Prosecuting Attorneys' Council of Georgia

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Salinas v. Texas

Supreme Court Rules That Silence In The Face Of Noncustodial Interrogation Is Not Protected By The 5th Amendment; To Assert Privilege, A Person Is Required To Invoke It

In *Salinas v. Texas*, No. 12-246 (June 17, 2013), the U. S. Supreme Court ruled that a prosecutor properly commented on Salinas' failure to answer a police officer's question as evidence of guilt. The evidence showed that Salinas was a person of interest in a murder in which a person was killed with a shotgun. When the police visited Salinas at his home, Salinas agreed to hand over his shotgun for ballistics testing and to accompany the police to the station for questioning. During this noncustodial interrogation, which did not require *Miranda* warnings, Salinas answered all the questions posed by an officer. However, when the officer asked Salinas whether a ballistics test would show that his shotgun matched the shells recovered at the scene of the murder, 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." After a few moments of silence, the officer asked additional questions, which Salinas answered. At trial, and over objection, prosecutors used Salinas' reaction to the officer's question during the interview as evidence of his guilt.

The Court granted certiorari to resolve a division of authority over whether prosecutors may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case-in-chief. But in a 5-4 decision, the Court decided that since Salinas did not in fact invoke the privilege during his interview, it was unnecessary to address the issue to resolve the case.

The Court stated that the privilege against self-incrimination is an exception to the general rule that the government is entitled to everyone's testimony. To prevent the privilege against self-incrimination from shielding information not properly within its scope, a witness who desires the protection of the privilege must actually claim it. Nevertheless, the Court noted, there are two exceptions to this rule. First, a criminal defendant need not take the stand and assert the privilege at his own trial. This exception did not apply to Salinas because he had no comparable unqualified right not to speak during his police interview. The second exception lies where a witness' failure to invoke the privilege must be excused whenever governmental coercion makes his forfeiture of the privilege involuntary. Thus, for example, in *Miranda*, the Court held that a suspect who is subjected to the inherently compelling pressures of an unwarned custodial interrogation need not invoke the privilege. But, Salinas could not benefit from this exception either because it was undisputed that he voluntarily accompanied the officers to the station and was free to leave at any time.

Salinas urged the Court adopt a third exception for cases in which a witness stands mute and thereby declines to give an answer that officials suspect would be incriminating. The Court declined because it "would needlessly burden the Government's interests in obtaining testimony and prosecuting criminal activity." The Fifth Amendment guarantees that no one may be "compelled in any criminal case to be a witness against himself." It does not, however, establish an unqualified "right to remain silent." Neither a witness' silence nor official suspicions are sufficient to relieve a witness of the obligation to expressly invoke the privilege. Moreover, the Court found,

it is settled that forfeiture of the privilege against self-incrimination need not be knowing. Thus, the Court concluded, "[s]tatements against interest are regularly admitted into evidence at criminal trials, see Fed. Rule of Evid. 804(b)(3), and there is no good reason to approach a defendant's silence any differently." Accordingly, the prosecutor did not violate Salinas' Fifth Amendment rights by commenting on his silence during his noncustodial interrogation.

In Georgia, our Supreme Court has recently held that commenting on a failure to answer police questions after a defendant has had *Miranda* warnings and waived his right to silence does not violate a defendant's right against self-incrimination. *Curry v. State*, 291 Ga. 446, 450-51 (2012); *Rogers v. State*, 290 Ga. 401, 404-06(2) (2012). However, our Supreme Court in *Mallory v. State*, 261 Ga. 625, 629-630(5) (1991), overruled on other grounds, *Clark v. State*, 271 Ga. 6, 9-10(5) (1999), established a "bright line evidentiary rule" that the State may not comment on either a defendant's silence prior to arrest or failure to come forward voluntarily. *Reynolds v. State*, 285 Ga. 70, 71 (2009). The *Mallory* Court relied in part on former O.C.G.A. § 24-3-36 which provided that "[a]cquiescence or silence, when the circumstances require an answer, a denial, or other conduct, may amount to an admission." This Code section, however, is not a part of our new evidence code. See O.C.G.A. §24-8-801(d)(2)(B) (hearsay admissions of party-opponent); see also O.C.G.A. §24-8-801(b)(3)(hearsay statements against interest by unavailable declarant). Nevertheless, one commentator has stated that "[t]he Court's reasoning appears based on constitutional concerns rather than an interpretation of [O.C.G.A. § 24-3-36] and thus it is unlikely the Court's position will change as a result of adoption of the new 2013 rules of evidence. Paul Milich, *Georgia Rules of Evidence*, §18:4, p. 660 (2012-2013 ed).

Prosecutors may wish to test the viability of *Mallory*'s "bright line evidentiary rule" under our new rules of evidence and after the decision by the U. S. Supreme Court in *Salinas*.