5TH AMENDMENT SILENCE: ONE DAY IN SALINAS WE LET IT SLIP AWAY

There is a famous line in the famous Kris Kristofferson song “Me and Bobby McGee” that reads:

> Then somewhere near Salinas, Lord, I let her slip away

Today the United States Supreme Court let a bit of the 5th Amendment backbone right to silence slip away down the slippery slope. In the case of *Salinas v. Texas*, with Justice Alito writing for the Court (rarely a good sign), it was held that a criminal defendant’s silence can be used against him at trial. This is a stunning decision placing a knife blade in the age old general rule that a defendant’s silence cannot be taken against him at trial.

The facts, as laid out in the court’s syllabus are as follows:

> Petitioner [Salinas], without being placed in custody or receiving Miranda warn- ings, voluntarily answered some of a police officer’s questions about a murder, but fell silent when asked whether ballistics testing would match his shotgun to shell casings found at the scene of the crime. At petitioner’s murder trial in Texas state court, and over his objection, the prosecution used his failure to answer the question as evidence of guilt. He was convicted, and both the State Court of Appeals and Court of Criminal Appeals affirmed, rejecting his claim that the pros- ecution’s use of his silence in its case in chief violated the Fifth Amendment.

Alito held that petitioner’s Fifth Amendment claim fails because he did not “expressly” invoke his privilege to silence affirmatively in response to the police officer’s questions. The upshot is that the word “silence” in “right to silence” does not necessarily mean “silence”. This follows a long line of similarly disquieting cases going back to the likes of the 1984 decision in *Minnesota v. Murphy* to the quite recent decision in *Berghuis v. Thompkins*, where the Court held that a defendant failed to invoke his Miranda right by remaining silent for nearly three hours.

The difference between the *Berghuis* line of cases and the Salinas decision today, however, is huge. The *Berghuis* line all involved admissibility of evidence, whether statements or physical evidence, in the face of Miranda rights. Today’s decision in *Salinas* travels a light year past that and allows the prosecution at trial to infer a defendant’s guilt from his silence.

So, one might think a waiver of this magnitude of one’s Fifth Amendment privilege must be voluntary and affirmative, not so according to Alito:

> We have before us no allegation that petitioner’s failure to assert 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 grounds. Because he failed to do so, the prosecution’s use of his noncustodial silence did not violate the Fifth Amendment.

But, by far, the biggest problem with the Salinas decision is the extension of the old doctrine of *Jenkins v. Anderson*, that a defendant’s silence prior to a Miranda warning can be used by the prosecution at trial to imply an admission of guilt, to the restrictions on invocation of Miranda of the *Berghuis* line. The

court bordered on dismissive of the concerns Salinas expressed (and that any criminal defendant and defense attorney worth his salt would express):

> Petitioner and the dissent attempt to distinguish Berg- huis by observing that it did not concern the admissi- bility of the defendant□’s silence but instead involved the admissibility of his subsequent statements. Post, at 8□–9 (opinion of BREYER, J.). But regardless of whether prose- cutors seek to use silence or a confession that follows, the logic of Berghuis applies with equal force: A suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege.3
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> In support of their proposed exception to the invocation requirement, petitioner and the dissent argue that reli- ance on the Fifth Amendment privilege is the most likely explanation for silence in a case such as this one. Reply Brief 17; see post, at 9□–10 (BREYER, J., dissenting). But whatever the most probable explanation, such silence is □“insolubly ambiguous.□” See Doyle, v. Ohio, 426 U. S. 610, 617 (1976). To be sure, someone might decline to answer a police officer□’s question in reliance on his constitutional privilege. But he also might 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 probative of guilt, but neither is every possible explanation protected by the Fifth Amend- ment. Petitioner alone knew why he did not answer the officer□’s question, and it was therefore his □“burden . . . to make a timely assertion of the privilege.□” Garner,

> 424 U. S., at 655.

Chief Justice Roberts and Anthony Kennedy joined Alito in the majority, with Thomas and Scalia filing a concurring opinion, but shockingly evidencing they would have gone even further in gutting the Fifth Amendment:

> We granted certiorari to decide whether the Fifth Amend- ment privilege against compulsory self-incrimination prohibits a prosecutor from using a defendant’s pre- custodial silence as evidence of his guilt. The plurality avoids reaching that question and instead concludes that Salinas’ Fifth Amendment claim fails because he did not expressly invoke the privilege. Ante, at 3. I think there is a simpler way to resolve this case. In my view, Salinas’ claim would fail even if he had invoked the privilege be- cause the prosecutor’s comments regarding his precusto- dial silence did not compel him to give self-incriminating testimony.

Breyer entered a fairly strong dissent, joined by Ginsburg, Sotomayor and Kagan. The “liberal bloc” held, though it is small solace here. Breyer’s dissent is well worth the read though, as it does an excellent job of distinguishing the main cases the majority relied on, namely *Jenkins, Murphy* and *Berghuis*. The gist of it is contained in the following:

> We end where we began. “[N]o ritualistic formula is necessary in order to invoke the privilege.” Quinn, 349 U. S., at 164. Much depends on the circumstances of the particular case, the most important circumstances being: (1) whether one can fairly infer that the individual being questioned is invoking the Amendment’s protection; (2) if that is unclear, whether it is particularly important for the

> questioner to know whether the individual is doing so; and (3) even if it is, whether, in any event, there is a good reason for excusing the individual from referring to the Fifth Amendment, such as inherent penalization simply by answering.
> ….
> Far better, in my view, to pose the relevant question directly: Can one fairly infer from an individual’s silence and surrounding circumstances an exercise of the Fifth Amendment’s privilege? The need for simplicity, the constitutional importance of applying the Fifth Amend- ment to those who seek its protection, and this Court’s case law all suggest that this is the right question to ask here. And the answer to that question in the circumstances of today’s case is clearly: yes.
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> For these reasons, I believe that the Fifth Amendment prohibits a prosecutor from commenting on Salinas’s silence. I respectfully dissent from the Court’s contrary conclusion.

I agree in every respect with the dissent. *Salinas* may, on the surface, seem like an incremental decision, but it has the characteristics of something more, and more dangerous. The concurrence of Thomas and Scalia is a dead give away why. The Roberts Court conservative bloc has a disdain for Miranda, not just as to evidentiary admission, but as to comment on right to silence as well. These are linchpins of a criminal suspect/defendant’s constitutional rights, and the chipping away is being accomplished by big hatchets.

One of my first reactions is that it is a decision that is unlikely to ever affect lawyers who are in such a position, or the rich who always have lawyers on call; no, it will be a plague on the more vulnerable in society. I could restate it, but Tim Lynch at Cato already

put it quite nicely:

> Unfortunately, the Supreme Court has complicated the law for persons who are the most vulnerable—persons who lack education, persons who do not speak English very well, persons who may suffer from mental problems, and persons who may be under the influence of alcohol. This is a bad day for the Bill of Rights.

Exactly. The Fifth Amendment should be basic, unfettered and automatic. Defendants should not need a law degree to suss out where they stand in the moment they are most in peril. That was most certainly never the "original intent" of the Founders.

> Freedom's just another word for nothin' left to lose

Consider the slope well greased for further slippery slide to further loss.

[Update: The quote of the day care of @cnnevets "You have the right to remain silent. That silence may be used against you in court of law."]