair, and had told the other woman that he would divorce Mrs. Girts. App. 12a-13a. When he did not follow through with a divorce, the other woman broke off the relationship. App. 13a. Just after his wife's death, he got back in contact with

her, telling her that his wife died of an aneurysm. App. 13a. Separately, Girts had a possible financial motive, as he collected life insurance money and was then able to invest in another funeral home. App. 14a.

While the police now had theories about Girts's motive and how he obtained cyanide, the police and the coroner did not pinpoint the method of delivery of the cyanide into Mrs. Girts's body. App. 14a-15a Girts was out of town when his wife died. App. 14a. Her body also did not show some of the classic signs of heavier cyanide ingestion. App. 15a.

On these facts, the prosecutors proceeded to charge and try Mr. Girts for aggravated murder.

B. The prosecutor's closing statement included references to evidence in a way that indirectly reflected that Girts did not testify at trial.

Girts was tried for aggravated murder. He did not testify at the trial. App. 3a.

In closing arguments, the prosecutor summarized the evidence presented against Girts. In doing so, the prosecutor made three statements that indirectly reflected Girts's silence at trial and his silence early in the investigation. App. 3a. Girts's counsel did not object to any of the statements at the time.

The first allegedly improper statement was the prosecutor's description of several witnesses' statements as unrefuted. Those witnesses all recounted inculpatory statements that Girts made to them. The prosecutor said:

> Again these are his words. And the words that you heard from these folks supplied by him are unrefuted, and they are uncontroverted. There has been no evidence offered to say that these people are incorrect. None at all.

App. 3a. The second allegedly improper statement was the prosecutor's comment that Girts had omitted mentioning that he had obtained cyanide, even though he had several conversations with the police:

> [W]ith respect to the source [of the cyanide], the defendant had no less than three occasions to tell the police that he had ordered the cyanide.

App. 3a. Finally, the third allegedly improper comment occurred when the prosecutor argued that the accused was the only person who would know how cyanide was introduced into his wife's system. The defense had said, in closing argument, that the State's circumstantial case was flawed for failing to pin down how Mrs. Girts ingested the cyanide. The prosecutor responded as follows:

> Again, the possibility is thrown out that we don't know how it was introduced in her system. Ladies and gentlemen, we don't have to tell you how it was introduced into her system. We know that it was ingested. And there is only one person that can tell you how it was introduced, and that's the defendant.

App. 4a.

Girts was convicted of murder and sentenced to a prison term of twenty years to life. App. 4a, 41a.

C. The state courts upheld Girts's conviction.

Girts appealed to the state court of appeals, which affirmed his conviction. App. 4a. Girts also tried several other state court avenues for relief, including a reconsideration motion in the appeals court, a direct appeal to the Ohio Supreme Court, and an application for post-conviction relief, including appeals to the intermediate appeals court and to the Supreme Court on that application. App. 4a. None of those attempts succeeded. App. 4a-5a.

D. The federal district court denied Girts's request for habeas relief.

Girts sought federal habeas relief, filing his petition in the U.S. District Court for the Northern District of Ohio in February 2002. App. 5a. Girts asserted that his "'due process rights and [ ] right to a fundamentally fair trial were violated when the prosecutor improperly commented on Petitioner's right to remain silent,' and that he was denied effective assistance of counsel." App. 5a (quoting Girts's habeas petition). The magistrate recommended denying the petition. App. 5a.

The district court found that the prosecutor's statements were improper comments on Girts's silence. The district court looked first at whether the comments were "improper" and then whether they were sufficiently "flagrant" to warrant relief. App. 97a-98a. The district court held that the statements were improper and flagrant. App. 107a. But it denied habeas relief, because it found that Girts was not prejudiced, and thus did not show ineffective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668 (1984). App. 107a, 110a-

112a. That, in turn, meant that Girts did not overcome procedural default. App. 112a. Thus, the district court concluded that the state court result was consistent with federal law. App. 107a, 112a.

E. The Sixth Circuit reversed and granted a writ of habeas corpus.

The Sixth Circuit reversed the district court and granted Girts habeas relief. App. 2a. The court, after finding that Girts overcame procedural default by pointing to ineffective assistance of counsel, App. 23a-29a, reviewed the merits of Girts's claim that the prosecutor's statements violated Girts's Fifth Amendment rights. App. 29a.

The Sixth Circuit explained that using a defendant's silence against him as substantive evidence amounted to "prosecutorial misconduct." Accordingly, the Circuit evaluated the statements under a test that the Circuit had previously used for Fourteenth Amendment claims based on improper statements as a form of prosecutorial misconduct. As the panel explained, that test has two parts, asking first "whether the prosecutor's conducts and remarks were improper," and second, whether the "impropriety was flagrant and thus warrants reversal." App. 31a.

The majority found that the statements were improper because, it said, the statements violated Girts's Fifth Amendment right not to have his silence used against him as substantive evidence of guilt. The court relied on an earlier Sixth Circuit case for the proposition that this principle applies to comments regarding a defendant's silence in a pre-

arrest, non-custodial setting. App. 29a-31a (citing *Combs v. Coyle*, 205 F.3d 269, 284 (6th Cir. 2000)).

The majority also concluded that the statements violated the second part of the test, regarding flagrancy, so reversal was required. The court conducted the flagrancy inquiry under a four-prong test:

> (1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant;
>
> (2) whether the conduct or remarks were isolated or extensive;
>
> (3) whether the remarks were deliberately or accidentally made; and
>
> (4) whether the evidence against the defendant was strong.

App. 31a-32a (citing *United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001) and *United States v. Carroll*, 26 F.3d 1380 (6th Cir. 1994)).

Applying this test, the majority found that all four factors weighed in Girts's favor. That is, the majority found that the three statements prejudiced Girts, that they were not isolated, that they were made deliberately, and that the other evidence against Girts was not overwhelming. App. 32a-36a.

The dissent agreed with the framework to apply but reached a different result. App. 36a-39a. The dissent noted that the overwhelming evidence of guilt was the "most powerful" of the relevant factors. App. 38a. The dissent also urged that two of the three statements were legitimate. App. 38a The dissent argued first that the "prosecution's statement

regarding Girts's pre-arrest secrecy in not telling the police about his purchasing cyanide is not even a Fifth Amendment issue, it is part of the prosecution's theory of the case, insomuch as Girts—prior to any arrest or Miranda warning—withheld information critical to the police investigation." App. 38a. Second, the dissent reasoned that the "statement regarding the government-witness-testimony's being unrefuted is not improper either, it is merely a summary of the evidence." App. 38a. Finally, the dissent noted that the "statement that only Girts could explain how the cyanide got into Diane's system . . . . could be interpreted as a comment on Girts's decision not to testify at trial." App. 38a-39a. But, said the dissent, even if that statement were improper, it did not affect the jury; and further, even if it did have some effect, it had minimal effect in light of the overwhelming evidence against Girts.

REASONS FOR GRANTING REVIEW

The Court should grant the petition to address two critical issues regarding a prosecutor's indirect comments on a defendant's silence. First, the Court should resolve the confusion in the lower courts regarding the proper test to use in evaluating Fifth Amendment claims based on such comments. Second, the Court should resolve the circuit split over references to pre-arrest, pre-*Miranda* silence. On both issues, it should confirm that any prohibition on such references was not already "clearly established" law for purposes of AEDPA.

A. The Court should resolve the confusion in the lower courts regarding the test for evaluating Fifth Amendment claims based on a prosecutor's "indirect comment" on a defendant's silence at trial.

The Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California*, 380 U.S. 609, 615 (1965). "*Griffin* prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt." *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976). The *Griffin* rule is generally understood to prohibit most direct prosecutorial comments on a defendant's failure to testify unless the remark is made in fair response to argument by the defense. *United States v. Robinson*, 485 U.S. 25, 31-34 (1988). The Court has also explained that "prosecutorial comments must be examined in context" to determine their propriety, *id.* at 33, and that "a reference to the defendant's failure to take the witness stand may, in context, be perfectly proper, *id.* at 33 n.5. See also *Lockett v. Ohio*, 438 U.S. 586, 595 (1978) (holding that references to State's evidence as "unrefuted" and "uncontradicted" were not improper in context). The Court, however, has not explained how *Griffin* applies to comments that may refer indirectly to a defendant's silence, or how to draw the line between which comments count as indirect or direct.

The appeals courts have generally settled on the test to use to determine when *Griffin* is violated. While the circuits vary slightly in how the full test is

phrased and formulated, they have generally adopted common core principles—principles at odds with the approach in the decision below. As detailed below, most circuits say that a prosecutor's remark will violate *Griffin* if it was "manifestly intended" to refer to the defendant's constitutionally protected silence or if, because of the remark's character, "the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify." *United States v. Stroman*, 500 F.3d 61, 65 (1st Cir. 2007).

But some circuits, including the Sixth Circuit in the decision below, have used different tests in different cases. In particular, the decision below applied a different test, imported from Fourteenth Amendment due process case law. That test is properly used to address improper statements as violations of due process, as opposed to Fifth Amendment claims based on references to a defendant's silence. That Fourteenth Amendment test did not require the court to consider whether other, permissible explanations for the prosecutor's remarks were equally possible. App. 31a-32a. Similarly, the Seventh Circuit has acknowledged inconsistency within that circuit, as cases have alternated between the proper Fifth Amendment test and the mistaken use of the Fourteenth Amendment test. *United States v. Cotnam*, 88 F.3d 487, 498 n.11 (7th Cir. 1996).

Consequently, the Court should review this case and instruct the lower courts on how to resolve this issue.

1. Most circuits consistently apply the *Morrison-Knowles* test, which holds that references to silence are improper only when "manifestly intended" to refer to a defendant's silence or when the jury would "naturally and necessarily" interpret the references that way.

The circuits largely agree on how to address claims such as Girts's. As the Second Circuit explained, when looking at whether a prosecutor's words indirectly implicate a defendant's right to remain silent, a "formula that has become rather a favorite of many courts, including this one, is 'Was the language used manifestly intended to be, or was it of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'" *United States ex rel. Leak v. Follette*, 418 F.2d 1266, 1269 (2d Cir. 1969) (quoting *Morrison v. United States*, 6 F.2d 809, 811 (8th Cir. 1925)).

This test has sometimes been called the *Morrison-Knowles* test or the *Knowles* test, because it was first explained in *Morrison,* above, while many courts adopting the test have treated *Knowles v. United States,* 224 F.2d 168, 170 (10th Cir. 1955), as the lead case adopting the rule. The Sixth Circuit has called it "the *Morrison-Knowles* test" and explained—ironically, given its approach in the decision below—that "[e]very court of appeals has adopted the test." *Butler v. Rose,* 686 F.2d 1163, 1170 (6th Cir. 1982) (en banc). As the Sixth Circuit further explained, "[w]hen the alleged infringement consists of statements which do not comment directly

on the defendant's failure to testify or suggest that an inference of guilt should be drawn from this fact, a reviewing court must look at all the surrounding circumstances in determining whether or not there has been a constitutional violation." *Id.* This need for a "probing analysis of the context" means that there cannot be a per se rule against comments that describe the state's evidence as uncontradicted. *Id.* at 1170-71.

Each of the circuits, including the Sixth, has applied the *Morrison-Knowles* test at least once. *United States v. Stroman*, 500 F.3d 61, 65 (1st Cir. 2007); *United States ex rel. Leak v. Follette*, 418 F.2d 1266, 1269 (2d Cir. 1969); *United States v. Brennan*, 326 F.3d 176, 187 (3d Cir. 2003); *United States v. Francis*, 82 F.3d 77, 78 (4th Cir. 1996); *United States v. DeJean*, 613 F.2d 1356, 1360 (5th Cir. 1980); *Byrd v. Collins*, 209 F.3d 486, 533-34 (6th Cir. 2000); *United States v. Cotnam*, 88 F.3d 487, 497-98 (7th Cir. 1996); *United States v. Emmert*, 9 F.3d 699, 701-02 (8th Cir. 1993); *United States v. Mende*, 43 F.3d 1298, 1301 (9th Cir. 1995); *United States v. Barton*, 731 F.2d 669, 674 (10th Cir. 1985); *Williams v. Wainwright*, 673 F.2d 1182, 1184 (11th Cir. 1982); *United States v. Hawkins*, 595 F.2d 751, 754 n.8 (D.C. Cir. 1978).

Despite this seeming unanimity, the rule has not been settled enough to ensure uniformity in all cases. In particular, some courts have confused the *Morrison-Knowles* test with a different test used for Fourteenth Amendment challenges to other types of improper prosecutorial comments. For example, the Seventh Circuit explained, in *Cotnam*, that "a claim that a prosecutor improperly commented upon the

defendant's failure to testify is most properly considered first under the traditional *Fifth Amendment* test." 88 F.3d 487, 498 n.11. But the Seventh Circuit in *Cotnam* also noted that it, like the Sixth Circuit here, had sometimes deviated and applied the broader Fourteenth Amendment test for improper statements, even when the claim was premised upon a comment about a defendant's silence. See *id.* (citing cases).

The Sixth Circuit, like the Seventh, has been inconsistent. As explained below, the Sixth Circuit here strayed from the *Morrison-Knowles* consensus and used an inappropriate Fourteenth Amendment test that led to the wrong result.

2. The Fourteenth Amendment test that the Sixth Circuit applied here is improper because it eliminates the key questions of the prosecutor's intent and the jury's perception.

In this case, the Sixth Circuit applied a different test that focuses on whether the prosecutor's remarks "tended to mislead the jury" and "were deliberately or accidentally made." App. 31a-32a. That Fourteenth Amendment test is properly used for prosecutorial actions, such as vouching or misrepresentation of testimony, that violate common-law rules of trial conduct and due process. *Byrd v. Collins*, 209 F.3d 486, 529 (6th Cir. 2000); *United States v. Emmert*, 9 F.3d 699, 701 (8th Cir. 1993). But when a defendant claims that a prosecutor violated the Fifth Amendment by directly or indirectly commenting on his silence, a court should use the more specific *Morrison-Knowles* test. The *Morrison-Knowles* test is better than the test

that the court below used, because the "manifest intent" and "natural and necessary" factors ensure that verdicts are not set aside for words taken out of context.

The substantial body of case law applying the *Morrison-Knowles* test demonstrates that it is the better test for evaluating allegedly improper comments on a defendant's silence. Those cases show that the circuits do not focus, as the test used below does, on whether the statements are "prejudicial"—for after all, all good evidence is prejudicial, but not improperly so. Instead, the circuits using the *Morrison-Knowles* test focus on whether the statements were truly a comment on silence or served some other legitimate purpose, with the reference to silence merely an unavoidable side effect. See *United States v. Austin*, 585 F.2d 1271, 1280 (5th Cir. 1978) ("[W]e cannot say that the prosecutor manifestly intended to comment on Austin's failure to testify, since another explanation for his remark is obviously plausible."); *United States v. Nelson*, 450 F.3d 1201, 1213 (10th Cir. 2006) (manifest intent "will not be found if some other explanation for the prosecutor's remark is equally plausible"); *United States v. Calderon*, 127 F.3d 1314, 1338 (11th Cir. 1997) ("No manifest intent exists where there is another, equally plausible explanation for the remark").

The cases applying *Morrison-Knowles* also show the courts' careful attention to this Court's teaching that context is critical in determining the prosecutor's intent and the jury's perception. "Whether the jury 'necessarily construes' a prosecutor's remark as a comment on a defendant's

failure to testify requires a probing analysis of the context of the comment." *United States v. Robinson*, 651 F.2d 1188, 1197 (6th Cir. 1981). If the comment, in context, validly bears a permissible interpretation, no violation will be found. *United States v. Wendt*, 698 F.2d 933, 935 (8th Cir. 1982). According to the Second Circuit, "[t]he trend has been, correctly in our view, to treat the two adverbs in the conjunctive and to stress the 'necessarily.'" *United States ex rel. Leak v. Follette*, 418 F.2d 1266, 1269 (2d Cir. 1969). Other circuits have also emphasized this view. *Barrientes v. Johnson*, 221 F.3d 741, 780 (5th Cir. 2000) ("the question is not whether the jury might or probably would view the challenged remark in this manner, but whether it necessarily would have done so"); *Williams v. Wainwright*, 673 F.2d 1182, 1185 (11th Cir. 1982) (same).

In sum, the *Morrison-Knowles* test, although never formally adopted by the Court, embodies the principles that the Court has adopted in *Griffin, Lockett,* and *Robinson.* In sharp contrast, the broader Fourteenth Amendment test cannot be said to represent the Court's clearly established law regarding comments on a defendant's silence, because it omits critical principles. In all events, the lower courts need the Court's guidance to clarify which approach is correct.

3. The Sixth Circuit's use of the wrong test led to the wrong result, and the uncertainty over the test harms many cases beyond this one.

Not only did the Sixth Circuit reach the wrong result here, but more important, the way it did so is a textbook example of the harm that this decision,

left unreviewed, could have on future cases. Girts, in his direct appeal in state court, argued that the prosecutor had improperly commented on his right to remain silent. App. 150a. The state appellate court correctly applied the *Morrison-Knowles* test, and it concluded that the comments were not improper. App. 150a-153a.

The Sixth Circuit, by contrast, ignored *Morrison-Knowles* and applied a Fourteenth Amendment test designed for other forms of purported prosecutorial misconduct. That choice of the wrong test led to its mistaken result. By using the test designed for other forms of prosecutorial misconduct, the court looked to four prongs that nowhere reflect the core *Morrison* concepts of prosecutorial intent and jury perception. App. 31a-32a. Asking, as the court below did, whether the statements are "flagrant" or "prejudicial" misses the point of Fifth Amendment analysis. If the statements are made for a valid reason, such as pointing out the unrefuted nature of certain evidence, then the statements should be valid under the majority *Morrison-Knowles* approach, which looks to whether the statements are truly a comment on silence, or whether the implication about silence is an unavoidable effect of a legitimate point. Legitimate statements might well be "flagrant," because prosecutors can and do make them openly. So, too, will they be "prejudicial." Thus, the use of the wrong test did not just play out differently on *these* facts; rather, the use of the Fourteenth Amendment "misconduct" test here steered the court toward the wrong result. Thus, continued use of the wrong test could systematically skew cases toward the wrong outcome.

But if the court had applied the *Morrison-Knowles* principles to all three statements, it would have and should have reached different results on all three, and thus on the ultimate outcome.

First, the proper application of *Morrison-Knowles* to the first statement—namely, that various witness statements were unrefuted—shows that the statements were proper. In referring to the testimony of various witnesses recounting statements Girts had made to them, the prosecutor stated: "Again these are his words. And the words that you heard from these folks supplied by him are unrefuted, and they are uncontroverted. There has been no evidence offered to say that these people are incorrect. None at all." App. 3a.

This statement is legitimate under *Morrison-Knowles,* as cases in other circuits show, because when a non-testifying defendant's out-of-court statements are put into evidence, a prosecutor may permissibly characterize them as "uncontradicted" to underscore the merits of the government's case. *United States v. Christians*, 200 F.3d 1124, 1128 (8th Cir. 1999). This holds true even when the prosecution observes that its evidence is the defendant's "own words," because the words do not *necessarily* refer to the defendant's silence at trial. Such comments could just as well serve to emphasize the strength of the case against him. *United States v. Wendt*, 698 F.2d 933, 934-35 (8th Cir. 1982).[1]

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[1] Further, the circuits may be split as to the application of this principle. The Second Circuit, for example, has suggested that evidence may not be described as unrefuted when only the defendant could refute the evidence: "remarks concerning lack of contradiction are forbidden only in the exceedingly rare case

Second, the comment about Girts's failure to mention the cyanide he had obtained, even when he was "cooperating" with a search for cyanide, is allowable under *Morrison-Knowles*. The statement was not about the silence itself, but about Girts's attempt to *mislead* the police by pointing them in other directions and concealing the fact that he had obtained cyanide. (And, as explained below in Part B, regarding the second question presented, this statement is not even governed by the Fifth Amendment, because this "silence"—and the misleading "cooperative" statements—was pre-*Miranda,* pre-arrest, and non-custodial.)

Third and finally, applying *Morrison-Knowles* to the prosecutor's third statement—regarding the delivery method of the cyanide—shows that this statement is legitimate because it fairly responded to the defense's argument. *Robinson*, 485 U.S. at 31-34. Here, the prosecution said it did not have to tell the jury how cyanide got into the victim's body, because "[w]e know that it was ingested. And there is only one person that can tell you how it was introduced, and that's the defendant." App. 4a. But that statement was, as the state appeals court concluded,

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where the defendant alone could possibly contradict the government's testimony." *United States ex rel. Leak v. Follette*, 418 F.2d 1266, 1269 (2d Cir. 1969). But in a seemingly similar case, the Third Circuit held that a prosecutor fairly responded to an attack on the credibility of two witnesses in a statement that came "across as an assertion that the government obtained its evidence from the only available sources." *United States v. Isaac,* 134 F.3d 199, 206 (3d Cir. 1998); see also *Butler,* 686 F.2d at 1170 (expressly rejecting per se rule against describing evidence as uncontradicted, even if only defendant could contradict).

"a response to defendant's own closing argument in which he maintained that the State did not prove" how Girts could have put the cyanide into his wife's food. App. 153a.

Indeed, when the Second Circuit applied the *Morrison-Knowles* standard to a statement almost identical to the prosecutor's third statement here, that court found the statement acceptable. See *United States v. Knoll*, 16 F.3d 1313, 1323 (2d Cir. 1994). In *Knoll,* the prosecutor commented that the defendant was "the only person could explain how that $600,000 got into the Cayman Island bank account." *Id.* The court viewed that statement as a "fair response to the defense's claim the government could not show the origin of the $600,000." *Id.* This comment on how the money got into the account is a perfect parallel to the comment about how the cyanide got into Mrs. Girts, and the different outcomes can only be explained by the different tests used.

The Sixth Circuit, too, has approved a similar statement when it applied *Morrison-Knowles.* See *Spalla v. Foltz*, 788 F.2d 400, 403-04 (6th Cir. 1986). In *Spalla,* the prosecutor asked, "Who would know the motive? The killer would know . . . and the killer is the Defendant." *Id.* at 403. The court held that the comment was not "manifestly intended" to reflect the defendant's failure to testify, nor would the jury perceive it that way, since the comment responded to the defense's argument regarding lack of evidence of motive.

Thus, if the Sixth Circuit in the decision below had applied *Morrison-Knowles,* that test would have led the court to the right result, and the court's use

of the wrong test harms future prosecutions in two distinct ways. First, if followed, the decision will lead to after-the-fact nullification of other perfectly valid convictions. Second, and more insidiously, the decision could lead prosecutors to self-censor, and to refrain from perfectly legitimate comments, at the cost of persuasive power and thus possibly at the cost of a guilty verdict. And of course, such cases, as acquittals, would never be reviewed, so that the upshot of an overly restrictive test is that the guilty go free in an unknowable number of cases.

For this and all reasons above, the Court should grant the petition and address this issue.

B. The Court should resolve a circuit split over the use of a defendant's pre-arrest silence as substantive evidence of guilt.

The Court should also review this case to address the issue raised by the prosecutor's second statement, that is, whether the Fifth Amendment even applies to pre-arrest silence. The Court has never squarely answered the question, but now it should.

The common law has traditionally allowed a person's failure to state a fact, under circumstances where it would be natural to do so, to be used as impeachment evidence. *Jenkins v. Anderson*, 447 U.S. 231, 239 (1980). Accordingly, this Court held that, because it could not have been induced by a *Miranda* warning, a testifying defendant's pre-arrest silence may be used for impeachment. *Id.* at 239-41.

This case presents a different question, namely, whether pre-arrest silence may be used as

substantive evidence of guilt. *Jenkins* expressly left this question undecided. *Id.* at 236 n.2.

Girts spoke with police on at least three occasions before his arrest: when he called to tell them about a potential suicide note; when police told him they were searching his house for cyanide or other poisons; and when police confronted him with evidence that he had obtained cyanide. App. 7a-10a. The prosecutor referred to these in closing argument, stating "with respect to the source [of the cyanide], the defendant had no less than three occasions to tell the police that he had ordered the cyanide." App. 3a-4a.

This statement, which refers only to Girts's silence during the police investigation, does not even implicate Girts's right to remain silent at trial or his right to be silent in post-arrest, pre-trial proceedings, as the dissent noted. App. 38a. Nonetheless, the Sixth Circuit held that comments on pre-arrest silence are limited by the Fifth Amendment right to remain silent, relying on its previous *Combs* decision. App. 30a-31a (citing *Combs v. Coyle*, 205 F.3d 269, 284 (6th Cir. 2000)).

The circuits are badly split on this issue, both amongst and within themselves. For example, in *United States v. Savory*, the Seventh Circuit extended the *Griffin* rule to preclude use of pre-arrest silence as substantive evidence of guilt. 832 F.2d 1011, 1015, 1017-18 (7th Cir. 1987). Later, however, the court permitted use of a non-testifying defendant's silence about some matters before arrest, in conjunction with her inconsistent exculpatory statements, as substantive evidence. *United States v. Davenport*, 929 F.2d 1169, 1174-75 (7th Cir. 1991).

As Judge Posner explained, the defendant did not have "a privilege to weave a tapestry of evasions" or a "privilege to attempt to gain an advantage in the criminal process . . . by selective disclosure followed by clamming up." *Id.*

Some circuits have extended *Griffin* to bar substantive evidence of how a defendant went about invoking the Fifth Amendment privilege. See *Coppola v. Powell*, 878 F.2d 1562, 1567 (1st Cir. 1989); *United States v. Burson*, 952 F.2d 1196, 1200-01 (10th Cir. 1991) (error to admit evidence of silence after privilege was invoked); *Combs v. Coyle*, 205 F.3d 269, 279-83 (6th Cir. 2000) (error to admit "talk to my lawyer").

Other circuits have extended *Jenkins* from use of pre-arrest silence for impeachment to substantive use. See *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991); *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996) (pre-arrest silence about claimed duress was not induced by a government agent); *United States v. Oplinger*, 150 F.3d 1061, 1066-67 (9th Cir. 1998) (Fifth Amendment's bar against compelled testimony does not reach pre-arrest silence because there is no compulsion). Most recently, the Eighth Circuit allowed substantive use of post-arrest, pre-*Miranda* silent *conduct*, reasoning that there was no compulsion. *United States v. Frazier*, 408 F.3d 1102, 1109-11(8th Cir. 2005).

The Court should grant the petition to resolve this conflict regarding comments on pre-arrest silence, independent of the need to review the first question presented regarding the broader framework for reviewing all statements regarding silence.

Further, the independent significance of this second question—both as to the certworthiness of this case and as to this error's contribution to the Sixth Circuit's mistaken result—is not in any way diminished by the fact that the pre-arrest silence issue arose in conjunction with the two other purportedly improper prosecutorial statements at issue here.

As to the merits, that other statements are involved does not preclude the strong likelihood that the error on this one statement alone led to an improper result. This is true because the outcome in a multiple-statement case depends on the cumulative effect of those statements. First, the merits inquiry here incorporates a measure of the cumulative effect of any improper statements, so removing one from the scale could change the outcome. Second, the cumulative nature also affects the prejudice inquiry under *Strickland*. And third, it does so again under the prejudice prong of cause-and-prejudice. In sum, if the court was wrong to reject the comment on pre-arrest silence, then all of the analysis needs to be re-done with that error corrected. That would be so even if the Court rejects—though it should not—the State's arguments regarding the application of *Morrison* to the other two statements.

In addition, the multiple-statement scenario does not render the case less certworthy as to the pre-arrest silence issue. That is so because this second question is squarely presented, and its resolution may change the outcome here, as explained above. Moreover, because cases such as this one turn on cumulative effects, it is not surprising to find that a multiple-statement case is

more likely to result in an erroneous grant of relief. Thus, this complication, if it is one, is a recurring one, so it is no reason to deny review here.

Finally, this case is an AEDPA case, so the Sixth Circuit should have asked whether the alleged rule against commenting on pre-arrest silence was clearly established by this Court's precedent. But the Sixth Circuit did not identify any such precedent from this Court, nor could it. Instead, it relied on its own pre-AEDPA precedent, and further, that case itself acknowledged a sharp circuit split on the matter. App. 29a-31a (citing *Combs*); see *Combs,* 205 F.3d at 282 ("The circuits that have considered whether the government may comment on a defendant's prearrest silence in its case in chief are equally divided."). Thus, the Sixth Circuit clearly erred in granting relief on that basis, and that clear error calls into question the result below.

CONCLUSION

For the above reasons, the Court should grant the State's petition for a writ of certiorari.

Respectfully submitted,

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