YOU MIGHT HAVE THE RIGHT TO REMAIN SILENT: AN EROSION OF THE FIFTH AMENDMENT WITH THE USE OF PRE-ARREST SILENCE

I. INTRODUCTION

You have the right to remain silent. Anything you say—and, in some states, anything you do not say—can and will be used against you in a court of law. Although the United States Supreme Court has clearly held that an individual has a right to remain silent after arrest, the Court has avoided determining whether the Fifth Amendment to the United States Constitution also protects an individual's pre-arrest silence from being utilized as evidence of guilt. Currently across the United States, courts are increasingly divided regarding whether it is constitutional to admit an individual's pre-arrest silence as substantive evidence of guilt. Specifically, eight of the United

1. U.S. Const. amend. V.
2. See Miranda v. Arizona, 384 U.S. 436, 460 (1966) (stating that the right against self-incrimination, explicitly protected by the Fifth Amendment, is fulfilled only when an individual is guaranteed the right to remain silent) (quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964)); see also Salinas v. Texas, 133 S. Ct. 2174, 2184 (2013) (Thomas, J., concurring) (stating that the United States Supreme Court granted certiorari for the purpose of deciding whether the Fifth Amendment protection against compulsory self-incrimination prohibits the use of pre-arrest silence as substantive evidence of guilt and recognizing that the Court never addressed the question but instead decided the case on different grounds).
3. Compare People v. Welsh, 80 P.3d 296, 299, 311 (Colo. 2003) (recognizing that the Colorado Court of Appeals ruled that pre-arrest silence was inadmissible but not reaching the issue itself after having granted certiorari), State v. Fenc, 325 N.W.2d 703, 711-12 (Wis. 1982) (noting the admission of pre-arrest silence of substantive evidence of guilt was a constitutional error, but determining the reference was too brief to warrant a new trial), State v. Lovejoy, 89 A.3d 1066, 1073 (Me. 2014) (concluding that people are endowed with constitutional protections from compelled self-incrimination both pre- and post-arrest), State v. Cassavaugh, 12 A.3d 1277, 1286 (N.H. 2010) (noting that it is well-established in the state that if an individual does not testify, prosecutorial use of the individual's pre-arrest silence as part of the state's case-in-chief violates the constitution while citing the United States Court of Appeals for the First Circuit for guidance) (citing Coppola v. Powell, 878 F.2d 1562 (1st Cir. 1989)), State v. Boston, 66 S.E.2d 886, 895-96 (N.C. Ct. App. 2008) (agreeing with the United States Courts of Appeals for the First, Sixth, Seventh, and Tenth Circuits, thus holding that the Fifth Amendment privilege against self-incrimination protects individuals' silence extends beyond the realm of custodial interrogation to both before and after arrest), Weitzel v. State, 863 A.2d 999, 1002 (Md. 2004) (adopting the stance that evidence of pre-arrest silence “is too ambiguous to be probative” when the silence is in the presence of a police officer but doing so under Maryland’s evidence laws as opposed to the United States’ Constitution), State v. Leach, 807 N.E.2d 335, 342 (Ohio 2004) (concluding the use of pre-arrest, pre-Miranda silence as substantive evidence of guilt undermines and violates the Fifth Amendment privilege against self-incrimination), Commonwealth v. Thompson, 725 N.E.2d 556, 565 (Mass. 2000) (stating that the lower court erred in ad-
States Courts of Appeals have addressed this issue, which resulted in an even split. Because a constitutional right hangs in the balance and often an individual's liberty or even life is at risk in these criminal

mitting evidence that Thompson had remained silent, staring at the floor when in- formed of his wife's death as substantive evidence of consciousness of guilt), State v. Moore, 965 P.2d 174, 180 (Idaho 1998) (adopting the position that the Fifth Amendment protects against the use of an individual's pre-arrest silence against them in a court proceeding), Taylor v. Commonwealth, 495 S.E.2d 522, 529 (Va. Ct. App. 1998) (finding that burden imposed upon the privilege against self-incrimination substantially out- weighs any prosecutorial interest in utilizing pre-arrest silence to police officers' ques- tions as substantive evidence of guilt), State v. Easter, 922 P.2d 1285, 1286 (Wash. 1996) (holding that the government violated the Fifth Amendment right to remain si- lent), Tortolito v. State, 901 P.2d 387, 388, 391 (Wyo. 1995) (reversing the conviction on the grounds that the prosecutor impermissibly commented on Tortolito's pre-arrest si- lence to indicate substantive evidence of guilt), State v. Palmer, 860 P.2d 339, 349-50 (Utah Ct. App. 1993) (concluding that the lower court erred in admitting of evidence regarding Palmer's choice pre-Miranda to remain silent to demonstrate consciousness of guilt), and State v. Rowland, 452 N.W.2d 758, 763 (Neb. 1990) (stating that the trial court erred in admitting evidence regarding Rowland's pre-arrest silence) (citing United States ex rel. Savory v. Lane, 832 F.2d 1011, 1017-18 (7th Cir. 1965), with State v. Lopez, 279 P.3d 640, 645 (Ariz. Ct. App. 2012) (finding that the United States Courts of Appeals for the Fifth, Ninth, and Eleventh Circuits were most persuasive, agreeing that the Fifth Amendment does not prohibit prosecutorial comment on an individual's pre-arrest silence), State v. Borg, 806 N.W.2d 535, 543 (Minn. 2011) (agreeing with Justice Steven's concurring opinion in Jenkins v. Anderson, 447 U.S. 231, 241-45 (1980), and holding that the Fifth Amendment does not protect an individual's silence if it is not compelled, indicating that it believes pre-arrest silence is not compelled), State v. LaCourse, 716 A.2d 14, 16 (Vt. 1998) (stating that the lower court did not error because nothing in the record indicated LaCourse was under arrest or in custody), People v. Schollaert, 486 N.W.2d 312, 316 (Mich. Ct. App. 1992) (concluding that the state did not violate Schollaert's constitutional rights when it introduced, and the court admitted, evidence regarding his silence to indicate guilt), Waldo v. State, 746 S.W.2d 750, 755 (Tex. Crim. App. 1988) (stating the prosecution could inquiry into Waldo's pre-arrest silence without impermissibly encroaching on his constitutional rights), and State v. Helgeson, 303 N.W.2d 342, 348 (N.D. 1981) (adopting Justice Steven's rationale from his concurring opinion in Jenkins, 447 U.S. at 241-45, and concluding the lower court did not err in its admission of Helgeson's pre-arrest silence).

4. Compare United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996) (finding that the Fifth Amendment does not prohibit substantive evidentiary use of pre-arrest silence), United States v. York, 830 F.2d 885, 896 (8th Cir. 1987) (concluding prosecutorial comment on pre-arrest silence to indicate substantive evidence of guilt is not erroneous), United States v. Oplinger, 150 F.3d 1061, 1067 (9th Cir. 1998) (holding that the admission of testimony and evidence regarding the accused's pre-arrest silence did not violate the accused's right against self-incrimination), and United States v. Ri- ver, 944 F.2d 1563, 1568 (11th Cir. 1991) (determining that the prosecutor may com- ment on an accused's silence if the silence occurred pre-arrest or post-arrest, but pre- Miranda warning), with Coppola, 878 F.2d at 1567 (finding that an accused's refusal to talk to the police invoked the privilege against self-incrimination, even though a state- ment may be made pre-Miranda warning), Combs v. Coyle, 205 F.3d 269, 283 (6th Cir. 2000) (holding that the use of pre-arrest silence as substantive evidence of guilt uncon- stitutionally infringes upon Fifth Amendment right against self-incrimination), Savory, 832 F.2d at 1018 (finding the admission of pre-arrest silence as evidence of guilt consti- tutes a constitutional error), and United States v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991) (concluding that the admission of testimony regarding a person's pre-arrest silence constitutes a clear error).
proceedings, the United States Supreme Court must resolve this split.\textsuperscript{5}

This Topic Article will demonstrate that the use of pre-arrest silence as substantive evidence of guilt is unconstitutional.\textsuperscript{6} First, this Article will provide a background of the Fifth Amendment, an overview of fundamental United State Supreme Court decisions addressing or failing to address the issue, and a survey of the circuit split across the United States Courts of Appeals.\textsuperscript{7} Next, this Article will advocate that the United States Supreme Court should address this issue because of the rights involved and the magnitude of the division between the courts.\textsuperscript{8} This Article will then contend that the First, Sixth, Seventh, and Tenth Circuits properly held that the use of pre-arrest silence as substantive evidence of guilt is unconstitutional.\textsuperscript{9} Subsequently, this Article will note the main objection, as provided by the Fifth and Ninth Circuits, to the inadmissibility of pre-arrest silence as evidence of guilt.\textsuperscript{10} Finally, this Article will rebut the main objection by exposing an improper assumption made by courts in their analysis.\textsuperscript{11}

II. BACKGROUND

A. Silence Within the Fifth Amendment: An Implied Right to Remain Silent

The Fifth Amendment of the United States Constitution provides several protections for individuals facing criminal charges and actions.\textsuperscript{12} One specific protection provided to all people is the privilege against self-incrimination.\textsuperscript{13} As the United States Supreme Court clarified in \textit{United States v. Wade},\textsuperscript{14} this privilege only protects an in-

\textsuperscript{5} See infra notes 220-228 and accompanying text.
\textsuperscript{6} See infra notes 196-283 and accompanying text.
\textsuperscript{7} See infra notes 12-195 and accompanying text.
\textsuperscript{8} See infra notes 206-214 and accompanying text.
\textsuperscript{9} See infra notes 215-249 and accompanying text.
\textsuperscript{10} See infra notes 250-263 and accompanying text.
\textsuperscript{11} See infra notes 264-283 and accompanying text.
\textsuperscript{12} See U.S. Const. amend. V (stating, “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”).
\textsuperscript{13} See id. (providing that “[n]o person shall . . . be compelled in any criminal case to be a witness against himself”).
\textsuperscript{14} 388 U.S. 218 (1967).
individual from being compelled to testify or otherwise provide evidence in a communicative manner against himself or herself.\textsuperscript{15}

The privilege against self-incrimination protects against compulsion by state and federal officials.\textsuperscript{16} In \textit{Malloy v. Hogan},\textsuperscript{17} the United States Supreme Court held that the protection from self-incrimination by compulsion as codified by the Fifth Amendment is also provided by the Fourteenth Amendment to ensure the privilege is not abridged by the states.\textsuperscript{18}

Although the phrase \textit{the right to remain silent} cannot be found within the Fifth Amendment or any other part of the United States Constitution, the Supreme Court has recognized the privilege.\textsuperscript{19} In \textit{Malloy}, the Court determined that both the Fifth and the Fourteenth Amendments guarantee protection against infringement of the right to freely choose to remain silent without suffering a penalty for such silence.\textsuperscript{20} Since \textit{Malloy}, the Supreme Court has clarified how this right exists if it cannot be found within the Constitution: the right to remain silent is implied from the privilege against self-incrimination.\textsuperscript{21}

\textbf{B. JENKINS V. ANDERSON: THE SUPREME COURT SPEAKS ON USE OF PRE-ARREST SILENCE FOR PURPOSES OF IMPEACHMENT}

In \textit{Jenkins v. Anderson},\textsuperscript{22} the United States Supreme Court concluded that the use of pre-arrest silence to impeach a defendant’s testimony is not an impermissible restraint upon a person’s right to exercise the Fifth Amendment right to remain silent.\textsuperscript{23} Michigan officials tried Dennis Jenkins for the first-degree murder of Doyle Redding.\textsuperscript{24} At trial, Jenkins claimed that after being accused of turning Redding into the police for the robbery of Jenkins' sister and her boyfriend, Redding attacked him with a knife.\textsuperscript{25} Jenkins described how

\begin{footnotes}
\footnote{15. United States v. Wade, 388 U.S. 218, 221 (1967) (citation omitted).}
\footnote{16. See \textit{Malloy v. Hogan}, 378 U.S. 1, 6 (1964) (explaining the scope of the protection against self-incrimination provided by United States Constitution).}
\footnote{17. 378 U.S. 1 (1964).}
\footnote{18. \textit{Malloy}, 378 U.S. at 6.}
\footnote{19. See generally U.S. Const. amend. V (lacking any explicit indication of a right to remain silent); but see, e.g., \textit{Malloy}, 379 U.S. at 7 (recognizing the right of the accused to "freely [choose] to admit, to deny, or to refuse to answer") (quoting Lisenba v. California, 314 U.S. 219, 241 (1941)); \textit{Miranda v. Arizona}, 384 U.S. 436, 445 (1966) (mandating that a "person must be warned that he has a right to remain silent . . . ") (emphasis added).}
\footnote{20. \textit{Malloy}, 378 U.S. at 8.}
\footnote{21. See \textit{Miranda}, 384 U.S. at 460 (explaining that the right against self-incrimination is fulfilled only when an individual is guaranteed the right to choose to remain silent) (quoting \textit{Malloy}, 378 U.S. at 8).}
\footnote{22. 447 U.S. 231 (1980).}
\footnote{24. \textit{Jenkins}, 447 U.S. at 232.}
\footnote{25. \textit{Id.} at 232-33.}
\end{footnotes}
the two scuffled, and in self-defense, Jenkins stabbed Redding. During cross-examination, the prosecutor attempted to impeach the credibility of Jenkins’ self-defense claim by questioning Jenkins on how long it took him to tell anyone of the scuffle or go to the police. In closing arguments, the prosecutor again referred to Jenkins’ pre-arrest silence, indicating if it were really self-defense Jenkins would not have waited two weeks to come forward. Convicted of manslaughter, the court sentenced Jenkins to ten to fifteen years in state prison.

After being convicted, Jenkins sought a writ of habeas corpus first in federal district court, and then in the United States Court of Appeals for the Sixth Circuit, arguing that the prosecutor’s questioning infringed upon his constitutional rights. Specifically, Jenkins argued that the prosecutor’s comments on his failure to come forward regarding his self-defense claim violated his Fifth and Fourteenth Amendment rights because this silence constituted an exercise of his right against self-incrimination. Although it did not offer any rationale for its ruling, the Sixth Circuit affirmed the district court’s decision to deny relief.

Jenkins appealed the decision to the United States Supreme Court, which granted certiorari. Jenkins again argued that the prosecutor’s conduct had violated Jenkins’ Fifth Amendment rights as incorporated into the Fourteenth Amendment. The only case that could be interpreted to support Jenkins’ claim was Doyle v. Ohio, in which the Supreme Court clarified that the use of a defendant’s post-arrest silence for impeachment purposes violates the Due Process Clause of the Fourteenth Amendment. The Supreme Court affirmed the lower courts’ denial of Jenkins’ petition for a writ of habeas corpus and distinguished Jenkins’ case from Doyle because the prosecutor did not question Jenkins regarding his post-arrest silence for the purposes of impeachment. In explaining the reason for the different treatment of post-arrest and pre-arrest silence, the Court stated that post-arrest silence can be attributed to the implicit guarantee found in Mi-

26. Id. at 233.
27. Id. at 233, 235.
28. Id. at 234-35.
29. Id. at 234.
30. Id. Jenkins failed to get a reversal on appeal, and the Michigan Supreme Court denied certiorari. Id.
31. Id.
33. Jenkins, 447 U.S. at 234.
34. Id. at 235.
37. Id. at 239-40 (distinguishing post-arrest silence from pre-arrest silence).
randan warnings that silence will not be penalized. The Court recognized that the Fifth Amendment guarantees the privilege of an accused to remain silent during his trial without comment by the prosecutor on the accused’s exercise of this privilege. However, the Court found that Jenkins did not remain silent during the trial, but instead took the stand for his own defense. A defendant who testifies as a part of his defense can be impeached by his prior silence.

The Court recognized the argument that people facing arrest will not feel free to remain silent if their failure to speak can later be used to impeach them. However, the Court reiterated the rule that the Constitution does not forbid all government-imposed choices that have an effect of discouraging the accused from exercising their constitutional rights. The test to determine whether the restriction is permissible evaluates whether compelling the choice impairs to an appreciable extent the policies that are the foundation of the right involved. The Court emphasized that the privilege to refuse to testify cannot be construed to encompass the right to commit perjury. Once a criminal defendant takes the stand, the prosecution may utilize the traditional truth-testing devices available in the criminal justice system. After concluding that pre-arrest silence may be utilized to impeach a defendant, the Court added that each jurisdiction may create its own rules of evidence for determining whether the reference to prior silence is probative for purposes of contrasting that silence with current statements.

In Jenkins, Justice Stevens concurred, stating that a defendant’s claim of privilege against self-incrimination is irrelevant to a person’s decision to remain silent when the person is not under official compul-

38. Id.
39. Id. at 235 (citing Griffin v. California, 380 U.S. 609, 614 (1965)).
40. Id.
41. Id. (citing Raffel v. United States, 271 U.S. 494 (1926)). In Raffel, the defendant was tried twice. Jenkins, 447 U.S. at 235. During the first trial, the defendant exercised his right to remain silent. Id. During the second trial, the defendant took the stand in his own defense. Id. On cross-examination, the prosecutor commented on the defendant’s failure to testify in the first trial. Id. The Court held that the comment was proper because the defendant had waived his right to remain silent by offering himself as a witness. Id. When on the stand, the defendant is treated as any other witness, susceptible to cross-examination. Id. Therefore, the defendant’s credibility could be impeached just like any other witness. Id. at 235-36 (citing Grunewald v. United States, 353 U.S 391, 420 (1957)).
42. Id. at 236.
43. Id. (citing Chaffin v. Stynchcombe, 412 U.S. 17, 30 (1973); Corbitt v. New Jersey, 439 U.S. 212, 218 n.8 (1978)).
44. Jenkins, 447 U.S. at 236 (citing Chaffin, 412 U.S. at 32).
45. Id. at 237-38 (quoting Harris v. New York, 401 U.S. 222, 225 (1971)).
46. Id.
47. Id. at 238-39.
sion to speak. Justice Stevens explained that when determining whether the right to remain silent is applicable, the test is whether the defendant’s testimony could be compelled in that situation and whether the defendant asserted the privilege. Instead of deeming it a constitutional issue, Justice Stevens classified the question of whether comment may be made on the defendant’s pre-arrest silence as a routine evidentiary question, whose answer depends upon the evidence’s probative value.

Justice Marshall, joined by Justice Brennan, dissented, opining that the decision in Jenkins undercut the two major rights that form the foundation of the United States constitutional system: the right against self-incrimination and the right to a defense. In this dissent, the justices pointed out three fatal defects in the majority’s holding. First, the mere presence of pre-arrest silence is so unlikely to be probative regarding the truth or lack thereof in the defendant’s trial testimony that its use for impeachment contradicts the Due Process Clause of the Fourteen Amendment. Second, the adverse inference drawn from the silence, which is a failure to volunteer incriminating information, impermissibly infringes upon the right to avoid self-incrimination. Third, the possibility of a negative inference drawn from the silence impermissibly burdens the choice to exercise the constitutional right to testify as a part of one’s defense. The dissent argued that due to the absolute right to testify as a part of one’s own defense and an absolute right to avoid self-incrimination, the government cannot force a defendant to choose to exercise only one of those fundamental rights.

48. Id. at 241 (Stevens, J., concurring).
49. Id. at 243-44 (Stevens, J., concurring) (explaining that the test is whether a defendant “was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent.”).
50. Id. at 244.
51. Id. at 246 (Marshall, J., dissenting).
52. See id. (clarifying that these “fatal” defects are Justice Stevens’ and Justice Brennan’s own view).
53. Id. The justices recognized other possible explanations for silence, such as the fear of retaliation or the belief that if a person did not commit a crime, that person has no need to go to the police to explain herself. Id. at 248.
54. Id. at 246.
55. Id.
56. Id. at 251.
In *Salinas v. Texas*, the United States Supreme Court avoided addressing the question of whether the use of pre-arrest silence as substantive evidence of guilt is constitutional. Instead, the Supreme Court focused on whether the defendant, Genovevo Salinas, properly invoked the privilege against self-incrimination to receive its protections. Before ever being arrested or read *Miranda* warnings, Salinas handed over his gun and answered questions from police conducting a double homicide investigation. Salinas answered most of the police officer’s questions, but when the officer asked whether his gun would match the shells found at the crime scene, Salinas became silent. Police testified that in response to the question, Salinas looked to the floor and began shuffling his feet, biting his lip, and clenching his hands. Salinas did, however, answer other questions once the officer moved on.

When Texas officials tried him for those murders, Salinas chose not to testify. During the trial, the prosecutor introduced Salinas’ physical reaction and verbal silence to the officer’s question as substantive evidence of guilt. The jury convicted Salinas of murder. Salinas appealed to the Court of Appeals of Texas, claiming his Fifth Amendment right against self-incrimination had been violated. The court of appeals affirmed the jury’s verdict, reasoning that the Texas officials did not compel Salinas’ silence pre-arrest nor pre-*Miranda*, which rendered the Fifth Amendment privilege against self-incrimination inapplicable. Salinas then petitioned for discre-

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57. 133 S. Ct. 2174 (2013).
58. *Salinas v. Texas*, 133 S. Ct. 2174, 2184 (2013) (Thomas, J., concurring) (noting the case was resolved on other grounds and recognizing that the plurality opinion avoided addressing the question posed to it: whether the Fifth Amendment right against compulsory self-incrimination is violated by the use of a defendant’s pre-arrest silence as evidence of substantive guilt).
60. *Id.* at 2178.
61. *See id.* (continuing to refuse to answer the question and sitting silent for several moments).
62. *See id.* (characterizing him as beginning to “tighten up”).
63. *Id.*
64. *Id.*
65. *Id.*
66. *See id.* (sentencing him to twenty years in prison).
67. *Id.* at 2177-78.
68. *Id.* at 2178.
Salinas appealed to the United States Supreme Court, which granted certiorari due to the split in authority regarding the admissibility of a defendant’s exercise of the privilege against self-incrimination during pre-arrest interviews with police. The Supreme Court stated that the prosecutor did not violate Salinas’ Fifth Amendment right against self-incrimination by commenting on his pre-arrest silence because Salinas did not explicitly invoke the right in response to the officer’s questions. The privilege must be claimed as it is not effective immediately. This requirement puts the government on notice to enable the prosecution to prove the testimony will not be self-incriminating or fix any potential self-incrimination.

In a concurring opinion, Justice Thomas noted that although the Court granted certiorari to address the split authority on whether utilizing pre-arrest silence violated the Fifth Amendment protection against compulsory self-incrimination, the plurality decided the case on other grounds. Justice Thomas, however, proceeded to address the question, determining that individuals could not seek protection under the Fifth Amendment pre-arrest because the prosecutor’s comments about the pre-arrest silence did not compel Salinas to make additional statements. Therefore, although he agreed that Salinas’ claim should fail, Justice Thomas believed resolving the case upon this ground simplified the opinion.

Justice Breyer wrote the dissenting opinion, which also addressed the question, and determined that the Fifth Amendment prohibits comment on an accused’s silence in response to police questioning. The dissent reasoned that silence is an attempt to avoid serving as a witness against oneself, citing *Miranda v. Arizona* to emphasize the impermissibility of penalizing a person for invoking their Fifth

69. *Id.* at 2179.
70. *Id.*
71. *See id.* (deeming pre-arrest police interviews “noncustodial”).
72. *Id.* at 2179, 2184.
73. *See id.* at 2178 (recognizing that this is a well-established rule) (citing Minnesota v. Murphy, 465 U.S. 420, 425, 427 (1984)).
74. *See id.* at 2179 (allowing the government to prove the evidence would not be self-incriminating and enabling the state to cure potential self-incrimination by granting immunity) (citing Hoffman v. United States, 341 U.S. 479, 486 (1951) and Kastigar v. United States, 406 U.S. 441, 448 (1972)).
75. *Id.* at 2184 (Thomas, J., concurring).
76. *Id.*
77. *Id.*
78. *Id.* at 2185 (Breyer, J., dissenting). The dissent was joined by Justice Ginsburg, Justice Sotomayor, and Justice Kagan. *Id.*
Amendment right when in police custody.\textsuperscript{80} The dissent explained that if the state could comment on the accused's silence, any option the accused chose would provide the state with assistance in proving its case: to answer could give the state prejudicial information, to remain silent would make the accused a witness against himself, and to take the stand to explain speech or silence would give the state an opportunity to impeach the accused.\textsuperscript{81} No matter the choice regarding speech or silence, the accused would be put in an impossible situation.\textsuperscript{82}

D. \textit{You Might Have a Right to Remain Silent (Depending Upon What Circuit You Are In): The Circuit Split on the Use of Pre-Arrest Silence as Substantive Evidence of Guilt}

1. \textit{The Fifth, Eighth, Ninth, and Eleventh Circuits Decide the Use of Pre-Arrest Silence is Admissible as Substantive Evidence of Guilt}

a. The Ninth Circuit: \textit{United States v. Oplinger}

In \textit{United States v. Oplinger},\textsuperscript{83} the United States Court of Appeals for the Ninth Circuit held the admission of testimony and evidence regarding the accused's pre-arrest silence did not violate the accused's right against self-incrimination.\textsuperscript{84} William Oplinger was employed as a supply coordinator at a bank.\textsuperscript{85} In dealing with the vendors with which the bank had a cash purchase agreement, Oplinger would purchase unneeded supplies, return the extra supplies, and then pocket the cash.\textsuperscript{86} When the bank's officers questioned him after discovering the stolen money, Oplinger stated he did not know anything, reiterating this response to each question.\textsuperscript{87}

During his first trial in the United States District Court for the Western District of Washington for twenty-one counts of bank fraud, Oplinger took the stand.\textsuperscript{88} The judge, however, declared a mistrial.

\begin{itemize}
\item \textsuperscript{80} \textit{Id}. at 2185 (citing Miranda v. Arizona, 384 U.S. 436, 468 (1966)).
\item \textsuperscript{81} \textit{Id}. at 2186.
\item \textsuperscript{82} \textit{Id}
\item \textsuperscript{83} 150 F.3d 1061 (9th Cir. 1998). This case has since been overruled in part regarding the Court's interpretation of U.S. \textsc{Sentencing Guidelines Manual} \S\ 3B1.3 on the abuse of positions of trust or use of special skill. It has not affected the court's holding on the use of pre-arrest silence. \textit{See United States v. Contreras}, 593 F.3d 1135, 1136 (9th Cir. 2010) (stating that the court of appeals overruled any of its cases to the extent the cases conflict with its interpretation of U.S. \textsc{Sentencing Guidelines Manual} \S\ 3B1.3).
\item \textsuperscript{84} \textit{Id}. at 2186.
\item \textsuperscript{85} \textit{Oplinger}, 150 F.3d at 1063.
\item \textsuperscript{86} \textit{Id}. at 1064.
\item \textsuperscript{87} \textit{Id}
\item \textsuperscript{88} \textit{See id}. (failing to offer any evidence of these subsequent purchases).
\end{itemize}
because the jury could not reach a verdict. Oplinger did not testify. The prosecutor presented evidence that the subsequent purchases would not have been made with cash, contradicting Oplinger’s claims from the first trial, because almost all the other vendors had a credit system with the bank. This time the district court convicted Oplinger.

Oplinger appealed to the United States Court of Appeals for the Ninth Circuit, claiming the district court erred in admitting testimony and prosecutorial comment in closing arguments on Oplinger’s meeting with the bank’s managers. Oplinger argued that as soon as he realized the meeting was an informal hearing before termination and that his responses would be reported to police officials, he consciously remained silent. Oplinger claimed this was an impermissible reference to his pre-arrest silence, which was protected by the Fifth Amendment privilege against self-incrimination.

The United States Court of Appeals for the Ninth Circuit held that because the prosecutor’s comment on Oplinger’s pre-arrest silence was not impermissible, Oplinger did not suffer a violation of his Fifth Amendment privilege against self-incrimination. Recognizing the Supreme Court had yet to address the split in authority on the constitutionality of admitting pre-arrest silence as evidence of guilt, the Ninth Circuit looked toward Justice Stevens’ concurring opinion in Jenkins v. Anderson as support for its holding. The Ninth Circuit agreed with Justice Stevens that one’s right to remain silent is irrelevant before the individual has contact with state officials because the individual is not officially compelled to speak.

Surveying the circuits that had examined issue, the Ninth Circuit chose to join the United States Courts of Appeals for the Fifth and Eleventh Circuits. The Ninth Circuit reasoned that the right against self-incrimination protected by the Fifth Amendment does not

89. Id.
90. Id.
91. Id. The bank had a credit agreement established with Office Depot, which Oplinger claimed was the primary place he made subsequent purchases with the cash from the refunds. Id.
92. Id.
93. Id. at 1065-66.
94. Id. at 1066.
95. See id. (arguing it was a “pretermination hearing”).
96. Id. at 1067.
98. Id. at 1066 (citing Jenkins v. Anderson, 447 U.S. 231, 241 (1980) (Stevens, J., concurring)).
99. Oplinger, 150 F.3d at 1066.
100. See id. at 1067 (examining the United States Courts of Appeals for the First, Fifth, Seventh, Tenth, and Eleventh Circuits).
prohibit proper evidentiary use of all communication or silence by the accused that may lead to incriminating inferences about the accused.101 Instead, it only prevents evidentiary use of silence when one is compelled to speak.102 The court disagreed with the United States Courts of Appeal for the First, Seventh, and Tenth Circuits, reasoning that based upon the unambiguous language of the Fifth Amendment, a person must be compelled to speak before the right against self-incrimination is applicable.103

b. The Eleventh Circuit: United States v. Rivera

In United States v. Rivera,104 the United States Court of Appeals for the Eleventh Circuit determined that the prosecutor may comment on an accused’s silence if the silence occurred pre-arrest or post-arrest but pre-Miranda warning.105 In Rivera, Johnny Rivera and Elena Vila were charged with conspiracy to import cocaine, importation of cocaine, and possession with the intent to distribute cocaine.106 Before their arrest, Rivera and Vila were confronted at an airport after being noticed for acting suspiciously.107 When the customs inspector searched their bags, Rivera and Vila said nothing and had expressionless faces, even as cocaine was discovered.108 The two had not yet been arrested or read their Miranda rights.109

During the trial in the United States District Court for the Southern District of Florida, the customs inspector testified about the group’s lack of reaction.110 In closing arguments, the prosecutor pointed out that the group had remained expressionless, asking the jury to infer the reactions were planned in the event of discovery.111 A jury convicted the two on all charges.112

On appeal to the United States Court of Appeals for the Eleventh Circuit, Vila argued the district court erred in admitting the testimony and prosecutorial comment regarding the group’s silence before

101. Id. (citing United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996)). 102. See id. at 1066 (agreeing with Justice Stevens’ position, which requires compulsion of speech for the privilege to offer protection) (quoting Jenkins, 447 U.S. at 241 (Stevens, J., concurring)). 103. See id. at 1067 (emphasizing that “no person shall be compelled”) (quoting U.S. Const. amend. V). 104. 944 F.2d 1563 (11th Cir. 1991). 105. United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991). 106. Rivera, 944 F.2d at 1565. 107. See id. (noting the suspicion was based on age, speaking without accents, arriving from Colombia, and having passports issued so closely to the date of travel). 108. Id. at 1565. 109. Id. at 1565-66. 110. Id. at 1567. 111. Id. 112. Id. at 1565.
being arrested and read their *Miranda* warnings. The Eleventh Circuit affirmed the convictions, stating the government may comment on an accused’s silence as long as the *Miranda* warning has not yet been read. The court reasoned that once *Miranda* is read, individuals are assured their silence is protected and cannot be used to penalize or incriminate the defendant. The Eleventh Circuit noted that to penalize individuals after assuring them they had the right to remain silent would violate fundamental fairness. However, before the *Miranda* warning is read, there are no issues of fundamental fairness or constitutional infringements.

c. The Fifth Circuit: *United States v. Zanabria*

In *United States v. Zanabria*, the United States Court of Appeals for the Fifth Circuit found the Fifth Amendment does not prohibit evidentiary use of pre-arrest silence. In *Zanabria*, the United States District Court for the Southern District of Texas tried Miguel Zanabria on charges of possession with the intent to distribute cocaine and unlawful importation. Zanabria presented duress as a defense, claiming that a creditor threatened the life of his daughter and these threats forced him to transport drugs to pay back the money in order to protect her. At trial, the arresting officer testified that Zanabria had neither mentioned the death threats against his daughter nor indicated he was in danger or needed the officer’s help. In closing arguments, relying on the officer’s testimony to undercut the duress defense, the prosecutor noted that the death threats were never reported in the United States or Colombia, where the child lived. A jury convicted Zanabria on both counts.

113. *Id.* at 1567.
114. See *id.* at 1564, 1568 (explaining the government may comment on pre-arrest silence, as well as post-arrest silence before a Miranda warning has been read to the accused).
115. See *id.* at 1567 (stating that the Miranda warning carries the implicit guarantee that a person’s silence will not carry a penalty) (quoting Wainwright v. Greenfield, 474 U.S. 284, 290 (1986)).
116. *Id.*
117. *Id.* at 1568.
118. 74 F.3d 590 (5th Cir. 1996).
120. *Zanabria*, 74 F.3d at 591.
121. *Id.* at 592. His wife supported this claim by testifying that an unidentified third party made death threats against the couple’s eight-year-old daughter attributed to unpaid debts. *Id.*
122. *Id.* at 593. This officer was the customs officer at the Houston Intercontinental Airport, finding the drugs during a customs search. *Id.* at 592-93.
123. *Id.* at 593.
124. *Id.* at 591-92. In its judgment, the district court inadvertently stated that Zanabria had been convicted of “conspiracy to possess cocaine” rather than the proper
Zanabria then appealed to the United States Court of Appeals for the Fifth Circuit, claiming the district court erred in admitting evidence of his pre-arrest silence, which had violated his Fifth Amendment right against self-incrimination.\(^{125}\) The Fifth Circuit found that this testimony of pre-arrest silence was admissible as substantive evidence of guilt.\(^{126}\) The court noted the government agent did not compel the silence in question.\(^{127}\) The Fifth Circuit determined the Fifth Amendment provides protection against compelled self-incrimination, but it does not prevent appropriate evidentiary use and prosecutorial comment on all of the accused’s communications or silences that could lead to incriminating inferences.\(^{128}\)

d. The Eighth Circuit: United States v. York

In United States v. York,\(^{129}\) the United States Court of Appeals for the Eighth Circuit concluded the prosecutorial comment on pre-arrest silence to indicate substantive evidence of guilt is not erroneous.\(^{130}\) In York, Perry York was convicted in the United States District Court for the District of Minnesota for armed robbery.\(^{131}\) Although York’s attorney conceded that York participated in the robbery, the attorney presented a defense of entrapment during trial because one of York’s co-defendants was a paid FBI informant.\(^{132}\) York chose not to take the stand.\(^{133}\) During closing arguments, the prosecutor commented on York’s silence, pointing out that never once did York go to the police or FBI to report the terrible things York claimed the informant committed to cause the alleged entrapment.\(^{134}\)

York appealed to the United States Court of Appeals for the Eighth Circuit, claiming the district court erred in allowing the prosecutor to make an impermissible statement regarding York’s post-arrest conviction of “possession with intent to distribute cocaine.” \(^{125}\) This error was later cured on remand. \(^{126}\) at 593.

\(^{125}\) See \textit{id.} at 592-93 (stating procedural history and noting Zanabria’s claim of error).

\(^{126}\) \textit{id.} at 593.

\(^{127}\) \textit{id.}

\(^{128}\) See \textit{id.} (stating the rule which encompasses “communication or lack there of”) (emphasis omitted).

\(^{129}\) 830 F.2d 885 (8th Cir. 1987).

\(^{130}\) United States \textit{v.} York, 830 F.2d 885, 896 (8th Cir. 1987).

\(^{131}\) \textit{See York,} 830 F.2d at 888 (enhancing the crime for the use of a fire arm during the commission of a crime and sentencing York to fifteen year and five year consecutive sentences).

\(^{132}\) \textit{id.} at 888-89.

\(^{133}\) \textit{id.} at 888.

\(^{134}\) \textit{id.} at 895.
rest, post-Miranda warning silence. Although York recognized the prosecutor’s assertion that its closing argument was a comment on York’s pre-arrest silence of failing to go to the police, York argued that by pointing out York’s pre-arrest silence it impermissibly implicated his post-arrest silence. The Eighth Circuit concluded no constitutional error was committed by commenting on York’s pre-arrest silence.

2. The First, Sixth, Seventh, and Tenth Circuits Determined the Use of Pre-Arrest Silence is Inadmissible as Substantive Evidence of Guilt

a. The First Circuit: Coppola v. Powell

In Coppola v. Powell, the United States Court of Appeals for the First Circuit found that the accused’s statement of refusal to talk to the police without a lawyer invoked the privilege against self-incrimination, even though the statement was made before the Miranda rights were read. Before charging Vincent Coppola with burglary and aggravated felonious sexual assault, police officers approached Coppola on two separate occasions with questions regarding the crimes. On the second occasion, Coppola told the police officers he was not ignorant and repeatedly stated he would not confess to them. The New Hampshire state court admitted testimony on Coppola’s statement and tone of voice to the officers, reasoning the pre-arrest statement was not an invocation of the right to remain silent. A jury found Coppola guilty, and the New Hampshire Supreme Court affirmed the convictions.

Coppola petitioned the United States District Court for the District of New Hampshire for a writ of habeas corpus, but the district court denied the petition. Coppola then appealed to the United

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135. Id. at 895. The prosecutor said, “And never, never once did [York] tell the police or the FBI about this terrible thing that [the informant] had done to him . . . .” Id. (clarification added to identify parties).
136. Id. (citing Doyle v. Ohio, 426 U.S 610 (1976)).
137. Id. at 896. The court also clarified that any chance of error that the jury would think the prosecutor’s comments were about York’s failure to take the stand during trail was cured by the district court’s admonition. Id.
138. 878 F.2d 1562 (1st Cir. 1989).
139. Coppola v. Powell, 878 F.2d 1562, 1567 (1st Cir. 1989).
140. See Coppola, 878 F.2d at 1563 (describing how the victim gave a detailed description of her attacker and his license plate, which was tracked to Coppola’s residence where he was approached by officers and questioned on two separate occasions).
141. Id.
142. See id. at 1564 (reporting Coppola made his statement in a “bragging tone of voice”).
143. Id. at 1563.
144. See id. (agreeing with New Hampshire Supreme Court’s reasoning).
States Court of Appeals for the First Circuit, claiming the use of Coppola’s statement to the police was an infringement upon Coppola’s Fifth Amendment right against self-incrimination.\underline{145}

The United States Court of Appeals for the First Circuit issued the writ of habeas corpus.\underline{146} The First Circuit explained that a suspect questioned during a criminal investigation had the right to remain silent because, unlike the right to counsel, the right to remain silent attaches before the formal adversary proceedings begin.\underline{147} The First Circuit noted that an individual could assert the right to remain silent in any type of proceeding.\underline{148}

The First Circuit stated that whether the right had attached to enable the defendant to exercise the privilege depended upon whether answering the question could lead to a harmful disclosure.\underline{149} The First Circuit recognized that Coppola had verbally stated his refusal rather than indicating refusal through actual silence.\underline{150} The court declined to interpret a verbal exercise of the right to remain silent as a waiver of the privilege because such interpretation would contradict the principle that a claim of the privilege need not be a formulaic combination of words.\underline{151} The court noted that the purpose of the right against self-incrimination is to protect both the innocent and guilty, and, thus, the right requires a liberal application.\underline{152}

b. The Sixth Circuit: \textit{Combs v. Coyle}

In \textit{Combs v. Coyle},\underline{153} the United States Court of Appeals for the Sixth Circuit held that the use of pre-arrest silence as substantive evidence of guilt unconstitutionally infringed upon the Fifth Amendment right against self-incrimination.\underline{154} An Ohio state court convicted Ronald Combs of two counts of murder.\underline{155} During the commission of the crime, an off-duty police officer saw Combs shoot two women and subsequently shot Combs six times after he refused to drop his

\begin{thebibliography}{10}
\bibitem{145} Id. at 1564.
\bibitem{146} ld. at 1571.
\bibitem{147} Id. at 1565 (quoting United States ex rel. Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987)).
\bibitem{148} See id. (stating that the privilege can be asserted in any proceeding, including “civil or criminal, administrative or judicial, investigatory or adjudicatory . . . .”) (quoting Kastigar v. United States, 406 U.S. 441, 444 (1972)).
\bibitem{149} Id. (citing Hoffman v. United States, 341 U.S. 479, 486-87 (1951)).
\bibitem{150} Id.
\bibitem{151} Id. at 1566.
\bibitem{152} Id. (citing Maffie v. United States, 209 F.2d 225, 227 (1st Cir. 1957) and Hoffman, 341 U.S. at 486).
\bibitem{153} 205 F.3d 269 (6th Cir. 2000).
\bibitem{154} Combs v. Coyle, 205 F.3d 269, 283 (6th Cir. 2000).
\bibitem{155} Combs, 205 F.3d at 272.
\end{thebibliography}
weapon and made an aggressive movement.\footnote{156. \textit{Id.} at 273.} As soon as another officer arrived on the scene, he asked Combs what had happened, and Combs informed him that the off-duty officer had shot him.\footnote{157. \textit{See id.} at 278-79 (saying, "[T]he guy shot me.").} The second time the officer asked the question, Combs referred the officer to his lawyer.\footnote{158. \textit{Id.}} During trial, the on-duty police officer testified about Combs’ answers to his questions.\footnote{159. \textit{Id.} at 279.} The trial judge instructed the jury that although they could not draw any inferences against or for Combs based on either his request for counsel or his subsequent silence, the jury could consider the evidence as it related to the purpose, motive, and design of the offense.\footnote{160. \textit{Id.}}

After exhausting appeals at the state and federal level, Combs petitioned for a writ of habeas corpus to the United States Court of Appeals for the Sixth Circuit, claiming the district court erred in admitting the officer’s testimony and in instructing the jury.\footnote{161. \textit{Id.} at 274, 278.} The Sixth Circuit concluded that the prosecutor’s use of Combs’ pre-arrest silence was not a legitimate government practice because it violated Combs’ Fifth Amendment right against self-incrimination.\footnote{162. \textit{Id.} at 285-86.} The court distinguished this case from the \textit{Doyle} line of cases, which rests on the theory that \textit{Miranda} warnings implicitly guarantee that silence will not be penalized and post-\textit{Miranda} silence is protected by due process.\footnote{163. \textit{Id.}} Although the \textit{Doyle} cases indicate that comment on pre-\textit{Miranda} silence does not necessarily violate due process, the court noted that right against self-incrimination could still be violated.\footnote{164. \textit{See id.} (distinguishing because Combs’ silence was pre-arrest, pre-\textit{Miranda} warnings).}

Recognizing the split among numerous circuit courts which have weighed in on the use of pre-arrest silence as substantive evidence of guilt, the Sixth Circuit surveyed the reasoning behind each position.\footnote{165. \textit{See id.} at 282-83 (describing the split and the reasoning of each court, indicating with which courts the Sixth Circuit agreed).} The Sixth Circuit agreed with the reasoning of the First, Seventh, and Tenth Circuits and held that the use of pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination.\footnote{166. \textit{Id.} at 283.} The Sixth Circuit stated that people could exercise the privilege against self-incrimination when ques-
tioned as suspects during an investigation.\textsuperscript{167} Citing the United States Supreme Court in \textit{Hoffman v. United States},\textsuperscript{168} the Sixth Circuit recognized that the privilege was confined only to instances where a witness had cause to fear danger of incrimination arising from the witness’s response.\textsuperscript{169} As additional support for its holding, the Sixth Circuit noted that even under Justice Stevens’ logic in his concurrence in \textit{Jenkins}, the Fifth Amendment could apply in certain situations to protect an individual’s right to remain silent pre-arrest, specifically when that person’s testimony could be compelled.\textsuperscript{170}

c. The Tenth Circuit: \textit{United States v. Burson}

In \textit{United States v. Burson},\textsuperscript{171} the United States Court of Appeals for the Tenth Circuit concluded that the admission of testimony regarding a person’s pre-arrest silence constituted a clear error.\textsuperscript{172} The United States District Court for the District of New Mexico convicted Cecil Burson of tax evasion.\textsuperscript{173} During the trial, the prosecution called two Internal Revenue Service investigators to the stand that had attempted to question Burson as a part of their investigation.\textsuperscript{174} The investigators testified that on the day of the scheduled interview, they arrived to find Burson wielding a tape recorder, attempting to interrogate them instead.\textsuperscript{175} Burson refused to answer any of the investigators’ questions, which the prosecutor later emphasized at trial.\textsuperscript{176}

Burson appealed to the United States Court of Appeals for the Tenth Circuit, arguing that the prosecution had presented the pre-arrest silence as substantive evidence of guilt, which violated his Fifth Amendment right to remain silent.\textsuperscript{177}

\textsuperscript{167} \textit{Id.} (quoting Coppola v. Powell, 878 F.2d 1562, 1565 (1st Cir. 1989)).

\textsuperscript{168} 341 U.S. 479 (1951).

\textsuperscript{169} \textit{Combs}, 205 F.3d at 283 (quoting \textit{Hoffman v. United States}, 341 U.S. 479, 486-87 (1951)).

\textsuperscript{170} \textit{See id.} at 283-84 (applying Justice Stevens’ reasoning to defendant Combs’ situation and finding that one can be compelled when one reasonably believes there is a restraint on the freedom of movement or formal arrest and citing other Supreme Court cases to define what constitutes custody) (quoting \textit{Stansbury v. California}, 511 U.S. 318, 322 (1994) and \textit{Berkemer v. McCarty}, 468 U.S. 420, 442 (1984)). Custody is a set of circumstances surrounding interrogation in which there is a formal arrest or a restriction on freedom of movement generally associated with formal arrest. \textit{Stansbury}, 511 U.S. at 322. A relevant factor in determining whether one is in custody is assessing how a reasonable person would have comprehended the situation. \textit{Berkemer}, 468 U.S. at 442.

\textsuperscript{171} 952 F.2d 1196 (10th Cir. 1991).

\textsuperscript{172} \textit{United States v. Burson}, 952 F.2d 1196, 1201 (10th Cir. 1991).

\textsuperscript{173} \textit{Burson}, 952 F.2d at 1198.

\textsuperscript{174} \textit{Id.} at 1200.

\textsuperscript{175} \textit{Id.} at 1198, 1200. The investigators were seeking information about the activities of a separate taxpayer, which turned out to be a fake identity created by Burson to carry out the tax evasion. \textit{Id.} at 1199.

\textsuperscript{176} \textit{Id.} at 1200.
Amendment privilege against self-incrimination. The Tenth Circuit concluded the admission did in fact violate Burson’s Fifth Amendment privilege against self-incrimination. The Tenth Circuit stated it was clear from the investigators’ testimony that they met with Burson with the intention of questioning him about his financial status, pursuant to a criminal investigation. The court also concluded it was quite clear that Burson invoked his right to remain silent to avoid self-incrimination while not in police custody. Once a person invokes his right to remain silent, the Fifth Amendment applies, prohibiting prosecutorial comment on the invocation of that right.

d. The Seventh Circuit: United States ex rel. Savory v. Lane

In United States ex rel. Savory v. Lane, the United States Court of Appeals for the Seventh Circuit found that admission of pre-arrest silence as evidence of guilt constituted a constitutional error. An Illinois state court convicted Johnnie Savory of two counts of murder. During the trial, the prosecutor emphasized that Savory told the police he did not want to speak with them or make a statement regarding the murders. Although the Illinois Appellate Court held that the prosecutorial comment and witness testimony about Savory’s statement violated state law, it deemed this error harmless. The United States District Court for the Northern District of Illinois denied Savory’s petition for a writ of habeas corpus in which he claimed the errors noted by the state appellate court were not harmless.

Savory then appealed to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit found the state could not use Savory’s silence as evidence of guilt. The court reasoned that

177. Id.
178. Id. at 1201. Although the court concluded it was a constitutional error, violating one of Burson’s rights, the Tenth Circuit proceeded to analyze whether the error was harmless beyond a reasonable doubt. Id. at 1201-02.
179. Id. at 1200.
180. Id.
181. See id. at 1201 (noting the exception to the general rule, which is that pre-arrest silence may be used for impeachment purposes) (citing Griffin v. California, 380 U.S. 609, 615 (1965)).
182. 832 F.2d 1011 (7th Cir. 1987).
183. United States ex rel. Savory v. Lane, 832 F.2d 1011, 1018 (7th Cir. 1987).
184. Savory, 832 F.2d at 1012.
185. Id. at 1015.
186. See id. at 1016 (indicating the standard for reversal is whether the error was “harmless beyond a reasonable doubt”).
187. Id. at 1012.
188. Id.
189. Id. at 1017 (citing Griffin v. California, 380 U.S. 609 (1965)). In Griffin, the Supreme Court held that a prosecutor or court cannot ask the jury to infer guilt from an accused’s decision not to take the stand. Id. Although Griffin addresses comment on an
Unlike the Sixth Amendment right to counsel, the right to remain silent does not require formal or adversarial proceedings for the right to attach. In coming to this opinion, the court cited the United States Supreme Court's reasoning in *United States v. Gouveia* to support its own reasoning. In *Gouveia*, the Supreme Court stated that the Sixth Amendment right to counsel does not apply until a defendant becomes an accused, as the term is used within the amendment. The Seventh Circuit compared this Supreme Court explanation with the language used to codify the Fifth Amendment privilege against self-incrimination, specifically noting that the amendment used the word *person* as opposed to *accused*. Therefore, using the same logic the United States Supreme Court had previously utilized, the Seventh Circuit found error in the lower court's admission of Savory's pre-arrest silence to imply guilt.

III. ANALYSIS

The United States Courts of Appeals for the First, Sixth, Seventh, and Tenth Circuits correctly found the use of pre-arrest silence as substantive evidence of guilt is unconstitutional. Although these circuits reached the same conclusion regarding the admissibility of the pre-arrest silence, they do not uniformly refer to the right allegedly violated by the use of pre-arrest silence as the right to remain silent. Instead, many of the circuits, including those which deter-
mined pre-arrest silence is admissible as substantive evidence of guilt, focus their analysis on what they deemed as the right or privilege against compelled self-incrimination.\textsuperscript{198} Regardless of the right being identified as the right to remain silent or the right against self-incrimination, the Fifth Amendment of the United States Constitution is violated when evidence of pre-arrest silence is admitted into evidence as an indication of guilt.\textsuperscript{199}

First, this Analysis will demonstrate the significance of the split that exists across state and federal courts regarding the use of pre-arrest silence as evidence of guilt, as well as the need for the United States Supreme Court to resolve this constitutional issue.\textsuperscript{200} Second, this Analysis will explain how the Fifth Amendment protects the right to remain silent.\textsuperscript{201} Next, this Analysis will argue Fifth Amendment rights attach before one is arrested or before formal charges have been brought, resulting in the Fifth Amendment protecting pre-arrest silence.\textsuperscript{202} Subsequently, this Analysis will demonstrate how the Fifth Amendment prohibits admission of pre-arrest silence as substantive evidence of guilt in a criminal proceeding.\textsuperscript{203} Then, this Analysis will identify and examine a likely objection to the underlying arguments of this Analysis.\textsuperscript{204} Finally, this Analysis will rebut that objection by exposing an improper assumption utilized by the United States Courts of Appeals for the Fifth and Ninth Circuits regarding the necessity of referring to any Fifth Amendment rights which defendant exercised\textsuperscript{	extendash}) (emphasis added).

\textsuperscript{198} Compare Savory, 832 F.2d at 1017 (focusing on when the right to remain silent attaches, although the right against self-incrimination is mentioned), United States v. York, 830 F.2d 885, 895-96 (8th Cir. 1987) (concluding prosecutorial comment on York’s pre-arrest silence did not violate the exercise of “the right to remain silent”) (emphasis added), and Burson, 952 F.2d at 1200-01 (generally using the phrase the right to remain silent, but mentioning that “[w]hether Mr. Burson was advised of his privilege against self-incrimination is immaterial.”) (emphasis added), with Coppola, 878 F.2d at 1564-65 (explaining the three basic legal principles of the privilege against self-incrimination), United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996) (addressing Zanabria’s complaint that the lower court violated his Fifth Amendment right against self-incrimination by admitting evidence of his pre-arrest silence), Combs, 205 F.3d at 283 (surveying the split and joining the First, Seventh, and Tenth Circuits’ positions, claiming use of pre-arrest silence violates the privilege against self-incrimination), and United States v. Oplinger, 150 F.3d 1061, 1066-67 (9th Cir. 1998) (analyzing the right against self-incrimination to hold no impermissible restraint upon its exercise); but see United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991) (using neither the phrase “the right to remain silent” nor “privilege against self-incrimination,” instead noting there was no “constitutionally problematic” situation due to the comment on pre-arrest silence).

\textsuperscript{199} See infra notes 206-283 and accompanying text.

\textsuperscript{200} See infra notes 206-214 and accompanying text.

\textsuperscript{201} See infra notes 215-226 and accompanying text.

\textsuperscript{202} See infra notes 227-243 and accompanying text.

\textsuperscript{203} See infra notes 244-249 and accompanying text.

\textsuperscript{204} See infra notes 250-263 and accompanying text.
compulsion preventing protection of pre-arrest silence through the Fifth Amendment. 205

A. SEEKING AN END TO THE SUPREME COURT’S SILENCE: A CALL FOR THE COURT TO RESOLVE THE GROWING DIVIDE ON THE RIGHT TO REMAIN SILENT

Although the United States Supreme Court avoided resolving whether the use of pre-arrest silence as substantive evidence of guilt is constitutional, the growing split in federal and state courts has become too large and too significant for the Court to ignore any longer. 206 Currently, eight United States Courts of Appeals have addressed the issue, creating an even split for over the past sixteen years on whether the admission of pre-arrest silence as substantive evidence of guilt is constitutional. 207 Twenty state appellate courts and courts of last resort have weighed in on the issue as well, fourteen considering the evidence inadmissible and six allowing the use of pre-arrest silence as substantive evidence of guilt. 208

205. See infra notes 264-283 and accompanying text.
206. See Salinas v. Texas, 133 S. Ct. 2174, 2184 (2013) (Thomas, J., concurring) (stating that the Court granted certiorari for the purpose of deciding whether the Fifth Amendment protection against compulsory self-incrimination prohibits the use of pre-arrest silence as evidence of guilt and recognizing that the Court never addressed the question but instead utilized different grounds for deciding the case).
207. Compare United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996) (finding that the Fifth Amendment does not prohibit substantive evidentiary use of pre-arrest silence), United States v. York, 830 F.2d 885, 896 (8th Cir. 1987) (concluding prosecutorial comment on pre-arrest silence to indicate substantive evidence of guilt is not erroneous), United States v. Oplinger, 150 F.3d 1061, 1067 (9th Cir. 1998) (holding that the admission of testimony and evidence regarding the accused’s pre-arrest silence did not violate the accused’s right against self-incrimination), and United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991) (determining that the prosecutor may comment on an accused’s silence if the silence occurred pre-arrest or post-arrest but pre-Miranda warning), with Coppola v. Powell, 878 F.2d 1562, 1567 (1st Cir. 1989) (finding that an accused’s refusal to talk to the police invoked the privilege against self-incrimination, even though a statement may be made pre-Miranda warning), Combs v. Coyle, 205 F.3d 269, 283 (6th Cir. 2000) (holding that the use of pre-arrest silence as substantive evidence of guilt unconstitutionally infringes upon Fifth Amendment right against self-incrimination), United States ex rel. Savory v. Lane, 832 F.2d 1011, 1018 (7th Cir. 1965) (finding the admission of pre-arrest silence as evidence of guilt constitutes a constitutional error), and United States v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991) (concluding that the admission of testimony regarding a person’s pre-arrest silence constitutes a clear error).
208. Compare People v. Welsh, 80 P.3d 296, 299, 311 (Colo. 2003) (recognizing that the Colorado Court of Appeals ruled that pre-arrest silence was inadmissible but not reaching the issue itself after having granted certiorari), State v. Fencl, 325 N.W.2d 703, 711-12 (Wis. 1982) (noting the admission of pre-arrest silence of substantive evidence of guilt was a constitutional error, but determining the reference was too brief to warrant a new trial), State v. Lovejoy, 89 A.3d 1066, 1073 (Me. 2014) (concluding that people are endowed with constitutional protections compelled self-incrimination pre- and post-arrest), State v. Cassavaugh, 12 A.3d 1277, 1286 (N.H. 2010) (noting that it is well-established law in the state that if an individual does not testify, prosecutorial use
Beyond the sheer number of courts addressing and expanding the split on the issue, the United States’ Constitution protects the right at the heart of the issue, meaning the courts are dealing with potential violations of a constitutional magnitude by the use of pre-arrest silence as evidence of guilt.209 Because the United States Supreme

of the individual’s pre-arrest silence as part of the state’s case-in-chief violates the constitution while citing the United States Court of Appeals for the First Circuit for guidance) (citing Coppola, 878 F.2d at 1562), State v. Boston, 663 S.E.2d 886, 895-96 (N.C. Ct. App. 2008) (agreeing with the United States Courts of Appeals for the First, Sixth, Seventh, and Tenth Circuits and, thus, holding that the Fifth Amendment privilege against self-incrimination protects individuals’ silence extends beyond the realm of custodial interrogation to both before and after arrest), Weitzel v. State, 863 A.2d 999, 1002 (Md. 2004) (adopting the stance that evidence of pre-arrest silence “is too ambiguous to be probative” when the silence is in the presence of a police officer but doing so under Maryland’s evidence laws as opposed to the United States’ Constitution), State v. Leach, 807 N.E.2d 335, 342 (Ohio 2004) (concluding the use of pre-arrest, pre-Miranda silence as substantive evidence of guilt undermines and violates the Fifth Amendment privilege against self-incrimination), Commonwealth v. Thompson, 725 N.E.2d 556, 565 (Mass. 2000) (stating that the lower court erred in admitting evidence that Thompson had remained silent, staring at the floor when informed of his wife’s death as substantive evidence of consciousness of guilt), State v. Moore, 965 P.2d 174, 180 (Idaho 1998) (adopting the position that the Fifth Amendment protects against the use of an individual’s pre-arrest silence against them in a court proceeding), Taylor v. Commonwealth, 495 S.E.2d 522, 529 (Va. Ct. App. 1998) (finding that burden imposed upon the privilege against self-incrimination substantially outweighs any prosecutorial interest in utilizing pre-arrest silence to police officers’ questions as substantive evidence of guilt), State v. Easter, 922 P.2d 1285, 1286 (Wash. 1996) (holding that the government violated the Fifth Amendment right to remain silent), Tortolito v. State, 901 P.2d 357, 388, 391 (Wyo. 1995) (reversing the conviction on the grounds that the prosecutor impermissibly commented on Tortolito’s pre-arrest silence to indicate substantive evidence of guilt), State v. Palmer, 860 P.2d 339, 349-50 (Utah Ct. App. 1993) (concluding that the lower court erred in admitting evidence regarding Palmer’s choice pre-Miranda to remain silent to demonstrate consciousness of guilt), and State v. Rowland, 452 N.W.2d 758, 763 (Neb. 1990) (stating that the trial court erred in admitting evidence regarding Rowland’s pre-arrest silence) (citing Savory, 832 F.2d at 1017-18), with State v. Lopez, 279 P.3d 640, 645 (Ariz. Ct. App. 2012) (finding that the United States Courts of Appeals for the Fifth, Ninth, and Eleventh Circuits were most persuasive, agreeing that the Fifth Amendment does not prohibit prosecutorial comment on an individual’s silence pre-arrest), State v. Borg, 806 N.W.2d 535, 543 (Minn. 2011) (agreeing with Justice Steven’s concurring opinion in Jenkins v. Anderson and holding that the Fifth Amendment does not protect an individual’s silence if it is not compelled, indicating that it believes pre-arrest silence is not compelled), State v. LaCourse, 716 A.2d 14, 16 (Vt. 1998) (stating that the lower court did not err because nothing in the record indicated LaCourse was under arrest or in custody), People v. Schollaert, 486 N.W.2d 312, 316 (Mich. Ct. App. 1992) (concluding that state did not violate Schollaert’s constitutional rights when it introduced and the court admitted evidence regarding his silence to indicate guilt), Waldo v. State, 746 S.W.2d 750, 755 (Tex. Crim. App. 1988) (stating the prosecution could inquire into Waldo’s pre-arrest silence without impermissibly encroaching on his constitutional rights), and State v. Helgeson, 303 N.W.2d 342, 348 (N.D. 1981) (adopting Justice Steven’s rationale and concluding the lower court did not err in its admission of Helgeson’s pre-arrest silence). 209. See Combs, 205 F.3d at 281-83 (discussing the constitutional impact of admitting pre-arrest silence as substantive evidence of guilt); Burson, 952 F.2d at 1200 (recognizing the issue was determining whether the prosecutor’s comment on Burson’s silence constituted a violation of his constitutional right to remain silent); Zanabria, 74
Court has yet to resolve this split, a person’s pre-arrest silence is treated as protected by the federal constitution in some states and circuits but disregarded as an unprotected action with severe consequences in others.210

The need for the Supreme Court to address this issue becomes even more apparent when the consequences of these trials are considered.211 The right to remain silent protects people from being forced to disclose information that could be used against them in a current or future criminal prosecution.212 This privilege is so vital; courts have even extended its scope to apply beyond the rigid confines of criminal adjudicatory proceedings.213 Thus, when courts debate whether the right to remain silent is applicable, the accused’s liberty or even life hangs in the balance.214

F.3d at 593 (addressing Zanabria’s complaint that the prosecutor violated his constitutional right against self-incrimination); Rivera, 944 F.2d at 1568-69 (discussing which prosecutorial comments on a person’s silence are constitutionally problematic).

210. See, e.g., Coppola, 878 F.2d at 1563, 1565 (stating that the prosecutor violated Coppola’s Fifth Amendment right to remain silent when the prosecutor presented testimony that he had said “I grew up on the streets . . . if you think I’m going to confess to you, you’re crazy” because that statement constituted Coppola exercising his right to remain silent); but see, e.g., Oplinger, 150 F.3d at 1066-67 (stating that the Fifth Amendment did not protect a person who became silent after he recognized that his answers in a pre-termination would be reported to the FBI, meaning the prosecutor could indicate the silence evidenced guilt).

211. See Rivera, 944 F.2d at 1565, 1569 (affirming Rivera’s multiple conspiracy and drug-related convictions); Coppola, 878 F.2d at 1563 (ruling on Coppola’s conviction for burglary and aggravated felonious sexual assault); Savory, 832 F.2d at 1012 (determining whether to affirm Savory’s convictions for two counts of murder).

212. See U.S. Const. amend. V (stating that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . .”) (emphasis added). The Supreme Court clarified that “[t]o sustain the privilege, it need only be evidence from the implications of the question, in the setting which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.” Hoffman v. United States, 341 U.S. 479, 486 (1951).

213. See Kastigar v. United States, 406 U.S. 441, 444-45 (1972) (illustrating that although on its face the Fifth Amendment may seem to indicate that the Fifth Amendment only provides protection in criminal cases or proceedings, yet the Supreme Court has interpreted the Fifth Amendment’s language to mean that it protects the speaker “in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory.”).

214. Compare Miranda, 384 U.S. at 457, 460-61 (describing the necessity of procedural safeguards “to protect precious Fifth Amendment rights”), with Sharon Finegan, The False Claims Act and Corporate Criminal Liability: Qui Tum Actions, Corporate Integrity Agreements and the Overlap of Criminal and Civil Law, 111 PENN ST. L. REV. 625, 631-32 (2007) (comparing civil and criminal law, and noting the procedural safeguards in the criminal process are necessary because of the penalties available for criminal actions, including imprisonment and execution).
B. The Right Against Self-Incrimination & the Right to Remain Silent: Understanding the Connection

The Fifth Amendment of the United States Constitution protects the right against compelled self-incrimination.\(^\text{215}\) In *Miranda v. Arizona*,\(^\text{216}\) the United States Supreme Court called the right a noble principle, a substantive right that has become a hallmark of this country's democracy, and a mainstay in the United States' adversarial legal system.\(^\text{217}\) The Court noted that the underlying principle behind the right is the respect due to dignity and integrity of citizens by their government.\(^\text{218}\) This respect requires the government, when seeking to punish an individual it believes to be guilty of a crime, to carry the entire burden of producing evidence through its own labor rather than compelling an admission from the individual simply for efficiency.\(^\text{219}\)

To protect this fundamental right against incriminating oneself, an individual must be guaranteed the right to refuse to answer questions of law enforcement and prosecutors.\(^\text{220}\) The Supreme Court has recognized that failure to protect the privilege against self-incrimination without penalty forces the accused to make the false choice between self-accusation, perjury, or contempt, all of which could lead to imprisonment.\(^\text{221}\) This refusal to answer questions posed by law enforcement or prosecutors constitutes silence.\(^\text{222}\) When an individual confidently chooses to remain silent without fear that this silence will be used in court as evidence of guilt, the privilege against self-incrimination is protected and fulfilled.\(^\text{223}\)

The Fifth Amendment protects the right against self-incrimination, as indicated by the plain language and the consistent interpreta-

\(^{215}\) See U.S. Const. amend. V (stating that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . .”).

\(^{216}\) 384 U.S. 436 (1966).


\(^{218}\) *Id*.

\(^{219}\) *Id*.

\(^{220}\) See id. (stating, “In sum, the privilege is fulfilled only when the person is guaranteed the right ‘to remain silent unless he [or she] chooses to speak in the unfettered exercise of his own will.’”) (citing *Malloy v. Hogan*, 378 U.S. 1, 8 (1964)).

\(^{221}\) See Combs v. Coyle, 205 F.3d 269, 285 (6th Cir. 2000) (noting the Supreme Court recognized one of the “fundamental values and most noble aspirations” of the United States is “our unwillingness to subject those suspected of a crime to [this] cruel trilemma . . . .”) (citing *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52, 55 (1964)).

\(^{222}\) See *Combs*, 205 F.3d at 281 (stating the Fifth Amendment prohibits prosecutorial comment on the refusal to testify at trial) (citing *Griffin v. California*, 380 U.S. 609, 615 (1965)). In *Griffin*, the Supreme Court used the phrases “refusal to testify at trial” and “silence” interchangeably. *Griffin*, 380 U.S. at 615.

\(^{223}\) See *Miranda*, 384 U.S. at 460 (recognizing the necessity of allowing an individual to remain silent in order for him or her to exercise the fundamental privilege against self-incrimination).
tion by the Supreme Court.\textsuperscript{224} To avoid incriminating oneself, an individual has the right to remain silent when incriminating answers to questions can be compelled by forcing verbal communication or inferring such answers from silence.\textsuperscript{225} Therefore, the Fifth Amendment protects the right to remain silent.\textsuperscript{226}

C. Determining When the Right to Remain Silent Can Safely Be Utilized

The Fifth Amendment protects the rights of all people.\textsuperscript{227} The Fifth Amendment specifically uses the term \textit{person}, rather than restricting the right to a \textit{citizen}, a \textit{soldier}, or an \textit{accused} as utilized in other articles and amendments within the Constitution.\textsuperscript{228} This word choice is significant because it indicates not only who may exercise this right but also when this right is applicable.\textsuperscript{229}

In \textit{United States ex rel. Savory v. Lane},\textsuperscript{230} the United States Court of Appeals for the Seventh Circuit emphasized the different terms utilized by the Fifth and Sixth Amendments to indicate to

\textsuperscript{224}. See \textit{U.S. Const.} amend. V (stating that no person “shall be compelled in any criminal case to be a witness against himself . . . .”); see also Malloy, 378 U.S. at 6 (holding that the Fifth Amendment prevents “compulsory self-incrimination” and it is incorporated into the Fourteenth Amendment, making it applicable to state criminal proceedings); \textit{Miranda}, 384 U.S. at 439 (stating that the case before the Court involves the Fifth Amendment of the Constitution and the privilege it accords to not be compelled to incriminate oneself); Salinas v. Texas, 133 S. Ct. 2174, 2178 (2013) (stating the defendant’s Fifth Amendment claim fails because he did not invoke his “privilege against self-incrimination”).

\textsuperscript{225}. See \textit{Miranda}, 384 U.S. at 460 (stating that to maintain a fair and just system, the government must produce “evidence against [the person] by its own independent labors, rather than . . . compelling it from his own mouth.”); Jenkins v. Anderson, 447 U.S. 231, 246 (1980) (Marshall, J., dissenting) (noting the adverse inference drawn from the silence, which is a failure to volunteer incriminating information, impermissibly infringes upon the right to avoid self-incrimination).

\textsuperscript{226}. \textit{Compare} \textit{U.S. Const.} amend. V (stating that no person “shall be compelled in any criminal case to be a witness against himself . . . .”), and \textit{Malloy}, 378 U.S. at 6 (holding that the Fifth Amendment prevents “compulsory self-incrimination”), \textit{with Miranda}, 384 U.S. at 460 (determining the privilege against self-incrimination is only protected when a person’s right to remain silent is guaranteed, without fear that such silence will be used against him), \textit{and Combs}, 205 F.3d at 285 (explaining the right to remain silent is protected when a person does not have to choose between self-accusation, perjury or contempt) (citing \textit{Murphy}, 378 U.S. at 55).

\textsuperscript{227}. See \textit{U.S. Const.} amend. V (stating “No person shall . . . be compelled in any criminal case to be a witness against himself . . . .”) (emphasis added).

\textsuperscript{228}. \textit{Compare} \textit{U.S. Const.} amend V (stating “No person shall . . . .”) (emphasis added), \textit{with U.S. Const.} amend. III (stating “No Soldier shall . . . .”) (emphasis added), \textit{and U.S. Const.} amend. VI (stating “In all criminal prosecutions, the accused shall enjoy . . . .”) (emphasis added), \textit{and U.S. Const.} amend. XIX (stating “The right of citizens of the United States to vote shall . . . .”) (emphasis added).

\textsuperscript{229}. See United States ex rel. Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987) (discussing the significance of the different choice in words utilized within the Fifth and Sixth Amendments).

\textsuperscript{230} 832 F.2d 1011 (7th Cir. 1987).
FIFTH AMENDMENT AND PRE-ARREST SILENCE

whom the rights applied. While the Fifth Amendment utilizes the term *person*, the Sixth Amendment applies to the *accused*. The Sixth Amendment right to counsel is not applicable until an individual becomes an accused, which means an adversary judicial proceeding has commenced against that individual. The policy behind tying the right to the advent of adversarial judicial proceedings is to ensure the individual has aid when he or she is faced with the intricacies of the law and the prosecutor’s familiarity with those intricacies.

Although it uses *person* rather than *accused*, the Fifth Amendment does use the limiting phrase *any criminal proceeding* when prohibiting compelled incrimination. While this may seem to give the Fifth Amendment the same narrow scope as the Sixth Amendment, the United States Supreme Court has given the Fifth Amendment right against self-incrimination a broader scope. The Court has determined that the Fifth Amendment right against self-incrimination can be exercised in any proceeding, including those in civil, criminal, judicial, administrative, adjudicatory, and investigatory settings. The application is so broad because the right protects against any form of disclosure that a person reasonably believes may be used to criminally prosecute the person or expose other incriminating evidence. The only restriction upon when the Fifth Amend-

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231. *P.S. 832 F.2d at 1017.*
232. *See U.S. Const. amend. V (applying to all people); U.S. Const. amend. VI (restricting its applicability to the accused).*
233. *Savory, 832 F.2d at 1017 (recognizing the Supreme Court, in Gouveia, determined the Sixth Amendment right to counsel does not attach until the individual becomes an accused) (citing United States v. Gouveia, 467 U.S. 180, 188 (1984)). In Gouveia, the Supreme Court clarified that a person becomes an accused when a formal adversary judicial proceeding is commenced against the individual, such as a "formal charge, preliminary hearing, indictment, information, or arraignment." Gouveia, 467 U.S. at 188.*
234. *Id. at 188-89 (noting "We have recognized that the 'core purpose' of the counsel guarantee is to assure aid at trial, 'when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor.'") (quoting United States v. Ash, 413 U.S. 300, 309 (1973)).*  
235. *See U.S. Const. amend. V (stating that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself . . .") (emphasis added).*  
236. *See Combs v. Coyle, 205 F.3d 269, 283 (6th Cir. 2000) (noting that "the Supreme Court has given the privilege against self-incrimination a broad scope, explaining that 'it can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory, or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.'") (quoting Kastigar v. United States, 406 U.S. 441, 444-45 (1972)); see also Combs, 205 F.3d at 283 (providing additional Supreme Court cases that indicate the scope of the privilege against self-incrimination is broad) (quoting Hoffman v. United States, 342 U.S. 479, 485 (1951)).*  
237. *Id. at 283 (quoting Kastigar, 406 U.S. at 444-45).*  
238. *Id.*
ment right may be exercised is that the person must be in reasonable
fear of the injurious consequences arising from a direct answer.239

Due to the textual omission of the more specific term accused, the
Fifth Amendment right against self-incrimination attaches to all peo-
ple so long as those individuals have a reasonable fear that their re-
response may be used for criminal prosecution or lead to evidence that
could be used for subsequent prosecution.240 An individual may have
such fear when confronted with a state actor’s questions prior to ar-
rest.241 Therefore, the Fifth Amendment privilege against self-in-
crimination may be exercised pre-arrest.242 Because the privilege
against self-incrimination may only be fulfilled when one has the right
to refuse to answer questions, the Fifth Amendment protects the right
to remain silent pre-arrest.243

D. SILENCING THE PROSECUTION FROM COMMENTING ON A PERSON’S
EXERCISE OF THE RIGHT TO REMAIN SILENT

In order to protect an individual’s constitutional privilege against
self-incrimination, the Fifth Amendment prohibits comment on its ex-
cise.244 In Griffin v. California,245 the United States Supreme

239. See id. (laying out the requirements for the attachment of the Fifth Amend-
ment right) (quoting Hoffman, 341 U.S. at 486-87).
240. Compare U.S. Const. amend. V (stating that “[n]o person shall . . . be comp-
pelled in any criminal case to be a witness against himself . . . .”), and Combs, 205 F.3d
at 283 (indicating that the scope of the right against self-incrimination is broad, encom-
passing situations in which the individual reasonably fears any response will lead to
self-incrimination) (quoting Kastigar, 406 U.S. at 444-45), with U.S. Const. amend. VI
(stating “[i]n all criminal prosecutions, the accused shall . . . have the Assistance
of Counsel for his defense.”), and Savory, 832 F.2d at 1017 (explaining the right to counsel
does not attach until an individual becomes an accused at the commencement of formal
adversarial proceedings) (citing Gouveia, 467 U.S. at 188).
241. See Combs, 205 F.3d at 283 (reasoning that an individual’s comments, whether
in a pre-arrest setting or post-arrest setting, could “provide damaging evidence that
might be used in a criminal prosecution . . . .”) (citing Kastigar, 406 U.S. at 444-45).
242. Compare U.S. Const. amend. V (stating that “[n]o person shall . . . be comp-
pelled in any criminal case to be a witness against himself . . . .”), with Kastigar, 406
U.S. at 444-45 (determining the Fifth Amendment may be “asserted in any proceeding
. . . and it protects against any disclosure that [a person] reasonably believes could be
used in a criminal prosecution.”).
privilege is fulfilled only when the person is guaranteed the right to remain silent un-
less he chooses to speak in the unfettered exercise of his own will.”) (internal quotations
omitted) (citing Malloy v. Hogan 378 U.S.1, 8 (1964)), with U.S. Const. amend. V (stating
that “[n]o person shall . . . be compelled in any criminal case to be a witness against
himself . . . .”), and Kastigar, 406 U.S. at 444-45 (determining that both pre-arrest and
post-arrest comments could constitute damaging evidence).
244. See Coppola v. Powell, 878 F.2d 1562, 1568 (1st Cir. 1989) (holding the Fifth
and Fourteenth Amendments prohibit “either comment by the prosecution on the ac-
cused’s silence or instructions by the court that such silence is evidence of guilt.”) (citing
Griffin v. California, 380 U.S. 609, 615 (1965)).
Court noted that any other rule would allow the state to utilize a person's silence as substantive proof of guilt, penalizing the individual for exercising his privilege against self-incrimination.246 Allowing references to the silence would make exercising the privilege too costly, completely undercutting its purpose.247 As noted above, the Fifth Amendment protects an individual's right to remain silent pre-arrest.248 Therefore, in order to avoid penalizing the exercise of the right to remain silent, the Fifth Amendment must prohibit prosecutorial comment or jury instructions regarding pre-arrest silence when it is admitted as evidence of substantive guilt.249

E. YOU HAVE THE RIGHT TO REMAIN SILENT—BUT ONLY IF YOU CAN BE COMPELLED TO SPEAK: ANALYZING THE MAIN OBJECTION OF THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND NINTH CIRCUITS

In the United States Courts of Appeals for the Fifth and Ninth Circuits,250 one will find an argument emphasizing that the admission of pre-arrest silence as substantive evidence of guilt cannot vio-

246. Combs v. Coyle, 205 F.3d 269, 281 (6th Cir. 2000) (citing Griffin, 380 U.S. at 615); Coppola, 878 F.2d at 1568 (citing Griffin, 380 U.S. at 615).
247. See Combs, 203 F.3d at 281-82 (discussing the reasoning behind the prohibition on prosecutorial comment on a person's silence) (citing Griffin, 380 U.S. at 614); see also Miranda, 384 U.S. at 460 (stating that to ensure a “fair state-individual balance, to require the government ‘to shoulder the entire load,’ and ‘to respect the inviolability of the human personality,’ the government must produce ‘by its own independent labors’ evidence against the individual it accuses and seeks to punish, rather than ‘by the cruel, simple expedient of compelling it from his own mouth.’”) (citing Chambers v. Florida, 309 U.S. 227, 235-38 (1940)).
248. See supra note 226 and accompanying text.
249. Compare Combs, 203 F.3d at 281-82 (recognizing “[s]uch proffer of the defendant’s refusal to testify as evidence of guilt would impermissibly penalize the exercise of the privilege against self-incrimination and would ‘cut[ ] down on the privilege by making its assertion costly.’”) (citing Griffin, 380 U.S. at 614), and Coppola, 878 F.2d at 1568 (citing Griffin, 380 U.S. at 615) (holding that the Fifth Amendment prohibits comment on silence to establish guilt), with Kastigar v. United, 406 U.S 441, 444-45 (1972) (explaining that the Fifth Amendment “protects against any disclosures that [a person] reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.”).
250. The United States Courts of Appeals for the Eighth and Eleventh Circuits are not included in this portion of the Analysis due to their lack of analysis in resolving the issue of admissibility of pre-arrest silence as substantive evidence of guilt. The Eighth Circuit simply stated that the Fifth Amendment did not protect pre-arrest silence as a fact, without including a supporting citation or analysis. See United States v. York, 830 F.2d 885, 895-96 (8th Cir. 1987). The Eleventh Circuit cited Jenkins v. Anderson, interpreting the case as though the United States Supreme Court ruled that the government may permissibly comment on a person’s pre-arrest silence, whether it is for the purposes of impeachment or substantive evidence of guilt. See United States v. Rivera, 944 F.2d 1563, 1568 n.10 (11th Cir. 1991) (citing Jenkins v. Anderson, 447 U.S. 231 (1980)). However, in Jenkins, the Supreme Court specifically limited its conclusion to the use of pre-arrest silence for impeachment. Jenkins, 447 U.S. at 238.
late the Fifth Amendment because it is not compelled self-incrimination.251 This argument can be traced back to dicta in *Jenkins v. Anderson*,252 specifically in Justice Stevens’ concurring opinion.253

In *Jenkins*, while the majority opinion concluded that the Fifth Amendment was not violated by the use of pre-arrest silence for impeachment when an accused chose to take the stand, Justice Stevens argued that the United States Supreme Court failed to distinguish between pre-arrest silence and silence on the witness stand.254 Justice Stevens believed the two to be fundamentally different because, according to him, at the pre-arrest stage, the individual is under no compulsion to speak or remain silent.255 Justice Stevens reasoned that the threshold issue for the applicability of the privilege against self-incrimination was whether the testimony could have been compelled in that situation and then whether the individual actually asserted the privilege.256 The question, in Justice Stevens’ opinion, was not simply whether the individual remained silent.257

Without citing *Jenkins*, the United States Court of Appeals for the Fifth Circuit reasoned that pre-arrest silence could be used as substantive evidence of guilt because the silence was not induced by a government actor or a response to any government action.258 The court went on to clarify that the Fifth Amendment only protects against compelled self-incrimination, not proper evidentiary use of pre-arrest silence that may allow for an incriminating inference.259

251. See United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996) (finding no error in a prosecutor’s comment on pre-arrest silence because the record clearly demonstrated that a government agent did not induce the silence so that the silence could be considered a forced response); see also United States v. Oplinger, 150 F.3d 1061, 1066 (9th Cir. 1998) (citing *Jenkins v. Anderson*, 447 U.S 231, 241 (1980) (Stevens, J., concurring)) (agreeing with Justice Stevens that one’s right against compulsory self-incrimination cannot be violated when that person is under no official compulsion to speak).


254. See id. at 237-38 (majority opinion) (concluding “that the Fifth Amendment is not violated by the use of pre-arrest silence to impeach a criminal defendant’s credibility.”); id. at 241 (Stevens, J., concurring) (arguing that the Court improperly relied on *Raffel v. United States* because “such reliance incorrectly implies that a defendant’s decision not to testify at his own trial is constitutionally indistinguishable from his silence in a pre-custody context.”).

255. Id. at 243-44.

256. See id. at 244 (stating that a “different view ignores the clear words of the Fifth Amendment.”).

257. Id.

258. *Zanabria*, 74 F.3d at 593.

259. See id. (finding “[t]he Fifth Amendment protects against compelled self-incrimination but does not, as [the defendant] suggests, preclude the proper evidentiary use and prosecutorial comment about every communication or lack thereof by the defendant which may give rise to an incriminating inference.”) (emphasis omitted).
In contrast, the United States Court of Appeals for the Ninth Circuit quoted Justice Stevens’ concurring opinion, agreeing with his reasoning.260 In respectfully disagreeing with the United States Courts of Appeals for the First, Seventh, and Tenth Circuits, the Ninth Circuit viewed those courts as having endorsed a position contrary to the unambiguous words of the Fifth Amendment, emphasizing the word *compelled* in the text of the Fifth Amendment.261 The Ninth Circuit noted that the purpose of the Fifth Amendment’s self-incrimination clause was to limit the investigative techniques available to the government, not to provide an individual right against the world.262 Therefore, whether or not the courts cited Justice Steven’s concurring opinion in *Jenkins*, both the Fifth and the Ninth Circuits reached a conclusion similar to that of the Supreme Court Justice, all determining that pre-arrest silence was not protected by the Fifth Amendment because the silence is not compelled.263

F. THE FIFTH AND NINTH CIRCUITS’ SILENCE ON THE ISSUE OF COMPULSION OUTSIDE OF THE CONTEXT OF ARREST: EXPOSING AN IMPROPER ASSUMPTION

The United States Courts of Appeals that admit pre-arrest silence as substantive evidence of guilt improperly assume that to compel an individual, there must be an arrest.264 However, arrest is not...
the only mechanism through which the state compels an individual.\textsuperscript{265}

In \textit{Miranda v. Arizona},\textsuperscript{266} the United States Supreme Court noted that the privilege against self-incrimination originated from protest against inquisitorial and unjust means of interrogation.\textsuperscript{267} The Court further acknowledged the temptation of state actors to unduly pressure a witness into a timid state in order to entrap the person into a fatal contradiction.\textsuperscript{268} Although the holding in \textit{Miranda} specifically focused on custodial interrogation, the Court recognized that a fundamental feature of custodial interrogation is that it takes place in privacy, which poses a danger.\textsuperscript{269} The Court cited law enforcement manuals, which explained that the most significant psychological factor leading to a successful interrogation is privacy between the interrogators and the person being interrogated.\textsuperscript{270} This privacy fosters secrecy resulting in gaps in the knowledge of outsiders as to what in fact occurred.\textsuperscript{271} During this private interrogation time, interrogators are even instructed by some of these manuals to obtain a confession through trickery.\textsuperscript{272} The Court recognized that the setting prescribed by law enforcement manuals and practiced by those officials takes a heavy toll on liberty.\textsuperscript{273}

The Supreme Court has since determined that the right to remain silent can be exercised in any proceeding, whether judicial, investigatory, civil, criminal, administrative, or adjudicatory.\textsuperscript{274} The principal issue regarding the viability of the right is whether a harmful disclosure might result if the individual responds to a question posed.\textsuperscript{275} A harmful disclosure, the Court explained, creates a reasonable probability of prosecution.\textsuperscript{276} Therefore, the privilege is only limited

\footnotesize{were required to be reported to the FBI, the court held that this did not violate Oplinger's privilege against self-incrimination. \textit{Oplinger}, 150 F.3d at 1066-67.}

\textsuperscript{265.} See infra notes 280-298 and accompanying notes.


\textsuperscript{268.} Id. at 449.

\textsuperscript{269.} Id. at 448.

\textsuperscript{270.} Id. at 448.

\textsuperscript{271.} Id. at 448.

\textsuperscript{272.} See id. at 453 (noting that "[a] valuable source of information about present police practices, however, may be found in various police manuals and texts which document procedures employed with success in the past and recognizing that these manuals tell officers "that the 'principal psychological factor contributing to a successful interrogation is privacy—being alone with the person under interrogation.'") (quoting \textit{INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS, 1 (1962)}).

\textsuperscript{273.} Id. at 455.

\textsuperscript{274.} \textit{Coppola v. Powell}, 878 F.2d 1562, 1565 (1st Cir. 1989) (citing \textit{Kastigar v. United States}, 406 U.S. 441, 444 (1972)).

\textsuperscript{275.} \textit{Coppola}, 878 F.2d at 1565 (citing \textit{Hoffman v. United States}, 341 U.S. 479, 486-87 (1951)).

\textsuperscript{276.} Id. (quoting \textit{In re Kave}, 760 F.2d 343, 354 (1st Cir. 1985)).
to settings in which the witness has reasonable belief to apprehend danger from directly answering a posed question.277

The Supreme Court has emphasized the necessity of ensuring that the Constitution’s proclaimed rights are not treated as simply a form of words at the hands of the government.278 More specifically, the Court has stated that the self-incrimination clause of the Fifth Amendment must be given liberal construction in favor of the privilege that the amendment was intended to secure.279 Therefore, although the Court in Miranda limited its ruling to addressing individual’s Fifth Amendment rights in custodial interrogation, pre-arrest questioning can manifest as compulsion because it can occur in settings in which an individual’s answer or explanation of why the question cannot be answered could reasonably cause the individual to fear an injurious disclosure.280

Because a person can be compelled through pre-arrest questioning, a person may exercise the privilege against compelled self-incrimination during these types of interrogations.281 If that individual has the privilege against self-incrimination, he or she has the right to remain silent.282 Therefore, even under the reasoning of Justice Ste-

278. See Miranda, 384 U.S. at 444 (declaring “the meaning and vitality of the Constitution have developed against narrow and restrictive construction.”).
280. See Miranda, 384 U.S. at 444-46 (stating briefly the Court’s holding that the prosecution may not use statements arising out of custodial interrogation of the accused unless procedural safeguards were utilized to secure the privilege against self-incrimination); compare id. at 443-44 (emphasizing the necessity of ensuring that the Constitutional privilege against self-incrimination, and thus, the right to remain silent, are not ephemeral rights) (quoting Weems v. United States, 217 U.S. 349, 373 (1910)), and Hoffman, 341 U.S. at 486 (asserting the Fifth Amendment’s self-incrimination clause must be given “liberal construction in favor of the right it was intended to secure.”) (citing Counselman, 142 U.S. at 562 and Arndstein, 254 U.S. at 72-73), with Coppola, 878 F.2d at 1565 (stating that the “viability of the privilege depends on whether a responsive answer to the question might result in harmful disclosure.”) (citing Hoffman, 341 U.S. at 486-87), and Combs, 205 F.3d at 283 (recognizing “[t]he privilege must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer” and noting “[t]o sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.”) (quoting Hoffman, 341 U.S. at 486-87).
281. See supra note 295 and accompanying text; contra Jenkins v. Anderson, 447 U.S 231, 241-44 (1980) (Stevens, J., concurring) (distinguishing silence during trial with pre-arrest silence, arguing that compulsion cannot exist pre-arrest); Zanabria, 74 F.3d at 593 (emphasizing the Fifth Amendment only protects against compelled self-incrimination); Oplinger, 150 F.3d at 1066 (opining the Fifth Amendment “plainly states” that a person may not be “compelled in any criminal case to be a witness against himself.”) (quoting U.S. Const. amend. V).
282. See supra notes 206-214 and accompanying text.
vens and the United States Courts of Appeals for Fifth and Ninth Circuits that compulsion is required in order for the Fifth Amendment privilege to be applicable, an individual has the right to remain silent during pre-arrest interrogation.283

IV. CONCLUSION

The United States Courts of Appeals for the First, Sixth, Seventh, and Tenth Circuits properly held the Fifth Amendment is eroded when courts allow the unconstitutional use of pre-arrest silence as substantive evidence of guilt.284 Because the privilege against compelled self-incrimination requires that an individual has the right to remain silent, the Fifth Amendment also impliedly protects the right to remain silent.285 This protection extends to all individuals in situations in which they reasonably fear the answer to a posed question will lead to self-incrimination, regardless of whether there has been an arrest.286 To avoid penalizing the exercise of the right to remain silent, the Fifth Amendment prohibits prosecutorial comment or jury instructions regarding pre-arrest silence when it is admitted as substantive evidence of guilt.287

Opponents to this view, such as Justice Stevens and the United States Courts of Appeals for the Fifth and Ninth Circuits, argue that pre-arrest silence is not constitutionally protected by the Fifth Amendment because it is not compelled.288 However, this argument improperly assumes that arrest is the only means through which an individual may be compelled to incriminate oneself.289

Due to the number of courts that have weighed in on this issue, creating a nearly even split across state appellate courts, state courts of last resort, and United States Courts of Appeals, the United States Supreme Court should resolve whether admission of pre-arrest silence violates an individual’s Fifth Amendment right against self-incrimination.290 The severity in the split between the various courts contra-

283. Compare Jenkins, 447 U.S. at 244 (Stevens, J., concurring) (stating that a “different view ignores the clear words of the Fifth Amendment.”), and Zanabria, 74 F.3d at 593 (basing the ruling upon the premise that the Fifth Amendment protects against compelled self-incrimination), with Combs, 205 F.3d at 283 (quoting Hoffman, 341 U.S. at 486-87) (confining the privilege against self-incrimination to situations in which an individual reasonably fears the repercussions of answering questions), and Miranda, 384 U.S. at 460 (asserting that the privilege against self-incrimination is only protected and meaningful when a person is guaranteed the “right to remain silent.”).
284. See supra notes 206-249 and accompanying text.
285. See supra notes 206-214 and accompanying text.
286. See supra notes 227-243 and accompanying text.
287. See supra notes 244-249 and accompanying text.
288. See supra notes 250-263 and accompanying text.
289. See supra notes 264-283 and accompanying text.
290. See supra notes 206-208 and accompanying text.
dicts the well-established public policy in support of uniform protection under the Constitution.291 This difference in interpretation of the Constitution becomes significantly more important and urgent when one recognizes that these are criminal proceedings and remembers what is on the line: an individual’s life and liberty.292

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291. _See supra_ notes 209-210 and accompanying text.
292. _See supra_ notes 211-214 and accompanying text.