Silence Speaks Volumes: How the Absence of Testimonial Compulsion Prior to Arrest Makes a Defendant’s Pre-arrest Pre-Miranda Silence Admissible as Substantive Evidence

Jason E Niehaus

Available at: https://works.bepress.com/jason_edward_niehaus/1/
Table of Contents

Part 1: Scope of Article........................................................................................................................................... 2

Part 2: Analysis of Whether the Right Against Self-Incrimination Bars Usage of a
Defendant’s Pre-arrest, Pre-\textit{Miranda} Silence as Substantive Evidence ...................................................... 4

A: Areas Where Comment on a Defendant’s Silence is
Permissible.......................................................................................................................................................... 5

B: Areas of Inquiry Where Appropriateness of Inquiry is Undecided
Question ......................................................................................................................................................... 8

C: Federal Cases Discussing Usage of a Defendant’s Silence as Substantive
Evidence ......................................................................................................................................................... 8

1. Cases Finding Usage of Silence as Substantive Evidence
   Unconstitutional ............................................................................................................................................. 9

2. Cases Finding Usage of Silence as Substantive Evidence Permissible .......................... 17

D. Texas Cases Discussing Usage of a Defendant’s Silence as Substantive
Evidence ......................................................................................................................................................... 22

1. Cases Finding Silence as Substantive Evidence Permissible ................................. 22

2. Cases Finding Silence as Substantive Evidence Unconstitutional .................. 30

3. Cases Discussing Pre-arrest, Pre-\textit{Miranda} Silence in Contexts Other
   than the Right Against Self-Incrimination ................................................................................................. 33

Part 3: Conclusion ............................................................................................................................................... 34
Silence Speaks Volumes: How the Absence of Testimonial Compulsion Prior to Arrest Makes a Defendant’s Pre-arrest Pre-Miranda Silence Admissible as Substantive Evidence

I. Scope of Article

At the outset it is important to properly define the question for which an answer is sought. The question here is whether a Defendant’s pre-arrest, Pre-Miranda silence is admissible as substantive evidence. The question of the admissibility of a Defendant’s silence is an open question in both the State and Federal systems,\(^1\) however I limit my discussion herein to the considerations under Article I Section 10 of the Texas Constitution. Even though the Texas courts have been consistently finding that Article I Section 10 is equally protective of a defendant’s rights as the Fifth Amendment,\(^2\) I limit my analysis to the

\(^1\) *Ex parte Lewis*, 219 S.W.3d 335, 367 (Tex.Crim.App. 2007)

\(^2\) The Court of Criminal Appeals has had three opportunities to examine the differences and similarities between the privilege against self-incrimination under Article I, § 10 of the Texas Constitution and the Fifth Amendment of the U.S. Constitution. *Sanchez v. State*, 707 S.W.2d 575, 580 (Tex.Crim.App.1986); *Ex parte Shorthouse*, 640 S.W.2d 924 (Tex.Crim.App.1982); and *Olson v. State*, 484 S.W.2d 756, 762 (Tex.Crim.App.1969). In two of these cases, Article I, § 10, supra, was found to be comparable in scope to the Fifth Amendment. Cf. *Shorthouse*, supra (grant of use immunity sufficient to compel testimony of witness over claim of privilege under Article I, § 10, supra), with *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972) (grant of use immunity sufficient to compel testimony of witness over claim of privilege under Fifth Amendment); cf. *Olson*, supra (compelling handwriting exemplar from defendant does not violate privilege under Article I, § 10, supra), with *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967) (compelling handwriting exemplar from defendant does not violate privilege under Fifth Amendment). In the third case, Article I, § 10, supra, was found to be more protective
admissibility of a Defendant’s silence as substantive evidence to Texas law. I also note that Texas’s confession statute\(^3\) falls outside the scope of this question, as the Defendant’s silence is not a confession, and likely not a statement, for purposes of that statute.

The primary argument that a Defendant’s pre-arrest, pre-\textit{Miranda} silence is inadmissible is based on the premise that usage of silence as evidence violates the right against self-incrimination.\(^4\) An alternate argument, proffered once in the fifth Court of Appeals, Dallas, that the usage of a Defendant’s pre-arrest, pre-\textit{Miranda} silence violates the indictment clause of Article I Section 10 of the Texas Constitution is not addressed.\(^5\)

---

\(^3\) See \textit{Tex Code Crim. P. art 38.22} (statutory prerequisites for a Defendant’s confession to be admissible)


\(^5\) The argument was not properly preserved during trial, and the prior history of the indictment clause as a jurisdictional provision rather than as an extension of the right to remain silent makes the argument
II. Analysis of Whether the Right Against Self-Incrimination Bars Usage of a Defendant’s Pre-arrest, Pre-*Miranda* Silence as Substantive Evidence

While the Right Against Self-Incrimination attaches prior to the onset of adversarial proceedings against an accused, it does not necessarily follow that the right is always applicable. Where the right to counsel attaches at the point where the accused is not free to end their encounter with a member of the law enforcement community, to-wit: when placed in custody, the right against self-incrimination can be claimed at any time. The key distinction is that the right to counsel, once it attaches, is absolute, while the right against self-incrimination only prohibits the State from compelling the accused to provide testimonial evidence against himself. There is no need to extend the right against self-incrimination further than it already extends. At any point up until the accused is placed in custody, the person’s right against self-incrimination is sufficiently

---


7 *See Thomas v. State*, 723 S.W.2d 696, 703 (Tex.Crim.App.1986)(discussing the time at which the right to counsel attaches)
protected by their ability to terminate their encounter with the authority seeking information.\(^8\)

There is a massive depth of case law interpreting both the Fifth Amendment and Article I Section 10. For purposes of this article, I will focus specifically on Texas law, with all references to federal law being either (1) illustrative or (2) citations to a rule, rationale, or decision which Texas has adopted directly from federal jurisprudence.

A. Areas Where Comment on a Defendant’s Silence is Permissible

The first area of conduct that the Supreme Court and the Texas Court of Criminal Appeals have found to be acceptable with regard to commenting on the silence of a Defendant is to use that silence for impeachment purposes.\(^9\) The right to remain silent does not prohibit the use of a Defendant’s silence as evidence to impeach him should he choose to testify at trial if the testimony at trial is inconsistent with his silence and a person would be expected to have not

\(^{8}\) *Florida v. Bostick*, 501 U.S. at 437, *see also*, *California v. Hodari D.*, 499 U.S. 621, 628 (1991)(“A person has been 'seized' … only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”); *Terry v. Ohio*, 392 U.S. 1 n. 16 (1968)(“Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred.”)

\(^{9}\) *Jenkins v. Anderson*, 447 U.S. 231, 236-37, 100 S. Ct. 2124, 2128, 65 L. Ed. 2d 86 (1980); *see also*, *Franklin v. State*, 606 S.W.2d 818 (Tex.Crim.App.1979)(holding silence is admissible for purposes of impeaching a later inconsistent position taken by the Defendant at trial)
previously remained silent in the face of the allegations.\textsuperscript{10} The Supreme Court has recognized that “[t]he probative value of silence, as analyzed by Mr. Justice Marshall in \textit{Hale} … is ordinarily minimal,”\textsuperscript{11} and has recognized “that neither the Fifth nor the Fourteenth Amendments to the United States Constitution are violated by the use of pre-arrest silence to impeach a witness’s credibility.”\textsuperscript{12} The Supreme Court has also “explicitly rejected the contention that the possibility of impeachment by prior silence is an impermissible burden upon the exercise of Fifth Amendment rights.”\textsuperscript{13}

Texas adopted the \textit{Jenkins} rule that a Defendant’s silence may be used to impeach his testimony in \textit{Franklin v. State},\textsuperscript{14} stating:

“[I]t is a general rule of evidence that the prior silence of a witness as to a fact to which he has testified, where such silence occurred under circumstances in which he would be expected to speak out, may be used to impeach the witness during cross-examination.”\textsuperscript{15}

Silence may, therefore, be used as evidence of prior inconsistent conduct only if two requirements are met: the person must have been expected to speak out under the circumstances, and the fact that he or she did not speak out must actually be

\textsuperscript{10} \textit{Id}.

\textsuperscript{11} \textit{United States v. Impson}, 531 F.2d 274, 276-77 (5th Cir. 1976)


\textsuperscript{13} \textit{Jenkins v. Anderson}, 447 U.S. 231, 236-37, 90 S. Ct. 2124, 2128, 65 L. Ed. 2d 86 (1980)

\textsuperscript{14} \textit{Franklin v. State}, 606 S.W.2d 818 (Tex.Crim.App.1979)

inconsistent with a later position.\textsuperscript{16} The Court of Criminal Appeals has also “indicate[d that] pre-arrest silence has ‘probative’ value which outweighs its ‘prejudicial’ effect.”\textsuperscript{17}

Knowing that a Defendant’s silence may be admissible to impeach him if he later testifies makes the Defendant’s silence admissible for the specific purpose of impeachment, but does not necessarily make it admissible as substantive evidence if the appropriate limiting instruction is requested pursuant to Rule 105\textsuperscript{18} of the Texas Rules of Evidence. With the Defendant’s silence admissible only for impeachment, if the Defendant does not testify then there is not testimony to impeach, and the existing rationale for admission of his silence is absent. It does not necessarily follow that the silence then becomes inadmissible, but there would need to be a secondary justification for its admission absent the existing rationale for its admissibility.

The admissibility of a Defendant’s silence for the purpose of impeaching later testimony is currently the only acceptable comment on a Defendant’s silence. This author does not believe it is necessary to recite at length the multiple well-


\textsuperscript{17} West v. State, 666 S.W.2d 545, 547 (Tex. App.--Dallas 1983, no pet.) (discussing Ayers v. State, 606 S.W.2d 936 (Tex.Crim.App. 1980))

\textsuperscript{18} When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly; but, in the absence of such request the court’s action in admitting such evidence without limitation shall not be a ground for complaint on appeal. Tex. R. Evid. 105
established ways that it is possible to violate a Defendant’s Right Against Self-Incrimination/Right to Remain Silent. The next portion of this article will address two areas of inquiry regarding a Defendant’s silence where there has not been a clear answer on the permissibility of the inquiry.

B. Areas of Inquiry Where Appropriateness of Inquiry is Undecided Question

There are at least two open questions regarding evidence of a Defendant’s silence and the scope and permissibility of testimony regarding that silence. First, where the Defendant has previously remained silent, then defendant testifies at trial, and that testimony is then impeached but no limiting instruction is requested. The second, closely related, area is where the Defendant’s silence is used as substantive, rather than impeachment, evidence of the Defendant’s guilt. If use of the Defendant’s silence as substantive evidence were not permissible, then a limiting instruction would be necessary. If usage as substantive evidence is permissible, a limiting instruction would be improper. Inasmuch as a determination of the usage of the Defendant’s silence as substantive evidence controls both questions, that issue is the only one discussed in this article.

C. Federal Cases Discussing Usage of a Defendant’s Silence as Substantive Evidence

Texas courts are trending away from providing protection to a Defendant’s pre-arrest, pre-Miranda silence on the basis that the right to remain silent is not implicated by silence not coerced by Miranda warnings. The following federal cases, reaching the opposite conclusion, are discussed specifically for the rationale
they provide with regard to why that silence should be protected and why that rationale is unpersuasive. It is important to note now that the right to silence is protected, but only to the extent of what is considered to be testimonial compulsion, meaning that the protection that is provided only precludes the compelled testimony of an individual.\textsuperscript{19} The failure of some federal courts to engage in analysis of the testimonial compulsion requirement likely accounts for much of the discrepancy between their conclusions regarding the constitutionality of the use of silence as substantive evidence of guilt.

1. Cases Finding Usage of Silence as Substantive Evidence Unconstitutional

\textit{United States v. Burson, 952 F.2d 1196 (10th Cir.1991)}

In \textit{Burson} the 10th Circuit began its analysis of whether comment on a Defendant’s pre-arrest, pre-Miranda silence was permissible by reviewing applicable Fifth Amendment principles. The Court noted that “[t]he invocation of the privilege against self-incrimination must be given a liberal construction. The invocation of the privilege against self-incrimination does not require any special combination of words. The privilege against self-incrimination can be asserted in any investigatory or adjudicatory proceeding.”\textsuperscript{\textit{20}}(internal citations omitted)

\textsuperscript{19} \textit{See Thomas v. State, 723 S.W.2d 696, 703 (Tex.Crim.App.1986)}

The Court went on:

Applying these basic legal principles, we have little trouble in concluding [the Defendant] invoked his privilege against self-incrimination. [the Defendant]'s silence was exhibited in a non-custodial interrogation by two criminal investigators during the regular course of a criminal investigation. While the record is silent as to whether [the Defendant] was a suspect, it is clear the investigators wished to ask [the Defendant] about his financial and property transactions that involved Mr. Pina and that [the Defendant] knew he was being interrogated as a part of a criminal investigation. It is clear from the agents' testimony [the Defendant] "did not want to be questioned" and would not answer any of the agents' questions. Whether [the Defendant] was advised of his privilege against self-incrimination is immaterial. What is important is that [the Defendant] clearly was not going to answer any of the agents' questions.

The general rule of law is that once a defendant invokes his right to remain silent, it is impermissible for the prosecution to refer to any Fifth Amendment rights which defendant exercised. To be sure, exceptions exist to this rule, such as the use of silence for impeachment in certain circumstances, but such exceptions have no applicability to the case before us. We therefore conclude the admission into evidence of the agents' testimony concerning [the Defendant]'s silence was plain error.21

Notably, the Court fails to engage in an analysis of the testimonial compulsion requirement. Where the Defendant was not in custody and had not been *Mirandized*, he is capable of invoking his right against self-incrimination by terminating the encounter. The Court’s application of the right against self-incrimination is entirely unnecessary where the accused was compelled neither to answer the questions asked of him nor to cooperate with the investigators. Burson was not a suspect,22 he was not in custody,23 and he needed only to terminate the

21 *Id.* at 1200-01

22 *Id.* at 1200
interview to protect himself. The conclusion that his own failure to do so somehow violated his right against self-incrimination ignores the fundamental requirement that a state actor compel the accused to provide testimonial evidence against them.

*Coppola v. Powell, 878 F.2d 1562 (1st Cir.1989)*

In *Coppola* the issue presented was whether the prosecutor was permitted to introduce evidence of a Defendant’s refusal to confess to police during the investigation of a rape was substantive evidence that the Defendant was the rapist.

The pertinent portion of the Officer’s in camera testimony was that:

> [Officer] Well, I asked him if he'd be willing to talk to us. And at this time, he said to me, "Let me tell you something. I'm not one of your country bumpkins. I grew up on the streets of Providence, Rhode Island. And if you think I'm going to confess to you, you're crazy."
> [Prosecutor] And what tone of voice did he use in communicating that statement to you?
> [Officer] It was fairly hostile, and he appeared to be in a bragging tone when he was telling me how he grew up in Providence, Rhode Island.
> [Prosecutor] What happened then?
> [Officer] Well, I said to him, "I just want to give you your rights and then talk to you."
> And at this time he said that he would not talk to me without a lawyer.24

The trial court allowed the Officer to testify to the statement, but not to his invocation of the right to counsel.25 *Coppola* was convicted, the conviction was affirmed by the New Hampshire Supreme Court, and habeas relief was initially

---

23 *Id.* at 1200

24 *Coppola v. Powell, 878 F.2d 1562, 1564 (1st Cir.1989)*

25 *Id.*
denied.\textsuperscript{26} The First Circuit Court reversed, noting that the “language [used by the New Hampshire Supreme Court] amounts to a rule of evidence whereby an inference of consciousness of guilt will trump a [F]ifth [A]mendment claim of the privilege.”\textsuperscript{27} The Court then notes “that where a defendant does not testify at trial it is impermissible to refer to any [F]ifth [A]mendment rights that defendant has exercised.”\textsuperscript{28}

The Court in \textit{Coppola} noted that the privilege protecting the right to silence is not limited to persons in custody or charged with a crime; it may also be asserted by a suspect who is questioned during the investigation of a crime. The right to remain silent, unlike the right to counsel, attaches before the institution of formal adversary proceedings.\textsuperscript{29} The privilege "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory...."\textsuperscript{30} The Court then went on to note the important distinction between usage of a Defendant’s silence as impeachment evidence versus its usage as substantive evidence.\textsuperscript{31}

\begin{itemize}
\item \textsuperscript{26} \textit{Id.} at 1564 – 1567
\item \textsuperscript{27} \textit{Id.} at 1566, 1571
\item \textsuperscript{28} \textit{Id.} at 1568
\item \textsuperscript{29} \textit{Id.} at 1565 \textit{quoting United States ex rel. Savory v. Lane,} 832 F.2d 1011, 1017 (7th Cir.1987).
\item \textsuperscript{30} \textit{Coppola v. Powell,} 878 F.2d at 1565 (1st Cir.1989) \textit{quoting Kastigar v. United States,} 406 U.S. 441, 444, 92 S.Ct. 1653, 1656, 32 L.Ed.2d 212 (1972)
\item \textsuperscript{31} \textit{Coppola} at 1566
\end{itemize}
The Court’s analysis found that the admitting the Defendant’s silence as substantive evidence was error and was, in light of the weakness of the State’s case absent the use of silence, was harmful error. The Defendant’s conviction was overturned on the basis that using his silence as substantive evidence violated his right to remain silent, even though he was not in custody when he invoked the right to silence. This holding requires an understanding of testimonial compulsion that is broader than the history of the term justifies.

*United States ex rel. Savory v. Lane, 832 F.2d 1011 (7th Cir.1987)*

In *Savory*, the state presented evidence that when police first asked to interview the defendant on January 25, 1977, a week after the murders, [the Defendant] told them that he didn't want to talk about it, he didn't want to make any statements. The prosecutor emphasized this statement in closing argument:

I believe you heard that on that date of January 25th, 1977, Officers George Pinkney and Edgar Hanes went to the Late Afternoon School to talk to Johnnie Savory, who they thought might have some information regarding the case. They asked him that afternoon about 3:30, they wanted to talk to him about Scopie, what he might know. The Defendant, what did he say at that time, ladies and gentlemen? "I don't want to talk about it. I won't make any statements." This, ladies and gentlemen, the apparent good friend of his, he doesn't want to talk about it, doesn't want to help the police[,] (internal quotations omitted). \(^{32}\)

“The prosecutor emphasized the inconsistencies between the other evidence (principally the testimony of [two other witnesses]) and the story defendant told the police at length.” \(^{33}\) The Court noted that the right to remain silent, unlike the

\[^{32}\] *United States ex rel. Savory v. Lane, 832 F.2d 1011 - 1015 (7th Cir.1987)*

\[^{33}\] *Id.*
right to counsel, attaches before the institution of formal adversary proceedings.\textsuperscript{34}

It further noted that “Griffin \textit{v. California} remains unimpaired and applies equally to a defendant's silence before trial, and indeed, even before arrest.”\textsuperscript{35} The Court ultimately found the erroneous admission of the testimony to be harmless, and affirmed the Defendant’s conviction.\textsuperscript{36}

This decision, too, fails to engage in any analysis of the testimonial compulsion requirement, yet still reaches the apparent conclusion that the refusal to speak to the police rises to the level of “testimonial compulsion” necessary to trigger the right against self-incrimination.

\textit{Combs v. Coyle, 205 F.3d 269 (6th Cir.2000)}

In \textit{Combs} the Defendant challenged prosecution’s closing argument that the Defendant’s invocation of his right to counsel, by stating: “talk to my lawyer,” showed that the Defendant was not too intoxicated to have acted with intent.\textsuperscript{37} This challenge was brought as an ineffective assistance of counsel claim during federal habeas proceedings.\textsuperscript{38} The Court elected to view the comment on Combs’s request for an attorney as an invocation of silence.\textsuperscript{39}

\begin{footnotes}
\item[34] \textit{Id.} at 1017
\item[35] \textit{Id.}
\item[36] \textit{Id.} at 1020
\item[37] \textit{Combs v. Coyle, 205 F.3d 269, 279 (6th Cir.2000)}
\item[38] \textit{Id.}
\item[39] \textit{Id.} at 279 (6th Cir.2000) \textit{See also Wainwright \textit{v. Greenfield, 474 U.S. 284, 295 n. 13, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986)} ("With respect to post-\textit{Miranda} warnings ‘silence,’ we point out that silence does not}
\end{footnotes}
The Court then analyzed Combs’s argument, which was premised on *Doyle v. Ohio*, in light of *Doyle* and its progeny, noting:

Later cases have restricted *Doyle* and have reaffirmed that the "fundamental unfairness" identified by the Court derives from the implicit assurances of the *Miranda* warnings. In *Jenkins v. Anderson*, the Court held that due process is not violated by the impeachment use of prearrest, pre-*Miranda* warnings silence. In *Fletcher v. Weir*, the Court held that impeachment use of post-arrest, pre-*Miranda* warnings silence does not offend due process. The *Weir* Court explained that *Doyle* was a case in which the government had actually induced silence with *Miranda* warnings, and it noted that any broadening of *Doyle* to a situation in which a defendant had not yet received *Miranda* warnings—even if the defendant was in custody—was unsupported by the reasoning of *Doyle*. In the instant case, Combs had not received *Miranda* warnings prior to his "talk to my lawyer" statement. The Ohio Supreme Court concluded that this was of no significance based on the following reasoning:

At the point when Combs was placed in the ambulance, we find that Combs was in custody and had a right to remain silent, consult a lawyer, and receive a *Miranda* warning. When he arrived at the scene, Officer Ventre personally took the shotgun from Combs; there were two women dead from shotgun blasts in the adjacent car; and Ventre had been at the scene for some ten to fifteen minutes. Ventre's questioning, without a *Miranda* warning, violated those rights. However, even if Combs should have received *Miranda* warnings prior to his "talk to my lawyer" statement, the *Doyle* rationale is still

---

40 *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)


42 See *Jenkins* at 238-39, 100 S.Ct. 2124


44 See id. at 607, 102 S.Ct. 1309

45 See id. at 605-06, 102 S.Ct. 1309.
inapplicable. As we have explained, the Doyle line of cases clearly rests on the theory that Miranda warnings themselves carry an implicit assurance that silence will not be penalized; actual receipt of the warnings is key. Therefore, the comment on Combs's pre-Miranda silence did not violate due process.

The Court’s analysis then went to discuss Jenkins, and noted that Jenkins expressly left unresolved the question of the permissibility of using a Defendant’s pre-arrest, pre-Miranda silence as substantive evidence. The Court then discusses the circuit split noted in this section in detail. After that discussion the Court noted its agreement with the Circuits finding that use of a Defendant’s silence as substantive evidence of guilt violates the Fifth Amendment.

Substantive Similarities Between Cases Finding Usage of Pre-arrest Pre-Miranda Silence Unconstitutional

While there are numerous similarities between the cases excerpted above, the primary similarity, and only similarity worth noting for my purposes in this article, between the cases noted above is that, while all note that the Fifth Amendment may be invoked prior to the instigation of the adversarial process, none of the cases discusses the testimonial compulsion requirement for a violation

---

46 Combs v. Coyle, 205 F.3d at 280 (6th Cir.2000)(internal quotations omitted)

47 Id.

48 Id. at 281, See also Jenkins, 477 U.S. at 236 n. 2, 100 S.Ct. 2124 (leaving this question unresolved)

49 Combs v. Coyle, 205 F.3d at 281-283 (6th Cir.2000)

50 Id.
of the Fifth Amendment to occur. Each of the cases concluding that the usage of a Defendant’s pre-arrest, pre-*Miranda* silence as substantive evidence violates the Constitution fails to address, in any way whatsoever, the threshold question of whether silence constitutes a form of testimonial compulsion.

2. Cases Finding Usage of Silence as Substantive Evidence Permissible

While the cases concluding that the usage of a Defendant’s pre-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the Constitution fail to address the threshold question of whether silence is a form of testimonial compulsion, the cases below address that question. In addressing the threshold question of whether silence is a form of testimonial compulsion, these courts conclude that, even if it is, the silence must be induced by a state actor to rise to the level of a violation of the Fifth Amendment. These courts properly rule the usage of silence as substantive evidence is not, in these situations, a violation of the Right Against Self-Incrimination.

*United States v. Oplinger*, 150 F.3d 1061 (9th Cir.1998) overturned on other grounds

---

51 For discussion on the requirement of testimonial compulsion, see *Jenkins v. Anderson*, supra at 241, 243-44, 100 S.Ct. 2124 (Stevens, J., concurring)

52 See *United States v. Oplinger*, 150 F.3d 1061, 1066 (9th Cir. 1998) overturned on other grounds; See generally, *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996)(assuming without deciding that silence would be a form of testimonial compulsion), *United States v. Rivera*, 944 F.2d 1568 (11th Cir.1991)(discussing the difference between assertive and nonassertive conduct and how those differences affect whether the Fifth Amendment is implicated.)

53 *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996)
In *Oplinger* the Defendant asserted, “that the government's reference to his "silence" was constitutional error because "non-custodial, pre-arrest, and investigatory assertions" of the right to remain silent are protected by the Fifth Amendment privilege against self-incrimination and the right to due process.”\(^{54}\)

The Court, in rejecting the claim, quoted from Justice Steven’s concurring opinion in *Jenkins v. Anderson* that:

> The fact that a citizen has a constitutional right to remain silent when he is questioned has no bearing on the probative significance of his silence before he has any contact with the police. ... When a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment. For in determining whether the privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent. A different view ignores the clear words of the Fifth Amendment.\(^{55}\)

The Court went on to note that, “we have previously addressed the constitutionality of the use of pre-arrest, pre-*Miranda* silence as substantive evidence of guilt. In *United States v. Giese*,\(^{56}\) in response to the defendant's argument that the use of his pre-arrest silence violated his privilege against self-incrimination, we held that "[n]either due process, fundamental fairness, nor any more explicit right contained in the Constitution is violated by the admission of

\(^{54}\) *United States v. Oplinger*, 150 F.3d 1061, 1066 (9th Cir. 1998)

\(^{55}\) *Id.* quoting *Jenkins* at 241, 243-44, 100 S.Ct. 2124 (Stevens, J., concurring) (footnotes omitted) (emphasis added).

\(^{56}\) *United States v. Giese*, 597 F.2d 1170 (9th Cir.1979)
the silence of a person, not in custody or under indictment, in the face of accusations of criminal behavior."57

This holding appears to be more in line with the historic understanding of the Fifth Amendment, and of Article I Section 10, noting that there is no testimonial compulsion at the pre-arrest, pre-Miranda stage of criminal proceedings.

*United States v. Zanabria, 74 F.3d 590 (5th Cir.1996)*;

In *Zanabria* the Defendant complained of the “arresting customs officer[’s] testimony] that prior to his arrest Zanabria said nothing about threats against his daughter or that he was in any kind of trouble or needed any help.”58 In closing argument the prosecutor used this testimony to rebut the duress defense by underscoring that the alleged threats were never reported to the authorities, either here or in Colombia where the child was located.59

The Court then “[a]ssum[ed] without deciding that Zanabria's pre-arrest silence falls within the reach of "testimonial communications"60 protected by the fifth amendment, [and noted] the record makes manifest that the silence at issue

57 Id. at 1197
58 United States v. Zanabria, 74 F.3d 590, 593
59 Id. at 593
60 See generally, Michael J. Zydney Mannheimer, Toward A Unified Theory Of Testimonial Evidence Under The Fifth And Sixth Amendments, 80 Temp. L. Rev. 1135, Winter, 2007 (discussing in detail the elements necessary to a violation of the Self-Incrimination Clause: compulsion, incrimination, and testimony)
was neither induced by nor a response to any action by a government agent. The [F]ifth [A]mendment protects against compelled self-incrimination but does not, as Zanabria suggests, preclude the proper evidentiary use and prosecutorial comment about every communication or lack thereof by the defendant which may give rise to an incriminating inference. We find no error in the use of this evidence or in the prosecutor's comments thereon.”

Here, the Court went as far as assuming, without any explicit justification for doing so, that the Defendant’s silence would fall within the understood meaning of testimonial compulsion and still found that the usage of silence was permissible because even if the silence is a form of testimony which could be compelled, without some affirmative act by a state actor, there is still no compulsion.


In *Rivera* the prosecutor elicited testimony from a customs agent, who had found cocaine in the Defendant’s luggage, about the demeanor of the suspects during his questioning of them at the airport. The Court noted “that some of Inspector Schor's testimony, even if construed as comments on Vila's silence, do[es] not raise constitutional difficulties.”

---

61 *Id.* at 593
62 *Id.*
64 *Id.* at 1568
The Court’s analysis continued, noting:

The government may comment on a defendant's silence if it occurred prior to the time that he is arrested and given his *Miranda* warnings.\(^{65}\) Schor's testimony about Vila's reaction to his initial questioning prior to inspection of the group's luggage falls within this category and therefore was not improper. In addition, the government may comment on a defendant's silence when it occurs after arrest, but before *Miranda* warnings are given.\(^{66}\) The record does not state whether Vila was in custody at the time that she and the others had been directed by Schor to an inspection area. Yet, even if she was in custody at that time, the government could comment on her silence as she viewed Schor's inspection of Stroud's suitcase because she had not yet been given her *Miranda* warnings.

After noting that the silence contested here had occurred prior to the suspect being read her *Miranda* rights, the Court continued its analysis and noted that

It is well established that "it is not proper ... for the prosecutor to ask the jury to draw a direct inference of guilt from silence — to argue, in effect, that silence is inconsistent with innocence."\(^{67}\) The complexity posed in this case is deciding what actually is "silence" within the context of the *Miranda* warnings. Although both logic and common sense dictate that "silence" is more than mere muteness, there is no definite outer boundary in determining what types of nonverbal conduct or demeanor, whether assertive or nonassertive, a prosecutor may permissibly comment on without running afoul of the dictates of *Miranda*.\(^{68}\) Rather, there are difficult levels of gradation between types of human behavior that constitute a purely physical act and behavior that is solely a communication.\(^{69}\) For

\(^{65}\) *Rivera* at 1568 *see also* *Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980).

\(^{66}\) *Rivera* at 1568 *see also* *Fletcher v. Weir*, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982).

\(^{67}\) *Rivera* at 1568 *quoting Doyle*, 426 U.S. at 634-35, 96 S.Ct. at 2252-53.

\(^{68}\) *Rivera* at 1568 *see also* *Greenfield*, 474 U.S. at 295 n. 13, 106 S.Ct. at 640 n. 13.

\(^{69}\) *Rivera* at 1568 *see also* *South Dakota v. Neville*, 459 U.S. 553, 561-62, 103 S.Ct. 916, 921-22, 74 L.Ed.2d 748 (1983).
instance, in this case, Schor's testimony about Vila's demeanor after exercising her right to remain silent is perhaps probative of her state of mind; a suspect can act silent in many ways that may be inconsistent with innocent knowledge.\textsuperscript{70}

The Court ultimately decided that error, if any, in allowing the comment on the Defendant’s passivity during the search was harmless.\textsuperscript{71}

D. Texas Cases Discussing Usage of a Defendant’s Silence as Substantive Evidence

After discussing the divergent opinions of the federal circuits, it is necessary to note that of the Texas courts that have rules on the issue, the majority are inclined to follow those federal cases that allow for the admissibility of a Defendant’s silence as substantive evidence on the grounds that silence is not a form of compelled testimony subject to bar by the right against self-incrimination until such time as the State makes the affirmative representation, by means of \textit{Miranda} warning, that the silence is protected. A discussion of illustrative cases follows.

1. Cases Finding Silence as Substantive Evidence Permissible

\textit{Fenn v. State}, 2011 WL 2651914 (Tex.App. -- Houston [1\textsuperscript{st} Dist]) July 7, 2011 (not selected for publication)

In \textit{Fenn v. State} the objection to a Defendant’s pre-arrest silence came about during the State’s closing argument. In response to the closing argument by Defense Counsel, the State argued that:

\textsuperscript{70} \textit{United States v. Rivera}, 944 F.2d 1563, 1568 - 69 (11th Cir.1991)

\textsuperscript{71} \textit{Id.} at 1569
I'm just as concerned you are going to find a person who is guilty of DWI not guilty. I'm just as concerned of that. I don't want it to be an indictment of Officer Stockholm. I want the video to suggest that what Officer Stockholm—and I think it does—that what the two of them [the officers] did out there on the road was gather all the evidence they needed to convict a guy who was wasted, but that had it within him to as soon as he knew he had been pulled over by the cops to slow up, stay within himself, try not to say too much.  

An objection under the Fifth Amendment was then raised and overruled. On appeal the Defendant attempted to broaden the issue to include Article I Section 10 of the Texas Constitution, but the Court observed the objection was not properly preserved and discussed only the Fifth Amendment issue. 

The *Fenn* Court took note of the *Salinas* decision, from Houston’s sister Court of Appeals, noting that the issue of a Defendant’s pre-arrest silence was an open question both in Texas and in the Federal system, and cited cases on each side of the argument. After so noting that the question was regarding the

---


73 *Id.*

74 *Id.* at *3. (Noting that except for complaints involving systemic (or absolute) requirements, or rights that are waivable only, none of which are involved here, all other complaints, whether constitutional, statutory, or otherwise, are forfeited by failure to comply with Rule of Appellate Procedure 33.1(a). *See Mendez v. State*, 138 S.W.3d 334, 338 (Tex. Crim. App. 2004). Moreover, an appellant's complaint on appeal must comport with the objection made at trial; otherwise, the appellant has preserved nothing for review. *See Tex. R. App. P. 33.1(a); Turner v. State*, 87 S.W.3d 111, 117 (Tex. Crim. App. 2002).)

75 *Fenn* at *3 – 4 (Tex.App. -- Houston [1st Dist]) July 7, 2011

permissibility of comment on a Defendant’s pre-arrest silence, the Court explicitly refused to address the question, asserting that any error was harmless.77


The Defendant in Salinas was charged with murder. A police officer testified that Salinas remained silent when asked if ballistics testing on the shotgun his father surrendered to police would match the shell casings found at the murder scene.78 According to the officer, Salinas showed "signs of deception" when he failed to respond: looking down at the floor, shuffling his feet, biting his bottom lip, clinching his hands in his lap, and tightening up.79 Sergeant Elliott further testified that Salinas answered every question but this one during the nearly hour-long interview.80 The Fifth Amendment objection raised by Defense Counsel at

Salinas recently noted that the federal circuit courts of appeal are split on the issue. Id. "The First, Sixth, Seventh, and Tenth Circuits have held that pre-arrest, pre-Miranda silence is not admissible as substantive evidence of guilt." Id. (citations omitted). "The Fifth, Ninth, and Eleventh Circuits, on the other hand, have held that pre-arrest, pre-Miranda silence is admissible as substantive evidence of guilt." Id. (citations omitted). In Salinas, the court "agree[d] with the Fifth, Ninth, and Eleventh Circuits" and held that "the Fifth Amendment has no applicability to pre-arrest, pre-Miranda silence used as substantive evidence in cases in which the defendant does not testify." Id. at *7.

79 Id.
80 Id.
During the State’s closing argument, the prosecutor argued that the Defendant’s silence was evidence of his guilt. Another Fifth Amendment objection by the defense attorney was overruled.

The Salinas Court noted that the United States Supreme Court has yet to decide what protections, if any, the Fifth Amendment affords to pre-arrest silence when the defendant does not testify and his silence is introduced by the State not for impeachment but in its case-in-chief. The Court continued:

There is little precedent from Texas courts to provide guidance. … A sister court of appeals has addressed the issue, but did not ultimately decide it. Hennessy v. State, 268 S.W.3d 153, 161 (Tex.App.-Waco 2008, pet. ref’d) (assuming without deciding Fifth Amendment does not permit use of pre-arrest silence as substantive evidence of guilt).

The federal courts of appeals are split on the issue. The First, Sixth, Seventh, and Tenth Circuits have held that pre-arrest, pre-Miranda silence is not admissible as substantive evidence of guilt. Combs v. Coyle, 205 F.3d 269, 283 (6th Cir.2000), cert. denied, 504 U.S. 977, 112 S.Ct. 2950, 119 L.Ed.2d 573 (1992); United States v. Burson, 952 F.2d 1196, 1200–01 (10th Cir.1991), cert denied, 503 U.S. 997, 112 S.Ct. 1702, 118 L.Ed.2d 411 (1992); Coppola v. Powell, 878 F.2d 1562, 1568 (1st Cir.1989), cert denied, 493 U.S. 969, 110 S.Ct. 418, 107 L.Ed.2d 383 (1989); United States ex rel. Savory v. Lane, 832 F.2d 1011, 1017–18 (7th Cir.1987). The Fifth, Ninth, and Eleventh Circuits, on the other hand, have held that pre-arrest, pre-Miranda silence is admissible as substantive evidence of guilt. United States v. Oplinger, 150 F.3d 1061, 1066–67 (9th Cir.1998), overruled on other grounds, United States v. Contreras, 593 F.3d 1135 (9th Cir.2010) (per curiam); United States v. Zanabria, 74 F.3d 590, 593 (5th Cir.1996); United States v. Rivera,

---

81 Id.
82 Id. at *5 – 6
83 Id.
84 Id. at *6
944 F.2d 1563, 1568 (11th Cir.1991). We agree with the Fifth, Ninth, and Eleventh Circuits [that silence is admissible as substantive evidence].

That Court concluded by agreeing with the Fifth, Ninth, and Eleventh Circuits that the usage of pre-arrest, pre-Miranda silence does not offend the Fifth Amendment. It went on to state:

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V (emphasis added). A plain reading of the amendment reveals that only government compulsion triggers its protections against self-incrimination. The Fifth Amendment does not "preclude the proper evidentiary use and prosecutorial comment about every communication or lack thereof by the defendant which may give rise to an incriminating inference." The otherwise proper acquisition or use of evidence which does not involve compelled testimonial self-incrimination of some sort does not offend the Fifth Amendment. Absent a showing of government compulsion, the Fifth Amendment simply has nothing to say on the admissibility of pre-arrest, pre-Miranda silence in the State's case-in-chief. We therefore hold the Fifth Amendment has no applicability to pre-arrest, pre-Miranda silence used as substantive evidence in cases in which the defendant does not testify.

West v. State, 666 S.W.2d 545 (Tex.App. – Dallas 1983, no pet.)


86 Id.

87 Zanabria, 74 F.3d at 593 (emphasis in original).


In West the Defendant complained of prosecutorial comment on his silence during closing argument. The Court quickly dispatched with the argument on the basis that there was no error where the use of silence was to impeach the Defendant and thus was within the permissible usage of commenting on the silence of the accused as defined by the Supreme Court in Jenkins v. Anderson.90

The Fifth Court of Appeals for Dallas, Texas has previously concluded that the difference between the Texas and Federal Rule on post-arrest silence does not prohibit a comment on pre-arrest silence in Texas.91 Although the Court found no case directly on point, there is authority from the Court of Criminal Appeals that indicates a pre-arrest silence has “probative” value that outweighs its “prejudicial” effect.92

The West Court noted that the pertinent distinction with regard to when the Defendant’s silence could be used against him was on the basis that “when a defendant is given a Miranda warning after arrest, the State implies to a defendant that his silence will not be used against him, and it would be unfair for the State to renege on that implied promise by using the defendant's silence against him.93

90 West v. State, 666 S.W.2d 545, 546 (Tex.App.—Dallas 1983)
91 Id. at 547 (discussing Ayers v. State, 606 S.W.2d 936 (Tex.Cr.App.1980))
92 Id.
93 West v. State, 666 S.W.2d at 546 (Tex.App.—Dallas 1983)
Since no governmental inducement exists to remain silent in the pre-arrest context, no unfairness exists in using the defendant's silence.\footnote{Id.}

If the key inquiry into the permissibility of the usage of a Defendant’s silence as substantive evidence against him is based in a promissory estoppel theory, then the Defendant is faced with a choice during police encounters not rising to the level of custody. He can either make a statement, which will be admissible against him as an admission pursuant to Rule 801(e)(2),\footnote{Statements Which Are Not Hearsay. A statement is not hearsay if:… (2) Admission by Party-Opponent. The statement is offered against a party and is: (A) the party’s own statement in either an individual or representative capacity; (B) a statement of which the party has manifested an adoption or belief in its truth; (C) a statement by a person authorized by the party to make a statement concerning the subject; (D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. Tex. R. Evid. 801(e)(2)} or he can terminate the interview. In ether case, at this juncture his continued participation is voluntary as he is not in custody and has the ability to terminate the interview.\footnote{See Salinas v. State, supra at *7} Where a Defendant’s participation in the interview is voluntary, he cannot be said to be compelled to incriminate himself, even in cases where he does.\footnote{Id.}

In *Steadman* a police officer testified that when the Defendant was asked about whether he had sexually abused a child that he did not answer the question. His attorney objected to the testimony regarding the Defendant’s failure to deny the allegation was under the Fifth Amendment.\(^98\)

The Court noted that the Defendant’s silence occurred prior to his arrest, and prior to him being *Mirandized*.\(^99\) The Court discussed the use of a Defendant’s silence in terms analogous to promissory estoppel, noting “[t]hat [the promise that silence will not be used against the Defendant] is not the case in pre-arrest/pre-*Miranda* situations. There is no governmental inducement to remain silent and no promise that an individual's silence will not be used against him.”\(^100\) The court reasoned that in such situations there was no fundamental unfairness and upheld the Defendant’s conviction.\(^101\)

“The Eastland Court of Appeals agree[d] with the reasoning of the courts in *Oplinger, Rivera,* and *Zanabria*, and held], as stated by the court in *Waldo*, that pre-arrest silence of a defendant who has not received any *Miranda* warnings “is a constitutionally permissible area of inquiry.”\(^102\) We further hold that Steadman’s

---

\(^98\) *Steadman v. State*, 328 S.W.3d 566, 568 (Tex.App.—Eastland 2010, *pet. granted*)

\(^99\) *Id.*

\(^100\) *Id.* at 569 quoting *United States v. Oplinger*, 150 F.3d 1061, 1067 (9th Cir.1998)(overruled on other grounds); see also, *Salinas v. State*, supra at *7

\(^101\) *Steadman* at 569

\(^102\) *Id.* at 570
pre-arrest/pre-\textit{Miranda} silence was not the result either of interrogation or of his being compelled to be a witness against himself.”\textsuperscript{103}

2. Cases Finding Silence as Substantive Evidence Unconstitutional

\textit{Hennessy v. State}, 268 S.W.3d 153\textsuperscript{104}(Tex. App.--Waco 2008, pet. ref'd)

\textit{Hennessy v. State} involved a DWI conviction where the State used the Defendant’s refusal to answer questions by the police officer as substantive evidence of guilt during its case-in-chief. The Court engaged in an extensive analysis before concluding, without deciding, that such usage violated the rights of the Defendant, but was, in this case, harmless.\textsuperscript{105} The Court’s analysis included an analysis of when the Defendant could invoke her Article I Section 10 rights, stating:

There are three recognized categories of interaction between the police and citizens: encounters, investigative detentions and arrests."\textsuperscript{106} [The police officer] testified that he had stopped [the Defendant] to investigate his suspicion that she was driving while intoxicated and that she was not free to leave until he had completed his investigation and traffic stop. Under nearly identical facts, the Fort Worth Court, primarily relying on \textit{Berkemer v. McCarty},\textsuperscript{107} and \textit{State v. Stevenson},\textsuperscript{108} recently held that the driver's statements to the

\textsuperscript{103} \textit{Id.} See also, \textit{Salinas v. State}, supra at *7


\textsuperscript{105} \textit{Id.} at 162


\textsuperscript{107} \textit{Berkemer v. McCarty}, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984),

officer were the result of an investigative detention, not a custodial interrogation.\textsuperscript{109} A stop is deemed an investigative detention when a police officer detains a person reasonably suspected of criminal activity to determine his identity or to momentarily maintain the status quo to garner more information.\textsuperscript{110} An investigative detention must last no longer than necessary to effectuate the purpose of the stop and must involve actual investigation.\textsuperscript{111} An arrest occurs when a person's liberty of movement is restricted or restrained by an officer or person executing a warrant of arrest or without a warrant.\textsuperscript{112} Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."\textsuperscript{113} In determining whether an interrogation is custodial for purposes of \textit{Miranda}, we look to the objective circumstances, not to the subjective views harbored by either the interrogating officer or the person being questioned.\textsuperscript{114} The determination of custody must be made on an ad hoc basis, after considering all of the objective circumstances.\textsuperscript{115} The subjective views of the interrogating officer and the person being questioned are relevant only to the extent that they may be manifested in the words or actions of law enforcement officials.\textsuperscript{116}

In determining whether a noncustodial encounter has escalated into custodial interrogation, we look to the four factors discussed in \textit{Dowthitt}: (1) when the suspect is physically deprived of her freedom of action in any significant way, (2) when law enforcement officers tell a suspect that she cannot leave, (3) when law enforcement officers create a situation that would lead a reasonable person to believe that her freedom of movement has been

\textsuperscript{109} \textit{Arthur v. State}, 216 S.W.3d 50, 56-58 (Tex.App.-Fort Worth 2007, no pet.)


\textsuperscript{111} \textit{Akins v. State}, 202 S.W.3d 879, 885 (Tex.App.-Fort Worth 2006, \textit{pet. ref'd}).


\textsuperscript{116} See \textit{id.} at 254.
significantly restricted, and (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that she is free to leave.\footnote{Stevenson, 958 S.W.2d at 826 (citing Dowthitt, 931 S.W.2d at 255); Arthur, 216 S.W.3d at 57 (same).} None of those factors is present here. We hold that [the officer’s] questioning at the scene of the stop was not a custodial interrogation.\footnote{Hennessey v. State, 268 S.W.3d 153, 158 – 159 (Tex.App.—Waco 2008)}

Having determined that the Defendant was not in custody and thus could not invoke her Fifth Amendment/Article I Section 10 rights, the Hennessey Court then went on to discuss whether the Defendant’s refusal to answer the police officer’s questions was admissible as substantive evidence of her guilt. The Court noted:

The law is clear that if a defendant testifies, her pre-arrest silence can be used to impeach her.\footnote{See Jenkins v. Anderson, 447 U.S. 231, 238-40, 100 S.Ct. 2124, 2129-30, 65 L.Ed.2d 86 (1980) (holding that defendant's pre-arrest silence could be used to impeach defendant because his failure to speak was before he was in custody and given Miranda warnings).} Texas cases have re-stated this rule without distinguishing its proper role in impeachment.\footnote{See, e.g., Waldo v. State, 746 S.W.2d 750, 755 (Tex.Crim.App.1988) ("Pre-arrest silence is a constitutionally permissible area of inquiry.") (citing Jenkins); Rosas v. State, 76 S.W.3d 771, 776 (Tex.App.-Houston [1st Dist.] 2002, no pet.) ("Comments made concerning pre-arrest silence are constitutionally permitted.") (citing Waldo, 746 S.W.2d at 755); see also State v. Lee, 15 S.W.3d 921, 926 n. 7 (Tex.Crim.App. 2000) (noting that statement in Waldo was dicta), overruled on other grounds by Ex parte Lewis, 219 S.W.3d 335, 371 (Tex.Crim.App. 2007).} Much less clear is the case where the defendant does not testify and the State offers a defendant's pre-arrest, pre-Miranda silence as substantive evidence of guilt, which is what the State used it for here. In a request-for-counsel context, we recently stated that "the Supreme Court has never recognized the right of a person to invoke his Miranda rights anticipatorily.... Further, we do not
believe the existing case law supports the right of an accused to invoke his *Miranda* rights in any context other than a custodial interrogation."  

Because of its different context, *Russell* [invocation of right to counsel] is not dispositive of the precise issue before us.

The Court then assumes, without deciding, that use of pre-arrest, pre-*Miranda* silence violates the Fifth Amendment but ultimately finds the error here harmless.

3. Cases Discussing Pre-arrest, Pre-*Miranda* Silence in Contexts Other than the Right Against Self-Incrimination

The most common context other than self-incrimination in which the usage of a Defendant’s pre-arrest, pre-*Miranda* silence is discussed is in the context of a double jeopardy claim where a mistrial was granted during the first trial due to prosecutorial comment on the Defendant’s right to silence. Due to the open nature of the question regarding the permissibility of comment on pre-arrest, pre-*Miranda* silence, the Courts of Appeals have been reluctant to bar re-trial of a

---


123 *Id.* at 159 – 161
Defendant in cases where a mistrial was granted for prosecutorial comment on pre-arrest silence.\textsuperscript{124}

Texas courts have also not been afraid to bypass deciding this issue where it is not preserved.\textsuperscript{125} The vast majority of Texas cases ruling on the question of the constitutionality of inquiry into a Defendant’s pre-arrest, pre-\textit{Miranda} silence have ruled that such testimony is permissible.\textsuperscript{126}

\textbf{III: Conclusion: Use of a Defendant’s Pre-arrest, Pre-\textit{Miranda} Silence Does Not Offend the Texas Constitution}

\textsuperscript{124} \textit{See generally, State v. Lee,} 15 S.W.3d 921, 926 (Tex.Crim.App. 2000) (holding that the prosecutor's statement concerning defendant's pre-arrest, pre- \textit{Miranda} silence was “not clearly erroneous”), \textit{overruled on other grounds by Ex parte Lewis,} 219 S.W.3d 335, 371 (Tex.Crim.App. 2007); \textit{Ex parte Lewis,} 219 S.W.3d 335 (Tex.Crim.App. 2007) (holding that prosecutor’s comment could not be intentional or reckless where state and federal law on issue were unsettled); \textit{Ex parte Peterson,} 117 S.W.3d 804 (Tex.Crim.App. 2003.) (same) \textit{overruled on other grounds by Ex parte Lewis,} 219 S.W.3d 335, 371 (Tex.Crim.App.2007)

\textsuperscript{125} \textit{See generally, Lamas v. State,} 2011 WL 3366399 (not selected for publication)(refusing to address the permissibility of comment on a Defendant’s pre-arrest silence because issue not properly preserved); \textit{Starks v. State,} 127 S.W.3d 127 (Tex.App.–Houston [1 Dist.], 2003.) (failure to object waives appellate review); \textit{Griffith v. State,} 55 S.W.3d 598 (Tex.Crim.App. 2001)(No need to decide if comment on pre-arrest silence violates constitution where Defendant waived right to silence by making statement to police officer.)

The right against self-incrimination does not bar usage of a Defendant’s pre-arrest, pre-\textit{Miranda} silence from being used as substantive evidence. The right against self-incrimination bars only testimonial compulsion.\footnote{\textit{Thomas v. State}, 723 S.W.2d 696, 703 (Tex.Crim.App. 1986); \textit{See also, Olson v. State}, 484 S.W.2d 756, 772 (Tex.Crim.App. 1972.)} The admission of a Defendant’s silence, when the silence occurs prior to the State’s implicit promise that remaining silent carries no penalty, is no more a form of testimonial compulsion than forcing the Defendant to submit to a blood draw, demanding a hand writing exemplar, or forcing the Defendant to stand in a lineup.\footnote{\textit{Id.} at n. 13 (specifying cases overturned and noting that overruled were \textit{Apodaca v. State}, 140 Tex.Crim.R. 593, 146 S.W.2d 381 (Tex.Crim.App. 1941)(collection of urine specimen over defendant's objection violates Article I, § 10.), \textit{Beachem v. State}, 144 Tex.Crim.R. 272, 162 S.W.2d 706 (Tex.Crim.App. 1942) (demand for voice exemplar violates Article I, § 10), and \textit{Trammel v. State}, 162 Tex.Crim.R. 543, 287 S.W.2d 487 (Tex.Crim.App. 1956) (collection of blood sample without consent of defendant violates Article I, § 10). \textit{See also, Schmerber v. California}, 384 U.S. 757, 765, 86 S.Ct. 1826, 1832, 16 L.Ed.2d 908 (1986)(compelled blood draw not a form of testimonial compulsion and thus does not violate right against self-incrimination); \textit{Rodriguez v. State}, 631 S.W.2d 515, 517 (Tex.Crim.App. 1982)(compelled chemical intoxication test is not testimonial compulsion); \textit{Burnett v. State}, 784 S.W.2d 510 (Tex.App.–Dallas,1990)(voice identification procedure used for purposes of identification is not testimonial in nature and does not violate right against self-incrimination).} Further, the accepted rational for the prohibition of comment on post-\textit{Miranda} silence, to wit: the State has implied that the silence will incur no penalty, is based on a promissory estoppel theory that is entirely inapplicable until such time as the \textit{Miranda} promise is made.
Testimonial compulsion requires, at a minimum, both a testimonial act and compulsion. There can be no compulsion to remain silent where the State has not made an affirmative representation that a Defendant has the ability to remain silent without penalty. Even if it is assumed that a Defendant’s silence is testimonial,\textsuperscript{129} a question that no court finding that usage of a Defendant’s pre-arrest, pre-
\textit{Miranda} silence as substantive evidence violates the Fifth Amendment has ruled upon, there can be no compulsion to remain silent until the State makes the affirmative representation that the silence will be protected, which does not occur until the Defendant is either in custody or \textit{Mirandized} (i.e. “under arrest”). Where it is categorically impossible for both prerequisites, a testimonial act and compulsion, to be satisfied in the context of the use of pre-arrest silence as substantive evidence, there can be no violation of the right against self-incrimination.

In sum, the Defendant’s pre-arrest, pre-\textit{Miranda} silence is the result of the Defendant’s voluntary acts, not the result of the compulsion of a state actor. Inasmuch as pre-arrest, pre-\textit{Miranda} silence occurs at a time prior to the State’s suggestion and encouragement that the Defendant remain silent, there is no compulsion at that time. At such time as the Defendant is \textit{Mirandized} and told not only of their right to remain silent, but that failure to take advantage of that right

\textsuperscript{129} This assumption was made in \textit{Steadman v. State}, supra, quoting \textit{Zanabria}, supra at 593. \textit{But see}, Mannheimer, \textit{Toward A Unified Theory Of Testimonial Evidence Under The Fifth And Sixth Amendments}, supra at n. 33.
may create evidence against them, the silence of the Defendant can no longer be said to be a fully and completely voluntary act. It is for that reason a Defendant’s pre-arrest, pre-\textit{Miranda} silence is and ought to be treated separately, and distinguished from, a Defendant’s silence after the Defendant’s capacity for voluntary action has been restricted by either being taken into custody or by having his intrinsic decision making formulae altered by the knowledge that his choice regarding whether to remain silent or speak carries the potential for extra penalties. The existing structure of both Article I Section 10 and the Fifth Amendment adequately take into account the distinction between a Defendant’s invocation of silence \textit{prior} to the State informing the Defendant of his right to do so versus the Defendant’s invocation of the right at the suggestion of the State. The existing testimonial compulsion standard, whereby Article I Section 10 is violated only by the compelled testimony of a person against himself adequately protects a Defendant’s silence from being used improperly as substantive evidence, and any further extension of those rights is unwarranted.