CHICAGOLAWBULLETIN.COM

Serving Chicago's legal community for 159 years

WEDNESDAY, JANUARY 15, 2014

Chicago Daily Law Bulletin®

Volume 160, No. 11

Supreme Court makes using the right to remain silent seem unwise

While flipping through the cable TV channels recently, I heard some interesting legal advice. In a 1930s gangster film, the lawyer told his client, "Listen, Whitey, if the coppers get a hold of you, just keep your mouth shut and you'll be all right."

Not only was this good advice in the 1930s, but it was pretty good advice up until just a few years ago. However, some recent U.S. Supreme Court decisions illustrate how "keeping your mouth shut" may cause problems never dreamed of by Whitey's lawyer.

Let's start with what has usually been considered the constitutional basis for "keeping your mouth shut." The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." You may believe — along with Whitey's lawyer — that this means a person has a "right to remain silent."

If so, you are wrong.

Police interviewed Genoveto Salinas concerning a murder. Because it was not a custodial interrogation, no *Miranda* warnings were given. Salinas answered a series of questions. However, when he was asked if the shells recovered at the scene would match his shotgun, he remained mute.

At trial, the officer testified that, in addition to remaining mute, Salinas "looked down at the floor ... and began to tighten up." The prosecution used this as substantive evidence of guilt in its case-in-chief. Shortly afterward, Salinas was convicted of murder.

Salinas asked the U.S. Supreme Court to determine whether a person's invocation of his Fifth Amendment right can be used against him at trial. But the court had a surprise for Salinas — it held that he never invoked his right. The court asserted that merely remaining silent did not constitute an invocation of the Fifth Amendment privilege.

Silence does not necessarily mean that a person is invoking the privilege. A person could be silent "because he is trying to think of a good lie ... or because he is protecting someone else." If a person wishes to claim the privilege, he must expressly say so. *Salinas v. Texas*, 133 S.Ct. 2174 (2013).

But what about a custodial interrogation situation? The *Miranda* warnings themselves tell the suspect that he has "a right to remain silent." It would follow that a person who simply "remains silent" in the face of such a warning must be invoking his Fifth Amendment privilege.

Wrong again. The Supreme Court recently held that mere silence in response to *Miranda* warnings does not constitute an assertion of the Fifth Amendment privilege. *Berghuis v. Thompkins*, 130 S.Ct. 2250 (2010).

The court noted that it had held in 1994 that the request for a lawyer in response to *Miranda* warnings had to be unequivocal. *Davis v. U.S.*, 512 U.S. 452 (1994). Thus, the *Berghuis* court held that "there is no principled reason to adopt different standards" for determining when a suspect has invoked his right to remain silent.

Here the court found that the suspect received proper *Miranda* warnings, understood them and simply remained mute. The police are thus allowed to interrogate him. If he unequivocally asserts his rights, the interrogation must stop. If he answers any question, the answer itself is considered an implied waiver of his *Miranda* rights and can be properly used against him in the prosecution's case-in-chief.

Standing mute is now an unwise tactic in any police interrogation, custodial or otherwise. And the Roberts court has also increased the opportunities for police to conduct interrogations.

It recently held that police may always attempt a custodial interrogation even if the defendant's Sixth Amendment right to counsel has already attached in a case. *Montejo v. Louisiana*, 556 U.S. 778 (2009), overruling *Michigan v. Jackson*, 475 U.S. 625 (1986). The court thus abolished the *Jackson* rule that had held that the attachment of Sixth Amendment rights automatically protected a defendant from any police attempt at custodial interrogation.

CRIMINAL PROCEDURE

TIMOTHY P. O'NEILL

Timothy P. O'Neill is a professor at The John Marshall Law School. In 2012 he was awarded the Chicago Bar Association's Herman Kogan Meritorious Achievement Award for legal journalism. Readers are invited to visit his Web log and archives at jmls.edu/oneill.

Moreover, *Montejo* also refuses to allow a defense attorney to anticipatorily invoke *Miranda* rights on behalf of her client in a court hearing; *Miranda* rights can only be claimed by the suspect personally when *Miranda* warnings are given during an actual custodial interrogation.

So what should a defense attorney do to protect a client against police interrogation?

When taking on a client — regardless of whether or not he or she has been charged and his or her Sixth Amendment right to counsel has attached — the answer is clear. The attorney must give the client her card and say "If the police ever read you *Miranda* rights, just say 'I want my lawyer' and show them this card."

> ***"What world is the U.S. Supreme Court living in where they expect lay persons to know how to invoke their Fifth Amendment right against self-incrimination — even assuming they have some vague idea that such a right exists?"***

Saying those four magic words means the police may no longer attempt a custodial interrogation on that or any other offense without the attorney being present. *Minnick v. Mississippi*, 498 U.S. 146 (1990). This protection lasts for as long as the person remains in custody. The protection disappears only after a person has been out of custody for 14 days. *Maryland v. Shatzer*, 130 S.Ct. 1213 (2010).

But what about a person in Genoveto Salinas' situation? He was uncharged and had no Sixth Amendment right to counsel. Moreover, although he was being interrogated by the police, he was not in custody and so he did not receive the benefit of *Miranda* warnings. As we saw, the Supreme Court has placed the burden on such a person to unequivocally claim his or her Fifth Amendment right against self-incrimination.

Think about that last sentence. What world is the U.S. Supreme Court living in where they expect lay persons to know how to invoke their Fifth Amendment right against self-incrimination — even assuming they have some vague idea that such a right exists?

This is why a recent case from the 2nd U.S. Circuit Court of Appeals is significant. *U.S. v. Okatan*, 728 F.3d 111 (2d Cir. 2013). It concerned a person being interrogated in a non-custodial environment in which *Miranda* warnings were unnecessary. At one point during this interrogation, he said he wanted a lawyer.

The court held that simply requesting a lawyer should be considered an unequivocal assertion of the Fifth Amendment privilege against self-incrimination. The court refused to demand a more specific assertion of the right.

The lesson is clear for Whitey's attorney in 2013. "Keeping your mouth shut" is now dangerous advice to give a client. Instead, he should tell Whitey to memorize the simple phrase "I want a lawyer."