

No. 12-246

IN THE
Supreme Court of the United States

GENOVEVO SALINAS,
Petitioner,

v.

TEXAS,
Respondent.

On Petition for a Writ of Certiorari
to the Texas Court of Criminal Appeals

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The State does not dispute that the question whether the Fifth Amendment precludes the prosecution from introducing pre-arrest, pre-*Miranda* silence in its case-in-chief is an extremely important and frequently recurring one. And the State acknowledges that federal courts of appeals and state courts of last resort are deeply divided over the issue. BIO 10-11. Indeed, the conflict has grown even deeper since the petition was filed; last month, the Kentucky Supreme Court joined those courts holding that the Fifth Amendment prohibits the prosecution from using a defendant's silence during pre-arrest questioning as substantive evidence of guilt. *Baumia v. Commonwealth*, ___ S.W.3d ___, 2012 WL 5877581, at *2-5 (Ky. Nov. 21, 2012).

The State nevertheless asks this Court to deny certiorari for two reasons. First, the State argues that the Texas Court of Criminal Appeals' decision is correct on the merits. Second, the State asserts that this case is an unsuitable vehicle for resolving the conflict at issue.

Neither of the State's arguments is persuasive. The State's argument on the merits provides no reason to deny review in a case involving a deep and mature conflict – and is unconvincing even on its own terms. The State's vehicle arguments – which, for the most part, depend on contentions it has never before advanced in this case – are specious. This Court should grant certiorari and bring much-needed clarity to this critical area of law.

1. The State's defense of the Texas Court of Criminal Appeals' holding does little more than echo that court's reasoning. Specifically, the State

contends that the prosecution may use a defendant's refusal to answer pre-arrest questions from law enforcement against him because a person cannot face any "official compulsion to speak" before he is taken into custody. BIO 12. In advancing that argument, the State focuses entirely on the kind of physical and psychological compulsion that prompted this Court, in *Miranda v. Arizona*, 384 U.S. 436 (1966), to require warnings before police conduct custodial interrogations. BIO 13.

But as petitioner has already explained (Pet. 14-17), the physical and psychological coercion present during custody is not the only form of compulsion that the Fifth Amendment recognizes. In *Griffin v. California*, 380 U.S. 609 (1965), this Court held that a person is compelled to be a witness against himself if the prosecution is allowed to use his silence at trial as substantive evidence against him. *Id.* at 614; *see also Lakeside v. Oregon*, 435 U.S. 333, 339 (1978) ("[U]nconstitutional compulsion [i]s inherent in a trial where prosecutor and judge [are] free to ask the jury to draw adverse inferences from a defendant's failure to take the witness stand."). This form of compulsion has nothing to do with physical or psychological coercion during custody. Many nontestifying defendants are not in custody at the time of trial. And in *Miranda* itself, this Court made clear that even after officers have given the required warnings to suspects in custody – that is, even after the potential for physical and psychological coercion has been dispelled – "[t]he prosecution may not . . . use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation." 384 U.S. at 468 n.37 (citing *Griffin*); *see also* NACDL Amicus Br. 4-7 (elaborating on this form of

compulsion and explaining why it is present in this case).

The State offers no reason why *Griffin*-style compulsion is not present here. Instead, the State argues that Justice Stevens' concurrence in *Jenkins v. Anderson*, 447 U.S. 231 (1980), "rejected the argument that the Fifth Amendment was implicated by the admission of pre-arrest silence." BIO 12-13. But Justice Stevens limited his observation to a person's silence "before he has any contact with the police." *Jenkins*, 447 U.S. at 243; *see also* Pet. 19. Once the police begin questioning someone, the Fifth Amendment's central aim of avoiding an inquisitorial system is squarely implicated. *See, e.g., Marchetti v. United States*, 390 U.S. 39, 60 (1968) (Fifth Amendment applies to governmental request to provide information in noncustodial setting); *Malloy v. Hogan*, 378 U.S. 1, 3, 14 (1964) (same); *Watkins v. United States*, 354 U.S. 178, 188, 196 (1957) (same).

Finally, the State argues that it would make no sense to allow the prosecution to introduce a defendant's pre-arrest *statements* in its case-in-chief but to preclude introduction of his *silence*. BIO 14-15. But in fact it makes eminent sense. When a person voluntarily responds to law enforcement questioning, he relinquishes his Fifth Amendment right to remain silent. *See, e.g., Jenkins*, 447 U.S. at 238; *Raffel v. United States*, 271 U.S. 494, 498 (1926). By contrast, when a person declines to speak, he exercises his right to remain silent and maintains his ability to invoke it at trial. *See, e.g., Marchetti*, 390 U.S. at 50-51.

2. None of the State's three vehicle arguments withstands scrutiny.

a. At trial, one of the officers who interviewed petitioner explained that petitioner "did not answer" his question whether the shells found at the victims' apartment would match the shotgun petitioner had given the officers. Pet. App. 11a. At closing, the prosecution stressed three times that petitioner "wouldn't answer that question." *Id.* 18a-19a. And on appeal, the State maintained that it was permissible to use petitioner's "silence" as substantive evidence of guilt. State's Br. in Tex. Ct. Crim. App. 3, *available at* 2012 WL 244956. The Texas Court of Appeals and Court of Criminal Appeals agreed, holding that the Fifth Amendment permitted the State to rely and comment on petitioner's "failure to answer the question" and his "silence." Pet. App. 6a, 23a.

The State now asserts for the first time that "petitioner was not silent" after all. BIO 16. Specifically, the State contends that "petitioner answered the question" about the shotgun shells "by his nonverbal conduct." *Id.*

This is nonsense. While some nonverbal conduct, such as a shake of the head, can answer an inquiry, *see, e.g., Schmerber v. California*, 384 U.S. 757, 761 n.5 (1966), the State cites no authority for its suggestion that the mere manner in which someone remains silent can be so communicative as to somehow answer a question. Nor does any such authority exist. Courts unanimously have held – consistent with common sense – that simply describing "what a defendant looked like in remaining silent" is "tantamount to [introducing]

evidence of silence.” *United States v. Velarde-Gomez*, 269 F.3d 1023, 1028, 1032 (9th Cir. 2001); *accord United States v. Elkins*, 774 F.2d 530, 537 (1st Cir. 1985); *State v. Easter*, 922 P.2d 1285, 1287, 1292 (Wash. 1996). This is especially so when, as here, the State contended at trial that the defendant “wouldn’t answer th[e] question” at issue. Pet. App. 18a-19a. The State thus cannot evade the constitutional question raised by its use of petitioner’s silence by a “post-hoc [re]characterization” of its evidence and arguments. *Velarde-Gomez*, 269 F.3d at 1032.

b. The State next argues that petitioner cannot rely now on the Fifth Amendment because he “did not invoke” the privilege during his interview. BIO 17. But this argument confuses cases involving the admissibility of pre-trial *statements* with those involving pre-trial *silence*. When a defendant argues that pre-trial *statements* he made should be excluded because they were obtained in violation of the Fifth Amendment, he must show that he actually invoked his right to remain silent before making the statements, thus rendering the statements effectively involuntary. *See, e.g., Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260-61 (2010); *United States v. Kordel*, 397 U.S. 1, 7-10 (1970).

But petitioner does not seek to exclude any statements he made. Instead, he contends that the prosecution violated the Fifth Amendment by relying and commenting at trial on his *silence*. No previous formal invocation is necessary to make such an argument, for pre-trial silence constitutes an expression of the privilege, not an arguable waiver of it. *See Marchetti*, 390 U.S. at 50-51. Accordingly, this Court has made clear that a person who “stood

mute or claimed his privilege in the face of accusation” during a pre-trial but post-arrest interview may rely on *Griffin* to preclude the prosecution from using that silence against him at trial. *Miranda*, 384 U.S. at 468 n.37 (emphasis added).

Lower courts have reached the same conclusion with respect to pre-arrest interviews. See *United States v. Burson*, 952 F.2d 1196, 1200 (10th Cir. 1991) (it sufficed for *Griffin* claim that defendant’s “silence was exhibited” during the pre-custodial interview); *Baumia*, ___ S.W.3d ___, 2012 WL 5877581, at *5 n.10 (“[T]here is no difference [under *Griffin*] between the introduction of a criminal defendant’s invocation of her right to remain silent and her silence itself.”); *Easter*, 922 P.2d at 1287; *State v. Rowland*, 452 N.W.2d 758, 761 (Neb. 1990). The State cites no authority to the contrary, and no basis for any exists.

c. The State never argued in the Texas Court of Appeals or the Court of Criminal Appeals that any Fifth Amendment error here could be harmless. Nor did either appellate court below suggest such a possibility. The State now contends, however, that any erroneous reliance on petitioner’s silence was harmless because “there was overwhelming evidence of petitioner’s guilt.” BIO 18. This contention is hard to take seriously. The State’s star witness initially failed to implicate petitioner in the killings. He changed his story and claimed that petitioner confessed to him only “after a dream” in which he was supposedly visited by the victims. Pet. App. 13a. And petitioner vigorously challenged the only physical evidence that arguably supported this

dream-induced testimony – the State’s ballistics report. Pet. 4.

But this Court need not make guesses about the strength of the State’s case. The State presented all of the same evidence it references now – with the sole exception of any significant reliance on petitioner’s silence during his pre-arrest interview – at an initial trial, and the jury hung. *See* Pet. 2-3. Only after the State, at the second trial, made a passionate argument based on petitioner’s pre-arrest silence – arguing that an “innocent person” would have answered the officer’s question – did it obtain a conviction. *Id.* at 4-5, 14; Pet App. 18a-19a. When the sole difference between a trial that proved inconclusive and one in which the prosecution obtained a conviction is the evidence at issue, it almost automatically follows that the improper admission of that evidence could not have been harmless. *See, e.g., Zappulla v. New York*, 391 F.3d 462, 472-73 (2d Cir. 2004); *Moreno v. Borg*, 1990 WL 212649, at *3 (9th Cir. 1990); *Brown v. Dugger*, 831 F.2d 1547, 1558 (11th Cir. 1987) (Clark, J., concurring).

Consequently, far from constituting a deficient vehicle, this case frames the question presented in stark relief. This case accordingly presents the perfect opportunity to resolve the split of authority over the issue. This Court should do so now and deliver the certainty that both the prosecution and criminal defense communities have told this Court that they want and need. *See* Pet. 11-12 (discussing previous amicus brief from a group of states); NACDL Amicus Br. 3-4.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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