

**THE PERILS OF COMMUNICATING WITH THE POLICE:  
WHAT EVERY LAWYER NEEDS TO KNOW ABOUT THE FIFTH AMENDMENT**

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**I. WHAT RIGHTS DOES THE FIFTH AMENDMENT GIVE YOU?**

**A. WHAT IT SAYS**

The Fifth Amendment to the United States Constitution provides:  
“No person ... shall be compelled in any criminal case to be a witness against himself.”

**B. WHEN MAY YOU REFUSE TO TALK?**

*Kastigar v. United States*, 406 U.S. 441, 445 (1972): The Fifth Amendment privilege against compulsory self-incrimination “protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.”

*Hiibel v. Sixth Judicial Dist. Court of Nevada*, 542 U.S. 177 (2004): There is no Fifth Amendment right to refuse to tell the police your name. “Answering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances.”

**C. IS IT ONLY FOR THE GUILTY?**

*Ullmann v. United States*, 350 U.S. 422, 426 (1956): “Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege.”

*Ohio v. Reiner*, 532 U.S. 17, 20 (2001): “One of the Fifth Amendment's basic functions is to protect innocent men who otherwise might be ensnared by ambiguous circumstances. Truthful responses of an innocent witness, as well as those of a wrongdoer, may provide the government with incriminating evidence from the speaker's own mouth.”

**D. WILL THE JURY LEARN YOU TOOK THE FIFTH?**

*Doyle v. Ohio*, 426 U.S. 610, 617-18 (1976): “[W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of

due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.”

*But see Baxter v. Palmigiano*, 425 U.S. 308 (1976): the Fifth Amendment “does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.”

**E. WHAT IF THE POLICE DIDN'T READ YOU YOUR RIGHTS?**

The Due Process Clause of the Constitution does *not* forbid the impeachment of a defendant with his silence before arrest, *Jenkins v. Anderson*, 447 U.S. 231, 239 (1980), or after arrest if no *Miranda* warnings were given, *Fletcher v. Weir*, 455 U.S. 603, 606-607 (1982).

This is because silence under those circumstances “does not rest on any implied assurance by law enforcement authorities that it will carry no penalty.” *Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993).

The latest word: *Salinas v. Texas*, No. 12-246 (argued April 17, 2013).

QUESTION PRESENTED: Does it violate the *Fifth* Amendment to tell the jury that a criminal suspect declined to answer questions from a law enforcement officer before he was arrested or read his *Miranda* rights?

**F. IS DOYLE STILL GOOD LAW?**

*See Wainwright v. Greenfield*, 474 U.S. 284 (1986): Post-*Miranda* silence may not be used by the prosecution even as evidence of the defendant’s sanity or to rebut his later insanity defense.

*But see Portuondo v. Agard*, 529 U.S. 61, 74 (2000): “Although there might be reason to reconsider *Doyle*, we need not do so here.”

**G. IS FLETCHER STILL GOOD LAW?**

*Brogan v. United States*, 522 U.S. 398, 405 (1998): “[A]s for the possibility that the person under investigation may be unaware of his right to remain silent: In the modern age of frequently dramatized ‘*Miranda*’ warnings, that is implausible.”

*Dickerson v. United States*, 530 U.S. 428, 443 (2000): “*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”

**H. SO WHAT SHOULD YOU DO IF THE POLICE DON'T TELL YOU ABOUT MIRANDA?**

## II. WHEN – AND WHY – SHOULD EVEN INNOCENT PEOPLE TAKE THE FIFTH?

“Any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances.” *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Justice Robert Jackson, concurring in part).

“For many reasons – including mental health issues and aggressive law enforcement tactics – innocent people sometimes confess to crimes they did not commit. While it can be hard to understand why someone would falsely confess to a crime, psychological research has provided some answers – and DNA exonerations have proven that the problem is more widespread than many people think. *In approximately 25% of the wrongful convictions overturned with DNA evidence, defendants made false confessions, admissions or statements to law enforcement officials.*” SOURCE: THE INNOCENCE PROJECT

“A teenaged Australian girl thought to be dead after being missing for nearly five years has reappeared during the trial of a man the prosecution said had confessed to murdering her.” *Murder Trial Halted as ‘Victim’ is Found Alive*, TIMES ONLINE, World News (April 12, 2003).

John Schwartz. *Confessing to Crime But Innocent*, N.Y. TIMES (Sept. 13, 2010).  
<http://www.nytimes.com/2010/09/14/us/14confess.html>

### A. YOUR CLIENT OFTEN DOES NOT KNOW WHETHER HE IS INNOCENT.

“The complexity of modern federal criminal law, codified in several thousand sections of the United States Code and the virtually infinite variety of factual circumstances that might trigger an investigation into a possible violation of the law, make it difficult for anyone to know, in advance, just when a particular set of statements might later appear (to a prosecutor) to be relevant to some such investigation.” *Rubin v. United States*, 525 U.S. 990 (1998) (Breyer, J., dissenting from denial of certiorari).

“Estimates of the current size of the body of federal criminal law vary. It has been reported that the Congressional Research Service cannot even count the current number of federal crimes. And these laws are scattered in over 50 titles of the United States Code, encompassing roughly 27,000 pages. Worse yet, the statutory code sections often incorporate, by reference, the provisions and sanctions of administrative regulations promulgated by various regulatory agencies. Estimates of how many such regulations exist are even less well settled, but the ABA thinks there are nearly 10,000.” Paul Rosenzweig, *The Over-Criminalization Of Social And Economic Conduct*, THE CHAMPION 28, 29 (Aug. 2003).

### B. POLICE OFFICERS ARE ONLY HUMAN AND SOMETIMES MAKE MISTAKES.

Examples: Julius Earl Ruffin;  
*Ferguson v. Commonwealth*, 663 S.E.2d 505 (Va.App. 2008)

**C. EVEN INNOCENT SUSPECTS SOMETIMES MAKE HONEST MISTAKES.**

Example: Ronald Cotton.

**D. EVEN INNOCENT SUSPECTS NEVER KNOW WHAT MISTAKEN WITNESSES OR UNRELIABLE EVIDENCE THE POLICE MAY HAVE AGAINST THEM.**

Of the more than 230 people in the United States who were wrongfully convicted and later exonerated by DNA evidence, *approximately 77 percent* involved cases of mistaken eyewitness identification, more than any other single factor. SOURCE: THE INNOCENCE PROJECT

*Notable Examples Of Innocent Men Convicted By Eyewitnesses Who Were Certain Of Their Identification – But Not Even Close To Accurate:*

Julius Ruffin  
Ronald Cotton  
Brenton Butler

**E. ANY STATEMENT CAN BE USED TO INCRIMINATE YOU IF THE POLICE ARE MISTAKEN OR CONFUSED ABOUT WHAT THEY TOLD YOU OR ASKED YOU.**

Example: *People v. Calabria*, 3 N.Y.3d 80, 83 (2004) (“[T]here was evidence adduced that, when brought to the precinct to await the lineup, defendant asked, “Did she really pick me out?” Although defendant claimed that he had heard the police mention that the complainant was a woman, the police denied that they had ever told this to defendant or mentioned it in his presence.”)

See Brandon L. Garrett, *The Substance of False Confessions*, 62 STANFORD L. REV. 1051 (2010).

**F. EVEN IF YOU SAY NOTHING THAT CAN BE USED AGAINST YOU, THE POLICE WILL BE ALLOWED TO TESTIFY THAT THEY THOUGHT YOU APPEARED TOO NERVOUS – OR TOO CALM.**

**G. THE USE OF POLICE DECEPTION IS VIRTUALLY UNCHECKED DURING INTERROGATION.**

Far too often, the appellate courts allow police officers to use forms of deception that are likely to induce even an *innocent* suspect to confess or make incriminating statements, including outright lies by the police that (1) exaggerate the strength of their case, or (2) minimize the seriousness of the defendant’s situation, or (3) mislead the suspect into believing that his cooperation will lead to immunity or leniency or exoneration.

**H. YOU CAN BE PROSECUTED FOR FALSE STATEMENTS TO THE POLICE OR OBSTRUCTION OF JUSTICE – EVEN IF THERE IS A VIGOROUS DISPUTE OVER WHAT YOU SAID TO THEM.**

### III. HOW SHOULD YOU INVOKE THE FIFTH – WHAT SHOULD YOU SAY?

#### A. THE TRADITIONAL METHOD.

#### B. A NEW PROPOSAL.

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