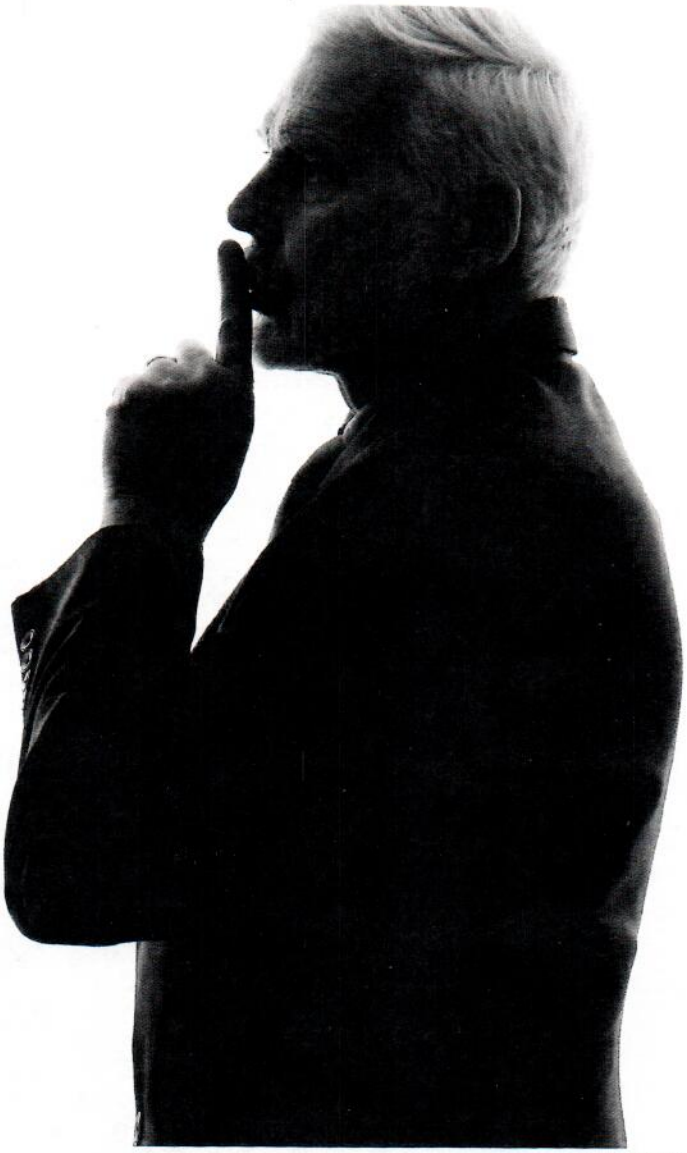

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Silence Is No Longer Golden: How Lawyers Must Now Advise Suspects in Light of *Salinas v. Texas*

Almost 70 years ago, Justice Robert Jackson made the following observation in *Watts v. Indiana*: "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."[1] But after the Supreme Court's recent decision in *Salinas v. Texas*,[2] Justice Jackson's once-stalwart advice could be tantamount to malpractice if police question a suspect in a noncustodial context. Silence is no longer golden.

Under the Supreme Court's *Alice in Wonderland* approach to the Self-Incrimination Clause, witnesses cannot exercise their right to remain silent in a noncustodial context unless they speak up. In a 5-4 decision,[3] *Salinas* held that a witness, whom police subject to noncustodial questioning without giving the *Miranda* warning, cannot rely on the Fifth Amendment unless he expressly invokes it.[4] That is, if a witness remains silent in the face of such questioning, the prosecution can, at trial, introduce his silence as substantive evidence of his guilt. And further, the police do not have to inform the witness in advance of his right against self-incrimination.

While it did not receive widespread media attention, *Salinas* has profoundly changed the law of self-incrimination.[5] Imagine the myriad common scenarios in which *Salinas* might apply. For example, *Salinas* might apply when (1) a suspect receives a target letter from a prosecutor; (2) police or prosecutors contact a suspect to discuss a case; or (3) police question a suspect while conducting an investigation or serving a subpoena. Then think about the frightening prospect of a suspect who simply remains silent. At trial, the prosecution can argue that the defendant must be guilty because he remained silent instead of cooperating and speaking to police. Consider how this argument — that pretrial silence shows the defendant's guilt — muddles the jury charge that a nontestifying defendant's refusal to take the stand cannot be held against him.

Welcome to the Roberts Court and the shrinking Bill of Rights.

1. Background

In late 1992, someone shot and killed Juan and Hector Garza in their apartment. A witness heard shots fired early that morning and saw a man run from the Garzas' apartment building to "a dark-colored Camaro or Trans Am." Houston police officers found shotgun shell casings in the apartment but no other physical evidence. Their investigation revealed that the Garzas had hosted a party the night before, and officers began searching for suspects from that gathering.

BY NEAL DAVIS AND DICK DEGUERIN

Officers learned that Genovevo Salinas had attended the Garzas' party, and they began to consider him a suspect in the murders. Nearly three weeks later, two police officers went to the Salinas family home. The officers spoke with Salinas and his father, both of whom cooperated fully with the investigation. Salinas and his father signed a consent-to-search form. Salinas told the police that his father owned a shotgun, and his father produced the weapon upon request.

The officers asked Salinas to accompany them to the police station "to take photographs" and provide "elimination prints." He agreed.

Salinas and the officers arrived at the police station around 6:30 p.m. The two officers showed him into an "interview room" and began questioning him about his relationship with the people who had been at the party. Salinas was never handcuffed and was technically free to leave at any time during the interview. And so *Miranda* warnings were neither issued nor required. He had no counsel present.

After the officers asked whether any of the other attendees had "disagreements" with the Garzas, their inquiry abruptly pivoted to Salinas. The officers asked him whether his father's shotgun "would match the shells recovered at the scene of the murder." Salinas remained silent, refusing to respond to the question. According to Sergeant Elliott, one of the questioning officers, Salinas also "looked down at the floor, shuffled his feet" and tightened up.

Officers then asked Salinas about other topics, such as where he had been the morning of the shootings. Salinas answered that he had been at home that morning.

After the interview, which lasted almost an hour, the questioning officers decided to arrest Salinas on outstanding traffic fines. The next day, a ballistics report suggested that the shotgun owned by his father matched the casings found at the Garzas' apartment. Yet the district attorney found the evidence insufficient to charge Salinas with murder and ordered him released.

Several days later, police procured an additional statement from Damien Cuellar, someone else at the Garzas' party. Cuellar had already given two statements to the HPD, neither of which implicated Salinas. But Cuellar now said that he "felt compelled to come forward" after the ghosts of the Garza brothers visited him in a dream. In this third statement, Cuellar claimed that, over scrambled eggs, Salinas confessed to him that he (Salinas) had killed the Garzas.

Based on this alleged confession, the Harris County district attorney charged Salinas with murdering Juan Garza. Police did not locate Salinas until 2007, when they found him living in Harris County under a different name.

The state argued at trial that Salinas had attended the party at the Garzas' apartment, returned several hours later with his father's shotgun, and killed both men. "We don't have [a] motive," the prosecution conceded to the jury. But it argued in closing that the jury should convict Salinas based on the ballistics report, Cuellar's revised statement to the police, and Salinas's effort to elude arrest.

At trial, the state placed little emphasis on Salinas's prearrest silence. During his direct examination, Sergeant Elliott did not mention Salinas's silence in response to his question about the shotgun shells; he mentioned it only during the redirect, and then briefly. And at closing, the prosecutor referred to Salinas's silence during prearrest questioning only in passing.

Salinas did not testify. His attorney argued that others had motives to commit the murders and attacked the state's three pieces of evidence. The jury was unable to reach a verdict, and the judge declared a mistrial.

The state elected to retry Salinas. Before trial, defense counsel asked the court to make clear that the Self-Incrimination Clause barred the state from referencing Salinas's silence during his prearrest interview. The state disagreed, contending that Salinas's silence was admissible. The court deferred a final ruling until trial.

Once again, Salinas did not testify at trial. Yet unlike the first trial, the prosecution relied heavily on Salinas's silence during police questioning, characterizing it as a "very important piece of evidence." Over the defense's renewed objection, the judge permitted Sergeant Elliott to testify at length during direct examination about Salinas's silence when asked whether the casings found at the Garzas' apartment would match his father's shotgun. The officer emphasized that Salinas "did not answer" that question.

During closing arguments, the prosecutor highlighted this evidence, arguing that Salinas's silence demonstrated his guilt:

> The police officer testified that [Salinas] wouldn't answer that question. He didn't want to answer that. Probably the first time he realizes you can do that. What? You can compare those? 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.

The jury found Salinas guilty of murder. Under Texas law, the jury also had to determine a proper sentence. Even though murder is punishable by up to life in prison, and the prosecution maintained that Salinas had actually killed both Garza brothers, the jury sentenced him to only 20 years in jail.

2. Texas Appeals

In the court of appeals — which is the intermediate appeals court in Texas — Salinas argued that the prosecution's use of his silence as substantive evidence of his guilt violated the Fifth Amendment. The prosecution argued the Fifth Amendment did not apply because he was not in custody and so not under compulsion when police questioned him. The court of appeals agreed with the prosecution and affirmed the conviction:

> Absent a showing of government compulsion, the Fifth Amendment simply has nothing to say on the admissibility of prearrest, pre-*Miranda* silence in the state's case-in-chief. We therefore hold the Fifth Amendment has no applicability to prearrest, pre-*Miranda* silence used as substantive evidence in cases in which the defendant does not testify.
>
> * * *
>
> Salinas does not argue he was in custody during the interview, and [police] testified Salinas was never handcuffed and was free to leave. Salinas's interview is therefore properly categorized as a voluntary encounter with police.

While it did not receive widespread media attention, *Salinas* has profoundly changed the law of self-incrimination.

> *Miranda* warnings, therefore, were neither issued nor required. There was no government compulsion in the prearrest, pre-*Miranda* questioning in which Salinas voluntarily participated for almost an hour. Accordingly, the Fifth Amendment privilege against self-incrimination was not triggered and did not prevent the state from offering Salinas's failure to answer the question at issue.[6]

The Texas Court of Criminal Appeals, which is the highest criminal court in Texas, granted review. The court, in a 7-1 opinion, affirmed:

> The plain language of the Fifth Amendment protects a defendant from *compelled* self-incrimination. In prearrest, 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."[7]

3. Supreme Court

After the state appeal, Salinas filed a petition for certiorari, raising the following question: "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."[8] The 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."[9]

At oral argument, most questions focused on whether a witness must formally invoke the Fifth Amendment. Justice Kagan easily navigated the nuances of Fifth Amendment law. Her heated questions forced the state to concede that the Fifth Amendment would apply to prearrest silence if the witness expressly invoked his right to silence. This was a shift from the state's position in Texas courts that a defendant has absolutely no Fifth Amendment rights during noncustodial interrogation. (Justice Sotomayor, a former prosecutor, described this position as "radical" at oral argument.)

It was apparent at oral argument that the case would be closely decided. We needed Justice Kennedy. During oral argument, he implied that prior cases had provided clarity on when the Fifth Amendment applies and that we were asking the Court to push those decisions into "a gray area." Appearing in his 21st oral argument, Professor Jeffrey Fisher replied that Salinas was actually arguing for a bright-line rule — that the right to remain silent be guaranteed for any individual "in a police investigation setting." Did Justice Kennedy's concern mean that he would vote against Salinas?

On June 17, 2013, the Supreme Court decided *Salinas*. Justice Kennedy joined the conservatives. Salinas lost 5-4.

Justice Alito wrote the Court's plurality opinion, which Chief Justice Roberts and Justice Kennedy joined.[10] This opinion controls the case.

The plurality held that "before [a witness can] rely on the privilege against self-incrimination, he [is] required to invoke it."[11] Since Salinas remained silent, instead of expressly invoking his right against self-incrimination, the prosecution could use his silence as substantive evidence of his guilt. The Court therefore affirmed the judgment of the Texas Court of Criminal Appeals, albeit on a totally different ground.

In explaining its holding, the plurality opinion stated that "[t]o 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."[12]

The plurality argued that its precedents had carved out two exceptions to this rule that a witness must invoke the privilege — neither of which applied to Genovevo Salinas.

The first exception was established in *Griffin v. California*.[13] There, the Court held that a defendant does not have to take the stand to assert his right against self-incrimination. A criminal defendant has an absolute right to refuse to testify. And so neither a showing that his testimony would be self-incriminating nor a grant of immunity could force him to speak. Accordingly, forcing him to take the stand to invoke the Fifth would be pointless.

The second exception is that defendants do not have to invoke the privilege when governmental coercion forces them to abnegate the privilege. The exception applies, for example, when a defendant faces the "inherently compelling pressures" of an "*unwarned* custodial interrogation."[14]

The plurality held that Salinas did not fall into the first exception — the right to refuse to take the stand — because witnesses in precustodial interrogation do not have an unqualified right to invoke the Fifth.

And it held that Salinas did not fall into the second exception because he had voluntarily accompanied the police and was free to leave the station. Thus, governmental coercion did not prevent him from invoking the privilege.

The problem, the plurality reasoned, was that "whatever the most probable explanation" for Salinas's silence, it was ultimately "insolubly ambiguous" why he was invoking it. There are different reasons a witness, like Salinas, might keep silent: perhaps he is trying to think of a good lie, he is embarrassed, or he is protecting someone else. Since Salinas alone knew why he did not answer the officer's question, he had the "burden ... to make a timely assertion of the privilege."[15]

The plurality observed that it might be true that a witness "unschooled in the particulars of legal doctrine" could think silence sufficiently invokes the right against self-incrimination. But despite "popular misconceptions," the Fifth Amendment protects a defendant against being "compelled in any criminal case to be a witness against himself." It does not establish an "unqualified 'right to remain silent.'"[16]

The plurality stated, in dicta, that police "have done nothing wrong" and "accurately state the law" when they tell suspects their silence can be used against them. In *Minnesota v. Murphy*,[17] for example, nothing unconstitutional occurred when government officials told Marshall Murphy that he was required to speak truthfully to his parole officer. "So long as police do not deprive a witness of the ability to voluntarily invoke the privilege, there is no Fifth

Amendment violation," the Supreme Court said in *Salinas*.

4. The Impact of *Salinas*

Salinas profoundly affects how police investigate cases, prosecutors try cases, and defense attorneys advise suspects.[18]

a. Police

Salinas does not require police officers to give any warning — *Miranda* or otherwise — to witnesses they subject to noncustodial interrogation. Witnesses are expected to know they have a right against self-incrimination. And unless they expressly invoke this right, anything they say — or do not say — can be used against them.

Perhaps most disturbing is the plurality's approval, in dicta, of police "accurately stating the law" to witnesses. Under this theory, there is nothing improper about police telling a suspect who is not in custody, "Joey, I want to ask you some questions. And if you don't answer my questions, then at your trial the prosecutor will be able to stand in front of the jury and tell them an innocent man would answer my questions. So I recommend you answer my questions." All but an expert in Fifth Amendment law would believe he had to answer the officer's questions.

And this is just part of the reason the plurality opinion significantly undermines *Miranda*. Police are now encouraged to "question first, arrest later." They can conduct noncustodial questioning of a suspect — even when probable cause exists to arrest him — knowing that he will rarely assert the privilege and that anything else he does, whether he speaks or remains silent, can be used against him.

Under *Salinas*, police can wield various investigative techniques against suspects. They can send a letter to the suspect and ask him to come in for questioning. They can call the suspect to ask him questions. Or they can ask the suspect questions ancillary to an investigation or while serving a subpoena. In any of these circumstances, or an array of others, the suspect's silence or his failure to respond can be held against him.

b. Prosecutors

The plurality opinion allows prosecutors to argue to jurors that the defendant's noncustodial silence can be held against him. After all, prosecutors will argue, an innocent person would talk.

This argument can have a devastating collateral effect. Jurors may well experience cognitive dissonance trying to reconcile how a defendant's pretrial silence is evidence of his guilt but his refusal to testify at trial is not. Jurors will be inclined to interpret a defendant's noncustodial silence as evidence of guilt despite all the innocent reasons a suspect might remain silent. As a result, defendants will feel extra pressure to take the stand to offer an explanation for their silence.

c. Defense Attorneys

It is no longer sufficient for defense attorneys to tell suspects to keep their mouths shut or ignore messages and letters from the police. The defense must tell suspects to expressly invoke their right against self-incrimination if governmental agents try to question them. Counsel should explain to the suspect that, even when the police or a prosecutor tells the suspect his silence can be used against him, he can — and should — invoke his right against self-incrimination. Some role-playing, with the lawyer playing an officer, would help condition the suspect to feel comfortable expressly invoking the Fifth Amendment.

Since an ounce of prevention is worth a pound of cure, the lawyer should give the suspect a letter explaining that he has been advised of his constitutional rights, including his right against self-incrimination, and he wishes to assert them. The letter should be on the lawyer's letterhead, addressed to government agents, and ask them to allow the suspect to contact his lawyer. The suspect should sign the letter. See the example below.

5. *Terry* Stops — The Gray Area

It is unclear whether a suspect's silence during a *Terry* stop sufficiently invokes the right against self-incrimination. The Court emphasized that *Salinas* applies to noncustodial interrogation. *Berghuis v. Thompkins*,[19] on the other hand, applies to an arrested suspect and suggests a suspect's silence is sufficient to assert his *Miranda* rights. In *Berghuis*, the Court addressed whether Van Thompkins's silence was sufficient to end police questioning and preclude the admissibility of his later statements. The Court held that a suspect who has received and understood the *Miranda* warnings and has not invoked his *Miranda* rights waives the right to remain silent if he makes an uncoerced statement to the police. The Court pointed out that "[i]f Thompkins wanted to remain silent, *he could have said nothing in response to [police] questions*, or he could have unambiguously invoked his *Miranda* rights and ended the interrogation."[20]

It is arguable that, unlike what happened in *Salinas*, a *Terry* stop involves a detention and that there is enough inherent compulsion in this detention that silence can sufficiently invoke the

To whom it may concern:

I represent Joey Client. I have thoroughly explained to him his constitutional and statutory rights, including his right against self-incrimination. As his signature evidences below, he does not wish to waive or forgo any of these rights, meaning he does not consent to any search or seizure, or to answer any questions. He desires to call this office immediately upon your attempting to interrogate him or to search or seize him or his property.

I know you will respect his constitutional and statutory rights and allow him to contact this office immediately. I am available anytime. Please notify any other governmental agents or agencies involved in this investigation of this letter and its contents. I appreciate your attention.

Sincerely,

_____

Danny Lawyer

I have read this letter, understand it, and invoke all of my constitutional and statutory rights. In particular, I invoke my right against self-incrimination and do not consent to any search or seizure. I request that I immediately be allowed to call my attorney if police try to interrogate me or try to search or seize my property or me.

_____

Joey Client

right against self-incrimination. Further, *Salinas* is merely a three-justice plurality opinion, so lawyers can ask courts to read it narrowly in the *Terry* context.

6. Custody

Miranda warnings must be given when the police subject a suspect to custodial interrogation.[21] Silence in response to post-*Miranda* questioning is inadmissible under *Doyle v. Ohio*.[22] *Miranda* defined *custodial interrogation* as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[23] *Miranda* did not further define *custody*.

In 1983, the Supreme Court defined *custody* as "a formal arrest or restraint of freedom of movement of the degree associated with a formal arrest."[24] This — the equating of custody with *de facto* and *de jure* formal arrest — narrowed *Miranda*'s definition of a *custodial interrogation*.

In 2012, the Supreme Court set forth a two-prong test for custody.[25] This is the first question:

> [W]hether, in light of "the objective circumstances of the interrogation," a "reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." And in order to determine how a suspect would have "gauge[d]" his "freedom of movement," courts must examine "all of the circumstances surrounding the interrogation." Relevant factors include the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning.[26]

If a reasonable person would not feel free to end questioning and leave, then this is the second question:

> [W]hether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*. Our cases make clear … that the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody.[27]

And when we get to the bottom we go back to the top: Are these "same inherently coercive pressures" the same as "a formal arrest or restraint of freedom of movement of the degree associated with a formal arrest"? Or are they the same as being "taken into custody or otherwise deprived of … freedom of action in any significant way"?

Regardless, here is what is known: a suspect is not in custody when he voluntarily goes alone to a police station to answer questions.[28] And a suspect is not in custody when he voluntarily accompanies police to the station house for questioning, as Salinas did.[29]

During a traffic stop, few would feel comfortable speeding away while the officer was writing a ticket. And yet a traffic stop is "temporary and relatively nonthreatening," without the same inherently coercive character as a station house interrogation.[30] The traffic stop, therefore, would not — categorically speaking — amount to custody under *Miranda*, even though it undoubtedly restrains the suspect's movement.[31]

While the Supreme Court's definition of *custody* has been far from precise, or even uniform, it would be futile to argue that the definition should be extended to cover *all* traffic stops. But one should not assume that custody only exists when the police are questioning a handcuffed suspect at the station house. *Custody*, as courts have defined it, can arise during a traffic stop[32] or when a suspect is not handcuffed[33] or when a defendant is questioned by police but later released[34] — as long as under the totality of the circumstances there are inherently coercive pressures.

7. Proper Invocation

The amicus brief submitted by the United States, which constitutes the official position of the Department of Justice until it says otherwise, approvingly cites cases in which the suspect sufficiently invoked the right against self-incrimination. Adequate invocation includes the following: "talk to my lawyer,"[35] a statement that the suspect would not confess and that police should talk to his lawyer,[36] a refusal "to make any statement" to the police,[37] and an express declination to be questioned in the first place.

But, to be safe, defense lawyers should advise suspects to expressly invoke the Fifth Amendment right against self-incrimination, particularly given the rationale of the *Salinas* plurality.

8. Excluding Silence on Evidentiary Grounds

A suspect's silence in response to noncustodial police questioning, while constitutionally admissible, can still be excluded under the Rules of Evidence. After all, the Supreme Court in *Salinas* described silence, as "insolubly ambiguous." How relevant can "insolubly ambiguous" testimony be?

Indeed, state courts have generally found noncustodial silence inadmissible on evidentiary grounds because silence is too ambiguous to prove guilt, and its probative value would be outweighed by the prejudice to the defendant.[38] In *Ex parte Marek*, for example, the Alabama Supreme Court abolished the evidentiary "tacit admission rule" in criminal cases because the "underlying premise, that an innocent person *always* objects when confronted with a baseless accusation, is inappropriately simple, because it does not account for the manifold motivations that an accused may have when, confronted with an accusation, he chooses to remain silent."[39] The *Marek* court explained: "Confronted with an accusation of a crime, the accused might well remain silent because he is angry, or frightened, or because he thinks he has

Is defendant's silence admissible under the Fifth Amendment?

	As Substantive Evidence of Guilt	To Impeach the Defendant
Prearrest, Pre-*Miranda* Express Invocation in Response to Police Questioning	Open question, but almost surely not. *See United States v. Okatan*, 728 F.3d 111 (2d Cir. 2013).	Undecided
Prearrest, Pre-*Miranda* Silence in Response to Police Questioning	Yes. *Salinas v. Texas*	Yes. *See Jenkins v. Anderson*, 477 U.S. 231 (1980)
Prearrest, Pre-*Miranda* silence not in response to police questioning	Undecided, but almost surely yes, under *Salinas*.	Yes. *Jenkins*
Prearrest, Post-*Miranda* silence in response to police questioning	No. *Doyle*[1]	No. *Doyle*
Prearrest, Post-*Miranda* silence not in response to police questioning	No. *Doyle*	No. *Doyle*
Postarrest, Pre-*Miranda* silence in response to police "statements"	*Not resolved. United States v. Velarde-Gomez, 104 F.3d 377 (D.C. Cir. 1997) (holding defendant's postarrest, pre-Miranda silence — in response to special agent telling defendant that marijuana was found in car — was inadmissible); contra United States v. Frazier*, 408 F.3d 1102 (8th Cir. 2005) (holding defendant's postarrest, pre-*Miranda* silence and stoicism — in response to officer telling defendant that he was being arrested for suspicion of narcotics — was admissible)	Yes. *Greer v. Miller*, 483 U.S. 756 (1987) ("'absen[t] the sort of affirmative assurances embodied in the *Miranda* warnings,' the Constitution does not prohibit the use of a defendant's postarrest silence to impeach him at trial"); *Fletcher v. Weir*, 455 U.S. 603 (1982)
Postarrest, Pre-*Miranda* silence not in response to police questioning	Not resolved. *See United States v. Whitehead*, 200 F.3d 634 (9th Cir. 2000) (No); *contra United States v. Frazier*, 408 F.3d 1101 (8th Cir. 2005) (Yes).	Yes.[2] *Greer* and *Fletcher*[3]
Postarrest, Post-*Miranda* silence in response to police questioning	No. *Miranda v. Arizona*, 384 U.S. 436 (1966)	No. *Doyle*[4]
Postarrest, Post-*Miranda* silence not in response to police questioning	No. *Doyle*	No. *Brecht v. Abrahamson*, 507 U.S. 619 (1993)[5]

1. *Doyle* here refers to *Doyle v. Ohio*, 426 U.S. 610 (1976), and its progeny. *Doyle* creates a pretty firm bar against the government's use of a suspect's post-*Miranda* silence.

2. State law may provide greater protection. For example, in *Ex parte Heidelberg*, 2006 WL 3306880 (Tex. Crim. App. 2006), the defendant was charged and arrested on a warrant for aggravated sexual assault. He was never questioned when arrested or given *Miranda* warnings. At trial, he testified about why the complainant falsely accused him. The prosecution cross-examined him about his failure to call the police after his arrest to explain the complainant's motives for falsely accusing him. The prosecution argued in summation the defendant had many months to call the detective and tell him the defendant's side of the story, yet failed to do so, which cast doubt on the credibility of his testimony. The Texas Court of Criminal Appeals reversed under the Texas Constitution, holding that "when the defendant is arrested, he has the right to remain silent and the right not to have that silence used against him, even for impeachment purposes, regardless of when he is later advised of those rights. This state right inheres, whether or not the arresting authorities have given the defendant his warnings under *Miranda v. Arizona*. [T]he fact of such silence may not be shown by the state, *either in testimony or in argument* [,] as a guilty circumstance."

3. In *Fletcher v. Weir*, 455 U.S. 603, 605 (1982), the defendant testified at his murder trial that he acted in self-defense when he stabbed the decedent. The prosecution cross-examined Eric Weir about his failure to either advance his self-defense claim to the arresting officers or disclose the location of the knife he had used to stab the decedent. In its holding in *Weir*, the Supreme Court stated: "The significant difference between the present case and *Doyle* is that the record does not indicate that [the defendant in the present case] received any *Miranda* warnings during the period in which he remained silent immediately after his arrest. ... In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a state to permit cross-examination as to postarrest silence when a defendant chooses to take the stand. A state is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony."

4. A narrow exception applies to the *Doyle* cases. If a defendant gives an exculpatory account of what happens — and then contends that he told the police this very same story after he was brought into custody — the government may then use the defendant's silence to impeach him. That is, the government may use the defendant's silence to show that the defendant did not give his exculpatory account when he was arrested. *See Doyle*; *Earnest v. Dorsey*, 87 F.3d 1123 (10th Cir. 1996).

5. In *Brecht*, the defendant was charged with murder. At trial, he admitted to shooting the decedent but claimed it was accidental. The prosecutor cross-examined Todd Brecht about his silence, before he was given his *Miranda* warnings, at an arraignment. The prosecutor also cross-examined Brecht about failing to mention the shooting (after being Mirandized) to anyone at any time before trial. The Supreme Court held the pre-*Miranda* silence, as opposed to post-*Miranda* silence, was admissible to impeach under *Doyle*: "The first time petitioner claimed that the shooting was an accident was when he took the stand at trial. It was entirely proper — and probative — for the state to impeach his testimony by pointing out that petitioner had failed to tell anyone before the time he received his *Miranda* warnings at his arraignment about the shooting being an accident. Indeed, if the shooting was an accident, petitioner had every reason — including to clear his name and preserve evidence supporting his version of the events — to offer his account immediately following the shooting. On the other hand, the state's references to petitioner's silence after that point in time, or more generally to petitioner's failure to come forward with his version of events at any time before trial, crossed the *Doyle* line. For it is conceivable that, once petitioner had been given his *Miranda* warnings, he decided to stand on his right to remain silent because he believed his silence would not be used against him at trial." Some courts, such as the Harris County, Texas, criminal courts, give *Miranda*-type warnings during the initial appearance where probable cause is heard. If that had occurred in *Brecht*, then *Doyle* would have applied.

the right to remain silent that the mass media have so well publicized."[40]

9. Explaining Noncustodial Silence

If a defendant's noncustodial silence will be admitted at trial, defense attorneys should raise the issue at voir dire, just as they raise the silence of a defendant who will not testify. Defense attorneys should ask the venire: "Why would an innocent suspect, who is free to leave, remain silent when police question him?" Then counsel should explain why he might: anger, fear, intimidation, embarrassment, the suspect thinks he has the right to remain silent and should not talk, he wants to speak with an attorney first, he has language problems, he does not understand the question, he does not know the answer to the question, he might get someone else in trouble, and so on. Undoubtedly, some members of the venire will give the defense attorney the answer the defense wants. But the defense can then identify other members of the venire who agree or disagree, and why. This may lead to a valid challenge for cause depending on the jurisdiction.

In one Texas case, the lawyer — before *Salinas* was decided — had advised his client not to speak to the police. When police called the client and tried to interview him about an alleged assault, he refused to say anything — but he never expressly invoked his right against self-incrimination.

The case went to trial after *Salinas*. The prosecutor sought to introduce the client's noncustodial silence as substantive evidence of his guilt. At the pretrial conference, the trial court was inclined to admit this silence.

The lawyer decided he needed to address the issue in jury selection. He asked the venire why someone under investigation would hire a lawyer, whether it is a good idea to follow a lawyer's advice, and why a lawyer would advise an innocent suspect not to say anything to the police. The silence was admitted and, after a week-long trial, the jury acquitted in less than an hour.

10. Post-*Salinas* Cases

In the wake of *Salinas*, how will the courts answer the question that was originally before the Court?[41] Time will tell, but it appears — even after *Salinas* — that the government cannot use an invocation to prove guilt.[42]

The Second Circuit, in *United States v. Okatan*,[43] supports this reading of *Salinas*. There, Tayfun Okatan, the defendant — during prearrest questioning — told the interrogating agent that he wanted a lawyer.[44] The prosecution then used Okatan's request to prove his guilt during its case in chief.[45]

The Second Circuit held that when Okatan requested a lawyer he expressly invoked his Fifth Amendment rights,[46] and that it was a violation of the self-incrimination clause for the government to use his invocation to prove his guilt.[47]

The Second Circuit distinguished *Salinas* on the basis that Salinas remained silent — that is, he did not expressly invoke his Fifth Amendment rights.[48] Because Okatan did invoke them, the logic of *Griffin* — that the government cannot punish a defendant for exercising a constitutional right — applied.[49] "The Fifth Amendment guaranteed [the defendant] a right to react to the question without incriminating himself, and he successfully invoked that right. … [A]llowing a jury to infer guilt from a prearrest invocation … [would] 'ignore[] the teaching that the protection of the Fifth Amendment is not limited to those in custody. …'"[50]

11. Snatching (Some) Victory From the Jaws of Defeat

How could *Salinas* have been worse for the defense and civil liberties? It would have been worse if a majority of the Supreme Court had agreed with the reasoning of the Texas Court of Criminal Appeals, the Harris County prosecutors, and Justices Thomas and Scalia. They all contended that the Fifth Amendment does not apply to questioning in a noncustodial context — regardless of whether a suspect expressly asserts his right against self-incrimination — because a prosecutor's use of the suspect's silence at trial does not amount to compulsion.[51] This would mean that anything a suspect said could be admitted as evidence of his guilt, that his silence could be admitted as evidence of his guilt, and that his express invocation of the Fifth Amendment could be admitted as evidence of his guilt.

Salinas thinned, but did not destroy, the right against self-incrimination in noncustodial interrogations. While it affirmed the judgment of the Texas Court of Criminal Appeals, the Court did not affirm Texas's radical take on the Fifth Amendment. The ball is now in defense counsel's court. It is up to each defense lawyer to educate other defense lawyers and clients about *Salinas*. Go forth and spread the word!

The authors did not represent Genovevo Salinas at trial. They handled his direct state appeal.

Notes

1. *Watts v. Indiana*, 338 U.S. 49, 59 (1949).

2. *Salinas v. Texas*, 570 U.S. __, 133 S. Ct. 2174 (2013).

3. Justice Alito wrote the controlling opinion, joined by Chief Justice Roberts and Justice Kennedy. Justice Thomas concurred in the judgment and was joined by Justice Scalia. Justices Breyer, Ginsburg, Sotomayor, and Kagan dissented.

4. It has long been settled that if police officers give the *Miranda* warning to a witness after he is arrested, the Due Process Clause forbids the prosecution from using any silence against him at trial, even for impeachment. *See Doyle v. Ohio*, 426 U.S. 610 (1976). Moreover, even when the defendant has waived his *Miranda* rights and given several statements, but is then silent in response to police questions, a prosecutor under *Doyle* cannot use this silence: "If a suspect does speak, he has not forever waived his right to be silent. *Miranda* allows the suspect to reassert his right to remain silent at any time during the custodial interrogation. Thus, a suspect may speak to the agents, reassert his right to remain silent or refuse to answer certain questions, and still be confident that *Doyle* will prevent the prosecution from using his silence against him." *United States v. Scott*, 47 F.3d 904 (7th Cir. 1995). While police officers, of course, have no duty to give the *Miranda* warning to a suspect precustody, they sometimes do. Given the rationale of *Doyle* — that "[s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights" and "[t]hus, every postarrest silence is insolubly ambiguous" — the Due Process Clause should equally apply to noncustodial silence in response to police questioning following *Miranda* warnings.

5. Gabriel Grand described *Salinas* as "arguably the most consequential Supreme Court ruling of the term." http://www.policymic.com/articles/52453/salinas-v-texas-the-biggest-change-to-miranda-rights-that-slipped-under-everyone-s-radar. Orin Kerr at the Volokh Conspiracy described *Salinas* as a "sleeper" case and wrote: "This morning the Supreme Court decided a very important criminal procedure case, *Salinas v. Texas*, by a 5-4 vote. I'm guessing that you haven't heard of *Salinas*. And it probably won't get much attention in the press. But it should: *Salinas* is likely to have a significant impact on police practices." http://www.volokh.com/2013/06/17/do-you-have-a-right-to-remain-silent-thoughts-on-the-sleeper-criminal-procedure-case-of-the-term-salinas-v-texas/. University of Virginia Law Professor Brandon L. Garrett wrote for *Slate*: "On

Monday, in a case called *Salinas v. Texas* that hasn't gotten the attention it deserves, the Supreme Court held that you remain silent at your peril." http://www.slate.com/articles/news_and_politics/jurisprudence/2013/06/salinas_v_texas_right_to_remain_silent_supreme_court_right_to_remain_silent.html.

6. *Salinas v. State*, 368 S.W.2d 550 (Tex. App.— Houston [14th Dist.] 2011, pet. granted).

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

8. Stanford Law Professor Jeffrey Fisher volunteered to assist in the appeal to the U.S. Supreme Court. Three of Professor Fisher's students in the Stanford Supreme Court Clinic — Ryan McGinley-Stemple, Mark Middaugh, and Alisa Claire Philo — worked full time for several months helping the team representing Genovevo Salinas. Stanford Law Professor Pamela Karlan and Lecturer Kevin Russell also worked on the case. Their help was invaluable. The defense could not have asked for a better team.

9. *Salinas v. Texas*, 570 U.S. __, 133 S. Ct. 2174 (2013).

10. Justices Thomas, joined by Justice Scalia, concurred in the judgment. They contended that the Fifth Amendment does not apply to noncustodial questioning, regardless of whether the witness expressly invokes his right against self-incrimination. This was consistent with the reasoning of the court of criminal appeals and the argument of the state in Texas courts.

11. *Salinas*, 133 S. Ct. at 2184.

12. *Id.* at 2179 (quoting *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984)).

13. 380 U.S. 609 (1965).

14. *Salinas*, 133 S. Ct. at 2180 (emphasis added).

15. *Id.* at 2182.

16. *Id.* at 2177.

17. 465 U.S. 427 (1984).

18. The United States amicus brief supporting Texas states: "The Court's resolution of that issue will have significant implications for the conduct of federal investigations and trials."

19. 560 U.S. ___, 130 S. Ct. 2250 (2010).

20. *Id.* at 2263 (emphasis added).

21. *Miranda v.* Arizona, 384 U.S. 436, 444-45 (1966).

22. 426 U.S. 610 (1976).

23. *Id.*

24. *California v. Beheler*, 463 U.S. 1121, 1125 (1983).

25. *Howes v. Fields*, 565 U.S. ___, 132 S. Ct. 1181 (2012) (explaining that *custody*, in the *Miranda* context, "is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion").

26. *Id.* at 1189 (citations omitted).

27. *Id.*

28. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977).

29. *See Beheler*, 463 U.S. at 1125.

30. *Maryland v. Shatzer*, 559 U.S. 98, 112-13 (2010).

31. *See id.*

32. *See, e.g., White v. United States*, 68 A.3d 271, 282 (D.C. Cir. 2013) (holding the defendant was in custody where police immediately pulled him out of the car, handcuffed him, and took him to the rear of the car; they never told him why they pulled him over, nor asked for his license and registration); *see also Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) ("If a motorist who[m police have] detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*.").

33. *See, e.g., United States v. Slaight*, 620 F.3d 816, 820 (7th Cir. 2010) (A small cavalry of police charged into the defendant's house, guns drawn, and seized his computer. They requested that he accompany them to the police station for questioning, which the defendant did. The police never manacled him, but the court held that the defendant was in custody for *Miranda* purposes.); *United States v. Craighead*, 539 F.3d 1073, 1086 (9th Cir. 2008) ("Craighead was not handcuffed or physically restrained … [but] Craighead's freedom of action was restrained in a way that increased the likelihood that [he would] succumb to police pressure to incriminate himself.").

34. *See, e.g., United States v. Colonna*, 511 F.3d 431, 434-36 (4th Cir. 2007) (holding that defendant was in custody for *Miranda* purposes even though the FBI released him after questioning and waited 22 months to arrest him); *United States v. Mittel-Carey*, 493 F.3d 36, 39 (1st Cir. 2007) (finding that the defendant was in custody where the agents questioned him at his home and then left without placing him under arrest).

35. *Combs v. Coyle*, 205 F.3d 269, 279 (6th Cir. 2000), *cert. denied*, 531 U.S. 1035 (2000).

36. *Coppola v. Powell*, 878 F.2d 1562 (1st Cir. 1989), *cert. denied* 493 U.S. 969 (1989).

37. *Savory v. Lane*, 832 F.2d 1011, 1015 (7th Cir. 1987).

38. *See, e.g., People v. Welsh*, 80 P.3d 296 (Colo. 2003); *Landers v. State*, 508 S.E.2d 637 (Ga. 1998); *Ex parte Marek*, 556 So. 2d 375 (Ala. 1989); *People v. DeGeorge*, 541 N.E.2d 11 (N.Y. 1989).

39. *Marek*, 556 So. 2d at 381.

40. *Id. See also* Meaghan Elizabeth Ryan, *Do You Have the Right to Remain Silent?: The Substantive Use of Pre-Miranda Silence*, 58 ALA. L. REV. 903 (2007).

41. The Supreme Court had indicated that the police do not have to stop questioning when a defendant invokes the Fifth.

42. By refusing to join Justice Thomas's opinion, the *Salinas* plurality implicitly rejected the notion that the government can use a defendant's (noncustodial) express invocation of the privilege to prove his guilt.

43. 728 F.3d 111 (2d Cir. 2013).

44. *Id.* at 114.

45. *Id.* at 115.

46. *Id.* at 118.

47. *Id.* at 120.

48. *Id.* at 119.

49. *Id.*

50. *Id.* (quoting *Coppola v. Powell*, 878 F.2d 1562, 1566 (1st Cir. 1989).

51. At oral argument, Harris County crawfished on its position under intense questioning from Justice Kagan.

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