No. 12-246

In The
Supreme Court of the United States

GENOVEVO SALINAS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The petitioner presents the following question for review:

> Whether or under what circumstances the Fifth Amendment's Self-Incrimination Clause protects a defendant's refusal to answer law enforcement questioning before he has been arrested or read his *Miranda* rights.

TABLE OF CONTENTS

		Page
QUESTION PRESENTED		i
TABLE OF AUTHORITIES		iv
STATEMENT		1
I.	The offense	1
II.	The noncustodial interview	1
III.	The trial court proceedings	4
IV.	The decision of the court of appeals	4
V.	The decision of the Texas Court of Criminal Appeals	5
REASONS FOR DENYING THE PETITION		5
I.	Federal and state courts have reached varying conclusions on the question of whether the admission of pre-arrest pre-Miranda silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination	7
II.	Pre-arrest pre-Miranda silence is not protected by the Fifth Amendment privilege against self-incrimination and the decision by the Texas Court of Criminal Appeals is correct	12

TABLE OF CONTENTS – Continued

Page

III. Evidence that petitioner "did not answer" one specific question during a pre-arrest pre-Miranda interview did not constitute silence within the purview of the Fifth Amendment privilege against self-incrimination where petitioner answered the question by his nonverbal conduct and answered all other questions during the voluntary noncustodial interview 16

IV. Petitioner did not invoke the Fifth Amendment privilege against self-incrimination 17

V. Any error in the admission of evidence that petitioner "did not answer" one specific question during a pre-arrest pre-Miranda interview was harmless beyond a reasonable doubt..... 18

CONCLUSION..... 20

TABLE OF AUTHORITIES

Page

CASES

Alberty v. United States, 162 U.S. 499 (1896) 15

Baumia v. Commonwealth, ___ S.W.3d ___, 2012 WL 5877581 (Ky. Nov. 21, 2012).....11

Beckwith v. United States, 425 U.S. 341 (1976).....14, 15

Berghuis v. Thompkins, ___ U.S. ___, 130 S.Ct. 2250 (2010).....17

Berkemer v. McCarty, 468 U.S. 420 (1984).....15

Chapman v. California, 386 U.S. 18 (1967) 18

Combs v. Coyle, 205 F.3d 269 (6th Cir.), *cert. denied*, 531 U.S. 1035 (2000).....10, 11

Coppola v. Powell, 878 F.2d 1562 (1st Cir.), *cert. denied*, 493 U.S. 969 (1989).....10, 11

Doyle v. Ohio, 426 U.S. 610 (1976).....7, 11

Fletcher v. Weir, 455 U.S. 603 (1982).....8

Griffin v. California, 380 U.S. 609 (1965) 7, 11

Jenkins v. Anderson, 447 U.S. 231 (1980) 8, 13

Miranda v. Arizona, 384 U.S. 436 (1966) .....*passim*

Portuondo v. Agard, 529 U.S. 61 (2000) 7

State v. Easter, 922 P.2d 1285 (Wash. 1996).....11

State v. Kulzer, 979 A.2d 1031 (Vt. 2009) 11

United States ex rel. Savory v. Lane, 832 F.2d 1011 (7th Cir. 1987).....10, 11

TABLE OF AUTHORITIES – Continued

Page

United States v. Ashley, 664 F.3d 602 (5th Cir. 2011), *cert. denied*, ___ U.S. ___, 132 S.Ct. 1651 (2012) 10

United States v. Burson, 952 F.2d 1196 (10th Cir. 1991), *cert. denied*, 503 U.S. 997 (1992) 10, 11

United States v. Caiello, 420 F.2d 471 (2nd Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970) 14

United States v. Oplinger, 150 F.3d 1061 (9th Cir. 1998), *overruled on other grounds*, *United States v. Contreras*, 593 F.3d 1135 (9th Cir. 2010) 9

United States v. Quinn, 359 F.3d 666 (4th Cir. 2004) 9

United States v. Rivera, 944 F.2d 1563 (11th Cir. 1991) 9

United States v. Zanabria, 74 F.3d 590 (5th Cir. 1996) 9, 10

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V.....*passim*

STATUTES

TEX. PENAL CODE §19.02(a) (current version at TEX. PENAL CODE ANN. §19.02(b) (Vernon 2011)) 4

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Michael J. Hunter, *The Man on the Stairs Who Wasn't There: What Does a Defendant's Pre-Arrest Silence Have to Do with Miranda, the Fifth Amendment, or Due Process?*, 28 Hamline L. Rev. 277 (2005) 15

STATEMENT

I. The offense.

During the early morning hours of December 18, 1992, petitioner shot twenty-six year old Juan Garza, the complainant, along with his twenty-seven year old brother, Hector Garza, at Hector's apartment in Houston, Harris County, Texas. Record RRIV-41, 69, 71, 168, 171, 179-180, 183-185, 189, 191, 224. Juan incurred three shotgun wounds of the back and a shotgun wound of the chest; he died as a result of two of the gunshot wounds of the back. Record RRIV-234-236, 240-252; State's Exhibit 34. Hector incurred a shotgun wound of the left shoulder and a shotgun wound of the back; he died as a result of the shotgun wound of the left shoulder. Record RRIV-234-236, 252-254; State's Exhibit 35.

II. The noncustodial interview.

On January 28, 1993, officers went to petitioner's residence and met petitioner and his father. Record RRV-28-29. The officers explained they were investigating a murder and asked if petitioner had a shotgun. Record RRV-29. Petitioner signed a written voluntary consent to search his residence. Record RRV-30-31; State's Exhibit 26. Officers asked for a shotgun. Record RRV-29, 32. Petitioner responded that his father had a shotgun. Record RRV-32-33. Petitioner's father brought the shotgun to the officers. Record RRV-32, 36; State's Exhibit 25. Petitioner knew the officers were conducting a murder

investigation. Record RRV-36. Petitioner offered no explanation when the shotgun was turned over to the police. Record RRV-35, 37-38.

Officers asked petitioner to come downtown to talk to them and provide his fingerprints. Record RRV-39-40. Petitioner agreed to go with the officers. Record RRV-40. Petitioner was not handcuffed. Record RRV-40. Petitioner was free to leave. Record RRV-40. Petitioner was not in custody. Record RRV-40. Upon arrival at the station, an officer engaged petitioner in a question-and-answer interview. Record RRV-40. The officer asked petitioner about Juan and Hector, how he knew them, when was the last time he had been there, and that type of thing. Record RRV-40. Petitioner responded that he knew them through Mike Provazek, he had been to the apartment a total of three to four times, and he had been over to the apartment the night before the killing. Record RRV-40-43.

The officer asked petitioner about the night before the murders and petitioner responded that he had been to the apartment with Mike. Record RRV-42-43, 47. The officer asked petitioner about Damien Cuellar, and petitioner responded that Damien was his and Mike's friend. Record RRV-43. The officer asked petitioner about any disagreements or arguments any of the parties may have had, and petitioner responded that there had not been any disagreements or arguments with Juan and Hector. Record RRV-43-44.

The officer asked petitioner if he had any weapons other than the shotgun, and petitioner responded that he had no other weapons. Record RRV-44. Near the end of the almost hour-long noncustodial interview, the officer asked petitioner "if the shotgun [officers recovered from petitioner's residence] would match the shells recovered at the scene of the murder?" Record RRV-40, 44. The officer testified, "[h]e did not answer." Record RRV-44. The officer further testified, without objection, that petitioner "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, clinched his hands in his lap, began to tighten up." Record RRV-44-45. The officer continued to ask petitioner questions, and petitioner continued to answer them. Record RRV-45.

The officer asked petitioner where he was at the time of the murder, and petitioner responded that he was at home. Record RRV-45-46. The officer asked petitioner why he was not at work that day, and petitioner responded that he did not go to work because he had been hung over, but that he had called in and said he had car trouble. Record RRV-46. The officer asked petitioner if anybody had seen him at home during the time of the murder, and petitioner responded that no one had seen him or could corroborate what he was saying. Record RRV-46.

During the 58 minute interview, petitioner answered all but one question. Record RRV-47.

III. The trial court proceedings.

On March 4, 1993, petitioner was charged by indictment in state district court with the offense of murder of Juan Garza. Record CRI-7; *see* Former TEX. PENAL CODE §19.02(a) (current version at TEX. PENAL CODE ANN. §19.02(b) (Vernon 2011)). Petitioner entered a plea of not guilty. Record RRIII-3-4; CRII-477. The jury found petitioner guilty of murder. Record RRVIII-3; CRII-477. The jury further found petitioner had used or exhibited a deadly weapon, namely, a firearm, and the trial judge entered a deadly weapon finding. Record RRVIII-3; CRII-466, 477. The jury assessed punishment at 20 years' imprisonment and a $5,000 fine, and the trial court sentenced petitioner accordingly. Record RRIX-178-179; Pet. App. 71.

IV. The decision of the court of appeals.

On appeal, petitioner contended that the trial court erred in admitting testimony of his pre-arrest pre-*Miranda* silence. Pet. App. 18a. The court of appeals held the Fifth Amendment has no applicability to pre-arrest pre-*Miranda* silence used as substantive evidence in cases in which the defendant does not testify. Pet. App. 22a. The court of appeals found there was no government compulsion in the pre-arrest pre-*Miranda* questioning in which petitioner voluntarily participated for almost an hour. Pet. App. 23a. And, the court of appeals held the Fifth Amendment privilege against self-incrimination was

not triggered and did not prevent the State from offering petitioner's failure to answer the question at issue. Pet. App. 23a.

V. The decision of the Texas Court of Criminal Appeals.

On discretionary review, the Texas Court of Criminal Appeals held that pre-arrest pre-*Miranda* silence is not protected by the Fifth Amendment right against self-incrimination, and that prosecutors may comment on such silence regardless of whether a defendant testifies. Pet. App. 6a. The Court of Criminal Appeals held the trial court did not err in allowing the State to do just that, and it affirmed petitioner's conviction. Pet. App. 6a. The Court of Criminal Appeals denied petitioner's motion for rehearing. Pet. App. 24a.

REASONS FOR DENYING THE PETITION

There is no compelling reason for this Court to grant the petition for a writ of certiorari. Evidence that petitioner "did not answer" one specific question during a pre-arrest pre-*Miranda* interview did not constitute silence within the purview of the Fifth Amendment privilege against self-incrimination. Petitioner answered the question by his nonverbal conduct and answered all other questions during the nearly hour-long interview. Moreover, petitioner did not invoke the Fifth Amendment privilege against

self-incrimination. And, any error in admitting evidence petitioner "did not answer" the question during a pre-arrest pre-*Miranda* interview was harmless beyond a reasonable doubt.

Near the end of an almost hour-long noncustodial interview, an officer asked petitioner "if the shotgun [officers recovered from petitioner's residence] would match the shells recovered at the scene of the murder?" Record RRV-40, 44. The officer testified, "[h]e did not answer." Record RRV-44. The officer further testified, without objection, that petitioner "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, clinched his hands in his lap, began to tighten up."[1] Record RRV-44-45.

Petitioner contends the admission of a defendant's pre-arrest pre-*Miranda* silence as substantive evidence of guilt is protected by the Fifth Amendment privilege against compelled self-incrimination and the decision by the Texas Court of Criminal Appeals conflicts with decisions of federal courts of appeals and state courts of last resort. Pet. 2-19.

This case would not be an appropriate vehicle for considering the issue of whether pre-arrest pre-*Miranda* silence is protected by the Fifth Amendment privilege against compelled self-incrimination because, in the context of this case, it is not squarely

[1] Petitioner does not contest the admission of evidence of his nonverbal conduct in response to the question.

presented. Moreover, petitioner could not benefit from a holding that pre-arrest pre-*Miranda* silence is protected by the Fifth Amendment privilege against compelled self-incrimination.

I. Federal and state courts have reached varying conclusions on the question of whether the admission of pre-arrest pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination.

In *Griffin v. California*, 380 U.S. 609, 615 (1965), this Court held the Fifth Amendment privilege against self-incrimination forbids comment by the prosecution on the defendant's silence or instructions by the court that such silence is evidence of guilt. The Court later explained that *Griffin* held that the defendant's right to hold the prosecution to proving its case without his assistance is not to be impaired by the jury's counting the defendant's silence at trial against him. *Portuondo v. Agard*, 529 U.S. 61, 67 (2000). In *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), the Court held the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.

In *Doyle v. Ohio*, 426 U.S. 610, 611 (1976), the prosecution sought to impeach the defendant's exculpatory story, told for the first time at trial, with

evidence the defendant had remained silent and had failed to provide the same story after receiving *Miranda* warnings following his arrest. While the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. *Id.* at 618. In such circumstances, it would be "fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.* at 618. The Court held that the use for impeachment purposes of the defendant's silence, at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 619.

Yet, in *Jenkins v. Anderson*, 447 U.S. 231, 240-241 (1980), the Court held the admission of a defendant's pre-arrest pre-*Miranda* silence to impeach the defendant's credibility does not violate the Fifth Amendment privilege against self-incrimination or fundamental fairness guaranteed by the Fourteenth Amendment. Then, in *Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (per curiam), the Court held that in the absence of the sort of affirmative assurances embodied in *Miranda* warnings, permitting cross-examination as to post arrest silence when a defendant chooses to take the stand does not violate due process of law.

This Court's decisions do not address the question of whether the admission of pre-arrest pre-*Miranda* silence as substantive evidence of guilt

violates the Fifth Amendment privilege against self-incrimination. The federal courts of appeals and state courts that have considered such a question have reached varying conclusions. The Fourth, Ninth, and Eleventh Circuits permit the government to use such evidence, reasoning that the protections against self-incrimination do not apply before a suspect has been arrested and has been given *Miranda* warnings. *See United States v. Quinn*, 359 F.3d 666, 678 (4th Cir. 2004); *United States v. Oplinger*, 150 F.3d 1061, 1066-67 (9th Cir. 1998), *overruled on other grounds*, *United States v. Contreras*, 593 F.3d 1135 (9th Cir. 2010); *United States v. Rivera*, 944 F.2d 1563, 1568 n. 12 (11th Cir. 1991).

The Fifth Circuit, without deciding whether the defendant's pre-arrest silence fell within the reach of "testimonial communications" protected by the Fifth Amendment, has held the prosecutor's use of, and comment upon, the defendant's pre-arrest silence, which was neither induced by nor a response to any action by a government agent, did not violate the Fifth Amendment privilege against self-incrimination. *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996). The arresting customs officer testified that prior to his arrest the defendant said nothing about threats against his daughter or that he was in any kind of trouble or needed any help. *Id.* Then, in closing argument, the prosecutor used this testimony to rebut the duress defense by underscoring that the alleged threats were never reported to the authorities, either here or in Colombia where the

child was located. *Id.* The Fifth Circuit stated the Fifth Amendment privilege against self-incrimination protects against compelled self-incrimination; it does not preclude the proper evidence use and prosecutorial comment about *every* communication or *lack* thereof by the defendant which may give rise to an incriminating inference. *Id.*

The Fifth Circuit was faced again with the issue of the admission of pre-arrest pre-*Miranda* silence in the government's case-in-chief in *United States v. Ashley*, 664 F.3d 602 (5th Cir. 2011), *cert. denied*, ___ U.S. ___, 132 S.Ct. 1651 (2012). A United States Postal Service special agent, during the prosecution's case-in-chief for the theft of mail matter by a postal service employee for stealing gift cards, testified the defendant, before arrest and before *Miranda* warnings, had refused to speak to him during his investigation. *Id.* at 603. The Fifth Circuit, without reaching the issue of whether pre-arrest pre-*Miranda* silence is admissible, held any error was harmless because the evidence shows, beyond a reasonable doubt, that the error did not contribute to the verdict. *Id.* at 605-606.

The First, Sixth, Seventh and Tenth Circuits, however, have held that pre-arrest pre-*Miranda* silence is not admissible as substantive evidence of guilt. *See Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir.), *cert. denied*, 531 U.S. 1035 (2000); *United States v. Burson*, 952 F.2d 1196, 1200-1201 (10th Cir. 1991), *cert. denied*, 503 U.S. 997 (1992); *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir.), *cert. denied*, 493 U.S. 969 (1989); *United States ex rel. Savory v. Lane*, 832

F.2d 1011, 1017-1018 (7th Cir. 1987). And some state courts likewise have held that pre-arrest pre-*Miranda* silence is not admissible as substantive evidence of guilt. *See*, *e.g.,* Pet. App. 9.

The facts and legal issues in these cases are substantially different. They generally have resulted in different legal reasoning, divergent dicta, and different outcomes based upon the various facts. Many of the cases have involved circumstances in which the defendant affirmatively asserted the privilege against self-incrimination. *See*, *e.g.*, *Combs v. Coyle*, 205 F.3d 269 ("talk to my lawyer"); *Coppola v. Powell*, 878 F.2d 1562 ("Let me tell you something. I'm not one of your country bumpkins. I grew up on the streets of Providence, Rhode Island. And if you think I'm going to confess to you, you're crazy."); *United States ex rel. Savory v. Lane*, 832 F.2d 1011 ("he didn't want to talk about it, he didn't want to make any statements").

Some of the cases have found any federal constitutional error to be harmless. *See*, *e.g., United States v. Burson*, 952 F.2d 1196; *United States ex rel. Savory v. Lane*, 832 F.2d 1011; *Baumia v. Commonwealth*, ___ S.W.3d ___, 2012 WL 5877581, *7 (Ky. Nov. 21, 2012); *State v. Kulzer*, 979 A.2d 1031 (Vt. 2009). Some of the state courts have relied on state constitutional provisions or evidentiary rules. *See*, *e.g.*, *State v. Easter*, 922 P.2d 1285 (Wash. 1996) (basing decision on both federal and state constitutions). Relying primarily on *Griffin v. California*, 380 U.S. 609 (1965), and *Doyle v. Ohio*, 426 U.S. 610 (1976), these

cases have extended such decisions far beyond their stated holdings and are not faithful to the text and history of the Fifth Amendment privilege against self-incrimination.

II. Pre-arrest pre-*Miranda* silence is not protected by the Fifth Amendment privilege against self-incrimination and the decision by the Texas Court of Criminal Appeals is correct.

The decision by the Court of Criminal Appeals holding that pre-arrest pre-*Miranda* silence is not protected by the Fifth Amendment privilege against self-incrimination, and that prosecutors may comment on such silence regardless of whether a defendant testifies, is correct. The Fifth Amendment privilege against self-incrimination is not applicable to pre-arrest pre-*Miranda* silence because there is no official compulsion to speak.

The Fifth Amendment privilege against compulsory self-incrimination is not implicated by the admission of pre-arrest pre-*Miranda* silence as substantive evidence of guilt. To hold otherwise would be directly contrary to the text of the Fifth Amendment, which states, "[n]o person . . . shall be *compelled* in any criminal case to be a witness against himself." U.S. CONST. amend. V (emphasis added). Justice Stevens, in his concurring opinion, joined by Justice Stewart, rejected the argument that the Fifth Amendment was implicated by the admission of

evidence of pre-arrest silence. *Jenkins v. Anderson*, 447 U.S. at 241 (Stevens, J., concurring).

The Fifth Amendment privilege against compulsory self-incrimination is irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak. *Jenkins v. Anderson*, 447 U.S. at 241 (Stevens, J., concurring). The policies underlying the privilege against compulsory self-incrimination have no application in a pre-arrest context. *Id.* at 243. When a citizen is under no official compulsion whatsoever, either to speak or to remain silent, there is no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment. *Id.* at 243-244. For in determining whether the privilege is applicable, the question is whether the accused was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent. *Id.* at 244. A different view ignores the clear words of the Fifth Amendment. *Id.*

Holding the admission of pre-arrest pre-*Miranda* silence as substantive evidence of guilt to be a violation of the Fifth Amendment privilege against self-incrimination cannot be reconciled with this Court's decision in *Miranda* and its progeny. This Court held the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. at 444. Prior to any questioning, the person must be warned that he has a right to

remain silent, that anything said can and will be used against him in court, that he has a right to consult with a lawyer and to have the lawyer with him during the interrogation, and that if he is indigent a lawyer will be appointed to represent him. *Id.* at 444 & 469-473. *Miranda* applies only to statements stemming from custodial interrogation. *Id.* at 444. Custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Id.* at 444.

In *Beckwith v. United States*, 425 U.S. 341, 347 (1976), the Court rejected the argument that *Miranda* should be extended to cover interrogation in noncustodial circumstances after a police investigation has focused on the suspect. The Court stated that *Miranda* was grounded squarely in the Court's explicit and detailed assessment of the peculiar "nature and setting of . . . in-custody interrogation." *Id.* at 346. "It was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the court to impose the Miranda requirements with regard to custodial questioning." *Id.* at 346-347, quoting *United States v. Caiello*, 420 F.2d 471, 473 (2nd Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).

This Court long ago upheld the admission of evidence of pre-arrest flight as substantive evidence.

See Alberty v. United States, 162 U.S. 499 (1896). And, the Court also has upheld the admission of evidence of pre-arrest pre-*Miranda* statements. *See*, *e.g.*, *Beckwith v. United States*, 425 U.S. 341 (1976) (holding taxpayer's pre-arrest pre-*Miranda* statement to IRS special agent during interview in private home admissible even though taxpayer may have been focus of investigation); *Berkemer v. McCarty*, 468 U.S. 420, 441 (1984) (holding motorist's pre-arrest pre-*Miranda* roadside statements admissible).

"If a defendant's pre-arrest and pre-*Miranda confession* is admissible in the government's case-in-chief, how can a defendant's pre-arrest and pre-*Miranda silence* be barred?" Michael J. Hunter, *The Man on the Stairs Who Wasn't There: What Does a Defendant's Pre-Arrest Silence Have to Do with Miranda, the Fifth Amendment, or Due Process?*, 28 Hamline L. Rev. 277, 295 (2005). Or, as raised by this well-reasoned article: Why would a defendant's silence, or his refusal to answer questions, be afforded more constitutional protection than a defendant's statement, which generally constitutes far more expressive conduct? *See* 28 Hamline L. Rev., at 295 & 298 (2005).

III. Evidence that petitioner "did not answer" one specific question during a pre-arrest pre-*Miranda* interview did not constitute silence within the purview of the Fifth Amendment privilege against self-incrimination where petitioner answered the question by his nonverbal conduct and answered all other questions during the voluntary noncustodial interview.

Even if pre-arrest pre-*Miranda* silence is protected by the Fifth Amendment privilege against self-incrimination, evidence that petitioner "did not answer" one specific question during a pre-arrest pre-*Miranda* interview did not constitute silence within the purview of the Fifth Amendment privilege against self-incrimination and the Fifth Amendment therefore was not implicated.

Petitioner voluntarily went to the police station and gave an exculpatory statement to officers conducting an investigation into the murders of Juan and Hector. Record RRV-39-40. An officer asked petitioner "if the shotgun [officers recovered from petitioner's residence] would match the shells recovered at the scene of the murder?" Record RRV-40, 44. While the officer testified petitioner did not answer, he also testified petitioner looked down at the floor, shuffled his feet, bit his bottom lip, clinched his hands in his lap, and began to tighten up. Record RRV-44-45. And, petitioner answered all other questions during the 58 minute interview. Record RRV-47. Because petitioner was not silent, this case does not

present a situation where silence was used against a defendant.

IV. Petitioner did not invoke the Fifth Amendment privilege against self-incrimination.

Even if pre-arrest pre-*Miranda* silence is protected by the Fifth Amendment privilege against self-incrimination, petitioner did not invoke the Fifth Amendment privilege against compelled self-incrimination. The main purpose of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel. *Berghuis v. Thompkins*, ___ U.S. ___, 130 S.Ct. 2250, 2261 (2010). Both the *Miranda* right to counsel and the *Miranda* right to remain silent protect the privilege against compulsory self-incrimination by requiring interrogation to cease when either right is invoked. *Id.* at 2254.

Petitioner, like Thompkins, did not say that he wanted to remain silent or that he did not want to talk with the police. Record RRV-44-45; *Berghuis v. Thompkins*, 130 S.Ct. 2250. Had he made either of these simple, unambiguous statements, he would have invoked the "right to cut off questioning." *Berghuis v. Thompkins*, 130 S.Ct. 2250.

V. Any error in the admission of evidence that petitioner "did not answer" one specific question during a pre-arrest pre-*Miranda* interview was harmless beyond a reasonable doubt.

Even if the admission of evidence that petitioner "did not answer" one specific question during a pre-arrest pre-*Miranda* interview violated the Fifth Amendment privilege against compelled self-incrimination, any error in the admission of such evidence was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18 (1967). Petitioner cannot show he suffered harm. Petitioner answered the question by his nonverbal conduct when he looked down at the floor, shuffled his feet, bit his bottom lip, clinched his hands in his lap, and began to tighten up. Record RRV-44-45.

Moreover, there was overwhelming evidence of petitioner's guilt. John Damien Cuellar, petitioner's good friend, testified petitioner kept a shotgun in the rear of his Camaro, and petitioner admitted that he had returned to the apartment in a Camaro and he, alone, had killed Juan and Hector. Record RRIV-168, 171, 179, 180-181, 183-185, 189, 191, 224-225. Shortly thereafter, Damien told petitioner he had decided to tell the police what petitioner had told him, and that petitioner has to do what he has to do, whether it is turning himself in or running. Record RRIV-190-191. Petitioner absconded and officers spent years searching for him. Record RRV-59-63. Finally, in 2007, officers located petitioner in custody, after he had

been arrested under a different name and a different date of birth. Record RRV-63-65.

The shotgun shells recovered at the scene of the murders had been fired in the shotgun recovered from petitioner's residence. Record RRIV-84, 92, 96, 103-104; RRV-10, 12, 36, 49-50, 149, 181-182, 201, 203. The description of the vehicle observed at the scene of the murders matched vehicles owned by petitioner and his family. Record RRIV-73, 146-147; RRV-19, 22, 29. The description of only one man being observed running from the scene of the murders matched petitioner's admission to Damien that he, alone, had killed Juan and Hector. Record RRIV-73, 140, 142, 144.

Clearly, the record as a whole establishes beyond a reasonable doubt that no harm occurred from the admission of evidence petitioner "did not answer" one question.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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