

PUBLICATION

Miranda Eviscerated: How Your Silence During a Government Interview Could Be Used Against You [Ober|Kaler]

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Can your silence be used against you in a criminal proceeding? Most of us would assume that it cannot because of the Fifth Amendment to the U.S. Constitution and case law interpreting it.¹ A recent U.S. Supreme Court case, *Salinas v. Texas*, raises questions about whether this long-standing belief is still true.

Imagine the following scenario:

You are a nurse who has just ended a grueling twelve-hour shift at your hospital. It's 7:00 p.m., and you've just arrived home, exhausted. You need to feed your children and get them ready for bed. At 8:30 p.m., when you are finally able to eat your own dinner, you hear a knock on your door. You answer the door and see a law enforcement investigator. He introduces himself and tells you that he would like to interview you now about your work at the hospital. You don't want to seem rude, so you agree to speak him. At first, his questions are easy to answer and seemingly benign. The conversation appears friendly. You believe him when he tells you that he's just gathering background information. Then, about 20 minutes into the interview, his tone changes and he asks you direct questions about your care of specific patients, including one who died. You become nervous, so you stop talking. You do not tell him that you don't want to talk to him anymore, you just remain silent.

Do you think that your decision to remain silent cannot be used against you in a later criminal prosecution? If your answer to that question is "yes," you could be wrong.

In *Salinas v. Texas*, Houston police officers were investigating the murders of brothers shot in their own home. Recovered from the scene of the crime were six shotgun shell casings. No one witnessed the murder, but a neighbor heard gunshots at the home. The neighbor also saw an unidentified man run out of the house and flee the scene in a dark-colored car. Ultimately, the police's investigation led to Genovevo Salinas' home. The police asked him to give them his weapon for ballistics testing, and he agreed. He also agreed to be questioned by the police at the station. The police did not take Salinas into custody (arrest him), nor did they read him his *Miranda* rights after he arrived at the station because the interaction was considered "non-custodial." In other words, it was a voluntary interaction; he was free to leave the station at any time. The police questioned Salinas for almost an hour. He answered most of their questions; however, when the police asked him if his shotgun would match the six shell casings recovered from the crime scene, Salinas stopped talking. According to the officer who testified at his trial, Salinas began to act nervously; i.e., he shuffled his feet, bit his lip, and clenched his hands in his lap. The police ceased questioning Salinas and they all sat in silence for a few minutes. When the officers resumed their questioning, Salinas answered their questions. After the government obtained additional evidence connecting Salinas to the crime, he was arrested and tried for murder. During closing argument at the murder trial, the prosecutor argued that Salinas' silence in the face of questioning about the shotgun was evidence of his "consciousness of guilt," i.e., that an innocent person would have said something to the police officer like "What are you talking about? I didn't do that. I wasn't there."²

On appeal, Salinas asserted that the prosecution's argument about his silence violated his Fifth Amendment privilege against compulsory self-incrimination. The Supreme Court had granted certiorari in *Salinas* to resolve a split in the lower courts regarding this question. Instead of resolving this question, however, the Court

decided in a plurality opinion that Salinas' Fifth Amendment claim failed because he did not expressly invoke his Fifth Amendment privilege against self-incrimination in response to the officer's question. The Court held that well-settled case law provides that the Fifth Amendment privilege "is not self-executing," and that a person cannot "simply stand mute," but, rather, must "assert the privilege in order to benefit from it."³ The Court opined that:

someone might decline to answer a police officer's question in reliance on his constitutional privilege. But he might also do so because he is trying to think of a good lie, because he is embarrassed, or because he is protecting someone else. Not every such possible explanation for silence is probation of guilt, but neither is every possible explanation protected by the Fifth Amendment.⁴

Thus, it appears that a logical interpretation of *Salinas* could be that an individual: (a) who volunteers to be interviewed by law enforcement; (b) in a non-custodial setting; (c) in a criminal investigation; (d) who answers some questions and then falls silent; (e) must use some talismanic words, such as "I exercise my Fifth Amendment right to remain silent," or "Fifth Amendment," or "I wish to not incriminate myself," or "I want to be silent," in order for the individual's silence to be interpreted as true silence worthy of protection under the Fifth Amendment.

The *Salinas* decision is particularly troubling because of all of the questions that it does not answer:

- How does a layperson know whether he/she is being investigated for a crime?
- What if the investigator lies and says to the interviewee that he/she is not the subject or target of a criminal investigation?
- Is *Salinas* restricted to scenarios where an individual is under criminal investigation? Or does it apply to **any** voluntary, non-custodial interview of a witness by law enforcement?

Because the Supreme Court's decision does not answer these and other questions, it is quite possible that *Salinas* could be read to apply to our hypothetical nurse. Thus, it is highly possible that if the nurse agrees to speak with the investigator, but later stops talking and does not say "Fifth Amendment" or use the right words—whatever those may be—to communicate that she wants to stop talking, then the government could likely argue at a later trial that her silence in the face of accusatory questioning is evidence of her guilt.

In light of *Salinas v. Texas*, what should corporate health care providers do? What advice can they give their employees on how to handle surprise visits from government investigators seeking to interview them about their work, which could ultimately impact the liability of the corporation?

Before a government investigator's surprise visit, health care providers should consider distributing a carefully worded advisory memorandum to employees regarding potential contacts with the government. But how specific does the employer need to be in this memorandum? At a minimum, the memorandum should clearly and accurately explain the employees' rights. Some suggested language includes advising an employee that:

- He has the right to speak with a government investigator, as well as the right to refuse to be interviewed.
- He has the right to have counsel present during an interview, to confer with counsel in advance of an interview, and to terminate an interview at anytime.
- If he chooses to speak with an investigator, he should tell the truth.
- Any statements made to the investigator could have legal consequences.

Now, because of *Salinas*, should the memorandum also tell the employee that if he agrees to answer questions, but later changes his mind and wishes to remain silent, any statements that he does **not** make

could have legal consequences? Put another way, does *Salinas* really mean that if you want to be silent you have to tell law enforcement that you want to be silent, otherwise you run the risk that what you **do not** say could be used against you in a future proceeding?

Given the current legal landscape, isn't it just safer and easier for a witness to refuse to talk to law enforcement without counsel present?

1 The Fifth Amendment provides that “no citizen shall be compelled in any criminal case to be a witness against himself.” Previously, U.S. Supreme court case law precluded a prosecutor from commenting at trial on your silence if the reason that you remained silent was to not be witness against yourself. See, e.g., *Griffin v. California*, 380 U.S. 609, 610 n.2 613 (1965).

2 *Salinas*, 133 S. Ct. 2174, 2185 (2013).

3 *Id.* at 2178.

4 *Id.* at 2182.