

## US SUPREME COURT

# SUSPECT MUST SPEAK TO INVOKE FIFTH AMENDMENT PROTECTION

*Salinas v. Texas*

The United States Supreme Court concluded in *Salinas v. Texas*,<sup>1</sup> that a suspect or witness must expressly invoke his privilege against self-incrimination during a noncustodial interview to avail him of the protections provided therein. The Court reiterated that cases have continually held that a witness may not invoke the privilege by simply remaining silent in the face of questioning from a government official. Rather, the witness must expressly state his intention to invoke his Fifth Amendment protection against self-incrimination.

In December 1992, two brothers were killed by a shotgun in their Houston home. An investigation into their death led police officers to the home of Genovevo Salinas, who had been a guest at a party the victims hosted the previous night. The police had recovered six fired shotgun shells at the scene of the shooting. When officers visited Salinas at his home, he agreed to hand over a shotgun for ballistic testing and voluntarily accompany the officers to the station to answer questions. All parties agree that at the time of the questioning, Mr. Salinas was not in custody, his presence at the station was completely voluntary, and he was free to leave at any time. Therefore, Salinas had not received *Miranda* warnings.

The officers interviewed Salinas for approximately one hour, during which time he answered the officers' questions. When asked whether his shotgun "would match the shells recovered at the scene of the murder," Salinas declined to answer. Salinas "look[ed] down at floor, shuffled his feet, bit his bottom lip, clenched his hands in his lap, [and] began to tighten up." After Salinas remained silent for a few moments, the officer proceeded to ask additional questions, which Salinas responded to.

At the conclusion of the interview, the police officer arrested Salinas on outstanding traffic warrants, but released him after prosecutors determined there was insufficient evidence to charge him with the murders. A few days later, officers obtained a statement from a man who stated he heard Salinas confess to murdering the two brothers. Based on the strength of this additional evidence, prosecutors decided to charge Salinas with the murders. By that time, Salinas had disappeared and was not found until 2007, when police discovered him living in the Houston area under an assumed name.

Salinas did not testify at trial. Despite his objection, prosecutors used his reaction to the police questioning during the 1993 interview as evidence of his guilt. The jury returned a guilty verdict and Salinas received a 20-year sentence. Salinas appealed to the Texas Court of Appeals arguing that the prosecutors' use of his silence during the interview as part of their case in chief violated his Fifth Amendment right against self-incriminating. The Court of Appeals rejected this argument and found that Salinas' silence during his

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<sup>1</sup> 568 U.S. \_\_\_\_ (2013)

pre-arrest, pre-Miranda interview was not “compelled” within the meaning of the Fifth Amendment. The Texas Court of Criminal Appeals affirmed the decision on the same grounds.

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.” The Court stated that because Salinas did not actually invoke his privilege during the interview, it was unnecessary to reach that question.

The Court confirmed that a witness who “desires the protection of the privilege [against self-incrimination] . . . must claim it at the time he relies on it.” The Court has previously recognized two exceptions to the requirement that the witness invoke the privilege: (1) a criminal defendant need not take the stand and assert the privilege at his own trial; and (2) a witness’ failure to invoke the privilege must be excused where governmental coercion make his forfeiture of the privilege involuntary. The Court found that neither exception applied here. The Court focused primarily on the fact that Salinas’ interview with the police was entirely voluntary and that he was free to leave at any time during the interview. The Court found that Salinas was not deprived of the ability to invoke his Fifth Amendment privilege. Furthermore, there was no allegation that Salinas’ failure to invoke 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 ground. Because he failed to do so, the prosecution’s use of the noncustodial silence did not violate the Fifth Amendment.”

Salinas urged the court to adopt a third exception to the requirement to invoke the privilege, for cases in which the defendant remains silent and declines to give an answer that officials suspect would be incriminating. The Court declined to adopt such an exception because it would result in needless burdens on the Government. The Court also reiterated that its cases establish “that a defendant normally does not invoke the privilege by remaining silent.” Additionally, the requirement to expressly invoke the privilege applies even when an officer suspects that the suspects answer to his question would be incriminating.

The Court rejected Salinas’ argument that the requirement to invoke the privilege does not apply where a witness remains silent in the face of official suspicions. The Court found that such an exception to the requirement “would do little to protect those genuinely relying on the Fifth Amendment privilege while placing a needless new burden on society’s interest in the admission of evidence that is probative of a defendant’s guilt.”

The Court also rejected Salinas’ argument that applying the requirement to expressly invoke the privilege where a witness is silent during a noncustodial interview would prove “unworkable in practice.” The claim that the approach would “unleash complicated and persistent litigation over what a suspect must say to invoke the privilege” was found to be without merit. The Court further rejected Salinas’ claim that the requirement to expressly invoke the privilege would encourage officers to “unfairly trick suspects into cooperating.” The Court concluded that before Salinas could rely on the privilege against self-incrimination, he was required to invoke it. Since he failed to do so, the Court affirmed the judgment of the Texas Court of Criminal Appeals.

It is important to recognize that Salinas was not in custody at the time he reacted to the questioning by law enforcement regarding his shotgun and the casings found at the scene of the murder. It is also clear that Salinas voluntarily went to the police station and that he was free to leave at any time. As such, he was not protected by any 5<sup>th</sup> Amendment protection. Officers and Investigators should recognize that if the suspect is not in custody and is being questioned there is no 5<sup>th</sup> Amendment protection unless the suspect raises their 5<sup>th</sup> Amendment privilege. Officers need to ensure that they document all responses; lack of responses, and body language which occurs during questioning for use by the prosecutor to show evidence of guilt. To read the Court's full opinion, [click here](#)

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