

Supreme Court Rules Fifth Amendment Has to Actually Be Invoked

Better brush up on those constitutional protections if you want to use them

Scott Shackford Jun. 17, 2013 4:00 pm

13604
364
142

-
-
-



Credit: CRASH:candy / Foter.com / CC BY-NCIn a 5-4

decision the Supreme Court ruled today that a potential defendant's silence *can* be used against him if he is being interviewed by police but is not arrested (and read his Miranda rights) and has not verbally invoked the protection of the Fifth Amendment.

Tim Lynch at the Cato Institute [explains](#) that the *Salinas v. Texas* case was intended to be about whether prosecutors during a trial could cast aspersions on a defendant's silence during questioning that took place prior to arrest — prior to the defendant being told he had the right to remain silent. Instead, the Supreme Court determined that they wouldn't need to rule on the matter because the defendant had never invoked the Fifth Amendment's protection. This decision means that it's the responsibility of the individual to know about the protections offered by the Fifth Amendment even prior to arrest and to actually verbally invoke it:

The Court said *Salinas* simply remained silent and did not “formally” invoke any constitutional right, so prosecutors could offer commentary to the jury. What's most disturbing about the ruling is its discussion of “burdens.” The plurality put the onus on the individual, not the government. That is the profound error in the decision. As the dissenters noted, in the circumstances of the case, it was evident what *Salinas* was doing. Unfortunately, the Supreme Court has complicated the law for

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

Justice Stephen Breyer's dissent notes that it should have been fairly clear that the defendant was invoking his Fifth Amendment right not to incriminate himself even if he didn't use the words "Fifth Amendment":

I would hold that Salinas need not have expressly invoked the Fifth Amendment. The context was that of a criminal investigation. Police told Salinas that and made clear that he was a suspect. His interrogation took place at the police station. Salinas was not represented by counsel. The relevant question—about whether the shotgun from Salinas' home would incriminate him—amounted to a switch in subject matter. And it was obvious that the new question sought to ferret out whether Salinas was guilty of murder.

The irony here is that the ruling is yet another reason to actually never cooperate with the authorities, ever, and add an invocation of the Fifth Amendment anytime you are put in a position to speak to one.

The ruling fell along ideological lines, with swing Justice Anthony Kennedy falling in with the more conservative members. Read the full ruling [here](#) (pdf).