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Failure to Relate Exculpatory Story at Pretrial Hearings May Be Used by Prosecution to Impeach Defendant's Testimony at Trial.

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trates its principles.[74] Although the validity of this decision is questionable, it does cloud a court of civil appeals' ability to set aside void orders. This, together with the supreme court's willingness to grant mandamus—even when the order may be remedied by appeal[75]—makes the mandamus route the most assured means of correcting the void order.

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CRIMINAL LAW—Self-Incrimination—Failure To Relate Exculpatory Story at Pretrial Hearings May Be Used by Prosecution To Impeach Defendant's Testimony at Trial

Franklin v. State,
No. 57,348 (Tex. Crim. App. May 24, 1978)(en banc)(not yet reported).

Donald Gene Franklin was found guilty of capital murder and sentenced to death. At the trial Franklin took the stand and related an exculpatory story. On cross-examination, the prosecutor asked Franklin several questions[1] concerning Franklin's failure to relate this story at the pretrial hearings.[2] Defense counsel objected, pointing out that the pretrial testimony had been limited by agreement of the parties to collateral points unrelated to the issue of guilt. The objections were overruled. On appeal to the Texas Court of Criminal Appeals, Franklin contended that the trial court erred in permitting cross-examination concerning Franklin's failure to testify about exculpatory matters at pretrial hearings.[3] Held—*Affirmed.* A defen-

writ)(ordinarily no right to appeal from interlocutory order, but rule different when order void).

74. *See* Crick, *The Final Judgment as a Basis for Appeal,* 41 YALE L.J. 539, 539-40 (1932); Frank, *Requiem for the Final Judgment Rule,* 45 TEXAS L. REV. 292, 292-93 (1966).

75. *See* Fulton v. Finch, 162 Tex. 351, 358, 346 S.W.2d 823, 828 (1961).

1. Mr. Conaway, one of the prosecuting attorneys, asked the question, "Isn't it true that you have been under oath in a Courtroom before Judge Barlow in previous proceedings and you never told us one mumbling word about the tale you just told me?" This question and several like it were repeated on many occasions. Franklin v. State, No. 57,348, slip. op. at 4 (Tex. Crim. App. May 24, 1978)(en banc)(not yet reported). The "tale" that Franklin related at trial was that a man named Eugene Tealer had borrowed Franklin's car and pants on the night of the incident in question. Franklin contended that although his car may have been seen in the parking lot from which the victim of the murder was abducted, Tealer was the driver of the car. *Id.* at 5.

2. The pretrial hearings were conducted solely to resolve the contentions that Franklin was not competent to assist his attorneys at the pretrial hearings, that he was not properly represented by an attorney at a police line-up, and that evidence was obtained against him in violation of his fourth amendment rights. Franklin v. State, No. 57,348, slip. op. at 9-10 (Tex. Crim. App. May 24, 1978)(en banc)(not yet reported)(dissenting opinion).

3. Forty-five points of error were presented on appeal to the court of criminal appeals.

dant's failure to relate an exculpatory story during pretrial hearings may be used by the prosecution to impeach the defendant's testimony at trial.[4]

A defendant's right to remain silent without that silence being used against him has been a part of American jurisprudence since the adoption of the Bill of Rights.[5] While this right was originally afforded only to defendants in federal criminal proceedings,[6] it has been extended to the states through the fourteenth amendment,[7] as well as to defendants in civil proceedings.[8]

Historically, this right has undergone substantial modification, particularly during this century.[9] The United States Supreme Court has narrowed the scope of the privilege against impeachment by one's own silence, holding that although a defendant had the right to remain silent, he waived this right when he took the stand on his own behalf.[10] Thus, while no inference of guilt could be drawn from a defendant's refusal to testify, he had no right to relate to the jury all the facts favorable to his case without being vulnerable to cross-examination.[11] Further, a refusal to answer a proper question upon cross-examination was a permissible subject of comment to the jury.[12] As the Court noted, the privilege against self-incrimination was afforded only to those who did not wish to become witnesses in their own behalf.[13] In *Miranda v. Arizona*[14] the Supreme Court

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Only three of those points deal with the issue of the use of pretrial silence to impeach testimony at trial. *See id.* at 1-9.

4. *Id.* at 5.

5. *See, e.g.*, Fitzpatrick v. United States, 178 U.S. 304, 315 (1900); Counselman v. Hitchcock, 142 U.S. 547, 552(1892); U.S. CONST. amend. V. *See generally* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 114-143 (2d ed. 1972); 8 J. WIGMORE, EVIDENCE § 2250 (Chadbourn rev. 1972).

6. *See* Adamson v. California, 332 U.S. 46, 48 (1947).

7. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55-56 (1964); U.S. CONST. amend. XIV. *See also* Adams v. Maryland, 347 U.S. 179, 184 (1954)(concurring opinion)(testimony by witness in congressional inquiry could not later be used against witness in subsequent case).

8. *See* Brown v. United States, 356 U.S. 148, 155 (1958).

9. *See, e.g.*, Simmons v. United States, 390 U.S. 377, 390(1968)(evidence given in support of motion to suppress not admissible at trial); Raffel v. United States, 271 U.S. 494, 499 (1926)(privilege against self-incrimination extends only to trial at which defendant asserts it); Fitzpatrick v. United States, 178 U.S. 304, 316 (1900)(refusal to answer proper question on cross-examination permissible subject for comment to jury).

10. *See* Brown v. United States, 356 U.S. 148, 153 (1958); Johnson v. United States, 318 U.S. 189, 196 (1943); Fitzpatrick v. United States, 178 U.S. 304, 315 (1900). When a defendant takes the stand on his own behalf, the prosecutor may cross-examine him in the same manner as he would any other witness. *Id.* at 315; *see* Raffel v. United States, 271 U.S. 494, 498 (1926); Black v. State, 440 S.W.2d 668, 670 (Tex. Crim. App. 1969). *See generally* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 132 (2d ed. 1972).

11. Fitzpatrick v. United States, 178 U.S. 304, 315 (1900).

12. *Id.* at 316. *See generally* 8 J. WIGMORE, EVIDENCE § 2276(b) (Chadbourn rev. 1972); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 132 (2d ed. 1972).

13. *See* Raffel v. United States, 271 U.S. 494, 499 (1926). In *Raffel*, the defendant did not offer himself as a witness at the first trial and the jury failed to reach a verdict. At the

clearly stated not only that a defendant has the right to remain silent, but that the state must affirmatively demonstrate that procedural safeguards have been employed to insure that the defendant is aware of this right.[15] Prosecutors are prohibited from using statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless the *Miranda* warnings have been given.[16]

Although it is well settled that a defendant normally waives his right to remain silent when he takes the witness stand,[17] an exception is made when he takes the stand to assert a fourth amendment claim to be free from unreasonable search and seizure.[18] Since this right is personal in nature, a defendant will usually have to take the witness stand to assert it.[19] In so doing, he may make statements tending to incriminate himself, which, if admissible at trial on the issue of guilt, would require the defendant to either give up what he believed to be a valid fourth amendment claim or, in legal effect, waive his fifth amendment privilege against self-incrimination.[20]

When a defendant invokes his right to remain silent at the time of his arrest, his silence cannot be used to impeach his credibility at trial if he testifies in his own behalf.[21] In most cases, silence is so ambiguous that it has little probative force.[22] Nevertheless, when a defendant is repeatedly

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second trial, the defendant took the stand and offered into evidence some exculpatory information. The court asked the defendant several questions probing for the reason he did not offer this evidence at the first trial. The second trial resulted in a conviction. *Id.* at 495-96. A challenge was made to the court's questioning of the defendant about his failure to previously mention the exculpatory story. The Supreme Court's affirmance of the conviction indicates that the privilege against self-incrimination extends only to the trial in which the defendant asserts it. *Id.* at 499. *See also* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 132 (2d ed. 1972). In a later case, it was held that even when the privilege to remain silent was mistakenly granted, the defendant has a right to rely on the court's assurance that the privilege is intact. *See* Johnson v. United States, 318 U.S. 189, 196-97 (1943).

14. 384 U.S. 436 (1966).

15. *Id.* at 444.

16. *See id.* at 444. An accused must be advised that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. *Id.* at 444. *But see* Harris v. New York, 401 U.S. 222, 225 (1971) (approved use of statements for impeachment purposes, although obtained in violation of *Miranda*).

17. Brown v. United States, 356 U.S. 148, 153 (1958); Raffel v. United States, 271 U.S. 494, 499 (1926); *see* Johnson v. United States, 318 U.S. 189, 196-97 (1943).

18. *See* Simmons v. United States, 390 U.S. 377, 389 (1968); U.S. CONST. amend. IV. *See also* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 131 (2d ed. 1972).

19. Simmons v. United States, 390 U.S. 377, 389 (1968).

20. *Id.* at 394.

21. Doyle v. Ohio, 426 U.S. 610, 618 (1976); *see* Miranda v. Arizona, 384 U.S. 436, 444 (1968).

22. United States v. Hale, 422 U.S. 171, 176 (1975); *see* Doyle v. Ohio, 426 U.S. 610, 618 (1976).

accused of a crime and does not attempt to rebut his accusers, his failure to speak becomes less ambiguous and more probative. It is assumed that a defendant would be likely to speak out in his defense when falsely accused.[23] Generally, the Supreme Court has construed the fifth amendment to forbid both comment by the prosecutor on the accused's silence and instructions by the court that such silence is evidence of guilt.[24]

In *Doyle v. Ohio*[25] the Supreme Court addressed the issue whether a prosecutor may properly cross-examine a defendant about his failure to relate an exculpatory story after receiving the *Miranda* warnings.[26] The Court held that this use of the defendant's post-arrest silence violates due process.[27] In so holding, the Court declared that every post-arrest silence is "insolubly ambiguous" in that the *Miranda* warnings impliedly contain the guarantee that an arrestee's silence will not be used against him.[28]

In *Franklin v. State*[29] the majority, in holding that the prosecutor's repeated references to Franklin's failure to relate an exculpatory story at pretrial hearings were not error, reasoned that Franklin could have told the same exculpatory story at the pretrial hearings that he offered into evidence at trial. The holding carries the further implication that Franklin *should* have told his story at the pretrial hearings, and his failure to do so could be used to impeach his testimony at trial.[30] The majority cited to *Raffel v. United States*,[31] a 1926 Supreme Court case in which a defendant's failure to relate an exculpatory story at his first trial was used to impeach his testimony at a retrial.[32] No attempt was made to relate the facts in *Raffel* to *Franklin*. Additionally, the majority relied on a footnote in *Doyle* which indicated that prosecutors should be allowed great latitude in their cross-examinations to prevent defendants from frustrating the truth-seeking function of a trial.[33]

23. United States v. Hale, 422 U.S. 171, 176 (1975); *see* Doyle v. Ohio, 426 U.S. 610, 617 (1976). *See generally* 3A J. WIGMORE, EVIDENCE § 1042 (Chadbourn rev. 1972).

24. *See* Johnson v. United States, 318 U.S. 189, 196-97 (1943); Raffel v. United States, 271 U.S. 494, 498 (1926). *See generally* Grunewald v. United States, 353 U.S. 391, 422-23 (1957)(identified three factors relating to whether silence is inconsistent with later exculpatory testimony); 3A J. WIGMORE, EVIDENCE § 1042 (Chadbourn rev. 1972).

25. 426 U.S. 610 (1976).

26. *Id.* at 611.

27. *Id.* at 611. In *Doyle* the dissent pointed out that this was the first decision of the Supreme Court to address the constitutionality of admitting evidence of a defendant's prior silence to impeach his testimony upon direct examination since *Raffel v. United States*, in 1926. *Id.* at 632-33 n.11 (dissenting opinion). Cases subsequent to *Raffel* had been decided on evidentiary rather than constitutional grounds, and had diminished the force of *Raffel* in the federal courts. *Id.* at 632-33 n.11.

28. *Id.* at 617; *see* United States v. Hale, 422 U.S. 171, 176 (1975). *See generally* 4 J. WIGMORE, EVIDENCE § 1071 (Chadbourn rev. 1972).

29. No. 57,348 (Tex. Crim. App. May 24, 1978)(en banc)(not yet reported).

30. *Id.* at 5. *See also* Fitzpatrick v. United States, 178 U.S. 304, 315 (1900).

31. 271 U.S. 494 (1926).

32. *Id.* at 495.

33. *See* Franklin v. State, No. 57,348, slip op. at 4 (Tex. Crim. App. May 24, 1978)(en

In a vigorous dissent, the minority quoted language from several Supreme Court cases to support their view that it would be fundamentally unfair and a deprivation of due process to allow a defendant's silence at a pretrial hearing to be used for impeachment purposes at trial.[34] The minority reasoned that the value of such silence for impeachment purposes was outweighed by its prejudicial impact.[35] It was pointed out that the ambiguous nature of post-arrest silence referred to in *Doyle* applied as well to silence at pretrial hearings, especially when the pretrial motions were not concerned with questions of guilt or innocence.[36]

It was further argued that the holding placed the defendant upon the "horns of a dilemma" when trying to determine whether to assert his fourth amendment rights.[37] *Simmons v. United States*,[38] which involved similar prosecution comments on a defendant's silence at a pretrial hearing, had supposedly resolved this dilemma; however, the majority, it was felt, would "resurrect it once again to haunt the courtrooms of this State."[39] It was reasoned that although there is an obvious difference between *Simmons* and the case at bar,[40] the appellant was relying on the

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banc)(not yet reported) (citing Doyle v. Ohio, 426 U.S. 610, 617 n.7 (1976)). The textual sentence to which this footnote is appended reads, "Despite the importance of cross-examination, we have concluded that the *Miranda* decision compels rejection of the State's position." The state's position was that the need to present to the jury all information relevant to the truth of petitioner's exculpatory story fully justifies the cross-examination that is at issue. Doyle v. Ohio, 426 U.S. 610, 617 (1976).

34. Franklin v. State, No. 57,348, slip op. at 11-13 (Tex. Crim. App. May 24, 1978)(en banc)(not yet reported)(dissenting opinion); *accord* Willinsky v. State, 360 So. 2d 760, 762 (Fla. 1978) (not material when defendant is silent if privilege attaches at that stage); *see* Doyle v. Ohio, 426 U.S. 610, 616 (1976); United States v. Hale, 422 U.S. 171, 176 (1975); Simmons v. United States, 390 U.S. 377, 394 (1968).

35. Franklin v. State, No. 57,348, slip op. at 12 (Tex. Crim. App. May 24, 1978)(en banc)(not yet reported)(dissenting opinion); *see* Doyle v. Ohio, 426 U.S. 610, 617 n.8 (1976); United States v. Hale, 422 U.S. 171, 177 (1975).

36. Franklin v. State, No. 57,348, slip op. at 11-12 (Tex. Crim. App. May 24, 1978)(en banc)(not yet reported)(dissenting opinion); *see* Doyle v. Ohio, 426 U.S. 610, 617 (1976); United States v. Hale, 422 U.S. 171, 177 (1975); Simmons v. United States, 390 U.S. 377, 381 (1968). In *Franklin* the hearings were expressly limited by agreement to the adjudication of issues unrelated to guilt or innocence. *See* Franklin v. State, No. 57,348, slip op. at 5 (Tex. Crim. App. May 24, 1978)(en banc)(not yet reported).

37. Franklin v. State, No. 57,348, slip op. at 15 (Tex. Crim. App. May 24, 1978)(en banc)(not yet reported)(dissenting opinion); *see* United States v. Hale, 422 U.S. 171, 177 (1975); Simmons v. United States, 390 U.S. 377, 394 (1968).

38. 390 U.S. 377 (1968).

39. Franklin v. State, No. 57,348, slip op. at 15 (Tex. Crim. App. May 24, 1978)(en banc)(not yet reported)(dissenting opinion).

40. Franklin v. State, No. 57,348, slip op. at 12 (Tex. Crim. App. May 24, 1978)(en banc)(not yet reported)(dissenting opinion); *see* Simmons v. United States, 390 U.S. 377, 382 (1968). In *Simmons* the prosecution commented on petitioner's testimony during a pretrial motion to suppress evidence on fourth amendment grounds. In *Franklin* the prosecutor commented on defendant's silence during a similar hearing. Both circumstances are covered by the fifth amendment, in that a defendant does not waive his privilege against self-

same principle, that is, that the testimony at the pretrial hearings was limited to issues raised by the motions, and that no questions beyond the scope of the motions were allowed.[41] The minority also questioned the validity of the holding under applicable Texas law,[42] reasoning that the prosecutor's reference to Franklin's failure to relate his exculpatory story was clearly a comment in violation of article 38.08 of the Texas Code of Criminal Procedure.[43]

The holding of the court of criminal appeals in *Franklin* is unsound in light of prior applicable law.[44] In particular, the court's reliance on *Doyle* and *Raffel* is misplaced.[45] In an effort to apply the law in *Doyle* to the instant case, the court culled language from footnotes in *Doyle* without referring to the holding or to the policy considerations which supported it.[46] In *Doyle* the Court stated that *Miranda* warnings impliedly assure a defendant that his silence will carry no penalty, and that therefore any post-*Miranda* warning silence would be "insolubly ambiguous."[47] Given these considerations, and despite the need for latitude in cross-examinations, it would be unconscionable to allow the defendant's pretrial silence to be used to impeach his testimony at trial.[48] Although the silence referred to

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incrimination when he takes the stand for the purpose of presenting evidence in support of a motion to suppress. Simmons v. United States, 390 U.S. 377, 390 (1968). In post-*Miranda* decisions, the Supreme Court has held that using a defendant's silence for impeachment purposes is similarly proscribed by the fifth amendment. *See* Doyle v. Ohio, 426 U.S. 610, 617 (1976); United States v. Hale, 422 U.S. 171, 180 (1975); Simmons v. United States, 390 U.S. 377, 389 (1968). *See also* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 132 (2d ed. 1972).

41. Franklin v. State, No. 57,348, slip op. at 12 (Tex. Crim. App. May 24, 1978)(en banc)(not yet reported)(dissenting opinion); *see* Simmons v. United States, 390 U.S. 377, 394 (1968).

42. Franklin v. State, No. 57,348, slip op. at 15 (Tex. Crim. App. May 24, 1978)(en banc)(not yet reported)(dissenting opinion); *see* Dudley v. State, 548 S.W.2d 706, 712 (Tex. Crim. App. 1977); Scroggins v. State, 97 Tex. Crim. 573, 576, 263 S.W. 303, 305 (1924); TEX. CONST. art. I, § 10; TEX. CODE CRIM. PRO. ANN. art. 38.08 (Vernon 1966).

43. Franklin v. State, No. 57,348, slip op. at 15 (Tex. Crim. App. May 24, 1978)(en banc)(not yet reported)(dissenting opinion); *see* TEX. CODE CRIM. PRO. ANN. art. 38.08 (Vernon 1966). This article states, "Any defendant in a criminal action shall be permitted to testify in his own behalf therein, but the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause." *Id.*

44. *Compare* Franklin v. State, No. 57,348, slip op. at 5 (Tex. Crim. App. May 24, 1978)(en banc)(not yet reported) *with* Doyle v. Ohio, 426 U.S. 610, 618 (1976) *and* United States v. Hale, 422 U.S. 171, 177 (1975) *and* Simmons v. United States, 390 U.S. 377, 394 (1968) *and* Raffel v. United States, 271 U.S. 494, 499 (1926).

45. *Compare* Franklin v. State, No. 57,348, slip op. at 11 (Tex. Crim. App. May 24, 1978)(en banc)(not yet reported)(dissenting opinion) *with* Doyle v. Ohio, 426 U.S. 610, 618 (1976) *and* Raffel v. United States, 271 U.S. 494, 499 (1926).

46. *See* Franklin v. State, No. 57,348, slip op. at 4-5 (Tex. Crim. App. May 24, 1978)(en banc)(not yet reported).

47. *See* Doyle v. Ohio, 426 U.S. 610, 617 (1976); United States v. Hale, 422 U.S. 171, 177 (1975).

48. *See* Doyle v. Ohio, 426 U.S. 610, 618 (1976).

in *Franklin* occurred at a pretrial hearing and not at the time of arrest, the same policy considerations apply. Franklin expressly asserted his fifth amendment right to remain silent on the issue of guilt at the pretrial hearings.[49] Therefore, his situation was similar to that of a defendant who has just been informed that he had a right to remain silent.[50]

The court's misplaced reliance on *Raffel* resulted from a failure to distinguish between a defendant's silence at a prior trial and a defendant's silence at a pretrial hearing.[51] This distinction is crucial. A defendant would be expected to relate an exculpatory story at a trial when his freedom was at stake, whereas he would not be expected to relate such a story when it was irrelevant to the issues at hand.[52] The point that the court overlooked is that in those cases in which the Supreme Court has allowed a defendant's silence to be used for impeachment purposes, the silence was either inexplicable under the circumstances,[53] inconsistent with the defendant's prior conduct or statements,[54] or occurred at a time when the defendant had waived his fifth amendment rights.[55] None of these situations were present in the instant case.[56] Franklin's failure to relate an exculpatory story at the pretrial hearings was understandable in light of the issues involved at those hearings.[57] He had previously related his story to the police, but whether he had or not was irrelevant to the issues at the pretrial hearings. Thus, his failure to relate it there was not inconsistent; Franklin

49. Franklin v. State, No. 57,348, slip op. at 9 (Tex. Crim. App. May 24, 1978)(en banc)(not yet reported)(dissenting opinion).

50. If anything, Franklin's silence is less ambiguous and more explicable than that of a defendant who has just been told he has a right to remain silent. In the latter case, one can only surmise why the defendant chooses not to speak. Franklin's silence on the issue of guilt was agreed to by both counsel for the defense and prosecution. The cross-examination was expressly limited to the scope of the direct examination, thereby encouraging Franklin to limit the testimony strictly to the subjects under consideration. Thus, there was no reason for Franklin to relate his exculpatory story at the pretrial hearings since it was irrelevant to the issues at hand. *See* Franklin v. State, No. 57,348, slip op. at 12 (Tex. Crim. App. May 24, 1978)(en banc)(not yet reported)(dissenting opinion).

51. *See* Raffel v. United States, 271 U.S. 494, 498-99 (1926); Franklin v. State, No. 57,348, slip op. at 4 (Tex. Crim. App. May 24, 1978)(en banc)(not yet reported).

52. *Compare* Franklin v. State, No. 57,348, slip op. at 4-5 (Tex. Crim. App. May 24, 1978)(en banc)(not yet reported) *with* United States v. Hale, 422 U.S. 171, 177 (1975) *and* Raffel v. United States, 271 U.S. 494, 498-99 (1926).

53. United States v. Hale, 422 U.S. 171, 176-77 (1975). *See also* Chapman v. United States, 547 F.2d 1240, 1249-50 (5th Cir. 1977)(use of defendant's silence for impeachment is harmless error).

54. Harris v. New York, 401 U.S. 222, 226 (1971)(dissenting opinion); *see* Johnson v. United States, 318 U.S. 189, 195 (1943); Raffel v. United States, 271 U.S. 494, 498-99 (1926).

55. *See* Brown v. United States, 356 U.S. 148, 155 (1958); Fitzpatrick v. United States, 178 U.S. 304, 315 (1900). *See generally* C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 132 (2d ed. 1972). *See also* Johnson v. United States, 318 U.S. 189, 195 (1943); Raffel v. United States, 271 U.S. 494, 496-97 (1926).

56. Franklin v. State, No. 57,348, slip op. at 3-9 (Tex. Crim. App. May 24, 1978)(en banc)(not yet reported).

57. *Id.* at 12 (dissenting opinion); *see* Hale v. United States, 422 U.S. 171, 177 (1975).

had expressly not waived his fifth amendment rights with respect to the issue of guilt, and the prosecutor expressly agreed to limit the scope of the cross-examination.[58] Since *Franklin* does not fit any of the exceptions outlined by the Supreme Court, the court of criminal appeals should have followed the general rule that a defendant's silence may not be used for impeachment purposes.[59]

Furthermore, the decision in *Franklin* does not follow the law in Texas.[60] The Code of Criminal Procedure provides that a defendant's failure to testify in his own behalf shall not be "alluded to or commented on" by the prosecutor.[61] Although the state could argue that once Franklin took the stand at the pretrial hearings he entirely waived his privilege, such a blanket waiver rule would discourage accused persons from testifying at all.[62] Although there are no Texas cases squarely on point, the few cases that address the general issue whether a defendant's silence may be used for impeachment favor the position taken by the minority in *Franklin.*[63] In *Dudley v. State*[64] the court of criminal appeals disallowed the use for impeachment purposes of a defendant's refusal to take a sobriety test. In a concurring opinion, it was indicated that if a defendant refused to take the test by standing mute, this silence would not be admissible at trial, particularly if *Miranda* warnings had been given.[65] Although clearly distinguishable from *Franklin, Dudley* strongly supports a defendant's right to not have his silence used against him at trial.[66]

58. Franklin v. State, No. 57,348, slip op. at 12 (Tex. Crim. App. May 24, 1978)(en banc)(not yet reported)(dissenting opinion). *See generally* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 132 (2d ed. 1972).

59. Griffin v. California, 380 U.S. 609, 613 (1965). *See generally* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 131, 132 (2d ed. 1972); 3A J. WIGMORE, EVIDENCE § 1042 (Chadbourn rev. 1972). In Professor Wigmore's treatise it is suggested that in legal proceedings, omitting what would naturally have been asserted under the circumstances amounts to an assertion of the non-existence of the fact. *Id.*

60. *See* Dudley v. State, 548 S.W.2d 706, 712 (Tex. Crim. App. 1977)(concurring opinion); Scroggins v. State, 97 Tex. Crim. 573, 576, 263 S.W. 303, 305 (1924); TEX. CONST. art. I, § 10; TEX. CODE CRIM. PRO. ANN. art. 38.08 (Vernon 1966). "It is elementary that a person arrested upon a charge of crime, and thus accused thereof, has an absolute and inviolable constitutional right under the Fifth Amendment . . . to remain silent." Dudley v. State, 548 S.W.2d 706, 712 (Tex. Crim. App. 1977)(concurring opinion).

61. TEX. CODE CRIM. PRO. ANN. art. 38.08 (Vernon 1966).

62. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 132 (2d ed. 1972). *See* Simmons v. United States, 390 U.S. 377, 389 (1968); Raffel v. United States, 271 U.S. 494, 498 (1926).

63. *Compare* Franklin v. State, No. 57,348, slip op. at 15 (Tex. Crim. App. May 24, 1978)(en banc)(not yet reported)(dissenting opinion) *with* Dudley v. State, 548 S.W.2d 706, 712 (Tex. Crim. App. 1977) *and* Scroggins v. State, 97 Tex. Crim. 573, 576, 263 S.W. 303, 305 (1924). In *Scroggins* questions similar to the ones in the instant case were asked, but the objections to these questions were sustained. The court still found reversible error stating that it was prejudicial to ask the questions at all. *Id.* at 576, 263 S.W. at 305.

64. 548 S.W.2d 706 (Tex. Crim. App. 1977).

65. *Id.* at 711 (concurring opinion of Presiding Judge Onion).

66. *See* Franklin v. State, No. 57,348, slip op. at 13-15 (Tex. Crim. App. May 24, 1978)(en banc)(not yet reported)(dissenting opinion).

Additionally, the holding in *Franklin* is not compatible with the policy considerations expressed in the post-*Miranda* Supreme Court decisions which construe the fifth amendment right to remain silent.[67] One such consideration is that an individual should not be forced to surrender one constitutional right in order to assert another.[68] The majority in *Franklin* implied that the defendant waived his fifth amendment right to remain silent when he took the stand to assert a fourth amendment claim.[69] Franklin only waived his fifth amendment privilege with respect to the pretrial motions, one of which was a motion to suppress based on the fourth amendment. The prosecutor was prohibited from asking questions concerning the issue of guilt, which, therefore, was irrelevant to the agreed-upon scope of the pretrial hearings. Thus, it is illogical to hold that Franklin should have told his exculpatory story at these hearings.[70] To so hold would be to require a defendant to relate his entire defense each time he had occasion to speak or face impeachment for his failure to do so.[71]

The holding in *Franklin* will significantly narrow the scope of constitutional rights afforded defendants in criminal proceedings in Texas. It is unlikely that an accused will be willing to assert fourth amendment rights if by so doing he might be waiving his fifth amendment rights. A defendant will not know whether to remain silent or to speak lest his silence be misconstrued. Clearly, a defendant should be under no compulsion to speak unless he chooses to do so or has otherwise waived his right to remain silent. To hold otherwise is to seriously abridge a right that is fundamental to traditional concepts of justice.

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67. *See* Doyle v. Ohio, 426 U.S. 610, 619 (1976); United States v. Hale, 422 U.S. 171, 181 (1975); Simmons v. United States, 390 U.S. 377, 394 (1968). For a discussion of the policy considerations in *Doyle* and *Hale*, see text accompanying notes 17-24 *supra*.

68. Simmons v. United States, 390 U.S. 377, 394 (1968). In *Simmons* a defendant's testimony in support of a motion to suppress evidence on constitutional grounds was held inadmissible on the issue of guilt. *Id.* at 394.

69. Franklin v. State, No. 57,348, slip op. at 4 (Tex. Crim. App. May 24, 1978)(en banc)(not yet reported); *see* Simmons v. United States, 390 U.S. 377, 394 (1968).

70. *See* Franklin v. State, No. 57,348, slip op. at 12 (Tex. Crim. App. May 24, 1978)(en banc)(not yet reported)(dissenting opinion); Doyle v. Ohio, 426 U.S. 610, 617 (1976); United States v. Hale, 422 U.S. 171, 177 (1975). *See also* C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 131-32 (2d ed. 1972).

71. *See* C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 118, 131-32 (2d ed. 1972).