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YOU HAVE THE RIGHT TO REMAIN SILENT, BUT ANYTHING YOU DON'T SAY MAY BE USED AGAINST YOU: THE ADMISSIBILITY OF SILENCE AS EVIDENCE AFTER *SALINAS v. TEXAS*

Salinas v. Texas, 133 S. Ct. 2174 (2013)

Adam M. Hapner[*]

In *Salinas v. Texas*, the United States Supreme Court held that a suspect's refusal to answer an officer's questions during a noncustodial, pre-*Miranda*, criminal interrogation is admissible at trial as substantive evidence of guilt.[1] In a plurality decision, Justice Samuel Alito emphasized that before a suspect can rely on the privilege against self-incrimination, the suspect must invoke the privilege.[2] Consequently, because silence does not invoke the privilege,[3] and because the petitioner failed to expressly invoke the privilege in words, the prosecutor's use of his pre-*Miranda* silence during a noncustodial interrogation did not violate the Fifth Amendment.[4]

The *Salinas* decision is important because it gives insight into the extent that the constitutional right to remain silent truly protects citizens while speaking—or refusing to speak—to law enforcement.[5] Furthermore, the decision created new rules governing the admissibility of silence evidence that may have a significant effect at trial and at sentencing.[6] After explaining the *Salinas* decision in more detail, this

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1. *See* Salinas v. Texas, 133 S. Ct. 2174, 2177–78 (2013) (holding that the use at trial of the petitioner's silence to suggest "that he was guilty" was constitutional because the petitioner did not invoke the Fifth Amendment privilege against self-incrimination).

2. *Id.* at 2178.

3. *Id.*; *see also* Berghuis v. Thompkins, 130 S. Ct. 2250, 2259 (2010).

4. *Salinas*, 133 S. Ct. at 2178.

5. *See* Christopher Totten, Salinas v. Texas*: Guilt by Silence and the Disappearing Fifth Amendment Privilege Against Self-Incrimination*, 49 CRIM. L. BULL. 1501, 1501 (2013) (describing *Salinas* both as a continuation the Court's "long-standing trend" of limiting *Miranda* protections and as "a more frontal attack on the Fifth Amendment right . . . against self-incrimination"); Adam Liptak, *A 5-4 Ruling, One of Three, Limits Silence's Protection*, N.Y. TIMES (June 17, 2013), http://www.nytimes.com/2013/06/18/us/supreme-court-hands-down-three-decisions-that-are-5-to-4.html (stating that *Salinas* "limited a criminal suspect's right to remain silent before being taken into custody").

6. *See infra* text accompanying notes 69–74; Totten, *supra* note 5, at 1501 ("By permitting defendants' silence in response to noncustodial police interrogation to be used against them as evidence of their guilt at trial, the [*Salinas*] judgment unjustifiably exposes defendants to the risk of wrongful conviction."); *cf.* Mitchell v. United States, 526 U.S. 314, 329 (1999) (noting the high stakes associated with negative inferences at criminal trials and during

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Comment briefly discusses the Supreme Court's development of rules governing the evidentiary admissibility of silence that occurs during questioning by law enforcement.[7] Then, this Comment addresses how *Salinas* has changed that framework. Finally, this Comment explains how *Salinas* implied the "right" answer to the only question regarding the admissibility of silence evidence that remains today.

In *Salinas*, local police were investigating a double homicide when they visited the petitioner at his home in Houston, Texas.[8] The petitioner agreed to accompany the police to the station for questioning, and also voluntarily handed over his shotgun for ballistics testing.[9] For most of the approximately hour-long, noncustodial interview that followed, the petitioner answered the police officer's questions.[10] "But when asked whether his shotgun 'would match the shells recovered at the scene of the murder,' the petitioner declined to answer."[11]

After receiving additional evidence from a witness who claimed to hear the petitioner confess to the killings, prosecutors charged the petitioner with committing both murders.[12] During the murder trial, the prosecutor used the petitioner's refusal to answer the officer's question as evidence of his guilt.[13] For example, the "prosecutor told the jury, among other things, that '[a]n innocent person' would have said, 'What are you talking about? I didn't do that. I wasn't there.'"[14] The petitioner was subsequently found guilty of murder and sentenced to twenty years in prison.[15] The Court of Appeals of Texas upheld the petitioner's conviction and rejected his argument that the prosecutor's use of his silence violated the Fifth Amendment, "reasoning that the petitioner's pre-arrest, pre-*Miranda* silence was not 'compelled' within the meaning of the Fifth Amendment."[16]

The Supreme Court "granted certiorari to resolve a division of authority" in the federal circuit courts.[17] Specifically, it framed the issue

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sentencing, and that "the inference drawn by the District Court from petitioner's silence may have resulted in decades of added imprisonment").

7. This Comment does not address silence occurring at trial (i.e., when the defendant refuses to testify), or the merits of any of the Supreme Court's decisions that are discussed.

8. *Salinas*, 133 S. Ct. at 2178.

9. *Id.*

10. *Id.* Importantly, both the petitioner and the prosecutor agreed that the petitioner was not in custody or given *Miranda* warnings at any time during the questioning. *Id.*

11. *Id.* (citation omitted).

12. *Id.*

13. *Id.*

14. *Id.* at 2185 (Breyer, J., dissenting) (alteration in original) (quoting Salinas v. State, 368 S.W.3d 550, 556 (Tex. App. 2011)) (internal quotation marks omitted).

15. *Id.* at 2178 (majority opinion); *id.* at 2185 (Breyer, J., dissenting).

16. *Id.* at 2178 (majority opinion) (citing *Salinas*, S.W.3d at 557–59). The Texas Court of Criminal Appeals affirmed on the same ground. *Id.* at 2179 (citing Salinas v. State, 369 S.W.3d 176, 179 (Tex. Crim. App. 2012)).

17. *Id.* at 2179 (citation omitted).

in the case as "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."[18] The Court declined to answer that question, however, because the petitioner did not assert his privilege.[19]

The privilege against self-incrimination comes from the Fifth Amendment's declaration that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[20] This privilege permits an individual not only to refuse to testify against himself in a criminal trial, but also to refuse to answer an official's questions "where the answers might incriminate him in future criminal proceedings."[21] In other words, the Fifth Amendment creates a "right to remain silent" both at trial and during interrogation by law enforcement.[22]

As *Salinas* emphasized, however, the privilege against self-incrimination is not self-executing.[23] To claim its protection, a witness must unambiguously invoke the privilege, absent exceptional circumstances.[24] For example, in *Berghuis v. Thompkins*, the Court previously held that the defendant's silence for two hours and forty-five minutes during a warned custodial interrogation by law enforcement was insufficient to invoke his right to remain silent,[25] and that he implicitly waived his right when he knowingly and voluntarily made statements to the police thereafter.[26] Although the practical effect of *Berghuis* is highly controversial,[27] and the decision dealt more with the

18. *Id.* (emphasis added).

19. *See id.* ("But because petitioner did not invoke the privilege during his interview, we find it unnecessary to reach that question.").

20. U.S. CONST. amend. V. *See generally* Miranda v. Arizona, 384 U.S. 436, 458–61 (1966) (exploring the contours of the Fifth Amendment privilege against self-incrimination in the context of in-custody interrogation).

21. Minnesota v. Murphy, 465 U.S. 420, 426 (1984) (quoting Lefkowitz v. Turley, 414 U.S. 70, 77 (1973)) (internal quotation marks omitted).

22. *See id.* at 430; *Miranda*, 384 U.S. at 467 ("[T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.").

23. *Salinas*, 133 S. Ct. at 2178; *accord Murphy*, 465 U.S. at 434 (noting the general rule that the Fifth Amendment privilege is not self-executing).

24. Berghuis v. Thompkins, 130 S. Ct. 2250, 2259–60 (2010) ("A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that 'avoid[s] difficulties of proof and . . . provide[s] guidance to officers' on how to proceed in the face of ambiguity." (alterations in original) (quoting Davis v. United States, 512 U.S. 452, 458–59 (1994))); *see Salinas*, 133 S. Ct. at 2183 (finding unpersuasive the petitioner's argument that the "express invocation requirement" is unworkable where a witness is silent).

25. *Berghuis*, 130 S. Ct. at 2258–60.

26. *Id.* at 2262–63.

27. *See Salinas*, 133 S. Ct. at 2189–90 (Breyer, J., dissenting) (citations omitted) (arguing that "most[] Americans are aware that they have a constitutional right not to incriminate

admissibility of statements made after silence, it nonetheless shows that silence itself does not invoke the protection of the Fifth Amendment.[28]

Nevertheless, the Court has made it clear that a person is not required to invoke the privilege to claim the protection of the Fifth Amendment where the person faces unwarned custodial interrogation.[29] In the groundbreaking case of *Miranda v. Arizona*, the Court concluded that the "process of in-custody interrogation" of suspects contains "inherently compelling pressures" that potentially undermine a suspect's opportunity to exercise the privilege against self-incrimination.[30] As a result, to protect Fifth Amendment interests, the Court mandated that all persons subjected to custodial interrogation be immediately given *Miranda* warnings, informing them of their right to remain silent and that anything they say may be used against them, among other things.[31] If *Miranda* warnings are not given to a suspect in custody, the suspect is not required to unambiguously invoke the privilege against self-incrimination during interrogation in order to assert the protection of the Fifth Amendment.[32] Thus, after *Miranda*, the issue of whether silence occurred post-custody[33] is significant to

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themselves by answering questions posed by the police during an interrogation" but are likely not aware of the "technical legal requirements" to invoke the right); Steven I. Friedland, *Post-*Miranda *Silence in the Wired Era: Reconstructing Real Time Silence in the Face of Police Questioning*, 80 MISS. L.J. 1339, 1344 (2011); Stephen Rushin, *Rethinking* Miranda*: The Post-Arrest Right to Silence*, 99 CALIF. L. REV. 151, 158 (2011) (arguing that while simple to apply, the *Berghuis* default rule may "fundamentally undermine the protections offered by *Miranda*"); Jonathan Witmer-Rich, *Interrogation and the Roberts Court*, 63 FLA. L. REV. 1189, 1194, 1202–09 (2011) (arguing, *inter alia*, that *Berghuis* "effectively eliminated" the waiver requirement, altering the protections afforded by *Miranda*); *cf.* Janet Ainsworth, *'You Have the Right to Remain Silent . . .' But Only if You Ask for It Just So*, 15 INT'L. J. SPEECH, LANGUAGE & L. 1, 19 (2008) (arguing that *Miranda* "rights are perilously easy to waive and nearly impossible to actually invoke").

28. *Berghuis*, 130 S. Ct. at 2259–60; *accord Salinas*, 133 S. Ct. at 2182.

29. *See Salinas*, 133 S. Ct. at 2180 (stating that custodial interrogation is a situation "where governmental coercion makes his forfeiture of the privilege involuntary"); Minnesota v. Murphy, 465 U.S. 420, 429–30 (1984) (noting that an exception to the general rule requiring suspects to assert the privilege may exist where "some identifiable factor" limits the suspect's ability to freely admit, deny, or refuse to answer).

30. Miranda v. Arizona, 384 U.S. 436, 467 (1966).

31. *Id.* at 467–74; *accord Berghuis*, 130 S. Ct. at 2259; *Salinas*, 133 S. Ct. at 2180 ("Due to the uniquely coercive nature of custodial interrogation, a suspect in custody cannot be said to have voluntarily forgone the privilege 'unless [he] fails to claim [it] after being suitably warned.'" (alterations in original) (quoting *Murphy*, 465 U.S. at 430)).

32. *See Salinas*, 133 S. Ct. at 2180 (noting that the Court has held that "a witness' failure to invoke the privilege *must be excused* where governmental coercion makes his forfeiture of the privilege involuntary," and that, under *Miranda*, a suspect who is subjected to the pressures of unwarned custodial interrogation "need not invoke the privilege" to claim the protection of the Fifth Amendment (emphasis added)).

33. For purposes of this Comment, "post-custody silence" is defined as silence that occurs while the suspect was "deprived of his freedom of action in any significant way" (i.e., while "in

determining the admissibility of silence evidence under the Fifth Amendment.[34] In fact, placing a suspect into custody may now be viewed as the "triggering mechanism" for the protection of the Fifth Amendment privilege against self-incrimination.[35]

Furthermore, after *Miranda*, the issue of whether the silence occurred before or after *Miranda* warnings is also significant to determining the admissibility of silence evidence. In footnote thirty-seven of the opinion, the Court stated that once the police give *Miranda* warnings to a suspect who is in custody, "[t]he prosecution may not . . . use at trial the fact that he *stood mute* or claimed his privilege in the face of accusation."[36] This dictum proved true in the following Supreme Court cases that addressed the admissibility of silence evidence. Indeed, in all of these cases, the dispositive factor was whether *Miranda* warnings were given before the defendants' silence.

For example, in *Doyle v. Ohio*, the Court granted certiorari to decide whether the impeachment use of a defendant's post-arrest, post-*Miranda* silence violated any provision of the federal Constitution.[37] In *Doyle*, two defendants were arrested and tried separately for selling marijuana.[38] Before trial, the defendants did not offer an exculpatory explanation for their arrest.[39] But at trial, each defendant testified that he was framed by a third party.[40] The prosecutor then attempted to impeach the defendants' credibility on cross-examination by asking each defendant why he had not told the "frameup story" to the arresting officer.[41] Although the Court did not address the issue under the Fifth Amendment, it held that the prosecutor's use of their post-arrest, post-

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custody"). *See Miranda*, 384 U.S. at 444. Accordingly, post-custody silence may occur before, during, and after arrest. *See* Benjamin Berkley, *Demeanor Evidence Does Not Demean Anything: How Exposure to Mass Media Provides a Solution to the Question of Whether Demeanor Evidence Should Be Admissible as Substantive Evidence of Guilt Post-Arrest and Pre-*Miranda, 42 SW. L. REV. 481, 483–85 (2013) (noting that, under *Miranda*, the right to remain silent is triggered once a suspect is in custody, whether or not the suspect has been placed under arrest).

34. *See Miranda*, 384 U.S. at 467–68 (holding that a suspect in custody who is subjected to interrogation must be informed of the right to remain silent in unequivocal terms); *infra* note 70 and accompanying text.

35. Berkley, *supra* note 33, at 483–85 (citing United States v. Moore, 104 F.3d 377, 385 (D.C. Cir. 1997)) (arguing that "custody and not interrogation [i]s the trigger for the attachment of the Fifth Amendment"); Meaghan Elizabeth Ryan, Commentary, *Do You Have the Right to Remain Silent?: The Substantive Use of Pre-*Miranda *Silence*, 58 ALA. L. REV. 903, 913–16 (2007).

36. *Miranda*, 384 U.S. at 468 n.37 (emphasis added).

37. 426 U.S. 610, 612, 616 (1976).

38. *Id.* at 611.

39. *See id.* at 612–13.

40. *See id.* ("Each petitioner took the stand at his trial and admitted practically everything about the State's case except the most crucial point: who was selling the marihuana to whom.").

41. *Id.* at 613.

Miranda silence to impeach the defendants violated the Due Process Clause of the Fourteenth Amendment.[42] The Court stated that any silence that occurs after a suspect has been given *Miranda* warnings is "insolubly ambiguous" and thus not very probative.[43] In addition, the Court stated that the *Miranda* warnings implicitly assure those who receive the warnings that their silence will not carry a penalty.[44] As a result, once *Miranda* warnings have been given, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."[45]

Next, in *Jenkins v. Anderson*, a prosecutor similarly used silence to impeach the defendant at trial.[46] However, because the defendant had not received *Miranda* warnings when he was silent, the Court came to the opposite conclusion.[47] In regard to due process, the Court held that the defendant's pre-custody, pre-*Miranda* silence was admissible to impeach the defendant because the government had not induced him to remain silent by administering *Miranda* warnings.[48] As a result, the "fundamental unfairness" present in *Doyle* was not present in *Jenkins*.[49] The Court also held that using pre-custody, pre-*Miranda* silence to impeach the defendant did not violate the Fifth Amendment because individuals waive some of their protection by voluntarily choosing to testify.[50] Thus, pursuant to *Jenkins*, a prosecutor does not violate due process or the Fifth Amendment by using pre-custody, pre-*Miranda* silence for impeachment.[51]

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42. *Id.* at 619.

43. *See id.* at 617 ("Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights."). One term earlier, the Court decided *United States v. Hale*, which held that pre-custody, post-*Miranda* silence was inadmissible to impeach under the Federal Rules of Evidence because silence after receipt of *Miranda* warnings is not very probative of a defendant's credibility and also has a significant potential for unfair prejudice. 422 U.S. 171, 180 (1975).

44. *Doyle*, 426 U.S. at 618.

45. *Id. But cf.* Anderson v. Charles, 447 U.S. 404, 408–09 (1980) (declining to extend *Doyle* to situations where a defendant has waived his *Miranda* rights and has given a post-custody statement that was factually inconsistent with his testimony at trial).

46. 447 U.S. 231, 233–34 (1980). In *Jenkins*, the prosecutor, on cross-examination, questioned the petitioner about his pre-arrest failure to report a stabbing, and again referenced the petitioner's "prearrest silence" during closing argument. *Id.*

47. *See id.* at 240.

48. *Id.* ("In this case, no governmental action induced petitioner to remain silent before arrest. The failure to speak occurred before the petitioner was taken into custody and given *Miranda* warnings.").

49. *Id.*

50. *See id.* at 238 ("[I]mpeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial.").

51. *Id.* at 238, 240. The Court in *Fletcher v. Weir* relied on *Jenkins* and subsequently held that post-custody, pre-*Miranda* silence was also admissible to impeach. *See* Fletcher v. Weir,

In subsequent decisions, the Supreme Court addressed whether the *Jenkins* and *Doyle* framework governed situations where the prosecutor used the defendant's silence as substantive evidence, rather than to impeach. This added a new dimension to the legal framework. In contrast to when silence is used for impeachment, the defendant does not necessarily testify when silence is used as substantive evidence.[52] Furthermore, the silence is not used to attack the defendant's credibility. Instead, it is used as actual evidence—most often to prove that the defendant is guilty as charged by suggesting consciousness of guilt.[53]

For example, in *Wainwright v. Greenfield*, the defendant entered a plea of not guilty by reason of insanity to a sexual battery charge.[54] At trial, the prosecutor used the defendant's invocation of the right to remain silent and requests to consult with counsel as evidence that the defendant was, in fact, sane.[55] During his closing argument, the prosecutor suggested that the defendant's repeated refusals to speak with police without counsel present demonstrated that the defendant possessed "a degree of comprehension that was inconsistent with his claim of insanity."[56] The jury found the defendant guilty, and the judge sentenced him to life imprisonment.[57]

Even though the prosecutor in *Wainwright* used the defendant's silence for an entirely different purpose than the prosecutor in *Doyle*,[58] the decision in *Wainwright* once again turned on whether *Miranda* warnings had been read at the time of the silence.[59] The Court held that the admission of the defendant's post-custody, post-*Miranda* silence as

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455 U.S. 603, 606–07 (1982) (per curiam). The Court again reasoned that the implicit assurance in the *Miranda* warnings that silence would not be used adversely is not present for post-arrest, pre-*Miranda* silence and therefore due process was not violated. *See id.*; *cf. Jenkins*, 447 U.S. at 240. The fact that the suspect was in custody when silent, unlike in *Jenkins*, was apparently immaterial to the due process analysis. *See Fletcher*, 455 U.S. at 606–07. Moreover, the Court did not address any Fifth Amendment concerns. *See id.*

52. *See, e.g.*, Wainwright v. Greenfield, 474 U.S. 284, 287 (1986); *see also* Marcy Strauss, *Silence*, 35 LOY. L.A. L. REV. 101, 159–61 (2001) (discussing the distinctions between the admission of silence for impeachment purposes and the introduction of silence as evidence of guilt).

53. *See* Strauss, *supra* note 52, at 102 n.5 ("[S]ilence may be introduced in the case-in-chief, as evidence of guilt.").

54. 474 U.S. at 285.

55. *Id.* at 285, 287.

56. *Id.* at 287.

57. *Id.*

58. *Compare* Doyle v. Ohio, 426 U.S. 610, 611 (1976) (using the defendant's silence for impeachment), *with Wainwright*, 474 U.S. at 285 (using the defendant's silence as evidence of sanity).

59. *See Wainwright*, 474 U.S. at 295 (relying on the fundamental unfairness of using post-*Miranda* silence against the defendant).

substantive evidence of guilt violated the Due Process Clause,[60] reasoning that, because the police had given *Miranda* warnings to the defendant, the implicit assurance that any silence thereafter would not be used against him was present, and therefore, it was a violation of due process for the prosecutor to break that promise to the defendant.[61]

Unfortunately, the Court did not specifically address any Fifth Amendment concerns, or whether the distinction between purposes of use was material to the Court's analysis. Consequently, it was unclear if the analysis would change under a different set of facts. Nevertheless, after *Wainwright*, it was clear that whether the defendant received *Miranda* warnings prior to his silence was extremely significant in almost all circumstances. If the defendant received *Miranda* warnings, any silence thereafter was inadmissible both to impeach and as substantive evidence because it is "fundamentally unfair" to use a suspect's silence against him after the police explicitly informed the suspect that he had the right to remain silent.[62] If the defendant did not receive *Miranda* warnings, however, there was no issue of fundamental unfairness, and any silence was admissible to impeach.[63] Nonetheless, the Court had not yet addressed the admissibility of pre-*Miranda* silence as substantive evidence.

Then came *Salinas v. Texas*.[64] In *Salinas*, the plurality held that the petitioner's pre-custody, pre-*Miranda* silence was admissible as substantive evidence of guilt under the Fifth Amendment because the petitioner did not invoke his right to remain silent.[65] In short, since he was not in custody and did not meet any other exception to the invocation requirement,[66] he was required to invoke the privilege

60. *Id.* (holding that the evidentiary use of an individual's post-arrest, post-*Miranda* silence was fundamentally unfair).

61. *See id.*

62. *See id.*; *Doyle*, 426 U.S. at 618.

63. *See* Fletcher v. Weir, 455 U.S. 603, 606–07 (1982) (per curiam) (finding no violation of due process where the government did not induce the defendant's post-custody silence through the imposition of *Miranda* warnings); Jenkins v. Anderson, 447 U.S. 231, 240 (1980) ("In this case, no governmental action induced petitioner to remain silent before arrest. The failure to speak occurred before the petitioner was taken into custody and given *Miranda* warnings. Consequently, the fundamental unfairness present in *Doyle* is not present in this case.").

64. 133 S. Ct. 2174 (2013).

65. *Id.* at 2180. Justices Antonin Scalia and Clarence Thomas concurred in the judgment, and argued that even if the petitioner had invoked the privilege, his claim would fail because the prosecutor's comments regarding his pre-custody silence did not compel him to give self-incriminating testimony. *See id.* at 2184 (Thomas, J., concurring).

66. *Id.* at 2180 (majority opinion). The Court explicitly declined to make an additional exception to the invocation requirement "for cases in which a witness stands mute and thereby declines to give an answer that officials suspect would be incriminating." *Id.* at 2180–81.

against self-incrimination in order to claim its protection.[67] Because he did not invoke the privilege through his silence or otherwise, his silence was admissible against him as evidence of his guilt.[68]

Salinas is significant to the legal framework governing the admissibility of silence evidence because the Court's holding demonstrates that pre-custody, pre-*Miranda* silence is admissible as substantive evidence of guilt unless the suspect has previously invoked the right to remain silent.[69] In addition, for the first time since *Miranda*, the Court did not focus its analysis of the admissibility of silence evidence on *Miranda* warnings. Instead, custody was more relevant to its analysis. In fact, both the plurality and the dissent agreed that if the petitioner was in custody, he would not have been required to invoke his right to remain silent to have claimed its protection.[70]

Salinas also shows that if the petitioner received *Miranda* warnings prior to his silence, his silence would have been inadmissible as substantive evidence of guilt.[71] Notwithstanding the difference between using silence for impeachment and using silence as evidence of guilt, *Doyle* and its progeny implied that using post-*Miranda* silence for any purpose would be inadmissible under the Due Process Clause for reasons of fundamental unfairness.[72] The Court confirmed this in footnote three of the *Salinas* opinion, where it explained in one sentence that under the paradigm set forth by *Doyle*, due process prohibits prosecutors from using pre-custody, post-*Miranda* silence against the defendant.[73] Thus, pursuant to *Doyle* and now *Salinas*, it is a violation

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67. *See id.* at 2178–84 (holding that the petitioner's failure to expressly invoke the privilege against self-incrimination precluded a finding that the prosecution's use of noncustodial silence violated the Fifth Amendment). Explaining that most Americans are aware that they have a constitutional right to remain silent when being interrogated by the police, the dissent would have held that the petitioner need not have expressly invoked the protection of the Fifth Amendment because the circumstances gave rise to a "reasonable inference that [the petitioner's] silence derived from an exercise of his Fifth Amendment rights." *See id.* at 2189–90 (Breyer, J., dissenting).

68. *Id.* at 2178 (majority opinion).

69. *See id.* at 2178, 2180.

70. *Compare id.* at 2180 ("[I]n *Miranda*, we said that a suspect who is subjected to the 'inherently compelling pressures' of an unwarned custodial interrogation need not invoke the privilege." (quoting Miranda v. Arizona, 384 U.S. 436, 467 (1996))), *with id.* at 2188 (Breyer, J., dissenting) ("The Court . . . has made clear that an individual, when silent, need not expressly invoke the Fifth Amendment if there are 'inherently compelling pressures' not to do so." (quoting *Miranda*, 384 U.S. at 467)).

71. *See id.* at 2182 n.3 (noting that the Due Process Clause prohibits the prosecution from "pointing to the fact that a defendant was silent after he heard *Miranda* warnings").

72. *See supra* note 62 and accompanying text.

73. *See Salinas*, 133 S. Ct. at 2182 n.3. However, the Court distinguished the *Salinas* case from *Doyle*, reasoning that the rule set forth in *Doyle* "does not apply where a suspect has not received the warnings' implicit promise that any silence will not be used against him." *See id.* (citing Jenkins v. Anderson, 447 U.S. 231, 240 (1980)).

of due process for a prosecutor to use pre-custody, post-*Miranda* silence at trial, whether the use is for substantive evidence of guilt or for impeachment.[74]

The Court, however, did not specifically address how the analysis would change if the petitioner was in custody but had not yet received *Miranda* warnings. It held only that because the petitioner was not in custody, he was required to invoke the privilege or else his silence could be used against him.[75] Today, this is the only missing piece to the Supreme Court's legal framework governing the admissibility of silence evidence, and there is currently a division of authority among federal circuit courts on this issue.[76] The split among the circuit courts is primarily predicated on a disagreement over whether administering *Miranda* warnings must trigger the right to remain silent, and whether a constitutional distinction between the use of silence evidence for impeachment and its use as evidence of guilt actually exists.[77]

The Fourth,[78] Fifth,[79] Eighth,[80] and Eleventh[81] Circuits have all held that post-custody, pre-*Miranda* silence is admissible as evidence of guilt. Most of these circuits understandably found *Miranda* warnings to

74. *See* Doyle v. Ohio, 426 U.S. 610, 619 (1976); *Salinas*, 133 S. Ct. at 2182 n.3.

75. *See Salinas*, 133 S. Ct. at 2180–84; Totten, *supra* note 5, at 1514 (noting *Salinas*, 133 S. Ct. at 2182 n.3).

76. Berkley, *supra* note 33, at 485. For a chart summarizing the Supreme Court's rules governing the admissibility of silence evidence after *Salinas*, see Appendix *infra*.

77. Berkley, *supra* note 33, at 485–86.

78. *See* United States v. Love, 767 F.2d 1052, 1063 (4th Cir. 1985) (holding that silence evidence was admissible to prove guilt because the defendants were not given *Miranda* warnings); Folston v. Allsbrook, 691 F.2d 184, 187 (4th Cir. 1982) (holding that silence evidence was admissible to prove guilt where the record was unclear as to whether the defendant received *Miranda* warnings, and where the defendant was not under interrogation by any police officer at the time of silence).

79. *See* United States v. Salinas, 480 F.3d 750, 755–59 (5th Cir. 2007) (holding that, pursuant to *Doyle*, the prosecution's reference to the defendant's post-arrest, pre-*Miranda* silence in its case-in-chief did not violate due process, but declining to answer "whether a prosecutor's use of a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination"); United States v. Garcia-Gil, 133 F. App'x 102, 108 (5th Cir. 2005) (holding that the defendant's post-arrest, pre-*Miranda* silence was admissible in the prosecution's case-in-chief); United States v. Musquiz, 45 F.3d 927, 931 (5th Cir. 1995) (holding that the admissibility of post-arrest, pre-*Miranda* silence evidence to prove guilt "turns on fact specific weighing by the judge").

80. *See* United States v. Osuna-Zepeda, 416 F.3d 838, 844 (8th Cir. 2005) (reiterating its prior holding that "the use of postarrest, pre-*Miranda* silence in a prosecution's case-in-chief was not unconstitutional"); United States v. Frazier, 408 F.3d 1102, 1111 (8th Cir. 2005) (holding that "the use of Frazier's silence in the government's case-in-chief as evidence of guilt did not violate his Fifth Amendment rights" because "he was under no government-imposed compulsion to speak").

81. *See* United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991) ("The government may comment on a defendant's silence if it occurred prior to the time that he is arrested and given his *Miranda* warnings.").

be a dispositive factor.[82] Relying mainly on *Doyle*, *Fletcher*, and *Jenkins*, these circuits reasoned that, because the suspect did not receive *Miranda* warnings, there was no violation of the Due Process Clause or the Fifth Amendment in allowing the jury to infer guilt from the post-custody silence.[83] Accordingly, these circuits did not find custody to be a dispositive factor, nor did they find a constitutional distinction between the two purposes of use.[84]

In contrast, the Second,[85] Seventh,[86] Ninth,[87] and District of Colombia[88] Circuits have all held that post-custody, pre-*Miranda* silence is inadmissible as evidence of guilt under the Fifth Amendment. Explaining that the right to remain silent derives from the Constitution, not from *Miranda* warnings themselves, most of these circuits found custody to be a dispositive factor.[89] Whereas custody is known as the triggering mechanism for Fifth Amendment protection,[90] *Miranda* warnings are merely prophylactic rules created by the Court in the 1960s to protect the privilege against self-incrimination.[91] Thus, unlike

82. *See, e.g.*, *Salinas*, 480 F.3d at 757–58; *Rivera*, 944 F.2d at 1568; *Love*, 767 F.2d at 1063. *But see, e.g.*, *Frazier*, 408 F.3d at 1111 (retreating from its prior position that *Miranda* warnings are determinative, and finding that "the more precise issue is whether [the defendant] was under any compulsion to speak at the time of his silence").

83. Berkley, *supra* note 33, at 490; Marty Skrapka, Comment, *Silence Should Be Golden: A Case Against the Use of a Defendant's Post-Arrest, Pre*-Miranda *Silence as Evidence of Guilt*, 59 OKLA. L. REV. 357, 378 & n.161 (2006); *see, e.g.*, *supra* notes 78–81 and accompanying text.

84. *See* sources cited *supra* note 83.

85. *See* United States v. Flecha, 539 F.2d 874, 877 (2d Cir. 1976) (noting that "many arrested persons know, without benefit of warnings, that silence is usually golden").

86. *See* United States *ex rel.* Savory v. Lane, 832 F.2d 1011, 1017–18 (7th Cir. 1987) (holding that the defendant has a "constitutional right to say nothing at all," and that using silence as proof of guilt is prohibited, even in the absence of *Miranda* warnings); *see also* United States v. Hernandez, 948 F.2d 316, 322 (7th Cir. 1991) (noting Seventh Circuit precedent barring the defendant's refusal to talk to the police as evidence of guilt); United States v. Ramos, 932 F.2d 611, 616 (7th Cir. 1991) (same).

87. *See* United States v. Bushyhead, 270 F.3d 905, 912–13 (9th Cir. 2001) ("The privilege against self-incrimination prevents the government's use at trial of evidence of a defendant's silence-not merely the silence itself, but the circumstances of that silence as well."); United States v. Velarde-Gomez, 269 F.3d 1023, 1028–33 (9th Cir. 2001) (holding that the district court erred by "allowing the government to comment" on the defendant's post-arrest, pre-*Miranda* silence); United States v. Whitehead, 200 F.3d 634, 639 (9th Cir. 2000) (same); Guam v. Veloria, 136 F.3d 648, 652–53 (9th Cir. 1998) (finding that the prosecutor's reference to the defendant's silence was prejudicial and contrary to "clearly announced rules of constitutional protection").

88. *See* United States v. Moore, 104 F.3d 377, 389 (D.C. Cir. 1997) ("[T]he law is plain that the prosecution cannot, consistent with the Constitution, use a defendant's silence against him as evidence of his guilt.").

89. *See, e.g.*, *Velarde-Gomez*, 269 F.3d at 1029; *Moore*, 104 F.3d at 389.

90. *See supra* note 35 and accompanying text.

91. *See* Doyle v. Ohio, 426 U.S. 610, 617 (1976) (describing the *Miranda* warnings as "prophylactic means of safeguarding Fifth Amendment rights"); Michigan v. Tucker, 417 U.S.

the protection of the Due Process Clause, the Fifth Amendment's protection arises once the government places an individual into custody, irrespective of whether the government administers *Miranda* warnings to the individual.[92] Some of these circuits also argue that there is a constitutional difference between using silence to impeach and using silence as evidence of guilt.[93] Consequently, any reliance on *Doyle*, *Fletcher*, and *Jenkins* in this regard is misplaced because those cases only spoke to the admissibility of pre-custody silence evidence to impeach.[94]

Although the *Salinas* Court seemingly "balked" by not explicitly resolving the question presented,[95] it did shed light on the current circuit split. Similar to the Fourth, Fifth, Eighth, and Eleventh Circuits, the Court could have come to the same conclusion in *Salinas*—that the petitioner's pre-custody, pre-*Miranda* silence was admissible as substantive evidence—based solely on the fact that the petitioner did not receive *Miranda* warnings, and its decision would have been arguably supported by precedent.[96] But by shifting the primary focus away from *Miranda* warnings and towards custody, like the Second, Seventh, Ninth, and District of Colombia Circuits, *Salinas* implied that it would be deficient and problematic to use *Miranda* warnings as the dispositive factor for determining the admissibility of silence as evidence of guilt under the Fifth Amendment.[97] For example, in *Salinas*, the Court relied on *Jenkins* to explain that, because the petitioner was not given *Miranda* warnings, there was no issue of fundamental unfairness and thus no violation of due process.[98] However, it would

433, 444, 446 (1974) (noting that *Miranda* warnings are "procedural safeguards" that are "not themselves rights protected by the Constitution," but rather "prophylactic standards" laid down by the Court in *Miranda*).

92. *See Velarde-Gomez*, 269 F.3d at 1029.

93. *See, e.g.*, *Moore*, 104 F.3d at 386 (distinguishing between the application of *Doyle*'s due process analysis for the use of silence evidence to impeach and the use of silence evidence to prove guilt); United States *ex rel.* Savory v. Lane, 832 F.2d 1011, 1017–18 (7th Cir. 1987); *accord* Skrapka, *supra* note 83, at 401–02 (arguing that there is a distinction between using silence evidence to prove guilt and to impeach; namely, the former is protected by enumerated principles in the Bill of Rights "that prevent its use as substantive evidence of guilt").

94. *See* Fletcher v. Weir, 455 U.S. 603, 606–07 (1982) (per curiam); Jenkins v. Anderson, 447 U.S. 231, 238 (1980); Doyle v. Ohio, 426 U.S. 610, 611 (1976).

95. *See* Salinas v. Texas, 133 S. Ct. 2174, 2179 (2013); Totten, *supra* note 5, at 1504.

96. *See supra* notes 78–84 and accompanying text. For example, in *Jenkins* and *Fletcher*, the Court previously indicated that, whether or not the suspect was in custody, pre-*Miranda* silence was admissible to impeach because there was no governmental action inducing the petitioner to remain silent. *See Jenkins*, 447 U.S. at 240; *accord Fletcher*, 455 U.S. at 607. Similarly, in *Salinas*, the Court could have said that the petitioner's silence was admissible as evidence of guilt because the petitioner did not receive *Miranda* warnings and, thus, was not induced by governmental action to remain silent. *See Salinas*, 133 S. Ct. at 2177–78.

97. *See Salinas*, 133 S. Ct. at 2180; *supra* notes 85–94 and accompanying text.

98. *See Salinas*, 133 S. Ct. at 2182 n.3.

have been illogical and untenable for the Court to say that, because there was no issue of fundamental unfairness, the petitioner's silence was also admissible under the Fifth Amendment. Just because there is no issue of fundamental unfairness, which is the core concern of due process, does not mean that there is no issue of compulsion to self-incriminate, the core concern of the Fifth Amendment's privilege against self-incrimination.[99] In other words, although *Miranda* warnings are highly relevant to a due process analysis, in isolation, they provide little guidance when determining the admissibility of silence under the Fifth Amendment.[100]

Custody, in contrast, makes more sense as the primary factor for determining the admissibility of silence evidence under the Fifth Amendment.[101] Due to the ubiquitous coverage of our criminal justice system in the media today, most Americans are aware of their right to remain silent, even when *Miranda* warnings have not been read.[102] As a result, placing a suspect into custody to conduct a criminal investigation may actually "compel" the suspect to remain silent out of fear that anything he says may be used against him in a court of law.[103] In addition, despite the fact that most Americans are not aware of the "technical legal requirements" to invoke their right,[104] in *Salinas*, the Court reiterated that the Fifth Amendment automatically protects a suspect who remains silent in the face of unwarned custodial interrogation because a suspect is not required to invoke the privilege against self-incrimination under such circumstances.[105] Furthermore,

99. *See* State v. Hoggins, 718 So. 2d 761, 770 (Fla. 1998) ("While the absence of *Miranda* warnings may prevent a federal due process violation from occurring where the defendant's post-arrest silence is used for impeachment purposes, the same is not true of the defendant's right to remain silent.").

100. *See* Ryan, *supra* note 35, at 913–16 ("The purpose of the *Miranda* warnings is not to trigger the right itself but only to inform the defendant that he has such a right."); *Hoggins*, 718 So. 2d at 770 ("The United States Supreme Court's decision finding post-*Miranda* silence violative of the federal constitution is based primarily on due process principles."). In this regard, *Miranda* warnings are perhaps more appropriately understood as the triggering mechanism for supplemental due process protection during interrogation by law enforcement. *See id.*

101. *See* Berkley, *supra* note 33, at 499; Ryan, *supra* note 35, at 913–16.

102. *See Salinas*, 133 S. Ct. at 2189–90 (Breyer, J., dissenting) (citations omitted); Skrapka, *supra* note 83, at 358 ("Most Americans have heard [*Miranda*] warnings recited countless times on television shows like *Dragnet*, *Hawaii Five-O*, *Law and Order*, and *The Wire*."); *supra* note 85.

103. *See* Skrapka, *supra* note 83, at 358–59 ("If most people are at least generally aware of their right to remain silent, it follows that a reasonable person who is aware of this right might naturally exercise the right when faced with arrest, even before the express warning is given.").

104. *See Salinas*, 133 S. Ct. at 2190 (Breyer, J., dissenting).

105. *See id.* at 2180 (noting that a suspect who is subjected to unwarned custodial interrogation is excused from failing to invoke the privilege because "governmental coercion

although silence does not invoke the right to remain silent,[106] silence has never been thought to waive that right.[107] Thus, to later use such self-incriminating silence against the suspect to suggest consciousness of guilt would raise serious Fifth Amendment concerns.[108] As a practical matter, allowing the use of silence under such circumstances may "compel" the defendant to testify at trial, thereby permitting impeachment,[109] and may create an incentive for law enforcement to delay giving *Miranda* warnings, for example.[110]

But even if custody is the primary consideration for determining the admissibility of silence under the Fifth Amendment, *Miranda* warnings and the distinction between purposes of use would still be important factors. For example, even if post-custody, pre-*Miranda* silence is inadmissible as evidence of guilt, the same silence may be admissible to impeach because *Miranda* warnings have not been given, and because the defendant has voluntarily chosen to waive some of the Fifth Amendment's protection by testifying.[111] But if *Miranda* warnings were given, the silence would also be inadmissible to impeach for reasons of fundamental unfairness.[112] Consequently, both *Miranda* warnings and the purpose of use are still important considerations to determining the admissibility of silence in general.

In conclusion, this Comment argues that post-custody, pre-*Miranda* silence should be inadmissible as substantive evidence of guilt under the Fifth Amendment. In addition, this Comment proposes a simple set of

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makes [the suspect's] forfeiture of the privilege involuntary"); *supra* notes 29–32, 35 and accompanying text.

106. *See Salinas*, 133 S. Ct. at 2182.

107. *See* Miranda v. Arizona, 384 U.S. 436, 475 (1966) ("[A] valid waiver will not be presumed simply from the silence of the accused after warnings are given . . . .").

108. *See Salinas*, 133 S. Ct. at 2186 (Breyer, J., dissenting) ("To permit a prosecutor to comment on a defendant's constitutionally protected silence would put that defendant in an impossible predicament. He must either answer the question or remain silent. If he answers the question, he may well reveal, for example, prejudicial facts, disreputable associates, or suspicious circumstances—even if he is innocent. If he remains silent, the prosecutor may well use that silence to suggest a consciousness of guilt." (citation omitted)); Berkley, *supra* note 33, at 498–500; Skrapka, *supra* note 83, at 396–402.

109. *See* Totten, *supra* note 5, at 1512; Skrapka, *supra* note 83, at 397; *Salinas*, 133 S. Ct. at 2186 (Breyer, J., dissenting) ("[I]f the defendant then takes the witness stand in order to explain either his speech or his silence, the prosecution may introduce, say for impeachment purposes, a prior conviction that the law would otherwise make inadmissible."); Fletcher v. Weir, 455 U.S. 603, 607 (1982) (per curiam) (allowing the use of post-custody, pre-*Miranda* silence to impeach the defendant at trial).

110. *See* State v. Hoggins, 718 So. 2d 761, 770 (Fla. 1998) (noting that by "relying on the right to remain silent to preclude evidence of and comment upon postarrest silence," the police will not have an incentive to delay administering *Miranda* warnings); Skrapka, *supra* note 83, at 400–01.

111. *See Fletcher*, 455 U.S. at 607.

112. *See supra* note 45 and accompanying text.

rules that distinguishes between the two purposes of use in determining the constitutional admissibility of all silence evidence. Not only does this set of rules coincide with all of the Court's precedents, including *Salinas*, it would resolve the current circuit split and complete the legal framework governing the admissibility of silence evidence today.

The first set of rules addresses the admissibility of silence as substantive evidence of guilt. If the suspect was given *Miranda* warnings, was in custody, or had otherwise invoked the privilege against self-incrimination, the suspect's silence is inadmissible as evidence of guilt.[113] But if the suspect was not given *Miranda* warnings, was not in custody, and failed to invoke the privilege, as in *Salinas*, the suspect's silence is admissible as evidence of guilt.[114] The second set of rules addresses the admissibility of silence for the purpose of impeachment. Regardless of if the suspect was in custody, if *Miranda* warnings were not given, the suspect's silence is admissible to impeach the suspect if he or she chooses to testify.[115] However, if *Miranda* warnings were given, the suspect's silence is inadmissible to impeach the suspect for reasons of fundamental unfairness.[116] Having a clear set of rules within this complex, unsettled area of law will help to provide predictability and uniformity in future cases involving one of our most fundamental rights: the right to remain silent.

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113. If the suspect has received *Miranda* warnings, the use of silence to prove guilt would be a violation of due process. *Salinas*, 133 S. Ct. at 2182 n.3 (noting that the use of pre-custody, post-*Miranda* silence as substantive evidence violates due process); Wainwright v. Greenfield, 474 U.S. 284, 295 (1986) (holding that the prosecutor's use of the defendant's post-arrest, post-*Miranda* silence as substantive evidence was fundamentally unfair). Assuming there is interrogation, if the suspect was in custody and *Miranda* warnings were not given, or if the suspect had otherwise invoked his right to remain silent, the use of silence to prove guilt would be a violation of the Fifth Amendment privilege against self-incrimination. *See* Berghuis v. Thompkins, 130 S. Ct. 2250, 2259 (2010) ("The *Miranda* Court formulated a warning that must be given to suspects before they can be subjected to custodial interrogation."); *supra* notes 29–32, 70 and accompanying text; Michigan v. Mosely, 423 U.S. 96, 103–04 (1975) (stating that by exercising the right to remain silent, a defendant can be ensured that the police will terminate their interrogation and concomitantly respect the suspect's exercise of that right).

114. *Salinas*, 133 S. Ct. at 2180.

115. *Fletcher*, 455 U.S. at 607 (holding that the prosecutor's use of post-custody, pre-*Miranda* silence to impeach the defendant at trial did not violate due process); Jenkins v. Anderson, 447 U.S. 231, 240 (1980) (holding that "the fundamental unfairness present in *Doyle* [wa]s not present" where "no governmental action induced petitioner to remain silent before arrest").

116. Doyle v. Ohio, 426 U.S. 610, 618 (1976) ("[W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."); *cf.* United States v. Hale, 422 U.S. 171, 180–81 (1975) (holding that a defendant's silence during police interrogation lacks significant probative value and is "intolerably" prejudicial).

Appendix

	IN CUSTODY	NOT IN CUSTODY
MIRANDA WARNINGS GIVEN	➢ Silence is inadmissible to impeach (*Doyle*). ➢ Silence is inadmissible to prove guilt (*Wainwright*).	➢ Silence is inadmissible to impeach (*Doyle*). ➢ Silence is inadmissible to prove guilt (*Salinas*).
MIRANDA WARNINGS NOT GIVEN	➢ Silence is admissible to impeach (*Fletcher*). ➢ There is a split among federal circuit courts over whether silence is admissible to prove guilt.	➢ Silence is admissible to impeach (*Jenkins*). ➢ Silence is admissible to prove guilt unless the suspect has previously invoked the privilege against self-incrimination (*Salinas*).