

INSIGHTS

## Salinas v. Texas: Your Silence May Be Used Against You

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On June 17, 2013, the Supreme Court of the United States issued an opinion with important ramifications for anybody who may be interviewed in connection with a criminal investigation.

In *Salinas v. Texas*, 570 U.S. \_\_\_\_ (2013) (Slip. Op. available [here](#)), the Supreme Court held that the Fifth Amendment privilege against self-incrimination does not protect a witness's silence in the face of a voluntary, noncustodial police interview. Rather, a person who is not under arrest (or otherwise in custody) and voluntarily speaks to the police must affirmatively and timely invoke the privilege to benefit from its protections. The Court stated that there was no "ritualistic formula" necessary to assert the privilege, but that a witness could not do so "by simply standing mute." *Id.* at 3 (citation omitted). If an individual fails to invoke, and is later charged with a crime, the prosecution may use his silence at trial as evidence of his guilt.

Petitioner Genovevo Salinas was a possible witness to a double murder. The police went to his home to question him, and he agreed to hand over his shotgun for ballistics testing. He further agreed to go to the police station for more questioning. Notably, because Salinas was not "in custody," police were under no obligation to read him *Miranda* warnings, and he was free to leave the station at any time. During most of his hour-long interview, Salinas answered questions. At one point, the police asked Salinas if shells recovered from the crime scene would match the shotgun he had handed over. Salinas did not answer, but sat in silence for a few moments before the police moved on to other questions that Salinas answered. Eventually, Salinas was charged with, and tried for, the double murder. In its case-in-chief at trial, prosecutors introduced evidence of Salinas's silence in response to the police question about the shell casings, and argued that his silence was evidence of his guilt. The jury convicted Salinas, and two Texas Courts of Appeals affirmed the conviction. *Id.* at 2-3.

The Supreme Court held that because Salinas did not unequivocally invoke his privilege against self-incrimination during the voluntary police interview, he had no Fifth Amendment right to have his silence in response excluded from evidence at his trial. *Id.* at 3. As the Court explained, the Fifth Amendment guarantees that no one may be "compelled in any criminal case to be a witness against himself." *Id.* at 10. It does not establish an unqualified "right to remain silent." *Id.* Salinas was not deprived of his ability to voluntarily invoke the privilege; rather, he failed to do so. Accordingly, the prosecution's use of his noncustodial silence did not violate the Fifth Amendment.

The decision is instructive to anybody who is asked to give an interview to a law enforcement agent. A quick glance at the headlines reminds us that FBI agents may seldom be far away, as they seek to investigate allegations of securities fraud, bank fraud, health care fraud and other wrongdoing. Agents have been known to approach bankers, traders, doctors and other

professionals at their homes in the wee hours of the morning, or at their places of business. Although each circumstance must be considered on its own merits, experience generally tells us that the best course of action in such situations may be to politely decline the request for the moment, advise the agents of the desire to confer with counsel and then to do so. *Salinas* also tells us that an express and immediate invocation of the Fifth Amendment privilege against self-incrimination may also be necessary in order to insure that an individual's silence is not used against that individual as a criminal defendant in a future proceeding.