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TIBA's Case of the Week

Case Name: Genovevo Salinas v. Texas

- OFFENSES: Murder
- CASE NO. 12-246
- DATE OF OPINION: June 17, 2013
- VOTE: 3-2-4 (5-4 as to the Result)
- OPINION: Alito, J.
- DISPOSITION: Court of Criminal Appeals of Texas Affirmed

Ed Note: (Procedural History) Appellant was convicted and his conviction was affirmed by the 14th Court of Appeals in 2011. Salinas v. State, 368 S.W.3d 550 (Tex.App. - Houston [14th] 2011)(see , Vol. 19, No. 13; 04/04/2011). Appellant's PDR was granted, but the Court of Criminal Appeals affirmed the Court of Appeals' actions. Salinas v. State, 369 S.W.3d 176 (Tex.Cr.App. 2012)(see , Vol. 20, No. 17; 04/30/2012).

Ed Note: (Background Facts) In January 1993, Houston police began to suspect Petitioner of having committed two murders the previous month. Police visited Petitioner at his home and he agreed to hand over his shotgun for ballistics testing and police asked Petitioner to come to the police station to take photographs and to clear himself as a suspect." At the station, police took Petitioner into what he described as "an interview room." Because he was "free to leave at that time," the police did not give him Miranda warnings. The police then asked Petitioner questions, and Petitioner answered until the police asked him whether the shotgun from his home"would match the shells recovered at the scene of the murder." At that point Petitioner fell silent.

 42 Confessions & Self-Incrimination / Right to Remain Silent (Pre-Arrest Pre-Miranda Silence): At closing argument in Petitioner's trial, drawing on testimony he had elicited earlier, the prosecutor pointed out to the jury that, during his earlier questioning at the police station, Petitioner had remained silent when asked about the shotgun. The prosecutor told the jury, among other things, that "an innocent person' would have said, "What are you talking about? I didn't do that. I wasn't there." Petitioner, the prosecutor argued, "didn't respond that way." Rather, "he wouldn't answer that question." As set out in the opinion, the question is whether the Fifth Amendment prohibits the prosecutor from eliciting and commenting upon the evidence about Petitioner's silence. Petitioner claims that this argument violated the Fifth Amendment.

Holding: Petitioner's Fifth Amendment claim fails because he did not expressly invoke the privilege against self-incrimination in response to the officer's question. It has long been settled that the privilege "generally is not self executing" and that a witness who desires its protection "'must claim it.'" Minnesota v. Murphy, 465 U. S. 420 (1984), quoting United States v. Monia, 317

U. S. 424, 427 (1943). *** Before petitioner could rely on the privilege against self-incrimination, he was required to invoke it. Because he failed to do so, the judgment of the Texas Court of Criminal Appeals is affirmed.

Concurring / Dissenting Opinions: Justice Thomas concurred (P. 16) and was joined by Justice Scalia. He lamented the fact that the plurality "avoids" the question of whether the Fifth Amendment privilege against compulsory self-incrimination prohibits a prosecutor from using a defendant's pre-custodial silence as evidence of his guilt, but, rather concluded that Petitioner's Fifth Amendment claim fails because he did not expressly invoke the privilege. He argued that "there is a simpler way to resolve this case." He argued that the claim would fail even if Petitioner had invoked the privilege "because the prosecutor's comments regarding his pre-custodial silence did not compel him to give self-incriminating testimony." Justice Breyer dissented (P. 18) and was joined by Justice Ginsberg, Justice Sotomayor, and Justice Kagan (P. 18). He believes that Fifth Amendment here prohibits the prosecution from commenting on a defendant's silence in response to police questioning.

Sidebars: (David A. Schulman) This opinion sent shock waves through the defense bar, but, although I recognize it as an important departure from previous cases, I don't see the holding as such a radical change. The Supreme Court long ago held that pre-arrest, pre-Miranda silence does not implicate due process. See Jenkins v. Anderson, 447 U.S. 231 (1980), in which the Court found there was no constitutional violation if the prosecution uses pre-arrest, pre-Miranda warning silence, to impeach the credibility of the defendant because "no Government action [has] induced [the defendant] to remain silent."). The primary difference, of course, and where this Court departs from its previous holdings, is that the pre-arrest pre-Miranda silence in Jenkins and similar cases was being used to impeach a testifying defendant, whereas here it being used without the defendant even testifying. Whether this creates a sea change in the manner in which the police interrogate suspects remains to be seen.