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 copsppers 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 Genovese Salinas concerning a murder because it was not a custodial interrogation. At the scene Salinas was convicted of murder. 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 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, 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 for a lawyer to 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.

The court further held that the suspect received proper Miranda warnings, understood them and remained mute. The police are thus allowed to interrogate him. If he unequivocally asserts his rights, the interrogation must stop.

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

Moreover, Montego also refuses to allow a defense attorney to anticipate the invocation of 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. 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, 729 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.”