St. Mary's Law Journal

Volume 13 | Number 2 Article 10

6-1-1982

Trial Judge Required, upon Proper Request, to Instruct Jury Not to Draw Adverse Inferences from a Defendant's Failure to Testify.

Susan L. Gellis

CRIMINAL PROCEDURE—Jury Instructions—Trial Judge Required, Upon Proper Request, To Instruct Jury Not to Draw Adverse Inferences From a Defendant's Failure to Testify.

Carter v. Kentucky,
___U.S.___, 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981).

Lonnie Joe Carter was indicted for third degree burglary of a hardware store and was later found to be a habitual felony offender. At trial, Carter chose not to testify, since doing so would enable the prosecution to introduce his prior convictions for impeachment purposes. Carter's attorney requested an instruction be given to the jury directing them to refrain from drawing adverse conclusions from his client's failure to take the stand.[1] The request was denied, and Carter was subsequently convicted.[2] On appeal, the Supreme Court of Kentucky affirmed.[3] The United States Supreme Court subsequently granted certiorari to determine whether the Constitution compels a criminal trial judge to give an instruction such as that requested by Carter's attorney.[4] Held—*Reversed and remanded.* A trial judge is required, upon proper request, to instruct the jury not to draw adverse inferences from a defendant's failure to testify.[5]

The objective of the fifth amendment privilege against self-incrimination[6] is to insure that an individual is not compelled, when acting as a

---

1. Carter v. Kentucky, ___U.S.___, ___, 101 S. Ct. 1112, 1115-16, 67 L. Ed. 2d 241, 246 (1981). Carter requested the jury be instructed: "The defendant is not compelled to testify and the fact that he does not cannot be used as inference of guilt and should not prejudice him in any way." *Id.* at ___, 101 S. Ct. at 1115-16, 67 L. Ed. 2d at 246.

2. *Id.* at ___, 101 S. Ct. at 1116, 67 L. Ed. 2d at 246-47. Carter was found guilty by the jury as a persistent offender and sentenced to the maximum prison term of twenty years. *Id.* at ___, 101 S. Ct. at 1116, 67 L. Ed. 2d at 247.

3. *Id.* at ___, 101 S. Ct. at 1113, 67 L. Ed. 2d at 243. Concluding that the trial court did not commit error by refusing an instruction to the jury regarding Carter's right not to testify, the Kentucky Supreme Court pointed to section 421.225 of the Kentucky Revised Statutes which provides: "In any criminal or penal prosecution the defendant, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him." KY. REV. STAT. § 421.225 (Supp. 1980); *see* Carter v. Kentucky, ___U.S.___, ___, 101 S. Ct. 1112, 1116, 67 L. Ed. 2d 241, 247 (1981).

4. *See* Carter v. Kenutcky, ___U.S.___, ___, 101 S. Ct. 1112, 1116-17, 67 L. Ed. 2d 241, 247-48.

5. *Id.* at ___, 101 S. Ct. at 1121-22, 67 L. Ed. 2d at 254 (1981).

6. U.S. CONST. amend. V. The fifth amendment commands, in pertinent part, that no

witness, to give testimony that is likely to incriminate him.[7] The fifth amendment is predicated upon the assumption that innocent people might be convicted if forced to testify at their own trials[8] and thus, the privilege includes the right to remain silent.[9] Furthermore, the fifth amendment guarantees that neither the prosecution nor the court may insinuate that the jury should come to adverse conclusions based upon a defendant's failure to testify.[10] To protect this constitutional right, courts have construed this provision liberally, in favor of an accused.[11] In *Bruno*

---

person "shall be compelled in any criminal case to be a witness against himself." *Id.*

7. *See, e.g.*, Lefkowitz v. Turley, 414 U.S. 70, 77 (1973); United States v. Gordon, 236 F.2d 916, 919 (2nd Cir. 1956); Williams v. State, 607 S.W.2d 577, 578 (Tex. Crim. App. 1980).

8. *See* Griffin v. California, 380 U.S. 609, 613 (1965). An individual may have justifiable reasons for choosing not to testify which bear no relation to fear of disclosing guilt. *See, e.g.*, Lakeside v. Oregon, 435 U.S. 333, 344 (1978) (fear of incriminating people whom defendant either fears or loves); Wilson v. United States, 149 U.S. 60, 66 (1893) (fear of demeanor giving unfavorable impression on witness stand); People v. Modesto, 42 Cal. Rptr. 417, 398 P.2d 753, 763 (Calif. 1965) (fear of disclosure of prior convictions during cross-examination). Excessive timidity and nervousness may embarrass and confuse an innocent defendant so as to increase, instead of remove, prejudices against him. *See* Wilson v. United States, 149 U.S. 60, 66 (1893). Although the fifth amendment privilege against compulsory self-incrimination may shelter the guilty, it often protects innocent people accused of crime who fear self-incrimination, contempt, or perjury. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964); Wilson v. United States, 149 U.S. 60, 66 (1893).

9. *See* Lefkowitz v. Turley, 414 U.S. 70, 77 (1973); United States v. Gordon, 236 F.2d 916, 919 (2nd Cir. 1956); Williams v. Texas, 607 S.W.2d 577, 578 (Tex. Crim. App. 1980).

10. *See, e.g.*, Griffin v. California, 380 U.S. 609, 614-15 (1965) (unconstitutional compulsion exists when prosecutor and court insinuate that jury should draw unfavorable inferences from defendant's silence); United States v. Sorzano, 602 F.2d 1201, 1202 (5th Cir. 1979) (unfavorable comment on defendant's failure to testify is prohibited by fifth amendment), *cert. denied*, 444 U.S. 1018; Brumfield v. State, 445 S.W.2d 732, 735 (Tex. Crim. App. 1969) (adverse inferences may not be drawn from defendant's silence and comment on such silence is prohibited). Moreover, counsel for a co-defendant is prohibited from commenting on the defendant's failure to testify. *See* DeLuna v. United States, 308 F.2d 140, 141 (5th Cir. 1962).

11. *See* Maness v. Meyers, 419 U.S. 449, 461 (1975) (fifth amendment privilege is afforded broad construction for benefit of individual); United States v. Mahady, 512 F.2d 521, 525 (3rd Cir. 1975) (quoting Hoffman v. United States, 341 U.S. 479, 486 (1951)) (privilege against self-incrimination must be given liberal construction to protect right it was intended to secure). In 1964, the Supreme Court established that the privilege provided the criminal defendant the same protections in state prosecutions as in federal prosecutions. *See* Malloy v. Hogan, 378 U.S. 1, 6 (1964). The *Malloy* Court overruled both Twining v. New Jersey, 211 U.S. 78 (1908) and Adamson v. California, 332 U.S. 46 (1947), which held the fifth amendment privilege against self-incrimination would not be made applicable to the states by virtue of the fourteenth amendment. *See* Malloy v. Hogan, 378 U.S. 1, 6 (1964). *See also* McGuffin v. State, 571 S.W.2d 56, 57 (Tex. Civ. App.—Austin 1978, no writ) (in Texas criminal prosecutions, fifth amendment applies by virtue of due process clause of fourteenth amendment).

v. United States,[12] the Supreme Court addressed the issue of jury instructions concerning a defendant's silence.[13] The *Bruno* Court interpreted a federal statute[14] as requiring federal judges, upon the request of the defendant, to advise the jury of the defendant's right to remain silent and the absence of any inference of guilt resulting therefrom.[15] The Court's ruling, however, was predicated on statutory construction and the traditional duty of the trial judge to instruct the jury on pertinent issues in a case, rather than on constitutional grounds.[16] Subsequently, the Court in *Griffin v. California*[17] held that comment by the prosecution or instructions by the court that the defendant's failure to testify is indicative of guilt is violative of the United States Constitution.[18] Such adverse comments or instructions are unconstitutional because they punish the accused for exercising his constitutional right to remain silent,[19] and, thus, undermine the purpose of the fifth amendment privilege.[20]

---

12. 308 U.S. 287 (1939).

13. *See* Bruno v. United States, 308 U.S. 287, 292 (1939). The Court held an accused should have the right to make the decision as to whether such instruction should be given when a congressional act gives him a choice. *Id.* at 294.

14. 18 U.S.C. § 3481 (1969). The legislative intent behind the federal statute involved in *Bruno* was to allow an accused to choose whether or not a jury instruction will be given on his right of silence. *See* 54 N.C.L. REV. 1001, 1004 (1976).The statute provides that in federal prosecutions "the person so charged shall, at his own request, but not otherwise, be a competent witness," and that "his failure to make such a request shall not create any presumption against him." 18 U.S.C. § 3481 (1969).

15. *See* Bruno v. United States, 308 U.S. 287, 293 (1939).

16. *See id.* at 294.

17. 380 U.S. 609 (1965).

18. *See id.* at 615 (prosecution precluded from commenting on defendant's constitutionally protected right to remain silent). Although the *Griffin* rule proscribes comment on a defendant's silence, it does not prohibit remarks that the defense has failed to present material evidence or remarks on the state of the evidence. *See* Bloom, *The California Experience: Griffin v. California*, 51 CALIF. S.B.J. 376, 376-77 (1976).

19. *See, e.g.*, Fontaine v. California, 390 U.S. 593, 596 (1968) (comment on defendant's silence violates fifth amendment); Chapman v. California, 386 U.S. 18, 21 (1967) (right not to be punished for exercise of constitutional right of silence); Griffin v. California, 380 U.S. 609, 614 (1965) (such comment limits the constitutional privilege to remain silent by making it costly for accused to exercise that privilege). In a further move to protect these rights, the Texas Legislature has enacted a similar provision which prohibits prejudicial comment concerning a defendant's silence. *See* TEX. CODE CRIM. PRO. ANN. art. 38.08 (Vernon 1979). Article 38.08 provides: "Any defendant in any 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 circumstance against him, nor shall the same be alluded to." *Id.*

20. *See* Chapman v. California, 386 U.S. 18, 21 (1967); 62 MARQ. L. REV. 74, 80 (1978). One criticism of allowing the prosecution to comment on a defendant's silence is that the prosecution may use it as a substitute for evidence which would, therefore, encourage sloppy police work. *See* D. FELLMAN, THE DEFENDANT'S RIGHTS TODAY, 321-22 (1976).

The United States Supreme Court in *Lakeside v. Oregon*[21] determined that it is constitutionally permissible for a trial judge to instruct a jury not to draw unfavorable inferences from a defendant's failure to testify, even if the defendant objects to the instruction.[22] The Court reasoned that such a rule would reduce the danger of jurors giving evidentiary weight to a defendant's silence.[23] Furthermore, the *Lakeside* majority held that the fifth and fourteenth amendments bar only adverse comment on a defendant's failure to testify, and viewed an instruction to the jury not to draw adverse inferences from a defendant's silence as a "comment of an entirely different order."[24]

In *Carter v. Kentucky*[25] the United States Supreme Court was faced with the narrow question of whether a jury instruction not to draw inferences from a defendant's silence is constitutionally required when requested by the accused.[26] The Court found that the failure to limit speculation on the significance of a defendant's silence when a proper request is made for a precautionary instruction puts an impermissable burden on the exercise of the fifth amendment privilege.[27] Relying on its decision in *Lakeside*, the Court concluded that the aim of the instruction was to eliminate from the jury's deliberations any prejudicial inferences drawn from the defendant's silence.[28] The Court noted that a trial judge may properly guard the constitutional right to remain silent through the appropriate use of jury instructions.[29] Ultimately, the majority held that a trial judge must issue a "protective" instruction if properly requested by

---

21. 435 U.S. 333 (1978).

22. *See id.* at 340-41.

23. *Id.* at 339 (very purpose of instruction is to prevent jury from drawing inferences from defendant's silence). The *Lakeside* Court emphasized that the purpose of the jury charge is to direct the attention of the jurors to concepts such as burden of proof and reasonable doubt, and the instruction on the significance of the privilege against self-incrimination is not any different. *Id.* at 340.

24. *See id.* at 340-41. The defendant in *Lakeside* argued that instructing the jury to disregard his silence is like "waving a red flag in front of the jury." *Id.* at 340. The Court dismissed this argument because it was predicated on two speculative assumptions: (1) that the jury failed to notice that he had not taken the stand and (2) that the jury would completely disregard the instruction and consider that which they had been told to disregard. *See id.* at 340.

25. ___U.S.___, 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981).

26. *See id.* at ___, 101 S. Ct. at 1114, 67 L. Ed. 2d at 244.

27. *See id.* at ___, 101 S. Ct. at 1121-22, 67 L. Ed. 2d at 254.

28. *See id.* at ___, 101 S. Ct. at 1118-19, 67 L. Ed. 2d at 249-51; Lakeside v. Oregon, 435 U.S. 333, 339 (1979).

29. *See* Carter v. Kentucky, ___U.S.___, ___, 101 S. Ct. 1112, 1120-21, 67 L. Ed. 2d 241, 251-53 (1981). The Court reasoned juries are not made up of specialists in legal principles, and it is predictable that jurors will speculate unfavorably upon a defendant's silence if they are not properly instructed in the law. *See id.* at ___, 101 S. Ct. at 1120, 67 L. Ed. 2d at 252.

the defendant.[30] The Court emphasized that a defense attorney's argument to the jury that the petitioner is not required to take the stand does not have the same purging effect as an instruction given by the judge.[31]

In a concurring opinion, Justice Stevens argued that the majority holding should be limited to cases where the accused has requested the court to instruct the jury not to infer guilt from his silence. He reasoned that the issue of whether a failure-to-testify instruction should be given is similar to the issue of whether a defendant should testify, and, as such, should be decided by the defendant rather than his lawyer or the state.[32] Justice Powell, in a separate concurring opinion, found the holding to be required by precedent and not by the Constitution. He argued that the Court was expanding the concept of compulsion beyond reasonable limits. Furthermore, the requirement of a failure-to-testify instruction stems from the instruction that the defendant is presumed to be innocent, rather than from the Constitution.[33]

In a vigorous dissent, Justice Rehnquist contended that Carter was not compelled to testify against his will or take the stand in violation of the fifth amendment.[34] There was, therefore, simply no unconstitutional compulsion involved at Carter's trial.[35] Justice Rehnquist also stressed that the procedural rules which apply to the administration of criminal justice are a matter of local concern.[36]

The *Carter* Court correctly ruled the Constitution requires a trial judge to give a failure-to-testify instruction to the jury when requested by a defendant.[37] Each defendant has an unconditional right to decide whether to testify and should have a corresponding right to decide whether his silence should be alluded to in front of the jury.[38] To achieve

---

30. *Id.* at ___, 101 S. Ct. at 1120, 67 L. Ed. 2d at 252; *accord* United States v. Bain, 596 F.2d 120, 122 (5th Cir. 1979) (refusal to give requested instruction is reversible error). If a defendant does not take the witness stand, it is prejudicial error to deny a charge to the jury that his silence is not indicative of guilt. White v. United States, 314 F.2d 243, 244 (D.C. Cir. 1962).

31. *See* Carter v. Kentucky, ___U.S.___, ___, 101 S. Ct. 1112, 1120, 67 L. Ed. 2d 241, 252.

32. *Id.* at ___, 101 S. Ct. at 1123, 67 L. Ed. 2d at 255 (Stevens, J., concurring).

33. *Id.* at ___, 101 S. Ct. at 1122, 67 L. Ed. 2d at 254. (Powell, J., concurring). "[N]othing in the clause requires that jurors not draw logical inferences when a defendant refuses to explain incriminating circumstances." *Id.* at ___, 101 S. Ct. at 1122, 67 L. Ed. 2d at 255 (Powell, J., concurring).

34. *Id.* at ___, 101 S. Ct. at 1123-24, 67 L. Ed. 2d at 256-57. (Rehnquist, J., dissenting).

35. *Id.* at ___, 101 S. Ct. at 1123-24, 67 L. Ed. 2d at 256-57 (Rehnquist, J., dissenting).

36. *Id.* at ___, 101 S. Ct. at 1124, 67 L. Ed. 2d at 257 (Rehnquist, J., dissenting).

37. *See id.* at ___, 101 S. Ct. at 1121-22, 67 L. Ed. 2d at 254; Russell v. State, 398 S.W.2d 213, 215 (Ark. 1966).

38. *See* Russell v. State, 398 S.W.2d 213, 215 (Ark. 1966); *cf.* United States v. Hudler, 605 F.2d 488, 490 (10th Cir. 1979) (accused is entitled to jury instructions regarding his

this end, however, the discretion of the trial court in giving such jury instructions must be limited.[39] The decision to testify is a matter of trial strategy, and, therefore, must be left to the accused.[40] Forcing the accused to accept a failure-to-testify instruction over his objection infringes upon the defendant's freedom to choose such a strategy, and, therefore, violates his privilege against unconstitutional comment.[41]

The purging effect of a requested jury instruction such as that in *Carter* demonstrates one method of securing a defendant's right to be judged exclusively on the basis of evidence introduced at trial.[42] One suspected of crime is entitled to have a finding of guilt or innocence based only on proof admitted at trial, and not on the basis of silence which is unrelated to such evidence.[43] Because a precautionary jury instruction may have probative value, the fifth amendment guarantee against self-incrimination may be rendered worthless unless a no-inference instruction is given in cases where the defendant remains silent.[44] On the other hand, failure-to-testify instructions are arguably precluded by the fifth amendment as they are inherently a "comment" on the silence of the accused.[45] The actual effect such instructions have on the jury and the ability of the jury to follow the court's admonitions is, therefore, uncertain.[46]

---

theory of case), *cert. denied*, 455 U.S. 961 (1980).

39. Gross v. State, 306 N.E.2d 371, 372 (Ind. 1974) (judicial statements regarding an accused's silence must be closely regulated).

40. *See* Corpus v. Estelle, 571 F.2d 1378, 1381 (5th Cir. 1978), *cert. denied*, 439 U.S. 957 (1978); Note, 57 ORE. L. REV. 613, 618 (1978).

41. *See* Russell v. State, 398 S.W.2d 213, 215 (Ark. 1966); Villinese v. State, 492 P.2d 343, 350 (Okla. 1971).

42. *See* Taylor v. Kentucky, 436 U.S. 478, 489 (1978) (defendant has right to have jury consider only evidence adduced at trial); Estelle v. Williams, 425 U.S. 501, 503 (1976) (court must secure concept that guilt is to be found only on basis of probative evidence). The Court has a duty to protect the rights of the accused and only the Court can adequately perform this duty. *See* United States v. Nelson, 498 F.2d 1247, 1248-49 (5th Cir. 1974) (arguments by counsel cannot replace instructions by judge).

43. *See* Taylor v. Kentucky, 436 U.S. 478, 485 (1978).

44. *See* Carter v. Kentucky, ___U.S.___, ___, 101 S. Ct. 1112, 1121-22, 67 L. Ed. 2d 241, 253-54 (1981). *See also* People v. Harris, 218 N.W.2d 150, 150-51 (Mich. 1974). On the other hand, if the jury obeys the court's instructions that an accused be found guilty beyond a reasonable doubt and precautions are taken to prevent the prosecution from exploiting a defendant's silence, the instruction would not seem to be necessary to prevent the defendant's silence from being considered unfavorably by the jury. State v. Barker, 399 S.W.2d 1, 5 (Mo. 1966); *see* State v. Nelson, 303 N.E.2d 865, 868 (Ohio 1973).

45. Some courts have prohibited the jury instruction despite the good intentions of the court in giving the instruction. *See* Green v. Commonwealth, 488 S.W.2d 339, 341-42 (Ky. 1972); People v. Horrigan, 61 Cal. Rptr. 403, 406 (Ct. App. 1967). *But see* People v. Molano, 61 Cal Rptr. 821, 825 (Ct. App. 1967).

46. *See* Lakeside v. Oregon, 435 U.S. 333, 339-40 (1978). There is a lack of empirical evidence as to the ability of jurors to follow instructions limiting evidence. *See generally* 51

In light of such uncertainty, a defendant should be allowed to make the decision as to whether or not the instruction should be given.[47]

The *Carter* majority used the *Lakeside* rule, that the Constitution does not forbid the failure-to-testify instruction, as a catalyst to determine that the Constitution requires the trial judge to give such an instruction when requested by a defendant.[48] The government may, however, plausibly obtain an evidentiary advantage by giving a failure-to-testify instruction without the defendant's consent. The defendant, therefore, should be given absolute discretion in determining whether or not the instruction should be given.[49] Such a rule will achieve a greater balance between the government and the accused, and further eliminate the threat of wrongful conviction.

Susan L. Gellis

MINN. L. REV. 264, 265 (1966). The University of Chicago used experimental juries and analyses of statistical data to test the actual effect of jury instructions. The conclusion taken from an analysis of recorded deliberations and interviews of members of the jury was that an instruction to disregard sensitized the jury to that evidence, rather than preventing the jury from considering that evidence. *See* Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 754 (1959); 51 MINN. L. REV. 264, 265 (1966); *cf.* Mengarelli v. United States Marshal, 476 F.2d 617, 620 (9th Cir. 1973) (problem raised by instruction is that it is two-edged blade and jury in a particular case may react to either edge).

47. *See, e.g.*, State v. Jordan, 5 S.E.2d 156, 161 (N.C. 1939) (decision to forego instruction should be left up to defense); State v. Persuitti, 346 A.2d 208, 209 (Vt. 1975) (accused should decide whether jury instruction is given); Champlain v. State, 193 N.W.2d 868, 873 (Wis. 1972) (defense may determine whether jury instruction is given as matter of trial strategy).

48. *Compare* Carter v. Kentucky, ___U.S.___, ___, 101 S. Ct. 1112, 1121-22, 67 L. Ed. 2d 241, 254 (1981) (defense requested failure-to-testify instruction) *with* Lakeside v. Oregon, 435 U.S. 333, 337 (1978) (jury instruction given over defendant's objection).

49. *See* Green, *The Failure To Testify Instruction*, 14 WILL. L. J. 43, 53 (1977).