No. 12-___

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

PETITION FOR A WRIT OF CERTIORARI

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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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PETITION FOR A WRIT OF CERTIORARI

Petitioner Genovevo Salinas respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals (Pet. App. 1a) is published at 369 S.W.3d 176. The opinion of the Texas Court of Appeals (Pet. App. 7a) is published at 368 S.W.3d 550. The relevant order of the trial court is unpublished but is referenced at Pet. App. 10a.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals was entered on April 25, 2012. Pet. App. 1a. That court denied a timely-filed petition for rehearing on June 6, 2012. Pet. App. 24a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(A).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment states in relevant part that "No person . . . shall be compelled in any criminal case to be a witness against himself."

STATEMENT OF THE CASE

This case presents a fundamental and frequently recurring question of constitutional criminal procedure over which the state and federal courts are openly and intractably divided. Acknowledging this "conspicuous split and lack of guidance from the Supreme Court," a divided Texas Court of Criminal Appeals held here 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. 5a-6a.

1. In the early morning hours in December of 1992, two brothers, Juan and Hector Garza, were shot and killed in Hector's apartment. Responding officers found no evidence of forced entry but did find discarded shotgun shells. A neighbor reported having heard the shots and told the police that the getaway car was a dark colored Camaro or Trans Am. And the police learned from other interviews that the brothers had hosted a party in the apartment the night before the shooting and that petitioner Genovivo Salinas might have been one of the attendees.

After investigating other leads, police proceeded to petitioner's home, where he lived with his parents. There, they discovered that petitioner's mother had a dark blue Camaro or Trans Am. The investigators told petitioner's family about the killings and obtained consent to search the home. During this search, petitioner's father tendered a shotgun to the police. The investigators then asked petitioner to accompany them to the police station for questioning and to "get elimination [finger]prints." 5 Tr. 39.

Petitioner consented to a voluntary interview; he was not under arrest. Pet. App. 23a.

At the station, officers interviewed petitioner for nearly one hour. The officers asked petitioner various questions concerning others who had been at the party – questions such as whether they had any disagreements with or reasons to kill the deceased – and petitioner answered those inquiries. Then, one officer asked petitioner "if the shotgun [his father had given them] would match the shells recovered at the scene of the murder." *Id.* 10a. Petitioner looked down and refused to answer the question. *Id.* 11a.

After the interview, the police arrested petitioner on some outstanding traffic warrants to keep him at the station. *Id.* 12a. Officers then obtained a ballistics report claiming that the casings from the murder scene matched the shotgun from petitioner's house. The police, however, declined to press charges and told petitioner that he was free to go. *Id.* 12a-13a.

Some time later, a friend of petitioner's, Damien Cuellar, appeared at the police station. Cuellar told officers that petitioner had confessed to him that he had killed the brothers. Cuellar said he had declined to offer that information initially, "but after a dream in which he saw the Garza brothers he felt compelled to come forward." *Id.* 13a.

The State then charged petitioner with two counts of murder but did not take him into custody until 2007, when they found him still in the State but living under a new name. *Id.*

2. At trial, the State offered four primary pieces of evidence: (1) Cuellar's dream-induced testimony

concerning petitioner's supposed confession; (2) the fact that petitioner's mother's car was a "potential match[]" to the getaway car; and (3) the ballistics report claiming a match between the murder weapon and the shotgun from petitioner's house; and (4) petitioner's refusal to answer the officer's question whether the ballistics report would assert such a match. *Id.* 17a.

Petitioner declined to testify. His attorney presented evidence that petitioner had been home the night of the killings and argued that someone else must have committed them. He also disputed the reliability of Cuellar's testimony and challenged the usefulness of the police ballistics report. *See, e.g.*, *United States v. Willock*, 696 F. Supp. 2d 536, 564-66 (D. Md. 2010) (noting recent studies evincing a "growing concern regarding the reliability" of ballistics testing).

The prosecution ended in a mistrial when the jury was unable to agree on a verdict.

3. The State then elected to retry petitioner, and introduced the same evidence in the second trial as in the first. When the prosecution elicited the officer's testimony concerning petitioner's refusal to answer his ballistics question, the defense argued that evidence was inadmissible, asserting that petitioner had been entitled to "invoke the Fifth Amendment privilege whether he was in custody or not. He d[id]n't have to talk to the police." Pet. App. 10a. The trial court overruled the objection. Petitioner again declined to testify.

At closing, the prosecution placed considerably more emphasis on petitioner's pre-arrest silence than

in the first trial. Instead of referencing petitioner's refusal to answer the officers' questions concerning ballistics only in passing, *see* First Trial Tr. 26 (June 26, 2008), the prosecutor now aggressively argued that it demonstrated petitioner's guilt:

> The police officer testified that he wouldn't answer that question. . . . You know, if you asked somebody – there is a murder in New York City, is your gun going to match up the murder in New York City? Is your DNA going to be on that body or that person's fingernails? Is [sic] your fingerprints going to be on that body? You are going to say no. An innocent person is going to say: What are you talking about? I didn't do that. I wasn't there. He didn't respond that way. He didn't say: No, it's not going to match up. It's my shotgun. It's been in our house. What are you talking about? He wouldn't answer that question.

Id. 18a-19a.

This time, the jury returned a guilty verdict and sentenced petitioner to twenty years' imprisonment.

4. The Texas Court of Appeals affirmed. As is relevant here, the court recognized that "[t]he federal courts of appeals are split on the issue" whether "pre-arrest, pre-*Miranda* silence is admissible as substantive evidence of guilt." Pet. App. 21a-22a. It also noted that state high courts were similarly divided. *Id.* 20a n.2. The court then agreed with those courts holding that "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.* 22a.

5. The Texas Court of Criminal Appeals granted review and affirmed by a divided vote. Like the Texas Court of Appeals, the Texas Court of Criminal Appeals began by noting "the courts that have weighed in on th[is] issue are split." Pet. App. 4a-5a. Indeed, it emphasized that "[n]early all of the courts that have addressed this issue have noted the conspicuous split and the lack of guidance from the Supreme Court." *Id.* 5a. The Texas Court of Criminal Appeals then sided with those courts holding 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." *Id.* 6a.

Judge Johnson dissented without writing an opinion. *Id.* Judge Meyers did not participate.

REASONS FOR GRANTING THE WRIT

In *Jenkins v. Anderson*, 447 U.S. 231 (1980), this Court reserved the question "whether or under what circumstances prearrest silence" in the face of law enforcement questioning "may be protected by the Fifth Amendment." *Id.* at 236 n.2. Federal and state courts are now openly and intractably divided over the issue. This Court should use this case – in which a divided Texas Court of Criminal Appeals sided with the prosecution side of this split – finally to resolve this important and persistent conflict.

I. Federal And State Courts Are Intractably Split Over Whether The Fifth Amendment Protects A Defendant's Silence In The Face Of Law Enforcement Questioning Before He Was Arrested Or *Mirandized*.

1. The Fifth Amendment's Self-Incrimination Clause precludes any person from being "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This Clause guarantees "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

Applying this basic principle, this Court held in *Griffin v. California*, 380 U.S. 609 (1965), that the Self-Incrimination Clause forbids comment by the prosecution on a defendant's refusal to testify. *Id.* at 615. "[C]omment on the refusal to testify," this Court explained, "is a remnant of the inquisitorial system of criminal justice." *Id.* at 614 (quotation marks and citation omitted). "It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Id.* As Justice Kennedy explained for the Court while applying this rule to sentencing proceedings, "the [*Griffin*] rule prohibiting an inference of guilt from a defendant's rightful silence has become an essential feature of our legal tradition." *Mitchell v. United States*, 526 U.S. 314, 330 (1999).

This Court likewise has held that the prosecution may not comment on a defendant's silence after he has been arrested and read his *Miranda* rights. *See Doyle v. Ohio*, 426 U.S. 610 (1976). This Court reasoned that when the police implicitly advise

someone "that silence will carry no penalty," it violates due process for the prosecution then to use silence against him or even to impeach an explanation of events later offered at trial. *Id.* at 618. "Silence in the wake of these warnings," this Court explained, is "insolubly ambiguous" because it "may be nothing more than the arrestee's exercise of [his] *Miranda* rights." *Id.* at 617.

This Court, however, has never decided "whether or under what circumstances *prearrest* silence" in the face of law enforcement questioning "may be protected by the Fifth Amendment." *Jenkins v. Anderson*, 447 U.S. 231, 236 n.2 (1980) (emphasis added). (This issue turns solely on the Fifth Amendment, not due process, because it does not involve any governmental promise other than the one contained in the Self-Incrimination Clause itself.) As the Texas Court of Criminal Appeals noted in this case, "the courts that have weighed in on the issue" – specifically, whether the Fifth Amendment prohibits the prosecution from using such silence as substantive evidence of guilt – "are split" and have frequently noted this "split and the lack of guidance from the Supreme Court." Pet. App. 4a-5a; *see also id.* 20a-22a & n.2; *State v. Kulzer*, 979 A.2d 1031, 269-71 (Vt. 2009) (describing the split as of a few years ago).

2. A majority of the federal appellate and state high courts to address the issue – ten in all – have held that the Fifth Amendment prohibits the prosecutor from commenting, as part of its case-in-chief, on a defendant's refusal to answer law enforcement questioning before he was arrested or *Mirandized*. *See Coppola v. Powell*, 878 F.2d 1562,

1568 (1st Cir. 1989) (Bownes, J., joined by Breyer and Gray, JJ.), *cert. denied*, 493 U.S. 969 (1989); *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000), *cert. denied*, 531 U.S. 1035 (2000); *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017-18 (7th Cir. 1987); *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991), *cert. denied*, 503 U.S. 997 (1992); *State v. Moore*, 965 P.2d 174, 180-81 (Idaho 1998); *State v. Rowland*, 452 N.W.2d 758, 763 (Neb. 1990); *State v. Cassavaugh*, 12 A.3d 1277, 1285-87 (N.H. 2010); *State v. Leach*, 807 N.E.2d 335, 339-42 (Ohio 2004); *State v. Easter*, 922 P.2d 1285, 1291-93 (Wash. 1996); *State v. Fencl*, 325 N.W.2d 703, 710 (Wis. 1982).[1] In short, these courts believe that because the right to remain silent applies not only at trial but also with respect to law enforcement questioning in the field, "*Griffin*'s prohibition on the use of a

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[1] Unlike other courts that have adopted a categorical bar against using a defendant's pre-arrest pre-*Miranda* silence against him in the prosecution's case-in-chief, *see, e.g.*, *Cassavaugh*, 12 A.3d at 1286-87, the Seventh Circuit generally prohibits use of such of silence but holds that the prosecution may use silence against a defendant in the narrow situation in which, after becoming "aware" that she was a suspect, the defendant "attempted to exculpate herself with some answers and then later refused to answer additional questions *related to those comments*." *Ouska v. Cahill-Masching*, 246 F.3d 1036, 1049 (7th Cir. 2001) (emphasis added). The State, however, has never argued – nor, as the Texas Court of Appeals implicitly recognized, could it – that such a situation is present here. *See* Pet. App. 21a-22a (acknowledging that its decision conflicted with Seventh Circuit law). The police did not make petitioner aware that he was a suspect until they asked him whether the ballistics information would match the shotgun, and petitioner did not offer any exculpatory comments about the shotgun.

defendant's silence as substantive evidence of guilt applies equally to a defendant's silence before trial, and indeed, even before arrest." *Combs*, 205 F.3d at 282 (internal quotation marks and citations omitted).

On the other hand, at least seven and perhaps nine state and federal courts of appeals allow the prosecution to use pre-arrest, pre-*Miranda* silence against defendants. Here, a divided Texas Court of Criminal Appeals in this case joined two federal courts of appeals and two other state high courts in holding that such a reaction to law enforcement questioning "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; *see also United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996); *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991); *State v. Borg*, 806 N.W.2d 535, 541-43 (Minn. 2011) (four-to-three decision); *State v. Kinder*, 942 S.W.2d 313, 325-26 (Mo. 1996), *cert. denied*, 522 U.S. 854 (1997).[2] Two other federal courts of appeals have gone even further, holding that the prosecution may comment on a defendant's pre-*Miranda* silence even *after* he was arrested. *See United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985), *cert. denied*, 474 U.S. 1081 (1986); *United States v. Frazier*, 408 F.3d 1102, 1109-11 (8th Cir. 2005), *cert. denied*, 546 U.S. 1151 (2006). These courts, therefore, clearly would allow prosecutorial comment on pre-arrest silence.

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[2] *Accord State v. Masslon*, 746 S.W.2d 618, 625-26 (Mo. App. 1988).

In addition, two other state high courts have held that the prosecution may comment at trial on the fact that a defendant remained silent in the face of a *private* accusation, made in the presence of law enforcement officers before the defendant was arrested. *See Key-El v. State*, 709 A.2d 1305, 1310-11 (Md. 1998), *cert. denied*, 525 U.S. 917 (1998), *overruled on state law grounds by Weitzel v. State*, 863 A.2d 999 (Md. 2004); *State v. Helgeson*, 303 N.W.2d 342, 347 (N.D. 1981). While such silence is at least arguably different than silence in the face of questions directly from law enforcement officers, neither court's reasoning suggested it would distinguish between the two.[3]

3. The need to resolve this conflict is manifest. In 2000, the State of Ohio – supported by a group of other states as amici – urged this Court to resolve the conflict. As the amici put it, states have a "significant interest" in the issue because it "affect[s] the day-to-day criminal investigation by state and local police officers as well as the effective prosecution based on evidence obtained in these investigations." Br. for Illinois et al. as Amici Curiae

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[3] The Texas Court of Criminal Appeals and Texas Court of Appeals also asserted that the Fifth and Ninth Circuits have held that the Fifth Amendment does not apply under the circumstances present here. Pet. App. 5a, 21a-22a (citing *United States v. Oplinger*, 150 F.3d 1061, 1066-67 (9th Cir. 1998). Neither of those cases, however, involved law enforcement questioning; instead, both involved silence in pre-arrest interactions with private parties without any law enforcement agents present. Accordingly, at least on their facts, those cases do not apply here.

at 1, *Bagley v. Combs*, 531 U.S. 1035 (2000) (No. 00-312). "This issue," they continued, "demands uniform treatment among all federal and state courts." *Id.* at 14.

Unfortunately, *Combs* was a poor vehicle for resolving this issue because the Sixth Circuit had granted the state prisoner there habeas relief based not only upon his Fifth Amendment claim but also based upon a totally "independent[]" Sixth Amendment ineffective-assistance violation. *See Combs*, 205 F.3d at 287-89; *see also id.* at 290 (each error independently prejudicial). Accordingly, this Court denied certiorari. 531 U.S. 1035 (2000).

Since that denial, the conflict over whether the Fifth Amendment protects a defendant's silence in the face of pre-arrest and pre-*Miranda* law enforcement questioning has only grown even deeper and more entrenched.[4] Numerous federal appellate courts and state courts of last resort have now weighed in on both sides of the divide. And new courts to confront the issue are no longer contributing to any process of percolation. As the Texas Court of Criminal Appeals did here in a single paragraph of

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[4] The only case between *Combs* and this one that generated a petition for certiorari was *Frazier*. *See* 546 U.S. 1151 (2006) (denying certiorari). But even though the Eighth Circuit in that case resolved the issue on the merits, the case was an inappropriate vehicle for certiorari because the court of appeals also held that "even if [it was] convinced that the prosecutor's reference to Frazier's silence was improper," the error was harmless because other "overwhelming evidence developed at trial establishe[d] Frazier's guilt beyond a reasonable doubt." *Frazier*, 408 F.3d at 1111.

analysis and a dissent without an opinion, they are just choosing sides. Pet. App. 4a-6a.

II. This Court Should Use This Case To Resolve This Important And Frequently Recurring Issue.

This Court should resolve the conflict over the question presented, and this case presents an ideal opportunity to do so.

1. There can be no serious dispute that the question whether the Fifth Amendment protects pre-arrest, pre-*Miranda* silence in the face of law enforcement questioning is extremely important. Police officers and other law enforcement agents across the country attempt to conduct such questioning on a daily basis – approaching everyone from suspects of common street crime to high-ranking executives of Fortune 500 companies. Many of these investigations turn into prosecutions and, like this case, eventually proceed to trial. Thus, as the group of States explained in *Combs*, "[t]he Court's resolution of this question will affect the day-to-day criminal investigation by state and local police officers as well as the effective prosecution based upon the evidence obtained in these investigations." *Combs* Amicus Br. at 1.

2. For two reasons, this case provides a perfect opportunity to resolve the conflict over whether the Fifth Amendment protects a person's refusal to answer such law enforcement questioning. First, this case cleanly presents the issue. Petitioner objected at trial to the prosecution's use of his silence, Pet. App. 2a, and both the Texas Court of Appeals and Texas

Court of Criminal Appeals squarely addressed the issue, *id.* 4a-6a, 18a-23a.

Second, the facts of this case bring the import of the right to remain silent in the face of pre-arrest, pre-*Miranda* questioning into sharp relief. At petitioner's trial, the prosecution not only elicited testimony concerning petitioner's silence from the officer who had questioned him in the stationhouse. It also contended at length in closing argument that "[a]n innocent person" would have answered the officer's questions and that petitioner's refusal to do showed he was guilty. *Id.* 18a-19a. This passionate argument may well have tipped the scales. At petitioner's first trial, the prosecution made no such argument and the jury was unable to reach a verdict. *Id.* 13a. The jury in a second trial based on the same evidence, however, returned a guilty verdict.

III. The Texas Court of Criminal Appeals' Decision Is Incorrect.

The rule forbidding the prosecution from commenting on a defendant's refusal to testify at trial dictates that the prosecution also may not comment on a nontestifying defendant's earlier refusal to respond law enforcement's pre-arrest questioning.

This Court held in *Griffin v. California*, 380 U.S. 609 (1965), that prosecutorial comment on a defendant's failure to testify at trial violates the Fifth Amendment right to remain silent because it treats a mere invocation of this right as substantive evidence of guilt. *See id.* at 615. In other words, such prosecutorial use of a defendant's silence exacts a "penalty" by making a defendant's reliance on his right against self-incrimination "costly." *Id.* at 614.

The same reasoning applies here. The right to remain silent applies not only at trial but also in the face of out-of-court investigatory questioning by law enforcement agents (or other state actors), whether or not the suspect is under arrest. *See Kastigar v. United States*, 406 U.S. 441, 444-45 (1972); *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951). Thus, just as allowing the prosecution to comment on a defendant's failure to testify would penalize him for relying on his Fifth Amendment rights, so too would allowing the prosecution to comment on a defendant's earlier refusal to answer a police officer's investigatory questions. Put another way, when law enforcement agents question someone about his or her potential involvement in criminal activity, the individual has two choices: speak or remain silent. If the latter necessarily creates evidence of guilt, then the right the Constitution grants him to remain silent is little more than a trap for the unwary.

Permitting the prosecution to use pre-arrest, pre-*Miranda* silence against people would also undermine the purposes of the Self-Incrimination Clause. This Court has explained that the right against self-incrimination "reflects many of our fundamental values and most noble aspirations." *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964). In particular, it reflects:

> our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone

> until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load; our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent.

Id. (internal quotation marks and citations omitted); *see also Mitchell v. United States*, 526 U.S. 314, 329 (1999) ("[T]he central purpose of the privilege [is] to protect a defendant from being the unwilling instrument of his or her own condemnation.").

These values and aspirations would be violated just as much – if not more – by prosecutorial comment on silence in the face of noncustodial law enforcement questioning as they are by prosecutorial comment on a defendant's failure to testify. Whenever the prosecution has the power to impose a "penalty . . . for exercising [the] constitutional privilege," *Griffin*, 380 U.S. at 614, the prosecution no longer is required to "shoulder the entire load" of proving its case, *Murphy*, 378 U.S. at 55. And in the context of pre-arrest questioning, allowing prosecutorial comment on a person's silence would permit police officers to manufacture supposedly incriminating evidence simply by asking people sensitive or uncomfortable questions. This could even "encourage improper police tactics, as officers would have reason to delay" arresting suspects and "administering *Miranda* warnings so that they might

use the defendant's pre-arrest silence to encourage the jury to infer guilt." *State v. Leach*, 807 N.E.2d 335, 341 (Ohio 2004).

2. Contrary to the Texas Court of Criminal Appeals' assertions, neither this Court's holding nor the reasoning in Justice Stevens' concurrence in *Jenkins v. Anderson*, 447 U.S. 231 (1980), undermines this straightforward Fifth Amendment analysis.

a. This Court held in *Jenkins* that when a defendant elects to testify at trial, "the Fifth Amendment is not violated by the use of [a defendant's] prearrest silence *to impeach [his] credibility*." *Id.* at 238 (emphasis added). There are two related justifications for this rule, neither of which applies here.

First, the *Jenkins* impeachment rule is necessary to protect against, and to ferret out, perjury. As this Court has explained, "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury." *Harris v. New York*, 401 U.S. 222, 225 (1971). Thus, the *Jenkins* rule "follows the defendant's own decision to cast aside his cloak of silence." *Jenkins*, 447 U.S. at 238; *see also Raffel v. United States*, 271 U.S. 494, 496 (1926) ("The [Fifth Amendment] immunity from giving testimony is one which the defendant may waive by offering himself as a witness. When he takes the stand in his own behalf, he does so as any other witness . . . ." (internal citations omitted)). When the defendant remains silent at trial, he offers no testimony of his own, so this anti-perjury rationale does not apply.

Second, the *Jenkins* impeachment rule "advances the truth-finding function of the criminal trial" by providing the jury with probative evidence to assist it in considering the defendant's in-court testimony. *Jenkins*, 447 U.S. at 238. But this consideration is also absent when the defendant does not testify. When a defendant refuses to answer questions both before *and* during trial, there is no reason to believe that his previous refusal to respond to law enforcement questioning reflected anything more than his basic understanding that he had no duty to speak. *See United States v, Hale*, 422 U.S. 171, 177-80 (1975); *Grunewald v. United States*, 353 U.S. 391, 422-23 (1957).[5] Such an understanding is at least as consistent with innocence as it is with guilt.

b. Nor does Justice Stevens' concurrence in *Jenkins* provide any support for the Texas Court of Criminal Appeals' holding. In that concurring opinion, Justice Stevens stated that he thought that the Fifth Amendment "privilege against compulsory self-incrimination [wa]s simply irrelevant" in the case

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[5] There are, of course, numerous reasons why an innocent person may choose not to speak to law enforcement before trial or to testify. For example, he may be ashamed or embarrassed about certain associations or transactions that he does not want to reveal. He may have a poor memory or cognitive deficits and accordingly feel vulnerable to artful or persistent questioning. Or he may be indignant at an accusation and wish to avoid dignifying it with a response. If the person has prior experience with the criminal justice system or has been advised by an attorney the government is investigating him, odds are even higher that he would decline out of an abundance of caution to speak with the police.

because the defendant had been "under no official compulsion to speak" at the time at issue. 447 U.S. at 241. The Texas Court of Criminal Appeals took this statement to imply that the Fifth Amendment does not apply at all before a person is arrested. Pet. App. 5a-6a.

But Justice Stevens made no such suggestion. To the contrary, he explicitly restricted his expression of the Fifth Amendment's irrelevance to scenarios in which a person's silence "before he has any contact with the police" is at issue. *Id.* at 243. Furthermore, Justice Stevens made clear that when law enforcement officials contact someone and ask him investigatory questions, the Fifth Amendment kicks in because "a citizen has a constitutional right to remain silent when he is questioned." *Id.*; *accord State v. Borg*, 806 N.W.2d 535, 554-55 (Minn. 2011) (Meyer, J., dissenting). For the reasons explained above, there is no reason to protect the right to remain silent in this setting any less than when invoked at trial.

CONCLUSION

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

Respectfully submitted,

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