

Ex parte Salinas, No. WR-90,982-01 (Tex. Crim. App. Nov. 16, 2022)
Attorneys. Neil Davis (Writ).

Issue & Answer. Is trial counsel ineffective for failing to object to the State's substantive use of a defendant's post-*Miranda* silence to selective questions during its case-in-chief? **No-the underlying question remains an unresolved issue of constitutional law.**

Facts. The defendant twice stood trial for the offense of murder. His first jury was hung on guilt. His second jury convicted him and sentenced him to 20 years of confinement. The defendant contends that his trial attorneys were ineffective for failing to properly challenge the State's use of his decision to stand mute and say nothing at all when investigating officers posed a question regarding the murder weapon (a shotgun) found in his parents' home where the defendant lived. The defendant had engaged with officers and answered questions until this question was posed.

At the first trial, the investigating officer initially made no reference to the substance of the defendant's interrogation but did admit in cross-examination that the defendant did not confess. In response, the prosecutor tried to elicit the defendant's silence when questioned about the murder weapon. A debate ensued about proper warnings for custodial interrogation after. The record was unclear as to whether the interrogation occurred at the defendant's home or at the police station while the defendant was in custody. Ultimately the investigating officer testified without objection to the defendant's silence in response to questioning about the murder weapon. Defendant's first trial ended in a mistrial when the jury was unable to reach a unanimous verdict.

The same lawyers represented the defendant at his second trial. A different investigating officer testified. A different prosecutor representing the state conveyed to the trial that the murder weapon interrogation occurred at the defendant's home and not at the police station while in custody. Notwithstanding this representation, the new investigator testified that the murder weapon interrogation did not occur at the defendant's house, but rather at the police station. Nonetheless, this officer's position was that the defendant was not in custody when the interrogation occurred. Defense counsel objected to the State's use of the defendant's silence on Fifth Amendment grounds-regardless of whether he was in custody.

On direct appeal, the Court of Criminal Appeals held that "[i]n pre-arrest, pre-*Miranda* circumstances, a suspect's interaction with police officers is not compelled. Thus, 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." The United States Supreme Court addressed the case in a plurality opinion but avoided resolving the pre-arrest-versus-post-arrest-silence dispute by holding that a person must specifically invoke his Fifth Amendment privilege before relying on it to insulate his silence from use at trial.

The Supreme Court plurality indicated that the State violates a defendant's right to due process when it seeks to use the defendant's post-*Miranda* silence at trial. This is the impetus of the instant writ of habeas corpus. Although, the State established that the

defendant was not in custody at his second trial. Despite the second investigator's testimony there existed at least one offense report reflecting that the defendant had received *Miranda* warnings before his decision to stand mute. The defendant contends that his trial counsel was ineffective for failing to raise a Fifth Amendment objection on this basis.

Analysis. The State may not induce a defendant to remain silent in the face of police questioning by cautioning of his right to remain silent, then use that silence against him at trial. *Doyle v. Ohio*, 426 U.S. 610 (1976). If *Doyle* were directly applicable to the facts of this case, trial counsel would be ineffective for having not articulated *Doyle* as the basis of excluding evidence. But *Doyle* is not directly applicable. The difference between *Doyle* and the instant case is that the defendant in the instant case invoked his silence piecemeal by answering some questions but standing mute on a single incriminating question. *Doyle*, in contrast, remained silent as to all questions post-*Miranda*. Defendant's silence was selective. Selective post-*Miranda* silence is an unresolved issue in constitutional law as reflected in a near-comprehensive discussion by the Ninth Circuit in *Hurd v. Terhune*, 619 F.3d 1080 (9th Cir. 2010). The Supreme Court declined to resolve the conflict among jurisdictions when the Ninth Circuit sanctioned the prosecutorial use of post-*Miranda* selective silence. Given that the issue is unresolved, trial counsel cannot be considered ineffective for failing to articulate the Ninth Circuit's point of view