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Salinas v. Texas: An Analysis of the Fifth Amendment's Application in Non-Custodial Interrogations

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NOTE

SALINAS V. TEXAS: AN ANALYSIS OF THE FIFTH AMENDMENT'S APPLICATION IN NON-CUSTODIAL INTERROGATIONS

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I. INTRODUCTION

The Fifth Amendment self-incrimination clause states that a person cannot be compelled to be a witness against himself.[1] This clause is important in the field of criminal procedure because it determines whether a criminal defendant's statements can be used against him. However, there are some Fifth Amendment issues that have not been completely settled. The issue of pre-arrest, pre-*Miranda* silence is one such issue. The Supreme Court has previously held that post-arrest, post-*Miranda* silence cannot be used against a person,[2] and post-arrest, pre-*Miranda* silence cannot be used as substantive evidence against a person.[3] Otherwise, the Court's holding in *Miranda v. Arizona*[4] would have no effect.[5] The Court touched on the issue of pre-arrest, pre-*Miranda* silence recently in the case of *Salinas v. Texas*,[6] a murder case in which the prosecutor used the defendant's silence during police questioning as evidence of his guilt.[7] Nevertheless, because the Court based its reasoning, in part, on other factors—namely, the defendant's other behavior during police questioning[8]—the question of pre-arrest, pre-*Miranda* silence should remain open. Since the Fifth Amendment states that a person may not be compelled to be a witness against himself,[9] the answer to this question turns on whether the person was compelled to

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1. U.S. CONST. amend. V.

2. Doyle v. Ohio, 426 U.S. 610, 619 (1976).

3. *See* United States v. Flecha, 539 F.2d 874, 877 (2d Cir. 1976); United States v. Velarde-Gomez, 269 F.3d 1023, 1027-33 (9th Cir. 2001).

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

5. *Id.*; *Doyle*, 426 U.S. 610 (1976).

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

7. *Id.* at 2177-78.

8. *See id.* at 2178.

9. U.S. CONST. amend. V.

answer questions posed by the police. Although pre-arrest, pre-*Miranda* police questioning is supposedly less coercive than post-arrest, post-*Miranda* questioning,[10] there are circumstances in which pre-arrest, pre-*Miranda* questioning can be coercive. In these circumstances, the person's silence during this questioning should not be brought in against that person as substantive evidence in a criminal case, due to the fact that evidence of this silence would violate both the Fifth Amendment and Federal Rule of Evidence 403.[11]

II. LEGAL BACKGROUND

The Supreme Court and several circuit courts have held that there are certain circumstances in which silence is a protected means of invoking the Fifth Amendment privilege against self-incrimination.[12] These courts have also held that silence is not a protected means of invoking the privilege in other circumstances.[13] These courts have decided several important questions of Fifth Amendment jurisprudence. Nevertheless, several questions in this field remain open.

A. *Situations in Which Silence Does Not Invoke the Privilege Against Self-Incrimination*

There are several situations in which silence is not a legitimate means of invoking the Fifth Amendment privilege against self-incrimination. One of the situations is when a person who is not in custody selectively answers some questions and refuses to provide a legitimate reason for his failure to answer other questions in a timely manner.

The Supreme Court has held that a person must give a reason for why he does not answer police questioning.[14] This situation occurred in *Roberts v. United States*.[15] In that case, the defendant was voluntarily speaking to the police.[16] The defendant was convicted, based in part on his refusal to answer

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10. *Compare* Salinas v. Texas, 133 S Ct. 2174 (2013), *with* Miranda v. Arizona, 384 U.S. 436 (1966).

11. This evidentiary rule states that evidence may not be admitted if its prejudicial effect outweighs its probative value. FED. R. EVID. 403.

12. *See infra* Part II.B.

13. *See infra* Part II.A.

14. Roberts v. United States, 445 U.S. 552, 557 (1980).

15. *Id.* at 552.

16. *Id.* at 553.

the officers' questions.[17] He argued that his failure to respond was justified by his Fifth Amendment right against self-incrimination.[18] However, the Court held that "[t]he Fifth Amendment privilege against compelled self-incrimination is not self-executing. At least where the Government has no substantial reason to believe that the requested disclosures are likely to be incriminating, the privilege may not be relied upon unless it is invoked in a timely fashion."[19] Therefore, the *Roberts* Court held that the privilege must be expressly invoked when the defendant is not in custody while the police are questioning him.[20] In this situation, the Fifth Amendment privilege against self-incrimination is waived if not brought in a timely manner.[21] The Court did not, however, specifically define what "timely manner" meant—it simply held that the defendant waived his privilege because he did not invoke it at any time during the three-year period between his conversation with police and his conviction.[22] Justice Brennan's concurrence noted that the government's questioning was not directed at incriminating the defendant, and so the defendant's failure to state a neutral inference that would explain his silence during questioning could be used against him.[23] Nevertheless, Justice Brennan also noted that "sentencing judges should conduct an inquiry into the circumstances of silence where a defendant indicates before sentencing that his refusal to cooperate is prompted by constitutionally protected, or morally defensible, motives."[24] In other words, if a defendant indicates, after being questioned by police but before being convicted, that his refusal to speak was brought about by his constitutional right, the judge should inquire into the reasons why the defendant refused to speak. This suggested safeguard would protect a defendant's constitutional rights, yet still allow silence to be used against a defendant in certain circumstances.

Although the *Roberts* Court held that a defendant's silence could be used against him, the majority opinion provoked a strong dissent from Justice

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17. *Id.* at 559.

18. *Id.* at 559.

19. *Id.*

20. *Id.* at 560 (stating that the *Miranda* warnings given to the defendant did not impact the outcome because the exception for *Miranda* warnings does not apply outside of custodial settings).

21. *Id.* at 560.

22. *Id.* at 561.

23. *Id.* at 562 (Brennan, J., concurring).

24. *Id.* at 563.

Marshall.[25] Marshall mentioned that, in certain instances, police could give defendants immunity from prosecution in order to get them to speak.[26] Justice Marshall argued that the courts, by allowing a defendant to be incriminated because of his silence, diminish the incentive for the police to offer immunity to defendants.[27] The police will not use immunity to elicit answers from the defendant if they can simply incriminate the defendant with his silence.[28] In *Roberts*, the defendant selectively refused to answer questions regarding other people who had engaged in criminal activity with him.[29] This factual pattern prompted Justice Marshall's statements that silence should be protected;[30] however, the Supreme Court previously stated that a person's refusal to answer questions about co-conspirators is not constitutionally protected.[31]

The Supreme Court previously held that silence does not invoke the privilege where the privilege against self-incrimination is not, in fact, being invoked for the protection of the person who is speaking but instead for the protection of others. When disclosing information about another person is unlikely to incriminate the person being questioned, the privilege may not be invoked through silence.[32] In *Rogers v. United States*,[33] the Supreme Court held that because a woman's statements about the criminal activity of others was not likely to incriminate her,[34] she could not refuse to speak, and her refusal to speak was not privileged under the Fifth Amendment right against self-incrimination.[35]

B. *Situations in Which Silence is Sufficient to Invoke the Privilege Against Self-Incrimination*

Although there are a few situations in which the Supreme Court has held that silence is not a legitimate means of invoking the Fifth Amendment

25. *See id.* at 563-72.
26. *Id.* at 568 (Marshall, J., dissenting).
27. *Id.*
28. *Id.*
29. *Id.* at 554 (majority opinion).
30. *Id.* at 563-72.
31. Rogers v. United States, 340 U.S. 367, 370 (1951).
32. *Id.* at 373.
33. *Id.* at 367.
34. *Id.* at 375.
35. *Id.* at 370.

privilege against self-incrimination,[36] there are other situations in which both the Supreme Court and several circuit courts have held that silence is an effective means of invoking the privilege.[37] Most of these situations involve the pressures of a custodial interrogation. However, courts have held that the threat of losing government benefits is sufficiently coercive, and this threat removes the free will to answer or refuse to answer; therefore, courts permit the option of silence as a means of invoking the privilege against self-incrimination.[38]

Several cases have held that the threatened loss of a government job will allow the defendant to invoke the privilege against self-incrimination through silence.[39] For example, when a policeman failed to talk at will, but later gave a forced confession after being threatened with removal from office, the Supreme Court held that the threat of removal from office constituted impermissible coercion, which rendered the confession involuntary.[40] The policeman's silence would have sufficed to invoke the privilege in this context.[41]

In *Garrity v. New Jersey*,[42] several policemen were questioned about the way they handled cases.[43] One of the policemen had been told that he could refuse to answer; nonetheless, he was also told that if he refused to answer, he would be fired.[44] The Court stated that the choice between talking and being fired for refusing to talk was of a coercive nature.[45] In holding that the policeman could not be forced to choose between losing his job or testifying, the Court stated that "[t]he privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. . . . The privilege serves to protect the innocent who otherwise

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36. *See supra* Part II.A.

37. *See* United States v. Velarde-Gomez, 269 F.3d 1023, 1027-33 (9th Cir. 2001); United States v. Flecha, 539 F.2d 874, 877 (2d Cir. 1976).

38. *See* Lefkowitz v. Cunningham, 431 U.S. 801 (1977); Lefkowitz v. Turley, 414 U.S. 70 (1973).

39. *See Cunningham*, 431 U.S. 801; *Turley*, 414 U.S. 70.

40. Garrity v. New Jersey, 385 U.S. 493, 500 (1967).

41. *Id.*

42. *Id.* at 493.

43. *Id.* at 494.

44. *Id.*

45. *See id.* at 499-500.

might be ensnared by ambiguous circumstances."[46] The Court stated that the threat of removal from office deprived the defendant of his right to choose to speak or remain silent.[47] The Court found that silence was protected in this situation even though the coercive nature of the questioning was reduced by the fact that three of the four defendants had attorneys present at the time of the questioning.[48] Justice Harlan dissented on the ground that the defense had not even argued that the defendants' confessions resulted from "physical or mental coercion."[49] He stated that the tactics had not overcome the will of the police officers; therefore, the police officers' free choice to make the statements or remain silent was not eliminated by coercion.[50]

Justice Harlan also dissented in *Spevack v. Klein*,[51] a Fifth Amendment case decided in the same year as *Garrity v. New Jersey*.[52] In *Spevack*, the defendant was a lawyer who was disbarred for refusing to submit certain documents under a *subpoena duces tecum*.[53] The lawyer stated that his refusal to submit the documents was the result of his belief that the documents would incriminate him.[54] He argued that, because of his Fifth Amendment right against coerced self-incrimination, he did not have to submit the documents and his disbarment was an unconstitutional punishment for his assertion of his Fifth Amendment right.[55] Although Justice White noted that the state had a legitimate interest in disbarring or firing state employees who are dishonest or who are involved in criminal activity,[56] the Court said this type of coercion tactic cannot be used.[57] Although Justice Harlan again stated that the defendant was not penalized

46. *Id.* (quoting Slochower v. Bd. of Educ., 350 U.S. 551, 557-58 (1956)).

47. *Id.* at 494.

48. *Id.* at 506 (Harlan, J., dissenting).

49. *Id.* at 503.

50. *Id.*

51. Spevack v. Klein, 385 U.S. 511 (1967).

52. Garrity v. New Jersey, 385 U.S. 493 (1967).

53. *Spevack*, 385 U.S. at 512.

54. *Id.* at 512-13.

55. *Id.*

56. *Id.* at 532 (White, J., dissenting). Note that Justice White's dissent, which is found at the end of *Spevack v. Klein*, covers both *Spevack* and *Garrity*. Justice White thought that the state had a legitimate interest in firing the police officers in *Garrity* for the same reason that the state had a legitimate interest in disbarring the defendant in *Spevack*. *Id.*

57. *Id.*

for invoking the privilege,[58] the majority recognized that the threat of disbarment was sufficiently coercive, and the defendant could have invoked the privilege through silence.[59] The majority also stated that the Fifth Amendment, as applied to the states through the Fourteenth Amendment, forbids the prosecution from commenting on a defendant's silence[60] and that the Fifth Amendment also prohibits a court from instructing the jury that a defendant's silence is evidence of guilt.[61]

In *Lefkowitz v. Cunningham*,[62] the Court reaffirmed its position that the threat of losing a government job allows the defendant to invoke the Fifth Amendment privilege against self-incrimination through silence.[63] In *Cunningham*, a public official refused to testify about his conduct in regards to the position that he held.[64] Since he refused to testify, he was removed from office and banned from holding any public or party office for the next five years.[65] The Court held that "when a State compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a subsequent criminal prosecution."[66] The Court's statement reaffirmed the rulings in *Garrity* and *Spevack* and noted that the threatened loss of employment rose to such a coercive nature that the defendant could not be expected to choose between giving possibly self-incriminating statements and losing his job.[67]

In addition to the Supreme Court's holding that the threatened loss of a job is sufficiently coercive to enable the defendant to invoke the privilege through silence,[68] several circuit courts have held that the privilege may be

58. *Id.* at 529 (Harlan, J., dissenting).

59. *Id.* at 516 (majority opinion).

60. *Id.* at 515 (quoting Griffin v. California, 380 U.S. 609, 615 (1965)).

61. *Id.*

62. Lefkowitz v. Cunningham, 431 U.S. 801 (1977).

63. *Id.*

64. *Id.* at 803.

65. *Id.* at 803-04.

66. *Id.* at 805.

67. *Id.*

68. Silence can mean either refusing to answer questions asked by police or refusing to expressly invoke the privilege on the witness stand. *See id.*

invoked through silence in various other circumstances.[69] One circuit has held that the privilege against self-incrimination is not "all or nothing."[70] It may be invoked by selectively answering questions posed by the police.[71] In fact, the court specifically stated, "[a] suspect may remain selectively silent by answering some questions and then refusing to answer others without taking the risk that his silence may be used against him at trial."[72] The court also found that "when a defendant remains silent or refuses to answer a question posed by police, that silence or refusal is inadmissible."[73] This statement shows that the defendant's silence during police questioning cannot be held against the defendant; the Fifth Amendment protects the defendant from the prosecutor's use of his silence as evidence. A defendant's silence may not be brought into court even if the police tell the defendant that his silence may be held against him—his Fifth Amendment rights do not simply cease because of an officer's warnings.[74] The court stated that the silence was protected because post-*Miranda* silence is ambiguous; the court cannot tell whether the defendant's silence is an indication of guilt or a natural response to the *Miranda* warnings.[75] When a prosecutor references the defendant's post-arrest silence during the trial, the error is not harmless, and the judgment of the trial court must be reversed,[76] especially when the other evidence of guilt is not overwhelming.[77]

The Tenth Circuit Court of Appeals has also held that the privilege may be selectively invoked.[78] The Tenth Circuit held that the partial invocation of the right by selectively answering questions is protected.[79] Nevertheless, the court asserted that the prosecutor's comments on the defendant's silence did not constitute reversible error because the prosecutor's statements were made solely for the purpose of impeaching the defendant's

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69. Hurd v. Terhune, 619 F.3d 1080 (9th Cir. 2010); United States v. May, 52 F.3d 885 (10th Cir. 1995).

70. *Hurd*, 619 F.3d at 1087.

71. *Id.*

72. *Id.*

73. *Id.* at 1088.

74. *Id.* at 1089.

75. *Id.*

76. *Id.* at 1090.

77. *Id.* at 1091.

78. United States v. May, 52 F.3d 885, 889 (10th Cir. 1995).

79. *Id.*

testimony by calling attention to the defendant's prior inconsistent statements.[80] Furthermore, the statements did not result in reversible error because a reasonable jury would not have taken the statements as a comment on the defendant's silence.[81] This case shows the differentiation between the use of the defendant's pre-trial silence as substantive evidence and the use of the defendant's pre-trial silence to impeach him.[82] Several other courts also have held that a defendant's silence may be used against him as impeachment even when it may not be used as substantive evidence.[83]

The Supreme Court and several circuit courts have been consistent in holding that a defendant's post-arrest, post-*Miranda* silence may not be used against him at trial. In *Miranda v. Arizona*,[84] the Supreme Court held that a defendant could not be taken into custody and questioned by the police without first being read certain warnings.[85] These warnings tell the defendant that she has certain rights that she can choose to exercise or waive during police questioning.[86] The defendant must be told that she has the right to remain silent, that anything she says can and will be used against her, that she has the right to an attorney, and that an attorney will be provided for her if she cannot afford one.[87] The *Miranda* Court also held that the prosecution has the burden of showing that the warnings were given to the defendant and were freely waived by the defendant.[88] These warnings are needed because they serve as protective devices to ensure that there is no coercion in the interrogation.[89] In fact, they help overcome the pressures of physical and mental coercion that occur with custodial interrogation.[90] The Court in *Miranda* held, in order to be protected by the

80. *Id.* at 890.

81. *Id.*

82. *See* GEORGE FISHER, EVIDENCE 447-48 (6th ed. 2013) (stating the differences between the use of silence to impeach and the use of silence as substantive evidence, and noting that the use of silence for impeachment does not need to meet the high standard for admission that must be met when silence is brought in as substantive evidence).

83. *See, e.g.*, Fletcher v. Weir, 455 U.S. 603, 607 (1982); Jenkins v. Anderson, 447 U.S. 231, 240 (1980).

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

85. *Id.* at 444.

86. *Id.*

87. *Id.*

88. *Id.* at 479.

89. *Id.* at 458.

90. *Id.* at 447-48, 469.

Fifth Amendment and to be able to take full advantage of the privilege against self-incrimination, a defendant must be informed of the privilege.[91] The Supreme Court's decision in *Miranda* was reasserted by the Supreme Court in *Doyle v. Ohio*,[92] which held that a defendant's silence may not be used against him, even for impeachment purposes, after he had been given *Miranda* warnings.[93]

Limited in scope, *Miranda* only applies in situations where the defendant has been taken into custody and is interrogated by police.[94] For a person to be in custody, the person must have been arrested or "otherwise deprived of . . . freedom of action in any significant way."[95] *Miranda* held that there was a right to choose between silence and speech,[96] and such rights could not be waived by mere silence.[97] Additionally, the *Miranda* Court found that these rights are not waived if the defendant has answered some questions before asserting the right to remain silent.[98] The *Miranda* Court reversed several defendants' convictions because they had not adequately been informed of their rights before they were interrogated.[99] Those defendants' confessions were obtained from these invalid interrogations, and therefore, the court reversed their convictions.[100]

Several circuit courts have manifested their adoption of this binding principle. In *United States v. Canterbury*,[101] the Tenth Circuit held that the defendant's due process rights were violated when the prosecutor commented on the defendant's post-arrest silence.[102] The Court stated, "partial silence does not preclude [the defendant] from claiming a violation of his due process rights."[103] The court even stated that the use of the

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91. *Id.* at 467.

92. Doyle v. Ohio, 426 U.S. 610 (1976).

93. *Id.* at 619.

94. *See Miranda*, 384 U.S. at 444.

95. *Id.*

96. *Id.* at 469.

97. *Id.* at 475.

98. *Id.* at 475-76.

99. *Id.* at 492, 494, 496. Note that *Miranda* involved four cases that were consolidated when they came before the Supreme Court.

100. *Id.*

101. United States v. Canterbury, 985 F.2d 483 (10th Cir. 1993).

102. *Id.* at 484.

103. *Id.* at 486.

defendant's silence to impeach was not proper under these circumstances.[104] Due to the fact that the defendant had been arrested and had been given his *Miranda* warnings, the prosecutor's use of defendant's silence to impeach the defendant was unwarranted and violated the defendant's due process rights.[105] The court held that post-arrest, post-*Miranda* silence could not be used to impeach the defendant even though it admitted that the use of silence for impeachment was different from the use of silence as substantive evidence.[106] It based its decision on the fact that the defendant had not made statements after being arrested that were inconsistent with his statements at trial; therefore, the prosecutor's cross-examination of the defendant could not be used to impeach the defendant, and the use of the defendant's silence during the prosecutor's cross-examination was sufficient to merit a reversal.[107] By discrediting the defendant's testimony through the use of his silence to "impeach" the testimony, the prosecutor violated the defendant's due process rights.[108]

The Fourth Circuit has also acknowledged that a defendant, in relying on his understanding of his *Miranda* warnings, may use silence as a means of invoking his Fifth Amendment privilege against self-incrimination.[109] The court held that "if, in declining to answer certain questions, a criminal accused invokes his fifth amendment [sic] privilege or in any other manner indicates he is relying on his understanding of the *Miranda* warning, evidence of his silence or of his refusal to answer specific questions is inadmissible."[110] This case further supports the well-accepted legal theory that a person's post-arrest, post-*Miranda* silence may not be used against him.

Courts also have held that a guilty plea does not waive the Fifth Amendment privilege against self-incrimination in further criminal proceedings.[111] The Supreme Court stated that a defendant retained her Fifth Amendment privilege against self-incrimination at her sentencing hearing even though she had pled guilty to the crime.[112] When the

104. *Id.*

105. *Id.* (citing United States v. Massey, 687 F.2d 1348, 1353 (10th Cir. 1982)).

106. *Id.*

107. *Id.* at 487.

108. *Id.* at 486.

109. United States v. Ghiz, 491 F.2d 599, 600 (4th Cir. 1974).

110. *Id.*

111. *See* Mitchell v. United States, 526 U.S. 314 (1999).

112. *Id.* at 316.

defendant refused to speak at her sentencing hearing she was given a sentence that was based partially on her refusal to speak. The Supreme Court reversed her sentence and stated that the sentencing court may not draw adverse inferences from the defendant's silence.[113] Although the Supreme Court had previously held that a defendant may not be selectively silent in a single proceeding such as a trial—that is, the defendant cannot selectively testify[114]—a person may choose to invoke the privilege in a later proceeding, even when she has failed to invoke it at an earlier phase.[115] The Court noted that the danger of the court being misled by selective disclosure[116] was very low under these circumstances and held that the defendant was being forced either to testify or to receive a harsher punishment.[117] The Court held that using this forced testimony to enhance prosecutorial power was a violation of the defendant's Fifth Amendment rights.[118]

III. *SALINAS V. TEXAS*: SILENCE AS AN IMPERMISSIBLE MEANS OF INVOKING THE PRIVILEGE AGAINST SELF-INCRIMINATION IN A NON-CUSTODIAL SITUATION

A. *Facts*

On December 18, 1992, two brothers were shot and killed in their home.[119] Although no one witnessed the shooting, the brothers' neighbor noticed someone fleeing the scene of the crime.[120] The neighbor saw the suspect leave the scene in a dark-colored vehicle.[121] The police recovered shotgun shell casings at the scene of the crime.[122] The evidence that the

113. *Id.* at 317.

114. *Id.* at 321 (citing Brown v. United States, 356 U.S. 148, 154-55 (1958)).

115. *See id.* at 316.

116. The danger of misleading the court through selective disclosure is a factor that the Court considers in analyzing whether the selective use of silence may be employed by the defendant. *See Mitchell*, 526 U.S. at 323.

117. *Mitchell*, 526 U.S. at 323, 325.

118. *Id.*

119. Salinas v. Texas, 133 S. Ct. 2174, 2178 (2013).

120. *Id.*

121. *Id.*

122. *Id.*

police found led them to the defendant, Genovevo Salinas.[123] Salinas had a dark-colored vehicle parked in his driveway, and he was in possession of a shotgun, which he handed over to police for ballistics testing.[124] Salinas voluntarily went to the police station to be questioned.[125] Apparently, the police had told Salinas that they wanted to take him to the station so that they could "take photographs and to clear him as [a] suspect."[126]

When Salinas arrived at the police station, he was questioned in a non-custodial manner for about an hour.[127] When Salinas was being questioned, he answered most of the police officers' questions.[128] However, when police asked him whether ballistics would show that his shotgun matched the shell casings found at the crime scene, Salinas refused to answer.[129] Instead of speaking, Salinas "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up."[130] After a "few moments" of silence, the police resumed questioning.[131] Salinas answered the subsequent questions posed by the police.[132]

At some point after this interview, the police determined that there was not enough evidence to charge Salinas, so they released him.[133] A short time later, a man stated that he had heard Salinas confess to the killings.[134] Using this additional evidence, police were able to obtain an arrest warrant.[135] However, Salinas had fled during the time in which he was released, and the police did not find him until 2007.[136]

Salinas did not testify during his trial.[137] The prosecutors used Salinas's reaction to the question about the shotgun as evidence that he was guilty.[138]

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123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 2185 (Breyer, J., dissenting) (alteration in original) (citation omitted).
127. *Id.* at 2178 (plurality opinion).
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*

The jury found Salinas guilty of murder, and Salinas was sentenced to twenty years in prison.[139] Salinas appealed to the Court of Appeals of Texas.[140] During this appeal, he argued that the prosecutors' use of his silence against him was a violation of the Fifth Amendment.[141] The Court of Appeals rejected this argument, stating that Salinas's silence was not compelled because he had not yet been arrested or given *Miranda* warnings.[142] After the Court of Appeals rendered its decision, the Texas Court of Criminal Appeals heard the case and affirmed the decision of the Court of Appeals of Texas.[143]

B. Salinas v. Texas *at the Supreme Court: Holding and Rationale*

The Supreme Court of the United States granted certiorari and affirmed the decision of the Texas Court of Criminal Appeals, thereby upholding Salinas's conviction.[144] In deciding Salinas's case, the Supreme Court held that a defendant's pre-arrest, pre-*Miranda* silence could be used against him at trial.[145] The Court stated that when a defendant is silent during questioning, and the questioning occurs before the defendant is arrested and given his *Miranda* warnings, the police have not coerced the defendant into silence.[146] Since the Fifth Amendment does not give a general right to silence, a defendant who has not been coerced by police into remaining silent cannot use the Fifth Amendment privilege unless he has expressly invoked it.[147]

The majority reasoned that the requirement that the privilege be expressly invoked exists because it puts the government "on notice when a witness intends to rely on the privilege so that it may either argue that the testimony sought could not be self-incriminating . . . or cure any potential self-incrimination through a grant of immunity."[148] It also helps courts understand the specific reasons why the witness refuses to answer the

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 2179.

144. *Id.* at 2178.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 2179 (citing Hoffman v. United States, 341 U.S. 479, 486 (1951); Kastigar v. United States, 406 U.S. 441, 448 (1972)).

question.[149] In other words, the government needs to know if the privilege is being invoked, and why it is being invoked, so that it can take measures to continue its prosecution. The Court stated that, although there are exceptions to this rule, Salinas's case did not fall within one of those exceptions because he had voluntarily come down to the police station and started answering the officers' questions.[150] Because Salinas was not deprived of the ability to voluntarily invoke his Fifth Amendment privilege, and because he failed to invoke this privilege, Salinas's silence could not be protected under the Fifth Amendment.[151] The Court stated that making a general exception to the Fifth Amendment privilege where the privilege was invoked through silence would "needlessly burden the Government's interests in obtaining testimony and prosecuting criminal activity."[152] The Court also stated that the privilege must be expressly invoked even when the officer has reason to believe that the answer to the question will incriminate the witness.[153] Salinas argued that when the question is one that the interrogating officer knows or expects will incriminate the witness, and the witness remains silent, the privilege should be invoked.[154] The Court, however, held that because the privilege is not considered to be invoked in either of these situations, it could not be met at the "intersection" of these two situations.[155] The Court also stated that a witness's constitutional right to remain silent in the face of questioning depends on his reasons for remaining silent, and that those reasons must be available for the court to evaluate in determining whether the Fifth Amendment privilege was rightly asserted.[156]

The Court also found Salinas's behavior during the time of the questioning to be a factor in determining whether his Fifth Amendment privilege was invoked.[157] The Court noted that when Salinas was asked the question about whether the shell casings found at the scene of the crime would match his shotgun, he not only remained silent but he also made certain movements that would tend to indicate his discomfort at the

149. *Id.*
150. *Id.* at 2180.
151. *Id.*
152. *Id.* at 2181.
153. *Id.*
154. *Id.* at 2181-82.
155. *Id.*
156. *Id.* at 2183.
157. *Id.*

question.[158] These behaviors led to an inference of guilt because they show that Salinas was uncomfortable with answering the question that was presented to him. This portion of the analysis could have been dispositive, but the Court only mentioned the defendant's other behaviors in one paragraph of its opinion—it did not consider these factors to be extremely important to the disposition of the case.[159] The Court's main holding involved the fact that Salinas had not been under pressure by the police—he retained his ability to voluntarily invoke the Fifth Amendment privilege.[160] Since he did not properly invoke this privilege, however, his Fifth Amendment privilege could not be protected.[161]

C. *Justice Thomas' Concurring Opinion*

Justice Thomas concurred in the judgment, stating that the Court's prior holding in *Griffin v. California*,[162] which held that a defendant was not required to expressly invoke the privilege when on the stand at his trial, was incorrect.[163] Justice Thomas focused his concurrence on the principle that a defendant should not be given his Fifth Amendment privilege without expressly invoking it, even when the defendant is on the witness stand at trial.[164] Justice Thomas reasoned that because the privilege should not be protected without being expressly invoked, and because Salinas did not expressly invoke the privilege, Salinas cannot be protected by the privilege.[165]

D. *Justice Breyer's Dissenting Opinion*

Justice Breyer stated that the Fifth Amendment privilege against self-incrimination prohibits a prosecutor from commenting on a defendant's silence in the face of police interrogation.[166] He stated that giving a defendant a choice between talking and remaining silent was impermissible because the prosecutor could then bring in information about how the

158. *Id.*

159. *Id.*

160. *Id.* at 2184.

161. *Id.*

162. Griffin v. California, 380 U.S. 609 (1965).

163. *Salinas*, 133 S. Ct. at 2184 (Thomas, J., concurring).

164. *Id.*

165. *Id.*

166. *Id.* at 2185 (Breyer, J., dissenting).

silence shows consciousness of guilt.[167] The defendant may then feel compulsion to speak at trial, and when he tries to explain his speech or silence at trial, the prosecutor could use prior convictions to impeach his testimony.[168] This situation would put the defendant in a tough predicament and would render his Fifth Amendment privilege void.[169] During this portion of his analysis, Justice Breyer failed to mention that the defendant would also have the option to expressly invoke his Fifth Amendment privilege.[170] It is possible that Justice Breyer believed that expressly invoking the privilege would serve as a means of self-incrimination, but he did not specifically state this line of reasoning.

Justice Breyer used the next part of his dissenting opinion to explain how many of the cases used in the plurality opinion do not support the proposition that silence is not protected by the Fifth Amendment.[171] He stated that the cases cited by the majority show that only self-incrimination, not fear of incriminating others, is protected; that silence that does not have enough of a connection to the Fifth Amendment privilege cannot be used to invoke the privilege; and that silence not based on Fifth Amendment grounds is not protected.[172]

Justice Breyer split the Fifth Amendment cases into two types: (1) those in which express invocation is not required to tie the defendant's silence to the Fifth Amendment privilege, and (2) those in which invocation is needed to tie the defendant's silence to the Fifth Amendment privilege.[173] The dissent also discussed a third type of case: those in which the defendant is not required to respond to police questioning or expressly invoke the privilege when expressly invoking the privilege would be punished by the loss of a government job or government benefits.[174]

The dissent also mentioned three important circumstances that determine which situations require the Fifth Amendment privilege to be invoked.[175] The first circumstance is "whether one can fairly infer that the individual being questioned is invoking the [Fifth] Amendment's

167. *Id.* at 2186.

168. *Id.*

169. *Id.*

170. *See id.* at 2185-91.

171. *Id.* at 2186-89.

172. *Id.* at 2187.

173. *Id.* at 2188.

174. *Id.*

175. *Id.* at 2189.

protection."[176] If the police officer believes that the person he is questioning will need to give up incriminating information by answering a question, then the Fifth Amendment privilege does not need to be invoked because the officer can reasonably understand that the person he is questioning is asserting the privilege through his silence.[177] The second circumstance is that, when the facts of the first circumstance are unclear, that is, if the interrogating officer cannot infer that the person he is questioning is trying to assert his Fifth Amendment privilege through his silence, it must be determined whether it is important for the interrogating officer to know if the individual is asserting the privilege.[178] If it is not important for the interrogating officer to know that the individual is invoking his Fifth Amendment privilege, then the privilege does not need to be expressly invoked.[179] Finally, if the officer does not know that the individual is asserting his Fifth Amendment privilege through silence, and if it is important for the officer to know that the individual is asserting his Fifth Amendment privilege, the defendant does not need to answer if "there is a good reason for excusing the individual from referring to the Fifth Amendment, such as inherent penalization simply by answering."[180] These circumstances show the critical question in Fifth Amendment cases: whether the circumstances of the case "give rise to a fair inference that the silence rests on the Fifth Amendment."[181]

According to the dissent, Salinas should not have needed to answer because his case fits within the first circumstance. By asking the question about the shotgun, the police were attempting to solicit an incriminating answer from Salinas, and they expected him to give an incriminating answer.[182] Because the circumstances of Salinas's case put the police on notice that Salinas was attempting to invoke his Fifth Amendment privilege through his silence, Salinas's conviction should have been reversed.[183]

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176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 2190.

181. *Id.* The Court says that it is "[f]ar better . . . 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?" *Id.* at 2191.

182. *Id.* at 2189.

183. *Id.* at 2190.

IV. ANALYSIS

A. *Introduction*

The Fifth Amendment states that "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[184] The language of the Fifth Amendment does not specifically state that silence is protected; however, it does state that a person cannot be compelled to be a witness against himself or herself.[185] The Fifth Amendment leaves open the question of what can be defined as compulsion, which is important because the existence of compulsion would necessarily lead to the conclusion that the declarant's testimony against himself was compelled. Since a person cannot be compelled to be a witness against himself, the disposition of Fifth Amendment cases should turn on whether or not compulsion exists. The word "compulsion" has been partially defined by several cases, such as *Lefkowitz v. Cunningham*,[186] which held that the threat of losing employment constituted sufficient compulsion to invoke the Fifth Amendment privilege.[187] When compulsion exists, the court has generally held that the Fifth Amendment privilege may be invoked through silence.[188]

The holding of *Salinas v. Texas* is not problematic. In this case, Salinas's conviction was upheld;[189] accordingly, the facts in this case are sufficient to support a conviction.[190] Salinas voluntarily went to the police station and voluntarily answered most of the questions that the police had for him.[191] Yet when the police asked him whether his shotgun would match the casings taken from the scene of the crime, he stopped talking, looked down, and engaged in other nervous behaviors such as shuffling his feet, biting his lip, and tightening up.[192] These behaviors went beyond mere silence and could reasonably give the police the indication that Salinas was hiding something.

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184. U.S. CONST. amend. V.

185. *Id.*

186. Lefkowitz v. Cunningham, 431 U.S. 801 (1977).

187. *Id.* at 805.

188. *Id.*

189. *Salinas*, 133 S. Ct. at 2178, 2184.

190. *See id.* at 2178 (noting that Salinas engaged in several incriminatory behaviors after being asked whether his shotgun would match the shells found at the scene of the crime).

191. *Id.* at 2178.

192. *Id.*

It is also important to note that Salinas not only answered all of the questions before being asked the question about his shotgun; he also answered all questions that were asked after the question about the shotgun.[193] Salinas's behavior would tend to show that he was simply avoiding one question. The most reasonable explanation of why he did not answer is that he was hiding something, possibly the fact that he was unsure whether his shotgun would match the shell casings. While it is true that Salinas was not immediately arrested for the crime,[194] and that there was initially not enough evidence to arrest Salinas for the crime,[195] these facts do not change the fact that Salinas was faced with a situation where he could have asserted his Fifth Amendment privilege or said something exculpatory. Instead, he engaged in behaviors that would tend to show that he was uncomfortable with the question.[196] The extreme discomfort that Salinas displayed leads to the conclusion that Salinas was hiding something. Due to the unique circumstances of this case, the affirmation of Salinas's conviction is fair.

Some of the rationale set forth in *Salinas* can, however, be problematic in that it alludes that silence cannot be protected at all.[197] The Court cites one case, *Berghuis v. Thompkins*,[198] to support its proposition that silence is not a protected means of invoking the Fifth Amendment privilege against self-incrimination.[199] Yet that case upheld the conviction of a defendant based on his incriminating statements that he gave after nearly three hours of silence.[200] The Court stated that this case stands for the proposition that silence is not an effective means of invoking the privilege;[201] however, there is a difference between holding that silence does not invoke the privilege against self-incrimination such that police must cease questioning a witness, and holding that silence on a particular question is not an appropriate means of invoking the privilege for that question. In the first situation, the

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *See id.* at 2179 (stating that the insistence on witnesses' express invocation of the "privilege assures that the Government obtains all of the information to which it is entitled.").

198. Berghuis v. Thompkins, 560 U.S. 370 (2010).

199. *Salinas*, 133 S. Ct. at 2182.

200. *Id.*

201. *Id.*

police are not using the defendant's silence against him, but in the second situation, the silence is considered to be a means of inferring guilt. Guilt should not be inferred from silence unless the silence is accompanied by several other behaviors that, taken as a whole, are enough to constitute guilt. Since *Berghuis* held that statements made after three hours of silence were not protected under the Fifth Amendment,[202] *Berghuis* does not truly stand for the proposition that silence cannot be protected. Rather, it stands for the proposition that silence does not protect subsequent communications.[203] Therefore, *Berghuis* is not dispositive of the question of whether silence is an adequate means of invoking the privilege.

The Court could have used a totality of the circumstances test to uphold Salinas's conviction; however, it chose to focus almost exclusively on Salinas's silence.[204] Here, it was not Salinas's silence per se that should have been used as evidence against him, but rather his body language that he engaged in after the question was asked, coupled with his silence after being asked that question. By focusing on silence in this case, the Court has not adequately protected future defendants' Fifth Amendment rights. The totality of the circumstances is an appropriate means of determining whether a defendant's Fifth Amendment right is invoked. For example, a rule could state that overt behaviors may be used as a means of inferring criminality; however, silence alone may not. Overt body language, from which a court may infer guilt, includes: looking down, fidgeting, shuffling feet, biting one's lip, and tightening up. Guilt may also be inferred from galvanic skin response,[205] otherwise known as skin conductance.[206] These can be determined by checking to see if the person has sweaty palms,[207] or other physical responses that show nervousness, such as biting one's lip and looking down at one's feet. Any one of these behaviors by itself should not be viewed as dispositive. Also, when looking at these behaviors, it is important to determine whether the behaviors existed since the beginning of the conversation or were simply engaged in after a certain question was

202. *Berghuis*, 560 U.S. at 375-76 (stating that the defendant spoke after he was told he could waive his right to remain silent).

203. *Id.*

204. *See generally Salinas*, 133 S. Ct. at 2177-84.

205. Frank Horvath, *An Experimental Comparison of the Psychological Stress Evaluator and the Galvanic Skin Response in Detection of Deception*, 63.3 J. APPLIED PSYCHOL. 338, 340-41 (1978).

206. *Galvactivator: Frequently Asked Questions*, www.media.mit.edu/galvactivator/faq.html (last visited Feb. 24, 2014).

207. *Id.*

asked. If the suspect has acted in this manner since the beginning of the conversation, even if he voluntarily came to the police station to answer questions, the court should not use the witness's behaviors against him. However, if the witness only started engaging in the behaviors after being asked a specific question, but did not engage in those behaviors throughout the entire conversation, guilt may be inferred from the behaviors, and the behaviors may be used against the witness in a criminal proceeding. The court should always err on the side of caution in determining guilt, and any uncertainties should be resolved in favor of the person being questioned if there is no overwhelming evidence of the silent person's guilt. Treating silence and body language in this manner ensures that people who are innocent will be protected and that the government may still look for guilt in behaviors that occur during an interrogation.

B. *The Blanket Rationale Set Forth in* Salinas *is too Broad and Should Not be Used*

A blanket rule stating that a person's pre-arrest, pre-*Miranda* silence may be used against the silent person in a criminal proceeding should not be used because this policy would not necessarily make convicting a guilty person easier, but may lead to the convictions of innocent persons.

1. The Policy of Using a Person's Pre-Arrest, Pre-*Miranda* Silence Against Him Will Not Make Convicting a Guilty Person Easier

The rule that a person's pre-arrest, pre-*Miranda* silence may be used against him or her is intended to favor the government; however, this rule does not make a large impact in favor of the government. In *Salinas*, the defendant's behaviors, in addition to his silence, helped give him away.[208] The defendant had "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up."[209] He also had answered all of the questions before the question on which he remained silent and looked to the floor, and he answered all of the questions after the question on which he had engaged in these incriminating behaviors.[210] Silence alone was not needed to infer that the defendant was guilty because guilt could be inferred from other

208. *See Salinas*, 133 S. Ct. at 2178.

209. *Id.*

210. *Id.*

behaviors.[211] In fact, many of these behaviors could be held as communicative of guilt.[212] Therefore, this case is similar to others in which people gave incriminating answers after being silent for part of the questioning[213] because here the behaviors themselves are communicative. The use of these behaviors, together with the defendant's silence, was sufficient to find an inference of guilt; nonetheless, because any one of these behaviors by itself, especially the silence by itself, can be misleading, the existence of only one of these behaviors should not be used as substantive evidence against the defendant at trial. There should be more than one behavior if the defendant's non-verbal acts are to be used as substantive evidence against him at trial, and a totality of the circumstances test should be used.

Totality of the circumstances tests were used prior to *Miranda v. Arizona*[214] and *Escobedo v. Illinois*[215] as a means of determining if a person was coerced into making a confession.[216] Although this test is no longer used in that manner, the totality of the circumstances test should be used when determining whether a person's conduct during police questioning is sufficient to find that the person had a guilty conscience during the interrogation. In other words, when determining whether conduct during the interrogation may be used as substantive evidence of guilt, the number and type of behaviors engaged in during the interrogation should be examined and weighed. If the totality of the circumstances shows that the defendant was engaging in behaviors because of a guilty conscience, then the evidence should be admitted against him at trial. However, if the totality of the circumstances does not show that the defendant was engaging in behaviors because of a guilty conscience, then the evidence should not be admitted at trial because it will have a low probative value and will not be useful to the government in ensuring that guilty individuals are imprisoned.[217]

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211. *See id.*

212. *See* discussion *supra* Part III.A.

213. *See, e.g.*, Berghuis v. Thompkins, 560 U.S. 370 (2010).

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

215. Escobedo v. Illinois, 378 U.S. 478 (1964).

216. *See Miranda*, 384 U.S. at 503 (Clark, J., dissenting); Haynes v. Washington, 373 U.S. 503, 514 (1963).

217. *See* FED. R. EVID. 401 *and* FED. R. EVID. 403.

Also, in *Salinas*, because the defendant engaged in other behaviors that tend to show guilt,[218] there was no need for the Court to make a blanket rule that silence may be used as substantive evidence in every situation in which the defendant had engaged in silence during pre-arrest, pre-*Miranda* questioning. Since silence alone was not needed to show that the defendant in *Salinas* showed a guilty conscience,[219] there was no need to use this case to show that silence alone should be used as substantive evidence. The Court should have deferred this question until a case with silence as the only showing of guilt during the interrogation arose.

2. The Policy of Using a Person's Pre-Arrest, Pre-*Miranda* Silence Against Him May Lead to Convictions of Innocent Persons

Silence alone should not serve as substantive evidence of guilt due to the fact that it tends to mislead the jury. People engage in silence during interrogations for multiple reasons, and although guilt may not be the reason for the silence, when a prosecutor presents the silence as substantive evidence of guilt, the jury may believe that the silence could only have been the result of a guilty mind. Yet silence may appear to be the only choice to a person who is being questioned by police. During the 1950s, Senator McCarthy questioned several people who were thought to be communists.[220] He told these people "an innocent man does not need the Fifth Amendment."[221] If a person believes that the police will infer her guilt from her invocation of the privilege, then she may refuse to expressly invoke the privilege for fear that the invocation of the privilege will be used against her for the remainder of the police's dealings with her. In this situation, the person has simply used silence because she feels that expressly invoking the privilege will harm her or that the willingness to speak would lead her to say something that is not true.[222] Therefore, forcing a person to

218. *See* Salinas v. Texas, 133 S. Ct. 2174, 2178 (2013).

219. *See id.* (noting the behaviors in which the defendant was engaged when he was asked whether the shotgun shells found at the scene would match his shotgun).

220. Donald A. Ritchie, *Joseph McCarthy and the Fifth Amendment Communists*, in THE RIGHT AGAINST SELF-INCRIMINATION 83 (Kimberly Troisi-Paton ed., Thomson-Gale 2006).

221. *Id.* at 92-93.

222. *See, e.g.*, Frances E. Chapman, *Coerced Internalized False Confessions and Police Interrogations: The Power of Coercion*, 37 L. & PSYCHOL. REV. 159 (2013) (recognizing the existence of coerced internalized false confessions and explaining that there are ways to mitigate this problem); Richard A. Leo & Deborah Davis, *From False Confession to Wrongful Conviction: Seven Psychological Processes*, 38(1/2) J. PSYCHIATRY & L. 9 (2010).

expressly invoke the privilege may be something that an innocent person is afraid to do.

The innocent person should not be punished for failing to expressly invoke the privilege when she reasonably fears that the invocation of the privilege would tend to make police and prosecutors believe that she is guilty and portray her as such. Although there are some protections against this problem, such as the rule that a person need not expressly invoke the privilege when the invocation of the privilege would tend to incriminate the person,[223] these rules do not serve as a sufficient protection for an innocent person who is being questioned by police. Generally, when the police are questioning a person, the police will believe the person is guilty if she asserts her Fifth Amendment privilege. Like Senator McCarthy, the police may assume that the person who asserts the privilege has something to hide. The rule that a person need not expressly invoke the privilege against self-incrimination, when the invocation of the privilege would itself tend to incriminate, is not applied in all situations in which the police question a person.[224] Also of importance is the fact that physical evidence on the person is not covered by the Fifth Amendment's protections;[225] so a person may not want to explicitly invoke the Fifth Amendment for fear of having physical evidence taken from her person. Therefore, it does not protect people in many situations.

There are many situations in which the express invocation of the privilege against self-incrimination would itself tend to incriminate. A person is not, however, protected from having the invocation used against her in some of these circumstances. First of all, several courts have held that a person may not assert the privilege if he or she does not reasonably believe that the answer to the question will tend to incriminate him or her.[226] Some courts have even stated that a person must offer an explanation of why her answers to questions would tend to be incriminating.[227] In other words, the assertion of the privilege will necessarily give the indication that the person who claims the privilege is guilty of something. When a person states that

223. *See* Spevack v. Klein, 385 U.S. 511, 513-14 (1967).

224. For example, if the defendant in *Salinas* had tried to invoke the Fifth Amendment privilege on the question about the shotgun shells, the invocation of the privilege would tend to show that he was guilty, or that there was some reason that he did not want to answer the question.

225. *See* Nita A. Farahany, *Incriminating Thoughts*, 64.2 STAN. L. REV. 351 (2012).

226. Davis v. Fendler, 650 F.2d 1154 (9th Cir. 1984).

227. *Id.* at 1160.

she will not answer on the grounds that her answer may incriminate her, the police could infer guilt from this statement.

It would also be difficult for a person who is not guilty of any crime, but who is afraid to talk to the police, to claim the privilege. Additionally, if there is an innocent person—who is not charged with a crime and therefore has no reason to believe her words will be used against her—she may reasonably believe that she is unable to invoke the privilege. After all, the privilege is only supposed to be invoked when a person reasonably believes that the answer to a question will tend to incriminate them.[228] In this scenario, the person may either speak to the police and risk having her prior silence or her subsequent speech used against her, or remain silent and risk having her silence used against her as evidence of guilt. Therefore, a blanket rule that states that all pre-arrest, pre-*Miranda* silence may be used to impeach, or as substantive evidence of guilt, is not beneficial to Fifth Amendment jurisprudence. Such a broad rule would allow an innocent person to be convicted of a crime that she did not commit.

In a similar vein, the use of silence alone as substantive evidence of guilt should violate Federal Rule of Evidence 403 because the evidence is unfairly prejudicial.[229] This evidence would have a low probative value because the evidence does not by itself show that the defendant was engaging in the behavior because he was guilty. There are other reasons that defendants engage in silence, and if silence during the questioning is not coupled with other behaviors that can show that the silence was a result of a guilty mind, then the silence loses its probative value as evidence. The use of the silence can also be highly prejudicial as jurors may be likely to believe a prosecutor when he says that the silence is evidence of guilt.[230] If a prosecutor leads the jury to believe that a person is only silent in the face of police questioning if she has done something wrong, then the evidence will be presented in a way that makes it look more probative than it really is,[231] and therefore will be unfairly prejudicial. Jurors, who may have been silent themselves if they had

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228.. *Id.*

229. FED. R. EVID. 403.

230. *See* Steve M. Wood et al., *The Influence of Jurors' Perceptions of Attorneys and their Performance on Verdict*, 23(1) JURY EXPERT 23 (2011) (stating that there was a correlation between the jurors' positive perceptions of the way that advocates present evidence and a verdict in favor of that attorney's client, and that this correlation was stronger for the prosecution or plaintiff's attorneys than it was for defense attorneys; although this information does not conclusively state that the prosecution is favored, it can lead to the inference that jurors will believe well-prepared prosecutors).

231. That is, that guilt is the only reason for silence during police questioning.

been questioned by the police, may believe a prosecutor who says that silence is always evidence of a guilty mind.

There are several reasons why silence, by itself, is not sufficiently probative but is highly prejudicial evidence that should be barred not only by the Fifth Amendment, but also by Federal Rule of Evidence 403.[232] First, an individual who is silent from the beginning of the interview may be silent for reasons other than because she has something to hide. Rather, she may remain silent because she is shy or otherwise afraid to talk to the police.[233] A person may also remain silent from the beginning because she does not understand the language or customs that are used by American police. Also, a person may be afraid to talk to the police because of her culture. Second, a person's silence on a specific question may not necessarily show guilt in all circumstances.

A person who is shy may tend to lock up when put under pressure and, instead of refuting obviously false allegations, will remain silent.[234] In her case, her silence is not conveying guilt but rather her fear of being questioned about a crime she knows she did not commit. This problem is lessened by the fact that a person may invoke her Fifth Amendment privilege against self-incrimination by silence in a situation where the person is in custody.[235] If, however, the police mislead a person as to the nature of the questioning, or if the person feels compelled to go to the police station to give a statement when she is asked, then the person may remain silent during questioning, and the silence should not be used against her at trial because it is not a good indication of guilt.

A person may also be afraid to speak to the police because she has knowledge of the plethora of cases in which an innocent person is convicted of a crime that the person did not commit because the police coerced a false confession out of the person.[236] That person may refuse to talk to the police because she is afraid that the police will turn her words against her and use her words to get the courts to convict her of a crime she did not commit.

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232. *See* FED. R. EVID. 403.

233. *See, e.g.*, United States v. Hale, 422 U.S. 171, 177 (1975).

234. *Id.*

235. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (stating that a person must be informed that he has the right to remain silent).

236. *See* ELLIOT ARONSON, TIMOTHY D. WILSON, & ROBIN M. AKERT, SOCIAL PSYCHOLOGY 532-35 (6th ed. 2007) (noting that people can be tricked or coerced into making false confessions, especially if they are led to believe that there is a witness against them, and mentioning a case in which several boys were imprisoned for 13 years (from 1989-2002) after wrongfully confessing to a rape).

Although the police may not do this often, in the mind of an innocent person who is being questioned by police, the police can and will twist the person's words and use them against her.[237] Therefore, the person may be afraid to talk to the police for reasons other than a guilty conscience.

A person may also be silent during police questioning because she does not understand the language or customs used by American police. A foreigner who does not understand English very well may not be able to conduct herself in a manner that other suspects would. She may decide to come into the police station voluntarily because she believes that it is required or because she believes that she will get into some sort of trouble if she does not go to the police station to answer questions. When she gets there, if she does not understand the language used by the police who are questioning her, she will not understand the questions. She may either try to talk to the police in her own language, or she may decide not to speak at all. In this case, silence will not be probative of guilt; instead, the silence is simply an indication of the fact that a person is not able to respond to police. The Fifth Amendment uses the word "person" and not "citizen," and therefore applies to all people, regardless of citizenship.[238] So a foreigner who is questioned by police may still use the privilege. However, because of the language and cultural barrier, they may not be able to expressly invoke the privilege and therefore, should not be required to do so. Instead, these people should be able to invoke the privilege through silence.

In a similar vein, a person may be silent because her culture has made her afraid of the police.[239] There are several countries and cultures in which

237. *See* Chapman *supra* note 222.

238. U.S. CONST. amend. V.

239. *See, e.g.*, Bureau of Democracy, Human Rights, and Labor, *Haiti*, U.S. DEP'T OF STATE, http://www.state.gov/j/drl/rls/hrrpt/2006/78895.htm (noting that many detainees are held in preventative detention without a hearing and in violation of certain constitutional provisions); Bureau of Democracy, Human Rights, and Labor, *2009 Human Rights Report: Uzbekistan*, U.S. DEP'T OF STATE , http://www.state.gov/j/drl/rls/hrrpt/2009/sca/136096.htm (stating that police often beat and otherwise mistreat detainees to obtain incriminating information, such as confessions, and that torture and abuse are common in prison); Bureau of Democracy, Human Rights, and Labor, *2008 Human Rights Report: Sudan*, U.S. DEP'T OF STATE, http://www.state.gov/j/drl/rls/hrrpt/2008/af/119026.htm (stating that the Sudanese governmental security forces tortured, beat, and harassed people, especially political opponents, and that indefinite detentions are common, especially for people who are accused of violating national security); David Bayley & Robert Perito, *Police Corruption*, U.S. INST. PEACE: SPECIAL REP., http://www.usip.org/sites/default/files/SR%20294.pdf (stating that an organization had "reported that in twenty-three countries studied, people saw the police not 'as a source of help and security, but rather of harm, risk, and impoverishment.'").

police are not an instrument of good and are not trying to protect the people by ensuring that true criminals are locked up in jail or prison. Rather, the police are instruments of evil who harm innocent people.[240] If a person from this type of country or culture is questioned by police, then this person may believe that the police will put her in jail no matter what she does or says, and may remain silent simply because she does not want to make her punishment worse. Evidence of the silence engaged in during questioning should not be used against this type of person since the evidence is only probative of the culture that the person comes from and is not probative of guilt. Nevertheless, if the prosecutor portrays the situation as one in which a reasonable person would rebut any charges, then the jurors, who may not come from this type of culture, may tend to believe the prosecutor's portrayal of this evidence. Therefore, the Fifth Amendment and Federal Rule of Evidence 403 should bar the evidence because of the unfairly prejudicial effect of the evidence, coupled with its low probative value.[241]

The previously suggested rules are intended to apply in a context in which a person is silent from the beginning of the interview with police. There may, however, be situations in which a person is silent on a specific question, where silence will not be probative of guilt.

Although silence during a specific question is a factor that may contribute to an inference of guilt, it should not be the only factor because there are other reasons that the person may remain silent after being asked a specific question. For example, if the person being questioned was misled as to the nature of the questioning, or if the person was being questioned about another subject, and the nature of the questioning has shifted, the person may be confused or shocked about the new line of questioning. The person may therefore be unable to answer the questions. Also, if the person does not understand the specific question, then the person may not be able to answer. Additionally, if a person who does not realize that she is

240. *See, e.g.*, Bureau of Democracy, Human Rights, and Labor, *Haiti*, U.S. DEP'T OF STATE, http://www.state.gov/j/drl/rls/hrrpt/2006/78895.htm; Bureau of Democracy, Human Rights, and Labor, *2009 Human Rights Report: Uzbekistan*, U.S. DEP'T OF STATE, http://www.state.gov/j/drl/rls/hrrpt/2009/sca/136096/htm; Bureau of Democracy, Human Rights, and Labor, *2008 Human Rights Report: Sudan*, U.S. DEP'T OF STATE, http://www.state.gov/j/drl/rls/hrrpt/2008/af/119026.htm; David Bayley & Robert Perito, *Police Corruption*, U.S. INST. PEACE: SPECIAL REP., http://www.usip.org/sites/default/files/SR%20294.pdf.

241. *See* FED. R. EVID. 403.

considered to be a suspect is given questions that suggest that she is, she may be startled and therefore temporarily unable to answer.

Also, if the line of questioning has changed dramatically, and the person willingly came to the police station because she believed that she was only going to be questioned about a certain subject matter, then the person may not wish to answer questions in this new line of questioning. When the scope of the questioning shifts dramatically, then the person may not be voluntarily subject to the questioning, and the nature of the questioning could be coercive. If the person does not want to answer this new line of questioning for any reason, the silence could apparently still be used against her as substantive evidence at her trial.[242] Since the interrogation has arguably become coercive at this point, the Fifth Amendment privilege against self-incrimination should apply and should prevent the silence from being admitted as substantive evidence at trial.[243] Here, the coercion lies in the misleading nature of the questioning and in the fact that the police expect the person to answer the questions.

Also, an individual, especially a foreigner, may not answer a specific question because she has trouble understanding that particular question. If a foreigner receives a question that she does not understand because words or idioms that she is not familiar with are used, then the person's silence should not be used against her because the silence is not probative of guilt or innocence, but rather, is simply a fact that shows that the person does not understand the language and customs of the United States. If this silence is used as substantive evidence against the person who did not understand the question, then the evidence will be overly prejudicial. It is prejudicial because, although the silence may seem probative of guilt, in this situation it is actually probative of another factor, but is not probative of guilt. Therefore, a person's silence on a specific question should not be used against her if her culture or customs would prevent her from understanding a specific question, or if the setting has prevented the person from being able to adequately hear the specific question.

The above situations are to be distinguished from a situation in which a person fails to answer questions posed by the police simply because she does not want to give an answer she knows will incriminate her. This is why other factors, along with the silence, should be used to incriminate the

242. *See* Salinas v. Texas, 133 S. Ct. 2174, 2180 (2013) (holding that a person's pre-arrest, pre-*Miranda* silence could be used against that person as substantive evidence at trial).

243. *See* U.S. CONST. amend. V (stating that a person cannot be coerced to be a witness against himself).

person. If the person engages in other incriminatory behaviors besides the silence, then the police and the prosecutor will be able to infer incrimination from silence. Silence alone, however, without any corroborating behaviors, will be less probative of guilt, and therefore should not be used by the police or prosecution as substantive evidence of guilt.

Also, the rule that silence may be used against a defendant as substantive evidence at trial should be considered dictum since the usage of this rule was not necessary to bring about the outcome of the case. *Salinas v. Texas* could have been decided based on the physical behaviors of the defendant, along with the silence, and in fact, these factors likely influenced the outcome of the case.[244] Nevertheless, the rationale seems more geared toward the silence alone.[245] In light of the fact that the case was decided based on the defendant's engagement in several incriminatory behaviors, such as shuffling his feet, looking down at his feet, and refusing to answer only one question while freely answering all other questions posed to him,[246] the rule should be based on the totality of the circumstances. In this vein, the rule that a defendant's silence may be used against him as substantive evidence does not logically flow from this case. Therefore, the statements that silence may be used as substantive evidence against a defendant should be considered dicta and should not be binding on future cases.

V. CONCLUSION

The fact that *Salinas* did not call for a decision based solely on the defendant's silence tends to show that the "rule" that silence may be used as substantive evidence against a defendant is not a rule at all, but is only dicta. Therefore, this rule should not be held as binding on future cases. Also, there are situations in which the use of silence against a defendant can be highly prejudicial and may lead to an innocent person being convicted of a crime. Although these situations do not necessarily occur every day, they are negative implications of the blanket rule that a defendant's silence during police questioning may be used against him. These scenarios must be taken into consideration when making a blanket rule that silence may be used against a defendant because the only thing worse than allowing a criminal to go free would be allowing the conviction of an innocent person.

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244. *See Salinas*, 133 U.S. at 2178.

245. *See id.* at 2177-84.

246. *See id.* at 2178, 2183.

Therefore, the blanket rule that silence may be used against a person should not stand and a totality of the circumstances test should be used in its place. Finally, the rule that silence may be used as substantive evidence against a person should be considered dicta since this ruling was not necessary to decide the case.