No. 12-246

In the Supreme Court of the United States

GENOVEVO SALINAS, PETITIONER

v.

STATE OF TEXAS

ON WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
MYTHILI RAMAN
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
GINGER D. ANDERS
Assistant to the Solicitor General
DEBORAH WATSON
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

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.

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INTEREST OF THE UNITED STATES

This case presents the question whether the substantive use at trial of petitioner's silence in response to one question during a consensual interview with the police violated petitioner's Fifth Amendment right against self-incrimination. The Court's resolution of that issue will have significant implications for the conduct of federal investigations and trials. Accordingly, the United States has a significant interest in the case.

STATEMENT

1. In the early morning hours of December 18, 1992, brothers Juan and Hector Garza were murdered in Hector's apartment following a night of partying at the apartment. A neighbor, Martha Trevino, heard gunshots and saw a man run out of the building and drive away in a dark-colored Camaro or Trans Am. Pet. App. 7a-8a.

Officers who arrived at the scene were unable to locate any witnesses other than Trevino. They found no signs of forced entry or any weapons in the house. They recovered six shotgun shells from around the doorway and in the living room. The police questioned people who had attended the party, who referred them to an individual named Damien Cuellar. He provided the police with information leading to petitioner as a suspect. Pet. App. 8a-9a.

Police investigators went to petitioner's home, where he lived with his parents. In the driveway was a dark blue Camaro or Trans Am. The investigators told the family about their murder investigation and obtained consent to search the home. Petitioner's father turned over a shotgun, and petitioner voluntarily accompanied the officers to the Houston police station for questioning. Pet. App. 9a.

Sergeant C.E. Elliott questioned petitioner at the station for nearly one hour. In response to questioning, petitioner told Sergeant Elliott that he knew the Garza brothers and had visited Hector's apartment three or four times before the shooting. Petitioner said he had no disagreement with either brother and that he did not own any weapons aside from the shotgun that had been turned over to the police. When Elliott asked petitioner if ballistics analysis would reveal that the shotgun matched the shells recovered at the murder scene, petitioner did not answer; rather, he "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, clinched his hands in his lap, [and] began to tighten up." Pet. App. 11a; J.A. 18. Thereafter, Elliott continued to question petitioner, and petitioner answered all of his questions. Pet. App. 11a-12a.

After the interview, Sergeant Elliott arrested petitioner on outstanding traffic warrants. Although a ballistics analysis matched petitioner's shotgun with the casings found at the murder scene, the Harris County District Attorney's Office declined charges, and petitioner was released. Cuellar subsequently told police that petitioner had confessed to murdering the Garza brothers. Petitioner was charged with murder, but he eluded arrest for nearly 15 years by assuming a false identity. He was captured in 2007. His first trial ended in a mistrial. Pet. App. 2a, 12a-13a.

2. At petitioner's retrial, Sergeant Elliott testified about his interview of petitioner, recounting the initial questioning in which petitioner admitted to knowing the Garza brothers and having visited the apartment three of four times before the shooting. Before eliciting Elliott's testimony concerning petitioner's response to the question whether his shotgun would match the shotgun shells found at the murder scene, the prosecutor approached the bench to obtain a ruling on its admissibility. Defense counsel contended that admission of the evidence would violate the Fifth Amendment and that petitioner could "invoke the Fifth Amendment privilege whether he was in custody or not." J.A. 15. The court questioned whether petitioner had "in fact" invoked his Fifth Amendment privilege. *Ibid.* In response, defense counsel merely observed that petitioner had remained silent. *Ibid.* The court then went off the record.

When Sergeant Elliott's examination resumed, the prosecutor, over petitioner's objection, elicited testimony that Elliott had asked petitioner if the shotgun in question would match the shells recovered at the murder scene. J.A. 17. Elliott testified that petitioner "did not answer" the question, and 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." J.A. 17-18. Elliott further explained that he continued to question petitioner, and petitioner answered his questions until the interview ended. J.A. 18-19. The only question that petitioner did not answer was the one about the possibility of a ballistics match. J.A. 19.

During closing arguments, the prosecutor argued, over the defense's objection, that petitioner's silence was evidence of his guilt. He pointed out that petitioner did not answer the question about whether the shells found at the murder scene would match the shotgun, and he argued that "an innocent person" would have asserted that the shotgun would not match the shells found at the scene. Pet. App. 18a-19a.

The jury convicted petitioner of the murder of Juan Garza and sentenced him to 20 years of imprisonment. Pet. App. 13a; Pet. Br. 7.

3. The intermediate court of appeals affirmed. Pet. App. 7a-23a. The court rejected petitioner's claim that the use of his pre-arrest, pre-*Miranda* silence as substantive evidence of his guilt violated his Fifth Amendment privilege against self-incrimination. *Id.* at 18a-23a. The court reasoned that the Fifth Amendment prohibits only *compelled* self-incrimination and that, "[a]bsent a showing of government compulsion * * * 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." *Id.* at 22a. Because petitioner voluntarily spoke with the police and was not subjected to any compulsion, the court held that the Fifth Amendment did not bar the substantive use of petitioner's failure to answer the question at issue. *Id.* at 23a.

4. The Texas Court of Criminal Appeals affirmed. Pet. App. 1a-6a. The court explained that although this Court has held that the Fifth Amendment prohibits any comment on a defendant's refusal to testify at trial, *Griffin* v. *California*, 380 U.S. 609 (1965), it has accorded less protection to a defendant's pretrial silence. Pet. App. 3a. The Court of Criminal Appeals further explained that under Supreme Court precedent, the prosecution may not use a defendant's post-arrest, post-*Miranda* silence to impeach his testimony at trial, see *Doyle* v. *Ohio*, 426 U.S. 610, 618 (1976), but the prosecution may use a defendant's pre-*Miranda* silence for impeachment purposes, see *Jenkins* v. *Anderson*, 447 U.S. 231 (1980). Pet. App. 4a. Relying on Justice Stevens' concurring opinion in *Jenkins*, the Court of Criminal Appeals held that "[i]n pre-arrest, pre-*Miranda* circumstances, a suspect's interaction with police officers is not compelled," and "the Fifth Amendment right against compulsory self-incrimination is 'simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak.'" *Id.* at 6a (quoting *Jenkins*, 447 U.S. at 241 (Stevens, J., concurring in the judgment)).

Judge Johnson dissented without opinion. Pet. App. 6a.

SUMMARY OF ARGUMENT

Police investigators often ask suspects who are not in custody if they would be willing to answer questions, and the Fifth Amendment generally permits the voluntary statements elicited in such interviews to be used as evidence of a suspect's guilt at a subsequent trial. This case presents the question whether a suspect's brief silence, in response to a question during a consensual

interview, may similarly be used as evidence of guilt. The answer is yes.

A. The core right conferred by the Self-Incrimination Clause of the Fifth Amendment is the right not to be compelled to testify against oneself at a criminal trial. To effectuate that right, this Court held in *Griffin* v. *California*, 380 U.S. 609 (1965), that the prosecution may not argue that a defendant's failure to testify at trial raises an inference of guilt, reasoning that such an inference is a "penalty * * * for exercising a constitutional privilege." *Id.* at 614. Petitioner's contention—that the admission of his mid-interview silence as evidence against him at trial unconstitutionally compelled him to be a witness against himself—turns on whether *Griffin*'s rationale should be extended beyond the trial context. It should not.

B. *Griffin*'s holding is based on the understanding that a defendant who declines to testify at trial—thereby remaining silent—is necessarily "exercising" his Fifth Amendment privilege. 380 U.S. at 614. *Griffin* is an exception to the general rule that "the burden appropriately lies with [a witness] to make a timely assertion of the privilege," in order to put the government on notice that Fifth Amendment rights are at stake. *Garner* v. *United States*, 424 U.S. 648, 655 (1976). Consistent with that rule, the Court has held in several contexts that "silence"—the unexplained failure to respond to official inquiries—is not an exercise of the Fifth Amendment privilege and that the Amendment does not prohibit the government from punishing such silence. See, *e.g.*, *Roberts* v. *United States*, 445 U.S. 552 (1980); see also *Berghuis* v. *Thompkins*, 130 S. Ct. 2250, 2259-2260 (2010).

The Court has excused the invocation requirement in certain "well-defined" circumstances. *Minnesota* v. *Murphy*, 465 U.S. 420, 429 (1984). First, when the government deters or prevents a witness from invoking the privilege—for instance, by subjecting the witness to the inherent pressures of custodial interrogation, or threatening to punish invocation—the witness need not invoke the Fifth Amendment. See *id.* at 429-440. Second, in the trial context at issue in *Griffin*, a defendant need not expressly invoke the Fifth Amendment in order to "exercis[e]" the privilege. 380 U.S. at 614. That is because a defendant who does not take the stand necessarily exercises the core, "absolute" Fifth Amendment right to decline to testify at trial for any reason. *Turner* v. *United States*, 396 U.S. 398, 433 (1970). And any defendant who decides not to testify doubtlessly relies on the Fifth Amendment's overriding purpose of ensuring that the burden of proving guilt always remains on the prosecution. Thus, unlike in the mine run of situations in which invocation is required, the failure to testify invariably implicates the policies underlying the Fifth Amendment.

C. Petitioner's contention that *Griffin* bars the use of his transitory silence during a noncustodial interview rests on the assumption that his silence should be treated as an exercise of Fifth Amendment rights notwithstanding his failure to expressly invoke the privilege. But neither of the justifications for excusing the invocation requirement that this Court has recognized are present here. First, no official coercion or threat of a penalty prevents a suspect in a noncustodial interview from expressly invoking the Fifth Amendment privilege. Second, while a defendant who does not take the stand at trial necessarily exercises the Fifth Amendment

privilege, a suspect who is briefly silent—but does not invoke the privilege—during a noncustodial interview cannot be understood as necessarily relying on a right to stop cooperating and stand on his constitutional privilege. That silence could reflect surprise, uncertainty at the thrust of the question, or an attempt to settle on the most exculpatory answer. Excusing the invocation requirement would thus protect a great deal of conduct that is entirely unrelated to the Fifth Amendment.

Prosecutorial use of a defendant's mid-interview silence as evidence of guilt therefore does not penalize the "exercis[e]" of the Fifth Amendment privilege under *Griffin*. 380 U.S. at 614. Nor does such use have any other unconstitutional compulsive effect: it does not lower the prosecution's burden of proof or exert undue pressure on the defendant to take the stand at trial.

D. In this case, petitioner voluntarily began answering questions related to the murder investigation and his status as a suspect. When asked about the ballistics evidence, petitioner could have invoked his Fifth Amendment privilege, but he simply did not answer instead, giving rise to the permissible inference that he was attempting unsuccessfully to formulate an exculpatory response. The prosecution's substantive use of petitioner's silence as evidence of guilt did not violate the Fifth Amendment.

ARGUMENT

THE FIFTH AMENDMENT DOES NOT PROHIBIT THE SUBSTANTIVE USE AT TRIAL OF A SUSPECT'S SILENCE IN RESPONSE TO A QUESTION DURING A NONCUSTODIAL POLICE INTERVIEW

Petitioner voluntarily answered police questions in a noncustodial setting, but he remained silent in response to a single question about whether the shells found at

the crime scene would match his shotgun. Because petitioner did not affirmatively invoke his Fifth Amendment privilege against compelled self-incrimination, his silence—as well as police testimony concerning petitioner's nervous-seeming demeanor in reaction to the question—was properly admitted as substantive evidence of his guilt at trial.

In only two contexts has the Court excused the general requirement that a witness who wishes to exercise his Fifth Amendment rights must expressly invoke the privilege and held that mere silence may be construed as an invocation. First, the Court has excused invocation in situations in which the government exerts coercive pressure designed to deter a witness from invoking the right. See *Minnesota* v. *Murphy*, 465 U.S. 420, 429 (1984). Second, in *Griffin* v. *California*, 380 U.S. 609 (1965), the Court held that the prosecution may not argue that a defendant's failure to testify at trial raises an inference of guilt because such an inference is a "penalty * * * for *exercising* a constitutional privilege." *Id.* at 614 (emphasis added). In the trial context at issue in *Griffin*, excusing invocation can be justified because a defendant who does not take the stand at trial necessarily relies on the core Fifth Amendment right to decline to testify at trial.

Those rationales have no application to a suspect's transitory silence during a noncustodial police interview. Petitioner could have invoked his Fifth Amendment right not to answer the question without being subject to any penalty (including the use of that invocation at trial), but he chose to be silent instead. And his silence in the course of a voluntary, noncustodial interview did not necessarily rely on his Fifth Amendment rights. Prosecutorial use of a defendant's mid-interview silence

as evidence of guilt therefore does not penalize the "exercis[e]" of the Fifth Amendment privilege under *Griffin*. 380 U.S. at 614.

A. Because The Fifth Amendment Prohibits Only Compelled Self-Incrimination, Petitioner Must Demonstrate That The Use Of His Silence At Trial Had An Unconstitutionally Compulsive Effect

1. a. The Self-Incrimination Clause of the Fifth Amendment provides that "[n]o person shall * * * be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. The Self-Incrimination Clause reflects "a judgment . . . that the prosecution should [not] be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused." *Doe* v. *United States*, 487 U.S. 201, 212 (1988) (citations and emphasis omitted). The touchstone of the Clause is therefore compulsion: "the Amendment does not automatically preclude self-incrimination, whether spontaneous or in response to questions put by government officials." *United States* v. *Washington*, 431 U.S. 181, 186 (1977). Rather, the Amendment "proscribes only self-incrimination obtained by a 'genuine compulsion of testimony.'" *Id.* at 187 (citation omitted); see *Michigan* v. *Tucker*, 417 U.S. 433, 448 (1974).

Accordingly, "[v]olunteered statements of any kind are not barred by the Fifth Amendment." *Miranda* v. *Arizona*, 384 U.S. 436, 478 (1966). "There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make." *Ibid.* Absent the coercion prohibited by the Fifth Amendment, voluntary "admissions of guilt by wrongdoers * * * are inherently desirable," subject to defined limitations, and

the police may seek such a confession or other evidence from a suspect. *Washington*, 431 U.S. at 187.

b. The core protection afforded by the Fifth Amendment is that a criminal defendant cannot be compelled to testify against himself at a criminal trial. See *Chavez* v. *Martinez*, 538 U.S. 760, 764-767 (2003) (plurality opinion); *id.* at 777 (Souter, J., concurring in the judgment); *Tucker*, 417 U.S. at 440. To effectuate that "absolute right," *Turner* v. *United States*, 396 U.S. 398, 433 (1970), the Court held in *Griffin*, *supra*, that no penalty may be imposed on a defendant for refusing to testify at a criminal trial. In *Griffin*, the prosecution had argued, and the court had instructed the jury, that the defendant's refusal to testify constituted substantive evidence of his guilt. The adverse inference drawn from a defendant's refusal to testify, the Court held, "is a penalty imposed by courts for exercising a constitutional privilege" that "cuts down on the privilege by making its assertion costly." 380 U.S. at 614. Permitting an inference of guilt based on the defendant's decision not to take the stand would lower the prosecution's burden of proof by "allow[ing] the State the privilege of tendering to the jury for its consideration the failure of the accused to testify." *Id.* at 613. That significant penalty would deter the exercise of the privilege, thus implicating the protection against compelling the defendant to testify within the meaning of the Fifth Amendment. See *Jenkins* v. *Anderson*, 447 U.S. 231, 242 (1980) (Stevens, J., concurring in the judgment).

c. Although the core Fifth Amendment privilege concerns the criminal trial, the Court has permitted the privilege to be asserted in "any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'"

Murphy, 465 U.S. at 426 (quoting *Lefkowitz* v. *Turley*, 414 U.S. 70, 77 (1973)); see *Tucker*, 417 U.S. at 440. Accordingly, the Court has held that a witness's invocation of the Fifth Amendment privilege to avoid testifying before the grand jury may not be used against him in a subsequent criminal trial. See *Grunewald* v. *United States*, 353 U.S. 391, 421 (1957).

The Court has further extended the Fifth Amendment privilege to police interrogations. See *Miranda*, 384 U.S. at 461, 467, 478. In the context of custodial interrogations—those in which the defendant is under arrest or subject to comparable restrictions on his ability to leave, *Thompson* v. *Keohane*, 516 U.S. 99, 112 (1995)—the Court has held that the "inherently compelling" pressures of custodial interrogation necessitate certain protections to ensure the efficacy of the Fifth Amendment privilege. *Murphy*, 465 U.S. at 430. Thus, a suspect's statements in a custodial interrogation may not be used against him at trial unless he "fails to claim the Fifth Amendment privilege after being suitably warned" of his rights, including the right to remain silent. *Ibid.*; *Miranda*, 384 U.S. at 467-469.

The Court has also accorded some protection to a suspect's *silence* in response to custodial questioning conducted after he has received *Miranda* warnings—but on due process, not Fifth Amendment, grounds. Post-*Miranda* silence, the Court held, has been "induced" by the government's action in informing the suspect of his *Miranda* rights because those warnings implicitly assure the suspect that "silence will carry no penalty." *Doyle* v. *Ohio*, 426 U.S. 610, 617-618 (1976). It would be "fundamentally unfair," therefore, to use the defend-

ant's silence against him at trial.[1] *Id.* at 618. Although the Court's decision in *Doyle* concerned only the use of the defendant's silence to impeach his trial testimony, *Doyle*'s rationale would apply *a fortiori* to use of a defendant's post-*Miranda* silence as evidence of guilt. The Court has declined, however, to extend *Doyle*'s due process rationale to situations in which the suspect's silence precedes *Miranda* warnings. See *Jenkins*, 447 U.S. at 239-240 (before *Miranda* warnings, "no governmental action [has] induced petitioner to remain silent"); *Fletcher* v. *Weir*, 455 U.S. 603, 606 (1982) (per curiam).

2. This case concerns the Fifth Amendment protection accorded to a suspect's silence during a noncustodial police interview—specifically, whether petitioner's brief silence during a voluntary interview may be used against him in the prosecution's case in chief at trial. Because petitioner was not in custody for purposes of *Miranda*, Pet. App. 23a; Pet. Br. 3, he was not subjected to the inherent coercion of custodial interrogation.[2] Cf.

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[1] Although the Court suggested in *Miranda* that the Fifth Amendment would prohibit the use at trial of a defendant's "exercising his Fifth Amendment privilege" in a custodial interview, 384 U.S. at 468 n.37, that statement was dicta, and the Court did not repeat it in *Doyle*. 426 U.S. at 616-619.

[2] Because petitioner does not contend that he was informed of his *Miranda* rights before his silence occurred, *Doyle* does not apply here. See *Jenkins*, 447 U.S. at 239-240. As petitioner explains (Br. 3 n.1), however, some testimony in petitioner's first trial may indicate that petitioner was in fact given *Miranda* warnings before the silence at issue here. *Ibid.*; Resp. Br. 1. Petitioner did not present evidence to that effect in his second trial—which resulted in the conviction challenged here—and he has not raised any claim under *Doyle*. The parties have therefore proceeded under the assumption that petitioner did not receive *Miranda* warnings before or during the interview in question. See Pet. Br. 3 n.1.

Miranda, 384 U.S. at 467-469. Nor does petitioner assert that any coercive police tactics or threats rendered the interview involuntary. Petitioner's contention that the admission of his mid-interview silence as evidence against him at trial unconstitutionally compelled him to be a witness against himself therefore turns on whether *Griffin*'s rationale—that adverse use of the failure to testify impermissibly penalizes a defendant's exercise of his Fifth Amendment rights—applies to a suspect's brief silence during a voluntary interview.

B. *Griffin* Treats A Defendant's Failure To Testify At Trial As An *Exercise* Of The Fifth Amendment Privilege And Is Therefore An Exception To The General Rule That A Witness Must Expressly Invoke The Fifth Amendment Privilege In Order To Exercise It

Griffin treats the failure to testify as an "exercis[e] [of] a constitutional privilege," 380 U.S. at 614, and thus excuses an explicit assertion of Fifth Amendment rights. *Griffin* is an exception to the general rules in Fifth Amendment cases that "the burden appropriately lies with [a witness] to make a timely assertion of the privilege," in order to put the government on notice that Fifth Amendment rights are at stake, and that "silence"—the unexplained failure to respond to inquiries—is not considered an exercise of the Fifth Amendment privilege. *Garner* v. *United States*, 424 U.S. 648, 655 (1976). That exception can be understood in light of the realities of the trial process, in which a defendant's decision to stay off the stand—made in consultation with counsel—necessarily implicates, and relies on, the core Fifth Amendment privilege not to be compelled to testify at trial.

1. A witness who wishes to exercise the Fifth Amendment privilege generally must expressly invoke it

a. The Fifth Amendment does not prohibit the government from compelling a witness to answer questions, for instance, by punishing his refusal to do so, when the witness does not seek to exercise his privilege against self-incrimination. See *Garner*, 424 U.S. at 656-657. In other words, if an individual wishes to decline to answer an official inquiry for some reason other than his desire to exercise his Fifth Amendment right—for instance, he wishes to claim some other privilege—then the Fifth Amendment privilege is not at stake, and the Amendment does not prohibit official attempts to compel cooperation or to punish a lack of cooperation. See *Murphy*, 465 U.S. at 427 (individual may be held in contempt for not answering questions before a grand jury, unless he "is required to answer over his valid claim of the privilege"); see also, *e.g.*, *Rogers* v. *United States*, 340 U.S. 367, 370-371 (1951) (upholding contempt judgment where witness stated that she preferred not to answer questions that might subject others to punishment instead of invoking the privilege); *United States* v. *Murdock*, 284 U.S. 141, 148-149 (1931) (upholding prosecution for failure to file tax returns where defendant's noncompliance was based on a justification outside of the then-governing scope of the Fifth Amendment), disapproved on other grounds, *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964).

b. Accordingly, the general rule is that the Fifth Amendment privilege is not self-executing, and if an individual "desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment." *United States* v. *Monia*, 317 U.S. 424, 427 (1943); see

Murphy, 465 U.S. at 425, 427. Because the individual facing government inquiries is best positioned to know whether the disclosure sought may incriminate him, it is appropriate to require him to invoke the privilege at the time the disclosures are sought. *Garner*, 424 U.S. at 655. That assertion "put[s] the Government on notice" that Fifth Amendment rights are at stake and that further efforts to compel answers or to punish non-cooperation may implicate the Fifth Amendment. *Murphy*, 465 U.S. at 428 (citation omitted).

i. If an individual facing an official inquiry answers the government's questions without invoking his Fifth Amendment privilege, the individual's answers are generally considered voluntary for purposes of the Amendment. *Murphy*, 465 U.S. at 428. The act of answering the questions is inconsistent with a desire to exercise any right against self-incrimination, and the "government ordinarily may assume that [it is] * * * not eliciting testimony that [the witness] deems to be incriminating." *Garner*, 424 U.S. at 655. The individual may not subsequently rely on the privilege to prevent his answers from being used against him in a criminal prosecution. *Murphy*, 465 U.S. at 427, 440; *Garner*, 424 U.S. 654-656.

ii. Similarly, if an individual does not respond to the government's questions and does not invoke his right against self-incrimination, he is ordinarily viewed as having failed to exercise his Fifth Amendment rights. In other words, silence—the failure to respond to or cooperate with government inquiries—is not presumed to be an exercise of the Fifth Amendment right.

For instance, in *Roberts* v. *United States*, 445 U.S. 552 (1980), the Court rejected the defendant's argument that his unexplained refusal, post-conviction, to provide

the government with information about an ongoing conspiracy should be understood as an exercise of his right against self-incrimination that could not be used against him at sentencing. *Id.* at 559-561. The defendant's silence, in the absence of any affirmative invocation of his rights either when questioned or at sentencing, could have reflected motivations having nothing to do with the Fifth Amendment privilege: "The principal divisive issue in this case is whether petitioner's silence should have been understood to imply continued solicitude for his former criminal enterprise, rather than assertion of the Fifth Amendment right against self-incrimination or fear of retaliation." *Id.* at 562 (Brennan, J., concurring)). Emphasizing that the defendant could have invoked the privilege, the Court held that the defendant's noncooperation should not be treated as an exercise of his Fifth Amendment rights. *Id.* at 559-560 & n.6; *id.* at 562 (Brennan, J., concurring) ("[P]etitioner may not stand upon a Fifth Amendment privilege that he never invoked at the time of his silence.").

The Court has also held that the Fifth Amendment does not prohibit prosecuting a taxpayer's "silence" in failing to file a tax return, where the taxpayer could have simply filed the return and invoked the Fifth Amendment in response to specific questions. See *United States* v. *Sullivan*, 274 U.S. 259, 263-264 (1927). The Court thus declined to construe the failure to file as a proper invocation of the right. See also *Vatjauer* v. *Commissioner of Immigration*, 273 U.S. 103, 113 (1927) (holding that witness could not subsequently rely on the Fifth Amendment when he had declined to answer questions without invoking the privilege).

In addition, in the related context of invocation of *Miranda* rights—rights that "protect the privilege

against compulsory self-incrimination"—the Court has held that suspects must unambiguously invoke the right to cut off questioning and that remaining silent for over two hours during an interrogation was insufficiently unambiguous to invoke the right. *Berghuis* v. *Thompkins*, 130 S. Ct. 2250, 2256, 2259-2260 (2010). The Court's decision placed the burden on the suspect in an interrogation to make a "simple, unambiguous statement[]" that he wishes to cut off questioning, and it held that in the absence of such a statement, the police may assume that the suspect has not invoked his right. *Id.* at 2260.

c. While in "certain well-defined situations" a witness is excused from affirmatively invoking the Fifth Amendment, those situations are ones in which the government has effectively prevented the witness from invoking the privilege. *Murphy*, 465 U.S. at 429. In those circumstances, it is clear that Fifth Amendment rights are at stake because the government has exerted coercive pressure to cause the witness to forgo invoking the right. It is therefore appropriate to deviate from the normal rule requiring invocation.

Thus, a witness need not expressly invoke the Fifth Amendment when he is subjected to custodial interrogation, because the "inherently coercive" environment necessitates the "extraordinary safeguard" of disallowing any unwarned statements. *Murphy*, 465 U.S. at 429-430; *Miranda*, 384 U.S. at 467. In addition, when the government expressly threatens a witness with severe sanctions—such as being fired or being prohibited from holding office—for refusing to testify, including on Fifth Amendment grounds, the witness is deprived of the ability to freely choose between invoking the privilege and speaking, and the invocation requirement is ex-

cused. See *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 806 (1977) (state law imposed penalty on refusing to waive immunity); *Garrity* v. *New Jersey*, 385 U.S. 493, 494 (1967). Finally, the Court has excused the invocation requirement when the applicable regulatory regime makes the act of invoking the privilege—thereby identifying oneself to the government—inherently incriminating. See *Marchetti* v. *United States*, 390 U.S. 39 (1968). In that situation, the Court "forgave the usual requirement" of invocation "in favor of a 'claim' by silence." *Garner*, 424 U.S. at 659 n.11. In this limited context, then, silence may be construed as invocation.

2. Griffin *treats a defendant's failure to testify at trial as an exercise of the Fifth Amendment privilege*

Griffin prohibits drawing an adverse inference from a defendant's failure to testify at trial, regardless of whether the defendant, in declining to testify, expressly invokes his Fifth Amendment privilege. Although *Griffin* did not discuss the general rule that a defendant must invoke the privilege in order to make clear that he intends to exercise his Fifth Amendment right, the decision is premised on the understanding that a defendant's failure to testify at trial is an exercise of Fifth Amendment rights.[3] 380 U.S. at 614 (adverse inference is a "penalty imposed by the courts for *exercising* a constitu-

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[3] Later decisions elaborating on or discussing the *Griffin* rule have invariably described *Griffin* as prohibiting prosecutorial comment on a defendant's *exercise* of his Fifth Amendment privilege. See, *e.g.*, *Mitchell* v. *United States*, 526 U.S. 314, 330 (1999); *Chapman* v. *California*, 386 U.S. 18, 19 (1967); *Chavez*, 538 U.S. at 768-769; *Wainwright* v. *Greenfield*, 474 U.S. 284, 291 n.7 (1986); *Lakeside* v. *Oregon*, 435 U.S. 333, 339 (1978); *Tucker*, 417 U.S. at 441 n.14; *Mackey* v. *United States*, 401 U.S. 667, 673 (1971); *United States* v. *Jackson*, 390 U.S. 570, 583, n.25 (1968).

tional privilege") (emphasis added); see *Jenkins*, 447 U.S. at 242 (Stevens, J., concurring in the judgment) ("In the trial context, it is appropriate to presume that a defendant's silence is an exercise of the constitutional privilege," thereby excusing the invocation requirement, "and to prohibit any official comment that might deter him from exercising that privilege."). Excusing the invocation requirement in the trial context can be justified for several reasons.

The right against compulsion to testify in one's own criminal trial is the core protection afforded by the Fifth Amendment. See *United States* v. *Patane*, 542 U.S. 630, 636 (2004) (plurality opinion); *Chavez*, 538 U.S. at 766-767; *id.* at 777 (Souter, J., concurring in the judgment) ("the text of the Fifth Amendment * * * focuses on courtroom use of a criminal defendant's compelled, self-incriminating testimony, and the core of the guarantee against compelled self-incrimination is the exclusion of any such evidence"). Because "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so," *Harris* v. *New York*, 401 U.S. 222, 225 (1971), a defendant who does not testify at his trial is literally exercising that core right not to do so, regardless of his particular motivations for not testifying, and regardless of whether he expressly invokes the Fifth Amendment. See *Turner*, 396 U.S. at 433 (a defendant has an "absolute right not to testify at his own trial unless he freely chooses to do so").

As a result, a defendant's failure to testify necessarily implicates the central purposes of the Fifth Amendment. A primary purpose of the rule against compelled testimony is to preserve the accusatorial system of criminal justice by ensuring that the burden of proving guilt by evidence "independently and freely secured" always

remains on the prosecution. *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964); see *Mitchell*, 526 U.S. at 330. Any defendant who decides not to testify—knowing that the prosecution must prove guilt beyond a reasonable doubt regardless of whether the defendant offers any defense—doubtless has relied at least in part on this fundamental tenet of the Fifth Amendment. Thus, unlike in the mine run of situations in which invocation is required—where invocation serves to notify the government that Fifth Amendment rights, rather than some other, unprotected, desire not to cooperate, see pp. 15-16, *supra*—the failure to testify necessarily implicates the policies underlying the Fifth Amendment. It therefore makes sense—and furthers the Fifth Amendment's purposes—to treat a defendant's failure to testify as an exercise of his Fifth Amendment right regardless of whether he invokes the right.

C. No Justification Excuses The Invocation Requirement When A Suspect Is Briefly Silent During A Noncustodial Interview, And Therefore The Fifth Amendment Does Not Bar Use Of That Silence As Substantive Evidence

Petitioner's contention that *Griffin* bars the use of his transitory silence during a noncustodial interview rests on the assumption that his silence should be treated as an exercise of Fifth Amendment rights notwithstanding his failure to invoke the privilege. But neither of the justifications for excusing the invocation requirement that this Court has recognized exists here. First, unlike in the situations in which the Court has excused the invocation requirement in the pretrial context, see pp. 18-19, *supra*, a suspect in a noncustodial interview could expressly invoke the Fifth Amendment without penalty. Second, while a defendant's decision not take the stand at trial for any reason inherently exercises the

Fifth Amendment privilege, a suspect's transitory silence, unaccompanied by any invocation, in a noncustodial interview does not inherently signal a desire to stop cooperating based on his constitutional rights. Excusing the invocation requirement would thus protect a great deal of conduct that is entirely unrelated to the Fifth Amendment. Prosecutorial use of a defendant's mid-interview silence as evidence of guilt therefore does not penalize the "exercis[e]" of the Fifth Amendment privilege under *Griffin*. 380 U.S. at 614. Nor does such use exert any other unconstitutional compulsive effect.

1. Expressly invoking the Fifth Amendment and merely failing to respond to questions present distinct issues

In arguing that *Griffin*'s rationale bars the use of his silence, petitioner incorrectly assumes that a suspect in a voluntary police interview has two options: responding to questions, or "remain[ing] silent." *E.g.*, Pet. Br. 17. In fact, a suspect has three choices: answering, invoking the Fifth Amendment privilege, or simply remaining mute. The latter two courses are distinct.

When a suspect expressly invokes his Fifth Amendment privilege during a noncustodial interview, that invocation may not be used as substantive evidence against him. By invoking the privilege—*i.e.*, making the claim "in any language that [the questioner] may reasonably be expected to understand as an attempt to invoke the privilege," *Quinn* v. *United States*, 349 U.S. 155, 162-163 (1955)—a suspect clearly "exercis[es]" his "constitutional privilege." *Griffin*, 380 U.S. at 614. To use the suspect's reliance on his Fifth Amendment right as substantive evidence of his guilt at trial would penalize the exercise of the right, "mak[ing] its assertion costly." *Ibid.* Although the Court has rightly declined to extend *Griffin*'s rationale to every situation in which

a witness's invocation of the Fifth Amendment may come at some cost, particularly in the civil context, see *Mitchell*, 526 U.S. at 328, drawing an inference of guilt from a defendant's invocation of the Fifth Amendment in response to police questioning would be a severe penalty on the exercise of the privilege that would deter its use in police investigations. Cf. *Tucker*, 424 U.S. at 440 (pretrial inability to protect the privilege may undermine its efficacy at trial). By analogy to *Griffin*, then, lower courts have generally held that when a suspect in a noncustodial interview has invoked the privilege, his refusal to answer the inquiries in question may not be used against him at trial. See, *e.g.*, *Combs* v. *Coyle*, 205 F.3d 269, 279, 281 (6th Cir.), cert. denied, 531 U.S. 1035 (2000); *Coppola* v. *Powell*, 878 F.2d 1562, 1567-1568 (1st Cir.), cert. denied, 493 U.S. 969 (1989).

By contrast, when a suspect is simply silent for an interval while voluntarily answering questions, that equivocal conduct raises questions about what that silence means. A suspect who sits silent does not expressly invoke the privilege. Cf. *Thompkins*, 130 S. Ct. at 2260 (suspect's post-warning silence, lasting over two hours, was insufficient to unambiguously invoke the right to remain silent). The question therefore becomes whether the invocation requirement should be excused, as in *Griffin* itself, such that a suspect's mid-interview silence may be treated as an "exercis[e]" of the Fifth Amendment privilege for purposes of *Griffin*.

2. The invocation requirement should not be excused when a suspect is briefly silent during a noncustodial interview

No justification exists for excusing the invocation requirement when a suspect is silent during a noncustodial interview.

a. Unlike in *Miranda* and the cases in which the government threatened to penalize the invocation of the Fifth Amendment privilege, a suspect being questioned in a noncustodial situation has the ability freely to invoke the right. See pp. 18-19, *supra*. Where a suspect "will have no problem effectively claiming the privilege at the time disclosures are requested," there is "no reason to forgive the requirement that the claim be presented." *Murphy*, 465 U.S. at 440.

As the Court held in *Murphy*, a suspect in a noncustodial interview ordinarily has the ability to invoke the Fifth Amendment privilege. 465 U.S. at 440. Because "virtually every schoolboy is familiar with the concept, if not the language," of the Fifth Amendment, *Tucker*, 417 U.S. at 439, the Court has assumed that suspects being interviewed in noncustodial situations are generally aware of their Fifth Amendment privilege, even though they have not received *Miranda* warnings.[4] See *Murphy*, 465 U.S. at 429, 440 (holding that an individual on probation could have invoked his Fifth Amendment right in a noncustodial interview). In a noncustodial interview, moreover, the suspect is not subjected to compulsion of the sort that has led the Court to excuse invocation in other contexts: the "inherently coercive" pressures of custodial interrogation are not present, and the suspect's invocation could not be used against him at trial. See *id.* at 438-439 (probationer could not have feared being penalized for invoking his right in view of

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[4] Indeed, suspects routinely invoke the privilege without being given *Miranda* warnings. See, *e.g.*, *Combs*, 205 F.3d at 279 ("talk to my lawyer"); *Coppola*, 878 F.2d at 1564 (statement that suspect would not confess and police should talk to his lawyer); *Savory* v. *Lane*, 832 F.2d 1011, 1015 (7th Cir. 1987) (suspect said he "didn't want to make any statement" to the police).

the rule against such penalties). Express invocation may be excused in individual cases if the police threaten the suspect with punishment for invoking the privilege. See *id.* at 436-438 (suspect may be excused from invoking when questioner threatens to punish the suspect for invoking the right). Absent that sort of deterrent, a suspect is fully capable of affirmatively invoking the privilege.

b. In addition, unlike in *Griffin*, a suspect who fails to respond to questions in an interview but does not affirmatively invoke the privilege is not engaging in conduct that necessarily implicates a core Fifth Amendment right or the purposes animating the privilege. Outside of the trial context, the Court has not treated a witness's silence as inherently an exercise of Fifth Amendment rights, particularly when, as here, the witness could expressly invoke the privilege. Cf. *Thompkins*, 130 S. Ct. at 2259-2260; *Roberts*, 445 U.S. at 560; *Sullivan*, 274 U.S. at 263-264. There is no reason to assume that a suspect's transitory silence during a noncustodial interview reflects any desire to avoid cooperating with authorities as a matter of right.

By agreeing to the police's request to be interviewed, and by beginning to answer questions, a suspect in petitioner's position establishes a baseline of voluntary disclosure to the police. Unlike a defendant who declines to take the stand at his trial, or a suspect who refuses to answer any police questions, the suspect takes actions that are inconsistent with any intention to exercise the privilege—indeed, for that reason, the statements he does make may be used against him at trial. See *Murphy*, 465 U.S. at 429. Against that backdrop, a brief failure to respond to questions during an interview—while answering other questions before and

after the silence—more likely than not reflects motivations that have nothing to do with a desire to rely on the Fifth Amendment's protections. For instance, a suspect's brief silence could reflect surprise, uncertainty at the thrust of the question, or an attempt to settle on the most exculpatory answer. See *United States* v. *Davenport*, 929 F.2d 1169, 1174 (7th Cir. 1991) (government may comment on failure to respond to particular questions in a noncustodial interview because such silence likely reflects a desire to craft the most exculpatory narrative), cert. denied, 502 U.S. 1031 (1992).

The conclusion that transitory silence is at best tenuously connected to any conduct protected by the Fifth Amendment is reinforced by the fact that such silence is practically indistinguishable from the suspect's nontestimonial demeanor. A suspect's demeanor during questioning is generally admissible at trial because it is "nontestimonial," in that it does not reflect communication by the suspect. *Pennsylvania* v. *Muniz*, 496 U.S. 582, 592, 594 (1990). Police may permissibly observe and testify, therefore, that a suspect paused for a long time before answering each question, or that he ended an answer by trailing off mid-thought and then appeared nervous. A suspect's silence in response to a mid-interview question, unaccompanied by any affirmative indication that the suspect intends to communicate any desire to invoke the right, is distinguishable from these permissible forms of demeanor evidence only as a matter of degree.

Unlike in the trial context, then, where every defendant's decision not to testify at trial may be viewed as implicating the core purposes of the Fifth Amendment, excusing the invocation requirement here by construing silence as invariably reflecting an exercise of Fifth

Amendment rights would likely protect a great deal of conduct that is entirely unrelated to the Fifth Amendment. There is therefore no justification for excusing the invocation requirement in the context of a suspect's transitory silence during a voluntary interview.

3. Permitting prosecutorial use of silence, when the suspect could have but did not invoke the privilege, does not subject the suspect to any unconstitutional compulsion

a. Because a suspect in a noncustodial interview is subject to the normal rule that he must invoke the Fifth Amendment, his brief silence in the midst of the interview cannot be considered an exercise of his Fifth Amendment right. As a result, the prosecution's use of that silence in its case in chief is not a "penalty * * * for exercising a constitutional privilege," and it is not barred by *Griffin*. 380 U.S. at 614. Rather, the use of such silence is comparable to the other situations in which the Court has held that the government could permissibly use the witness's silence against him because that silence could not be construed as an exercise of the Fifth Amendment privilege. See pp. 16-18, *supra*; *Roberts*, 445 U.S. at 560; *Sullivan*, 274 U.S. at 263-264. Because witnesses in those situations could have invoked the Fifth Amendment but did not, imposing penalties on silence did not exert any unconstitutional coercion. The same is true with respect to silence during a noncustodial interview.

Contrary to petitioner's argument (Br. 14, 19-20), permitting the use of silence as substantive evidence in the situation presented here does not subject the suspect to the "cruel trilemma" of incriminating himself, lying, or being punished for refusing to cooperate. See *Waterfront Comm'n*, 378 U.S. at 55. The suspect is not

forced to confront any such quandary because he may invoke his Fifth Amendment privilege without penalty.[5] Because that invocation cannot be used as evidence at trial, the suspect has a ready option that permits him to avoid incriminating himself or exposing himself to liability for false statements.[6]

b. Petitioner's remaining arguments that the prosecution's use of silence during a noncustodial interview exerts coercive effects prohibited by the Fifth Amendment are not persuasive.

Permitting the prosecution to rely on a defendant's silence in response to questioning during a voluntary interview does not risk relieving the prosecution of its burden of proving the defendant's guilt at trial, thereby coercing him to speak during the interview. But see Pet. Br. 14, 18-20. In such cases, the ability to use evidence of a defendant's silence may be incrementally helpful to the prosecution in shouldering its burden of proof. But the government may obtain helpful evidence

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[5] In addition to invoking the privilege during questioning, a suspect could do so by expressly declining to be questioned in the first place. Courts have generally treated an explicit, blanket refusal as sufficient to invoke the Fifth Amendment. See, *e.g.*, *Savory*, 832 F.2d at 1017-1018.

[6] If, however, the police attempt to coerce the suspect into forgoing his Fifth Amendment privilege, for instance, by threatening him with physical harm if he invokes his right, a different situation would be presented. Cf. National Ass'n of Criminal Defense Lawyers Amicus Br. 8-9. In that circumstance, if he does speak, the threat of a penalty on "the assertion of the privilege" might well render the suspect's statements compelled for purposes of the Fifth Amendment. See *Murphy*, 465 U.S. at 434; *Lefkowitz*, 431 U.S. at 806. In addition, coercive police conduct might render the interview custodial, necessitating *Miranda* warnings and the exclusion of any unwarned statements. *Miranda*, 384 U.S. at 467-469.

from a defendant, so long as it does not violate the Fifth Amendment in doing so—which it does not, when the defendant is not subjected to any police compulsion and chooses not to invoke the privilege. See *Tucker*, 417 U.S. at 449-450. And in any event, evidence about a defendant's out-of-court silence does not structurally reduce the prosecution's burden of proof. By comparison, permitting an adverse inference based on a defendant's failure to testify at trial implies that the defendant is unable to rebut or explain any part of the prosecution's case, thereby lessening the prosecution's burden of proof with respect to each piece of evidence it presents. See *Mitchell*, 526 U.S. at 330; *Griffin*, 380 U.S. at 613-614.

Petitioner is also incorrect in suggesting (Br. 21-23) that permitting an adverse inference from silence would threaten "the innocent [with] unjust conviction." The *Griffin* rule is designed to protect defendants from the risk that jurors will "too readily assume" that an invocation of the Fifth Amendment admits the possibility of incrimination, thereby indicating guilt, when in fact invocation has little relation to guilt or innocence. *Mitchell*, 526 U.S. at 329. For suspects who invoke the privilege in a noncustodial situation, the same principle would apply.

By contrast, because mid-interview silence reflects a defendant's choice not to stand on his privilege and also not to answer a particular question, it is potentially probative evidence of the defendant's state of mind. "Failure to contest an assertion * * * is considered evidence of acquiescence * * * if it would have been natural under the circumstances to object to the assertion in question." *United States* v. *Hale*, 422 U.S. 171, 176 (1975) (citation omitted). That is particularly so

when a suspect voluntarily answers many other questions, but remains silent in response to a particular question: "[j]ust as flight to avoid apprehension can reflect consciousness of guilt, so a sudden silence can reflect a suspect's consciousness that he has dug himself into a hole and cannot see an exit." *Bland* v. *Hardy*, 672 F.3d 445, 449 (7th Cir. 2012), cert. denied, No. 12-594, 2013 WL 1091775 (Mar. 18, 2013). Because this evidence is potentially probative and not an exercise of the Fifth Amendment privilege, evidentiary rules provide adequate protection against those instances in which the defendant's mid-interview silence is less probative than prejudicial. See Fed. R. Evid. 401-403. To categorically prohibit the use of mid-interview silence, moreover, would unjustifiably place the prosecution at a disadvantage by allowing admission only of the portions of an interview in which the defendant answered questions, perhaps exculpating himself, to the exclusion of portions that may indicate a different version of events. See *United States* v. *Robinson*, 485 U.S. 25, 32 (1988).

Petitioner also argues (Br. 18) that the use of mid-interview silence at trial would cause the defendant to "feel extra pressure to take the stand to offer an alternative explanation for his silence." The Court has recognized, however, that in every criminal case "there are undoubted pressures—generated by the strength of the government's case against him—pushing the criminal defendant to testify." *Ohio Adult Parole Auth.* v. *Woodard*, 523 U.S. 272, 287 (1998). But unless the government's case is based on testimony obtained through compulsion—which is not the case in petitioner's situation—the pressure to testify itself does not "constitute 'compulsion' for Fifth Amendment purposes." *Ibid.*

D. The Prosecution's Use Of Petitioner's Mid-Interview Silence Did Not Violate His Fifth Amendment Rights

1. In this case, the prosecution's substantive use of petitioner's silence in response to a single question during his noncustodial interview did not violate the Fifth Amendment. In order to exercise his Fifth Amendment right to decline to answer questions and insulate that refusal from being used against him as evidence of guilt, petitioner was required to affirmatively invoke his Fifth Amendment. There can be no question that he did not do so here.

Rather than indicating at any time that he preferred not to cooperate with the police, petitioner agreed to accompany officers to the station and to answer questions. He was not subjected to any police threats that might have induced him to speak or to forgo the privilege. See p. 25, *supra*. Petitioner voluntarily answered questions about the victims and his relationship with them. When asked whether ballistics evidence would match his father's shotgun to the shells found at the scene, petitioner did not say anything—rather, he "[l]ooked down at the floor, shuffled his feet, * * * [and] began to tighten up." J.A. 18. The conversation then moved on, and petitioner resumed answering questions, thus confirming that he did not wish to stand on his rights. Indeed, petitioner likely believed that continuing to answer questions was advantageous to him, as he provided an explanation of his whereabouts when the murder occurred. *Ibid.* In these circumstances, petitioner clearly failed to invoke the privilege. Cf. *Thompkins*, 130 S. Ct. at 2260.

2. Because petitioner did not invoke the Fifth Amendment, the prosecution's use of petitioner's silence as evidence of guilt at trial was constitutional.

As an initial matter, Sergeant Elliott's testimony about petitioner's physical movements "after" he failed to respond to the ballistics question, J.A. 17, would have been admissible whether or not petitioner's silence itself was admissible. The statement that petitioner looked down and acted nervous, J.A. 18, is evidence of petitioner's demeanor—the outward physical manifestations of petitioner's mental state—that is not testimony and therefore does not implicate his Fifth Amendment rights. See *Muniz*, 496 U.S. at 589; *United States* v. *Velarde-Gomez*, 269 F.3d 1023, 1031 (9th Cir. 2001) (evidence of physical reaction to questioning does not necessarily implicate the Fifth Amendment).

In all events, the prosecution's express references to petitioner's silence—Sergeant Elliott's testimony that petitioner "did not answer" the ballistics question, J.A. 17, and the prosecutor's argument to the jury that petitioner's silence was inconsistent with innocence, Pet. App. 18a—were admissible because petitioner failed to invoke the Fifth Amendment in response to the question. Indeed, this case exemplifies the potential probative value in a suspect's mid-interview silence: petitioner failed to answer a single question in the middle of a 58-minute interview, looking uncomfortable after the question was asked but resuming his answers immediately upon being asked another question. That sequence of events (though open to multiple interpretations) raised a permissible inference that petitioner knew that an honest answer to the question would not serve him well, but he lacked the time or ingenuity to fabricate an exculpatory explanation. Given that petitioner could have, but did not, invoke his right against self-incrimination, the Fifth Amendment does not require the prosecution to forgo using probative evidence creat-

ed as a result of petitioner's voluntary interaction with the police.

CONCLUSION

The judgment of the Court of Criminal Appeals of Texas should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
MYTHILI RAMAN
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
GINGER D. ANDERS
Assistant to the Solicitor General
DEBORAH WATSON
Attorney

MARCH 2013