In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **RICHARD TOM,** **Defendant and Appellant.**	Case No. S202107
In re **RICHARD TOM,** **On Habeas Corpus.**	

First Appellate District, Division Three, Case Nos. A124765, A130151
San Mateo County Superior Court, Case No. SC064912
The Honorable H. James Ellis, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF

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On October 2, 2013, this Court invited the parties to submit supplemental briefing "addressing how, if at all, the instant matter is affected by the United States Supreme Court decision in *Salinas v. Texas* (2013) ___ U.S. ___ [133 S.Ct. 2174]." The *Salinas* decision resolves the central constitutional question at issue in favor of respondent and mandates reinstatement of petitioner's conviction.

SALINAS CONTROLS THIS CASE AND COMPELS REVERSAL OF THE COURT OF APPEAL'S DECISION

A. The *Salinas* Decision

In *Salinas*, petitioner was suspected by the police of involvement in a double murder in which the killer used a shotgun. (*Salinas v. Texas*, *supra*, 133 S.Ct. at p. 2178.) He voluntarily met with the police and was subject to extensive questioning over the course of an hour. He was not placed in custody, nor given any warnings pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. (*Salinas*, *supra*, at p. 2178.) Although petitioner was largely responsive to the questions asked, at one point, "when asked whether his shotgun 'would match the shells recovered at the scene of the murder,' petitioner declined to answer. Instead, petitioner '[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up.' After a few moments of silence, the officer asked additional questions, which petitioner answered." (*Ibid.*, citations omitted, alterations in original.) Petitioner was arrested at the conclusion of the interview. (*Ibid.*) At trial, the prosecution used petitioner's silence in response to the officer's question as substantive evidence of his guilt. (*Ibid.*) Petitioner was convicted and his conviction was affirmed on appeal. (*Id.* at pp. 2178-2179.)

The United States Supreme Court granted certiorari "to resolve a division of authority in the lower courts over whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief." (*Salinas*, *supra*, at p. 2179.) However, Justice Alito, writing for a three-Justice plurality, concluded that the court need not resolve that dispute because petitioner had not invoked his right to remain silent. (*Salinas v. Texas*, *supra*, 133 S.Ct. at p. 2179 (plur. opn. of Alito, J.).) The plurality explained, "To prevent the privilege from shielding information not properly within its scope, we have long held that a witness who '"desires the protection of the privilege . . . must claim it"' at the time he relies on it." (*Ibid.*, alteration in original.) The plurality noted the importance of requiring an express invocation to provide sufficient notice to the government—which may wish to challenge the invocation or grant immunity—and "give[] courts tasked with evaluating a Fifth Amendment claim a contemporaneous record establishing the witness' reasons for refusing to answer." (*Salinas*, *supra*, at pp. 2179-2180.)

The plurality noted that the Supreme Court has recognized only two exceptions to the express invocation requirement. The first exception arises at the time of the defendant's trial. A "criminal defendant need not take the stand and assert the privilege at his own trial," because "a criminal defendant has an 'absolute right not to testify.'" (*Salinas*, *supra*, at p. 2179, citing *Griffin v. California* (1965) 380 U.S. 609.) No such unqualified right to silence, however, exists outside the courtroom. (*Ibid.*)

The second exception is "that a witness' failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary." (*Salinas*, *supra*, at p. 2179.) The plurality identified several examples to describe the scope of this exception. It pointed to *Miranda*, which held "that a suspect who is subjected to the

'inherently compelling pressures' of an unwarned custodial interrogation need not invoke the privilege." (*Id.* at p. 2180, quoting *Miranda*, *supra*, 384 U.S. at pp. 467-468 & fn.37.) "Due to the uniquely coercive nature of custodial interrogation, a suspect in custody cannot be said to have voluntarily forgone the privilege 'unless [he] fails to claim [it] after being suitably warned.' [Citation.]" (*Ibid.*, alterations in original.) The plurality likewise noted that no affirmative assertion of the Fifth Amendment privilege was necessary when it would subject the witness to loss of a governmental benefit, such as public employment, or would itself tend to incriminate the witness. (*Ibid.*) The plurality observed, "The principle that unites all of those cases is that a witness need not expressly invoke the privilege where some form of official compulsion denies him 'a "free choice to admit, to deny, or to refuse to answer."' [Citations.]" (*Ibid.*)

The plurality made clear that no exception existed for a failure to affirmatively assert the privilege during a voluntary exchange in the absence of a custodial interrogation. (*Salinas*, *supra*, at pp. 2180-2181.) The court's ruling also did not turn on whether the defendant was in custody at the time of the silence. For example, the plurality pointed to *Roberts v. United States* (1980) 445 U.S. 552, as exemplifying the affirmative assertion requirement. (*Salinas*, *supra*, at p. 2181.) *Roberts* affirmed a trial court's use of a defendant's failure to cooperate with authorities throughout the three-year period of his prosecution as a reason for a harsher sentence. *Roberts* rejected the claim that the use of the defendant's refusal to cooperate violated his Fifth Amendment privilege, since he never asserted that privilege as a basis for his refusal during the entire period he was incarcerated pending trial and sentencing. (*Roberts v. United States*, *supra*, 445 U.S. at pp. 558-560.) *Roberts* noted, "if petitioner believed that his failure to cooperate was privileged, he should have said so at a time when the sentencing court could have determined

whether his claim was legitimate." (*Id.* at p. 560.) *Roberts* also rejected the defendant's assertion that the *Miranda* warnings he was given upon being placed in custody obviated the need for such an assertion, explaining that the exception to the assertion requirement afforded by *Miranda* "does not apply outside the context of the inherently coercive custodial interrogations for which it was designed." (*Ibid.*)

The plurality also relied on *Berghuis v. Thompkins* (2010) 560 U.S. 370 [130 S.Ct. 2250], in rejecting petitioner's argument that silence in the face of official suspicions is sufficient. (*Salinas*, *supra*, at pp. 2181-2182.) *Berghuis* held that a defendant's post-*Miranda* silence did not constitute an invocation of the Fifth Amendment privilege where, following an extended silence, the defendant voluntarily answered the officers' questions. (*Berghuis v. Thompkins*, *supra*, 130 S.Ct. at pp. 2259-2260.) While recognizing that *Berghuis* involved admission of subsequent statements rather than the silence itself, the plurality observed that the logic animating the *Berghuis* decision "applies with equal force: A suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege." (*Salinas*, *supra*, at p. 2182, fn. omitted.) The plurality also rejected concerns that an express invocation requirement would present practical problems for review, noting, "our cases have long required that a witness assert the privilege to subsequently benefit from it. That rule has not proved difficult to apply." (*Id.* at p. 2183.)

The plurality summed up its ruling as follows:

> 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.'" [Citations.] Although "no ritualistic formula is necessary in order to invoke the privilege," [citation], a witness does not do so by simply standing mute. Because petitioner was required to assert the

> privilege in order to benefit from it, the judgment of the Texas Court of Criminal Appeals rejecting petitioner's Fifth Amendment claim is affirmed.

(*Id.* at p. 2178.)

In his concurring opinion, Justice Thomas, joined by Justice Scalia, went further. (*Salinas v. Texas*, *supra*, 133 S.Ct. at p. 2184 (conc. opn. of Thomas, J.).) Justice Thomas concluded that, even if the petitioner had invoked his right to silence, his claim would still fail because the prosecutor's comments during trial on his earlier silence "did not compel him to give self-incriminating testimony." (*Ibid.*) Justice Thomas questioned the continuing constitutional validity of *Griffin v. California* (1965) 380 U.S. 609, and refused petitioner's invitation to extend its "penalty" analysis outside the trial context from which it arose, namely a prosecutor's comment on a defendant's failure to take the stand. (*Salinas*, *supra*, 133 S.Ct. at p. 2184.) Although Justices Thomas and Scalia did not join in the plurality opinion, their concurring opinion is broader than and subsumes the plurality's decision. Accordingly, the plurality opinion is properly viewed as stating the controlling principles. (See generally *Marks v. United States* (1977) 430 U.S. 188, 193.)

B. Appellant Did Not Expressly Invoke his Right to Silence

As we explained in our opening brief, appellant never expressly invoked his right to silence as required under *Salinas*. As detailed in Argument II of our opening brief at pages 39 to 40, and in our reply brief at pages 12 to 16 and 20 to 21, appellant was largely cooperative and spoke freely with the officers throughout the investigation. (4 RT 678, 684-686, 688-689, 693-694, 715, 724-725.) His only assertion of silence occurred at the stationhouse when he informed the officers that his attorney advised

him not to make any statement without the attorney present (6 SRT 353-354), a fact not elicited at trial or commented on by the prosecution.

As in *Salinas*, appellant never affirmatively invoked his right to silence throughout the relevant period of his encounter with the police, either before or after his arrest. Critically, his failure to ask about the victims cannot be viewed as in implied invocation sufficient to activate any Fifth Amendment protection. (See *Salinas v. Texas*, *supra*, 133 S.Ct. at pp. 2178.)

The court below concluded that "the inherently coercive circumstances attendant to a de facto arrest" are by themselves sufficient to trigger a defendant's Fifth Amendment protection based on mere silence, even in the absence of *Miranda* warnings. (Typed Opn. at pp. 23-24.) *Salinas* rejected this approach, observing instead that "[t]he critical question is whether, under the 'circumstances' of this case, petitioner was deprived of the *ability* to voluntarily invoke the Fifth Amendment." (*Salinas v. Texas*, *supra*, 133 S.Ct. at p. 2180, italics added.) As in *Salinas*, "[w]e have before us no allegation that [appellant's] failure to assert the privilege was involuntary, and it would have been a simple matter for him to say that he was not answering the officer's question on Fifth Amendment grounds." (*Ibid.*; see also *id.* at p. 2184 ["So long as police do not deprive a witness of the ability to voluntarily invoke the privilege, there is no Fifth Amendment violation"].) In this case, there was no suggestion of police conduct that deprived appellant of his ability to invoke the privilege. Indeed, appellant ultimately did so before any interrogation began.

In light of *Salinas*, the lower court's finding of a Fifth Amendment violation from comment on appellant's uncompelled silence is erroneous.

CONCLUSION

Accordingly, respondent respectfully requests that the Court of Appeal's decision be reversed and the case remanded for further proceedings on the remaining issues.

Dated: October 14, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S SUPPLEMENTAL BRIEF uses a 13 point Times New Roman font and contains 1,845 words.

Dated: October 14, 2013

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Richard Tom***

No.: **S202107**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On October 15, 2013, I served the attached **RESPONDENT'S SUPPLEMENTAL BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 15, 2013, at San Francisco, California.

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Declarant

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Signature