THE TEXAS PROSECUTOR

The Official Journal of the
Texas District & County Attorneys Association

Volume 43, Number 6 • November–December 2013

"It shall be the primary duty of all prosecuting attorneys ... not to convict, but to see that justice is done."
Art. 2.01, Texas Code of Criminal Procedure

Harris County goes to Washington

Attorneys from the DA's office in Houston argued a Fifth Amendment case before the Supreme Court of the United States—and they now share the story with their Texas colleagues.

By Alan Curry
Assistant District Attorney in Harris County

On the morning of April 17, 2013, in a crowded courtroom, I got up from my chair, stepped to a podium a few inches to my left, looked directly at Chief Justice John Roberts, and said, "Mr. Chief Justice, and may it please the court."

I have been a prosecutor for almost 25 years and have prosecuted approximately 2,000 cases during that time. I have presented oral argument countless times before appellate courts in Texas. But never did I imagine that I would be able to present oral argument before the Supreme Court of the United States. It was a thrilling experience—and a little terrifying as well.

About the case

Like any other criminal case, this story begins with a crime, and, in this situation, a particularly violent one. On the morning of December 18, 1992, two brothers were shot and killed in their Houston home, and police recovered six shotgun shell casings at the scene. The investigation led police to the defendant, Geno Salinas, so officers went to the defendant's residence to talk with him. The defendant agreed to hand over his shotgun for ballistics testing and to accompany police to the station for questioning. The police questioned the defendant for a little

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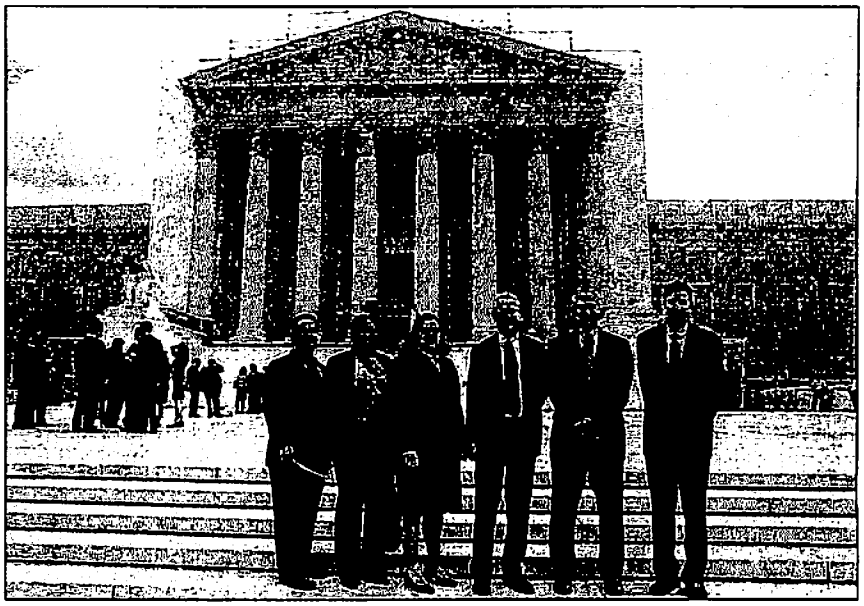

The Harris County trial team in front of the United States Supreme Court. From L to R: David Newell, ADA in Harris County; Andrea Kelley, intern in Harris County (now an assistant CDA in Galveston County); Carol Cameron and Alan Curry, both ADAs in Harris County; the late Mike Anderson, DA in Harris County; and Eric Kugler, ADA in Harris County.

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Harris County goes to Washington (cont'd)

less than one hour, and during that time, the defendant answered almost all of the officers' questions.

But when the defendant was asked whether his shotgun would match the shells recovered at the scene of the murder, Salinas did not verbally respond. Instead, he looked down at the floor, shuffled his feet, bit his bottom lip, clenched his hands in his lap, and began to tighten up. Then he answered more of the officers' questions.

After his statement, the defendant was arrested on unrelated traffic warrants, but he was later released when prosecutors believed that they did not yet have enough evidence to charge him. By the time authorities obtained enough evidence, he had fled. The defendant was not located until 2007 when officers found him living under a false name.

Salinas's first trial for murder ended in a mistrial, so the State retried him in 2009. During this second trial, prosecutors used the defendant's reaction to the officer's question as evidence of his guilt. The jury found the defendant guilty, and he received a 20-year sentence. The defendant appealed his murder conviction, and that is where I and my attorneys in the appellate division stepped in.

The road to Washington

On appeal, the defendant challenged the admissibility and use of his pre-arrest silence as a violation of his Fifth Amendment rights. I am chief of the appellate division, and I recognized the novelty of the issue, so I assigned the appeal to one of our more experienced appellate prosecutors, Carol Cameron. Even though the issue was novel, none of us anticipated that we were beginning down a road toward the United States Supreme Court.

As expected, the Fourteenth Court of Appeals in Houston rejected the defendant's Fifth Amendment claim and affirmed his conviction.[1] Likewise, the Texas Court of Criminal Appeals rejected the defendant's Fifth Amendment claim and affirmed the defendant's conviction.[2] Both Texas courts recognized that there was a split of authority across the nation concerning the admissibility of a defendant's pre-arrest, pre-*Miranda* silence, but they felt the stronger weight of authority supported the holding that such a defendant's Fifth Amendment rights would not be violated because he was not under arrest at the time that he did not answer a question.

Neal Davis, a well-known Houston criminal defense attorney, had represented the defendant throughout the appellate process in Texas. But shortly after the Court of Criminal Appeals had issued its ruling, Jeff Fisher contacted us, stated that he was now representing the defendant, and informed us that he would be filing a petition for a writ of certiorari. Jeff Fisher is a well-known litigator before the United States Supreme Court, and he is co-director of the Supreme Court Litigation Clinic at Stanford University. Mr. Fisher has argued before the Supreme Court more than 20 times, and he has proven to be very successful throughout his career before the high court. He predicted to us that the court would grant certiorari in the case. Even so, we did not at this stage believe the Supreme Court was poised to take the case—it is still uncommonly rare for the court to grant a petition for a writ of certiorari. We receive numerous such petitions each year, and they have always been denied, even when the court had requested the State file a response.

It was clear that this case was going to be a little different when we received a request from the National Association of Criminal Defense Lawyers to file an amicus brief in support of the defendant's petition for a writ of certiorari. But we still did not believe the court would grant the petition. The court had refused to grant similar petitions in other cases in which the same or similar Fifth Amendment claims had been raised. We did not feel the issue of the admissibility of a defendant's silence had been sufficiently raised in the case because our defendant had not really been silent. He had merely failed to answer only one question in a series of other questions that he freely answered. And the defendant certainly had not invoked his right to remain silent in any way.

On October 11, 2012, when the Supreme Court requested that we file a response to the defendant's petition for a writ of certiorari, that was the first indication that the court was taking a greater interest in the case.

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Nevertheless, in December 2012, when Carol Cameron filed our brief in opposition to the defendant's petition, we still believed there was a good chance the court would deny the defendant's petition.

All of that changed when, on January 11, 2013, the Supreme Court granted the defendant's petition. It was clear at that time that the court would order briefing from the parties and the case would be set for oral argument before the court in a just a few short months. We had contacted Carmen Mitchell, a former Harris County appellate prosecutor who is now Deputy Chief of the Appellate Division for the United States Attorney's Office in the Southern District of Texas. She and her colleagues suggested that we contact the Office of the Solicitor General with the Texas Attorney General's Office because those attorneys have significant experience before the United States Supreme Court. That proved to be a very wise suggestion because two attorneys with that office, Andy Oldham and Adam Aston, offered their assistance, which proved to be invaluable.

But our office was still faced with a number of choices—the most pressing of which was which attorneys would represent the State of Texas before the Supreme Court and which attorney would argue the case? Briefing a case before the Supreme Court is far too large a task for only one attorney to handle, and whoever argued the case would be arguing against Jeff Fisher, one of the more experienced Supreme Court litigators. Within a few days, the late Mike Anderson, the Harris County District Attorney at the time, made the decision that I should handle the argument and Carol Cameron would write the brief. We brought in Eric Kugler and David Newell, two other attorneys in the appellate division, to help write the brief, and the office let us bring in Andrea Kelley, an intern, to assist with the legal research for the case.[3]

Though I'd never argued before the high court before, it has long been the policy of the Harris County District Attorney's Office to represent the State of Texas on direct appeal before the United States Supreme Court. Because that is the case in our county, I and several other attorneys in the appellate division have been licensed to practice before the United States Supreme Court. Getting licensed to practice before the court is a relatively simple process: paying a relatively small fee and getting sponsors who are already licensed.

I was nervous and excited about the prospect of presenting oral argument before the United States Supreme Court. And I was very proud that Mike had the confidence in me and our division and proud that we were going to have the opportunity to represent Texas before the highest court in the land. I am not sure that, at that particular time, I was yet overwhelmed by the task in front of us. But I soon would be. For the next three months or more, these four attorneys would be working on nothing more than the case of *Genovevo Salinas v. The State of Texas*, while the other 11 attorneys in the appellate division handled the rest of the heavy workload.

Scott Durfee, one of our most knowledgeable attorneys, suggested that we reach out to Erin Busby, an attorney who had clerked at the Supreme Court and who also was a member of the faculty for the Supreme Court Clinic at the University of Texas. I also contacted David Gunn, a friend and one of the best civil appellate attorneys in Texas, and he directed me to Josh Blackman, a professor at South Texas College of Law and President of the Harlan Institute, and Will Consovoy, an experienced Washington D.C., litigator and co-director of the Supreme Court Clinic at George Mason University School of Law. At Erin Busby's and David Gunn's suggestion, I also contacted David Frederick, who is also on the faculty of the Supreme Court Clinic at the University of Texas and who has literally written the book on oral advocacy before the United States Supreme Court.[4] All of these individuals proved to be absolutely crucial in helping prepare our brief before the Supreme Court and in helping me prepare for the oral argument.

The petitioner's brief was filed on February 20, 2013, and our brief was filed on March 22, less than a month before the oral argument on April 17. Throughout the past few weeks, I had been reading and rereading Fifth Amendment caselaw and meeting with our attorneys on the best strategies to take in the brief and during oral argument. One of the key factors in helping a party present a case to the United States Supreme Court is the request for amicus briefs. Amicus briefs focus the court on particular aspects of a party's argument that the party may not be able to emphasize as well in its own brief. The petitioner certainly had his amicus briefs in support of his position: from the American Civil Liberties Union, American Board

of Criminal Defense Lawyers, National Association of Criminal Defense Lawyers, Cato Institute, and Rutherford Institute. But we had several amicus briefs in support of our position as well: the Illinois Attorney General on behalf of several other states across the nation that joined our position, the Criminal Justice Legal Foundation, and Wayne County, Michigan.[5]

Perhaps the most important amicus brief in support of our position was that filed by the United States, Solicitor General, a part of the Department of Justice. Filing that brief meant that the United States would be arguing with us in support of our position. Believe me, if you are presenting oral argument before the United States Supreme Court and the United States wants to argue in support of your position, your answer to that assistance is a resounding "Yes." I kept in close contact with Jenny Notz with the Illinois Attorney General's Office and Ginger Anders, Assistant to the Solicitor General with the Department of Justice. Ms. Anders herself had already argued several times before the Supreme Court, and her assistance proved to be invaluable. After conferring with these attorneys and amongst ourselves, we had decided upon the best approach to take during the oral argument: Absent an invocation of his Fifth Amendment privilege against self-incrimination, a defendant's failure to answer a question during an otherwise voluntary, non-custodial interview with the police was not protected by the Fifth Amendment. Such a failure to answer should be admissible against him, especially when, as in this case, the defendant accompanied his failure to answer with non-verbal conduct revealing his guilty conscience in reaction to the officer's questioning. A jury should have the right to hear such evidence without violating the defendant's constitutional rights.

Preparing with moots

The most important factor in getting ready for an argument before the Supreme Court is the moot court arguments. Moots are practice arguments in which several attorneys grill you at length about the facts of the case and the law. Supreme Court moots are not easy. Professor Blackman helped get the first moot together just a couple of weeks before the scheduled argument on April 17, and that first moot was attended by Mr. Oldham, Mr. Aston, Professor Busby, and other attorneys, many of whom had themselves argued before or worked for the Supreme Court. This first moot was long, about an hour and a half. In their questioning, they pushed me to the limits of our argument. It was some of the toughest questioning I have ever faced—but it was extremely valuable. Many of my attorneys took notes at this moot, and we went over those notes and a videotaped recording of the moot over the next few days. A few days later, the second moot was held at the offices of the United States Attorney in Houston. Carmen Mitchell helped put this moot together. The questioning was more relaxed at this moot, but it was still quite difficult.

My next moots were in the Washington D.C., area a week before the scheduled argument. One was before Will Consovoy and several other attorneys at George Mason University, and the second moot was on the last day of the week before the National Association of Attorneys General. As difficult as my preparation had been over the past few months, and as difficult as the previous moots had been, this last moot was by far the toughest. These attorneys at NAAG were experienced Supreme Court litigators, and each of them clearly had great difficulty with our argument. They found the petitioner's argument to be much easier to apply (just do not use a defendant's silence against him), and they urged that, even though we had a lot of Supreme Court law on our side, the justices would want to know why they should not adopt the petitioner's argument, which was much easier to apply and much easier to understand.

By this time, my confidence had been drained—though I was well-prepared. And I met with Carol Cameron, Eric Kugler, and David Newell that weekend to discuss our final strategies for the argument. We strongly believed in our argument and the best way to approach the case. But the difficult questioning in the moots had left me doubting whether the justices would agree with our position, and I was exhausted. There were so many questions the justices could ask me that would take me away from our argument. On Monday morning, I watched two oral arguments at the Supreme Court to get used to the venue and the questioning. The questioning at those arguments was lengthy and strenuous, as it usually is. On the following day and a half, we all met again, and I talked with Ginger Anders about the moots in which she

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had participated to get ready for her portion of the argument. After Jeff Fisher argued for the petitioner, I would argue for 20 minutes, and Ms. Anders would argue for 10 minutes.

At the SCOTUS

Surprisingly, the courtroom at the United States Supreme Court is smaller than you might imagine. It is awe-inspiring, but much smaller, and much, much more crowded than any other appellate courtroom. The tables where the attorneys sit are just a couple of feet from where the justices sit, and the podium from which an attorney argues is directly in between those two tables. If both persons were so inclined, the attorney arguing at the podium could lean forward and shake Chief Justice Roberts' hand (assuming that he also leaned forward a little). When you argue at the podium, you are essentially at eye level with the other justices. The seating by the attorney/spectators and reserved seating is all around you, so that when an attorney stands up to argue before the court, he is not far from anyone else in the courtroom. Rather, he is standing up in a crowd of people to present his argument.

On the morning of the argument, I was more nervous than I have ever been before an oral argument (and I have argued a couple of hundred times or so). An attorney arguing before the court can walk past all of the lines outside the Supreme Court building and go directly to the waiting room for the attorneys. Mike Anderson and I walked into the building and into that room together, and it was clear very quickly that, even as experienced as we were in Texas, we were rookies among several veterans. Jeff Fisher had an entourage with him, and it was clear that everyone knew who he was. After we entered the courtroom for the oral arguments, we first listened to an argument in which the United States was involved. I watched just a few feet away from me as Michael Dreeben, the Deputy Solicitor General for the United States, argued a very, very complex case, both factually and legally. He was pummeled with questions from the justices, and he answered all of them extremely well—and he brought no notes to the podium.

After the first case had been presented, it was our turn. Jeff Fisher argued first, and the justices pummeled him with questions as well. He stuck to his position throughout, and he argued very well. His position was simple: The Fifth Amendment prohibited the prosecution from using a defendant's silence against him at his criminal trial, even if that silence occurred during a non-custodial interview with the police. When the officer asked the defendant an incriminating question, according to Mr. Fisher, the defendant was faced with an impossible choice: incriminate himself by talking or incriminate himself by remaining silent. But Mr. Fisher's argument was not an easy argument. He was repeatedly interrupted with very difficult questions.

And my portion of the argument was equally difficult, if not more so. After I got up to present our argument, I brought only a few notes to the podium, but I would not really need them. I frankly never had much time to refer to them. After a few introductory words, Justice Sotomayor relentlessly questioned me, and I spent the next 20 minutes answering questions from almost all of the justices, but most from the two justices at either far end of the bench—Justices Sotomayor and Kagan. I was interrupted so much and asked so many questions, that I did not feel like I had said much of anything. But the moots had prepared me for that, and I was not asked any question I was not expecting. We had feared the justices might question me about several collateral issues that would take us away from our argument, but they never did. It was clear they were concerned only with the Fifth Amendment issue that was before them.

After the argument was over—after Ginger Anders had presented her argument, and after Jeff Fisher had concluded with a short rebuttal—I felt horrible, like I had not said anything. Everyone said that I had done a wonderful job, and they were clearly in a mood to celebrate. It was not until I got a chance to read and listen to the argument that I felt better about the job that I had done.[6] I felt even better several weeks later on June 17, when the United States Supreme Court handed down its decision.[7] In an opinion written by Justice Alito, the court had done precisely what we had hoped that they would: It held that, to prevent the prosecution from using his pre-arrest silence against him, a defendant must do more than merely remain silent. He must invoke his Fifth Amendment right against compelled self-incrimination. In this case, the defendant had not done that, so we were free to use his silence against him.

This has been a tremendous suc-

cess for the Harris County District Attorney's Office, the State of Texas, and for prosecutors and law enforcement in general. It has been a rewarding experience for me and my attorneys. I cannot tell you how proud I am of the work they have done. Our briefing was excellent, and the various lawyers and organizations did a wonderful job in helping me get prepared for the argument. Our office, through Mike Anderson and our first assistant, Belinda Hill, provided wonderful support to us. It is now my firm belief that *any* well-prepared, well-supported, experienced appellate litigator can present a case before the United States Supreme Court, even if that litigator is a local prosecutor. I am very glad that I got a chance to do this. Lisa McMinn, the State Prosecuting Attorney, recently asked me if I would do it again. "In a second," I replied. ✻

Endnotes

1 *Salinas v. State*, 368 S.W.3d 550 (Tex. App.—Houston [14th Dist.] 2011, pet. granted).

2 *Salinas v. State*, 369 S.W.3d 176 (Tex. Crim. App. 2012).

3 Andrea Kelley is now a prosecutor with the Galveston County Criminal District Attorney's Office.

4 Frederick, David, C., Supreme Court and Appellate Advocacy (Thomson West 2002).

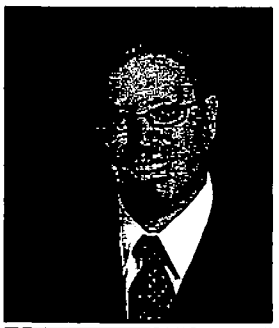
5 You can find all of these amicus briefs and more on SCOTUS Blog, the best resource for litigation at the Supreme Court, at www.scotusblog.com/case-files/cases/salinas-v-texas.

6 You can read and listen to the argument as well at www.oyez.org/cases/2010-2019/2012/2012_12_246. Oyez.org is a project of the Chicago-Kent College of Law, and it is an excellent source for arguments before the Supreme Court.

7 *Salinas v. Texas*, 133 S.Ct. 2174 (2013).

A beginner's guide to involuntary commitments

A primer on both criminal and civil commitments for patients or defendants with mental health issues



By Bradford Crockard
Assistant District Attorney in Harris County

A couple of months ago, a 911 dispatcher in Houston received a call from an employee of an insurance company who said that, while on the phone with a customer, whom we'll call John (not his real name) she received some alarming information. John was despondent and planned to run out onto Interstate-10 to kill himself. The insurance-company employee was worried that the man was suicidal and wanted someone to check on him.

The dispatcher sent Houston Police Department (HPD) officers to the scene, which was a dilapidated residence just outside downtown Houston. There, patrol officers encountered a man lying on a mattress surrounded by food wrappers, trash, and bottles of King Cobra malt liquor. When asked by the responding officer if he had told someone that he planned to kill himself, John admitted that he had. He then became irate, accusing the officers of trying to arrest him for simply asking for help. He began yelling at one officer for keeping her hand near her holstered weapon.

The responding officers decided to contact HPD's Crisis Intervention Response Team, a group of specially trained officers who ride with clinicians from the local mental health authority. When the closest available unit arrived at the scene, the CIRT officer began talking to John casually, even joking with him. Eventually, he calmed down and began to discuss his situation reasonably. She asked about his mental health history; he had recently been diagnosed with bipolar disorder and prescribed Depakote. She asked if he had been taking the meds as prescribed, and he replied that he had not. He said that he did not have a ride to get to a clinic and that he received only $700 in Social Security disability benefits per month. He paid $250 a month to stay in the room he called home and the rest he spent on food and clothes. She asked about the King Cobras, and he said that he drank about two a day, but then admitted he was drinking them pretty much all day and night. When she asked why, he said that he was depressed that he had no friends or family and that he could not sleep; he had nightmares that woke him up every night.

She asked about his criminal history, and John said that he was on parole from an aggravated assault that he had committed 10 years earli-

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