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High Court Turns Suspect Silence Into Prosecutorial Tool

By **Gavin Broady**

Law360, New York (June 17, 2013, 6:48 PM ET) -- Following the Supreme Court's ruling on Monday that Fifth Amendment protections don't apply to precustody interviews unless explicitly invoked, experts say white collar lawyers would be wise to inform clients that while they have the right to remain silent, now more than ever that silence may be used against them in a court of law.

The high court's 5-4 decision upheld the double murder conviction of Genovevo Salinas, whose refusal to answer a question during a precustody interview was later brought up by the prosecution as implicit evidence of his guilt. Justice Samuel Alito's plurality opinion found that the Fifth Amendment's protections do not automatically extend to referencing comments — or noncomments — made in a voluntary interview unless those constitutional rights are explicitly invoked.

Although the case may have dealt with the "street crime" of a double homicide, the implications of the high court's ruling will be felt in the world of white collar crime as well, experts say.

"There's nothing about the case that would suggest it doesn't apply equally in the context of investigations into business crimes or any other white collar offense," Barry J. Pollack of Miller & Chevalier said. "If you are interviewed by law enforcement and you choose to answer some questions and not others, you have to be aware that under the Supreme Court's ruling a jury can be told that they may infer you're guilty because of the questions you didn't answer."

Pollack criticized the ruling for ignoring the reality that holding a person's silence against them in court is effectively no different than compelling that person to speak.

"It really turns the Fifth Amendment upside down," Pollack said. "Basically, you have the right to remain silent, but if you do we will use your silence against you."

Kelly Kramer of Mayer Brown LLP agreed that the ruling was fascinating for how it seemingly laid bare the disconnect between the popular conception of what the Fifth Amendment protects and what protections actually apply.

"The court is saying that there is a narrower interest than what is usually assumed," Kramer said. "It seems to be saying that while you may have the right, there's a precondition to it. You have to invoke it."

Steven D. Benjamin, director of the National Association of Criminal Defense Lawyers — which submitted an amicus brief in support of Salinas — also said that the ruling seems to fly in the face of the received wisdom about one's Fifth Amendment rights.

"Today, the U.S. Supreme Court ruled that the Fifth Amendment's commonly understood right to remain silent is not quite the right many Americans thought it to be," Benjamin said. "The plurality held that in a prearrest, pre-Miranda warning context, the individual may not remain silent, but instead must expressly invoke that right."

Brian Murray of Jones Day LLP said the decision may have a significant impact across the spectrum of criminal trials, and that the only way to guard against the danger of a damning comment — or an equally damning silence — is to advise clients to shut down any interrogation before it starts.

"If you're a C-suite executive and the feds show up at your Fourth of July barbecue, do you have to talk to them? Your instinct, if you're trained well by your company's lawyers, will be no." Murray said. "I expect a lot of lawyers will be talking to their clients in the next month, saying: When the feds show up, you have to invoke your rights."

Eli Richardson of Bass Berry & Sims PLC said that this is true even where the person being questioned has no reason to believe he or she might wind up as the target of an eventual criminal case, advising white collar attorneys to push for a "better safe than sorry" approach to any investigation.

"The lessons that come out of this ruling are clear: If you are a representative of a company or an employee of a company, and you're contacted, the best thing to do is politely decline to speak to agents unless or until you retain counsel," Richardson said. "Even if you're entirely sure as an employee that your role is simply as a bystander, after Salinas you speak to agents at all at your own peril."

The ambiguity on the Fifth Amendment questions at issue in the case was reflected in the variety of legal opinions on display in the court's order Monday, with Justice Alito's three-judge plurality panel joined by Justices Clarence Thomas and Antonin Scalia in a concurring opinion that, according to Pollack, "got to the same result from two different places."

Justice Thomas wrote in his concurrence that the issue of whether Salinas invoked his privilege appropriately is irrelevant, as he had no such privilege in the first place. According to Thomas, nothing in the Fifth Amendment prohibits jurors from drawing logical inferences when a defendant chooses not to testify, and therefore no such right exists that can be extended to precustody interviews.

Murray noted that many attorneys were looking for an up-or-down ruling on a client's right to remain silent during voluntary interviews without fear of having that silence used against them, and said it was something of a surprise that Justice Alito's plurality opinion focused so much on whether the right was properly invoked.

"It's not as bad as it could have been," Murray said. "Had [Thomas's] thinking carried the day, it would've been a whole new day. If the right just flat-out didn't exist, we'd have to rethink how we advise our clients."

Kramer noted that Justice Alito's plurality and Justice Thomas' concurrence essentially arrived at two different interpretations of the law, meaning that the losing position — Justice Stephen Breyer's dissent arguing that the Fifth Amendment protects against any commentary on the implications of a person's voluntary silence — was actually the legal position that attracted the most justices.

Kramer said, however, that the ruling will likely have only a limited impact on white collar crime investigations, noting that a person giving a statement without representation — as Salinas was — is rare in the business crime arena.

“Folks who are interacting with the Department of Justice, even where a warrant isn’t involved, will have their counsel present,” Kramer said.

Richardson noted, meanwhile, that those who are fully briefed on the implications of Salinas will likely be that much more wary of the possibility that what they say might come back to haunt them, and therefore the high court’s ruling could have a potentially adverse effect on the government’s ability to conduct investigations.

“And who’s to blame someone?” Richardson said. “From the time that human beings are little children, they’re afraid of being falsely accused. There’s no one who wants to be falsely accused based in part on the mere fact of one’s silence.”

Susan Kohn Ross of Mitchell Silberberg & Knupp LLP, however, said that the ruling might empower government investigators, who are now aware that nonresponses to interview questions can also be incriminating despite a common perception to the contrary.

“This is where the ruling is going to potentially cause problems to a company,” Ross said. “It’s one thing to talk to upper management, but the way many of these cases are made is you’ll have an agent show up at an employee’s house after hours asking questions, and that person will be put in an impossible position.”

The only solution is for white collar attorneys to emphasize — and re-emphasize — that clients should never answer even seemingly innocuous questions without first obtaining counsel.

“Speaking right away doesn’t make sense,” Richardson said. “Now, remaining silent doesn’t make sense. The only thing that makes sense is getting an attorney.”

--Editing by John Quinn and Jeremy Barker.