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The Use of a Witness's Privilege for the Benefit of a Defendant

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THE USE OF A WITNESS'S PRIVILEGE FOR THE BENEFIT OF A DEFENDANT

In a murder prosecution, the defendant wished to call a severed co-defendant as a witness, apparently contending that the latter had committed the crime. In the absence of the jury, the witness invoked his privilege against self-incrimination and the court ruled that he was justified in the claim. The defendant was denied his request that the witness be required to invoke the privilege in the presence of the jury. Affirming the conviction, the Louisiana Supreme Court *held* that a defendant has no right to call a witness solely for the purpose of impressing upon the jury the claim of privilege. *State v. Berry*, 324 So. 2d 822 (La. 1975).[1]

Whether a witness may be required to invoke the fifth amendment privilege on the stand depends upon whether he is the accused or simply an ordinary witness. An accused can refuse to take the stand,[2] and no mention of his failure to testify due to his invoking the privilege can be made.[3] It is universally held that an ordinary witness cannot refuse to take the stand, but can invoke his privilege against self-incrimination to each question that is incriminating[4] since it is not known whether the witness can or will invoke the privilege until he is asked a potentially incriminating question. Early cases,[5] including a Louisiana case, held that even when the party calling the witness knew he would claim the privilege, the non-defendant witness still could not refuse to take the stand.

Other early cases, while not dealing with whether a witness was required to take the stand, established the rule that an inference from a witness's assertion of a privilege could not be used *against* a criminal defendant.[6] The reason usually stated was that a witness's exercising of his

1. *Berry* also involved alleged violations of the physician-patient and clergyman-penitent privileges. These matters are beyond the scope of this note, which is limited to the subject of having a claim of privilege invoked in the presence of the jury. For a discussion of these other aspects, see *The Work of Louisiana Appellate Courts for the 1975-1976 Term—Evidence*, 37 LA. L. REV. 575, 595-97 (1977).

2. *E.g.*, C. MCCORMICK, EVIDENCE § 119 at 254 (2d ed. 1972) [hereinafter cited as MCCORMICK]; 8 J. WIGMORE, Evidence § 2268 at 402 (McNaughton rev. ed. 1961) [hereinafter cited as 8 WIGMORE].

3. *E.g.*, Griffin v. California, 380 U.S. 609 (1965).

4. *E.g.*, MCCORMICK, *supra* note 2, § 136 at 289; 8 WIGMORE, *supra* note 2, § 2268 at 402.

5. *E.g.*, People v. Plyler, 121 Cal. 160, 53 P. 553 (1898); *Ex Parte* Stice, 70 Cal. 51, 11 P. 459 (1886); O'Chaito v. People, 73 Colo. 192, 214 P. 404 (1923); State v. Snyder, 244 Iowa 1244, 59 N.W.2d 233 (1923); State v. Gambino, 221 La. 1039, 61 So. 2d 732 (1952); People v. Allen, 282 N.Y.S. 860 (1935); State v. Hall, 59 S.D. 98, 238 N.W. 302 (1931).

6. *E.g.*, Belleci v. United States, 184 F.2d 394 (D.C. Cir. 1950) (error for court

constitutional right should not be used to harm a third person,[7] but a more plausible reason suggested by Wigmore[8] is that the party against whom the inference is used is denied his right of cross-examination: "If the witness's testimony rather than his silence were offered against the party, deprivation of an opportunity to cross-examine would entitle the party to have the testimony struck; a similar result should follow when it is the witness's silence which is offered probatively against the party."[9]

When confronted with the seeming conflict between the prosecutor's right to call and the exclusion of inferences against the defendant, later courts reversed convictions when there was evidence of prosecutorial misconduct in knowingly calling a witness to invoke the privilege in front of the jury, or when such inferences added critical weight to the prosecution's case.[10] The ABA Standards relating to the prosecution function[11] state that it is "improper conduct for the prosecutor to call a witness who he knows will claim a privilege not to testify, solely for the purpose of impressing upon the jury the fact of the claim of privilege." The comments to the standards, adopting what was mentioned by the Supreme Court in *Namet v. United States*,[12] state that the preferred method in dealing with a privilege which a prosecutor believes a witness will claim is

to refuse to give instructions that inference cannot be drawn against the defendant from witness's invoking privilege); Beach v. United States, 46 F. 754 (N.D. Cal. 1890) (error for court to allow district attorney to argue at inference from witness's privilege); People v. Kynette 15 Cal. 2d 731, 104 P.2d 794, *cert. denied*, 312 U.S. 703 (1940) (no inference to be drawn from a witness's refusal to testify); People v. Glass, 158 Cal. 650, 112 P. 281 (1910) (error in failing to give instruction that inference not to be drawn from witness's privilege); Powers v. State, 75 Neb. 226, 106 N.W. 332 (1905) (error for the court to allow the prosecutor to comment on witness's invoking privilege); *See generally* Annot., 24 A.L.R.2d 895 (1952).

7. "The refusal of the witness to answer the questions, if he thought his answers would incriminate himself, was his constitutional right, which the defendant could not control, and no inference should have been permitted to be drawn against the defendant because of the assertion by the witness of this right to protect himself." Beach v. United States, 46 F. 754, 755 (N.D. Cal. 1890).

8. 8 WIGMORE, *supra* note 2, § 2272 at 437 n.9.

9. *Id.*

10. Namet v. United States, 373 U.S. 179 (1963); Cain v. Cupp, 442 F. 2d 356 (9th Cir. 1971); Sanders v. United States, 373 F.2d 735 (9th Cir. 1967) (critical weight added when prosecutor made witness claim privilege 55 times); Fletcher v. United States, 332 F.2d 724 (D.C. Cir. 1964); United States v. Maloney, 262 F.2d 535 (2d Cir. 1959). Exactly what is prosecutorial misconduct is unclear from the cases. *See* Namet v. United States, 373 U.S. 179 (1963) (court stated that there was no misconduct since the prosecutor's action was only a minor lapse in the context of the entire trial).

11. ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION § 5.7 (1971).

12. 373 U.S. 179, 190 n.9 (1963).

to consider matters concerning the privilege outside the presence of the jury. This standard and the cases thus place a limitation on the rule that an ordinary witness cannot refuse to take the stand because of his fifth amendment privilege, since the *prosecutor* cannot place the witness on the stand solely to invoke the privilege.

Prior to the ABA Standards, the few cases that dealt with whether an inference from the assertion of a privilege could be used in favor of, rather than against the defendant, held that the inferences were not to benefit the accused.[13] The ABA Standards relating to the defense function,[14] citing no authority, adopted the "rule" that the defense should not call a witness it knows will invoke a privilege for the purpose of impressing upon the jury the fact of the claim of the privilege. The comments to the standards declare that it is unprofessional conduct to draw an inference from the claim of a privilege and subsequent cases have agreed.[15] Thus, the rule that a witness can be made to take the stand is limited in the same way for the defense as for the prosecution.

Until recently, Louisiana had not adopted this procedure for handling potentially privileged witnesses. The Louisiana Supreme Court recognized, in *State v. Gambino*,[16] the right of the defendant to call a severed co-defendant to the stand even though it was known that the severed co-defendant would claim his privilege against self-incrimination.[17] Revers-

13. Bowles v. United States, 439 F.2d 536 (D.C. Cir. 1970); People v. Bernal, 254 P.2d 283, 62 Cal. Rptr. 96 (1967); State v. Weber, 272 Mo. 475, 199 S.W. 147 (1917); Alexander v. State, 449 P.2d 153 (Nev. 1968).

14. "It is unprofessional conduct for a lawyer to call a witness who he knows will claim a valid privilege not to testify, for the purpose of impressing upon the jury the fact of the claim of privilege." ABA STANDARDS RELATING TO THE DEFENSE FUNCTION § 7.6(c) (1971).

15. United States v. Lacouture, 495 F.2d 1237 (5th Cir. 1974); United States v. Johnson, 488 F.2d 1206 (1st Cir. 1973); State v. Ortiz, 24 Ariz. App. 192, 537 P.2d 29 (1975); Dodd v. State, 236 Ga. 572, 224 S.E.2d 408 (1976); State v. Erickson, 231 N.W.2d 758 (N.D. 1975); State v. Mitchell, 487 P.2d 1156 (Ore. 1971); Commonwealth v. Hackett, 225 Pa. 822, 307 A.2d 334 (1975); Commonwealth v. Greene, 445 Pa. 228, 285 A.2d 865 (1971); State v. Lybert, 30 Utah 2d 180, 515 P.2d 441 (1973). *But see* Fletcher v. Colorado, 546 P.2d 980 (Colo. 1976) (court held that a defendant's right to trial by jury included his right to have all witnesses called in the presence of the jury).

16. 221 La. 1039, 61 So. 2d 732 (1952).

17. "This guaranty of immunity does not affect the competency of the [severed co-defendant] under the facts and circumstances of the instant case, and we do not agree that it can be urged as justification for his refusal to be sworn when called to testify by Gambino . . . . Although [the severed co-defendant] was a competent witness and Gambino was entitled to have him sworn and placed on the stand, [the severed co-defendant's] rights would have been fully protected because he could

ing the conviction, the court found that the severed co-defendant was a competent witness under Louisiana Revised Statutes Title 15, Section 461, and had no reason to refuse to take the stand. In *State v. McMullan*,[18] which involved the non-constitutional husband-wife privilege rather than the fifth amendment privilege,[19] the court allowed the prosecutor to call the wife of the defendant and have her invoke her privilege in the presence of the jury. The court held that since she was a competent witness under R.S.15:461, it was "difficult to perceive why the wife should not be required to assert the privilege in the presence of the jury . . . where she is free from outside . . . restraint."[20] The established "rule," then, was that both the prosecution and the defense were allowed to put a witness on the stand knowing he would invoke a privilege. This "rule," as it relates to the prosecution, was overruled in *State v. Duhon*,[21] and, as it relates to the defense, was discarded in the instant case.

In holding that there was no error in denying the defendant's request to have the witness invoke his privilege in the presence of the jury, the court in *Berry* cited *Namet* and the ABA Standards. Relying on the comments to the standards, the court said that claims of privilege were preferably determined outside the presence of the jury. There was no discussion of why the defense wished to have the privilege invoked in the jury's presence and there was no mention of *Gambino*.

The court's apparent aim in *Berry* was to incorporate into Louisiana law the ABA Standard relating to the defense, but the intended meaning of this standard is not clear. The standard itself speaks of excluding a claim of privilege invoked solely to impress upon the jury the fact of the claim. This general language can be interpreted to propose exclusion of the assertion on the stand no matter what purpose the assertion is intended to achieve. Yet the comments to the standards are concerned with drawing inferences from the assertion of the privilege, implying that the jury should be excluded only when the witness is called for that purpose. The viability of both interpretations will be considered, the latter to be discussed first.

. . . refuse to answer any question . . . which would have tended to incriminate him." *Id.* at 1042, 61 So.2d at 733.

18. 223 La. 629, 66 So. 2d 574 (1953).

19. There should be no difference in the treatment of inferences from a witness's assertion of the fifth amendment privilege and his statutory privileges, since the United States Supreme Court has said that using a witness's fifth amendment privilege against a defendant is a matter of evidentiary and not constitutional law. Namet v. United States, 373 U.S. 179, 185 (1963).

20. 223 La. at 635, 66 So. 2d 576.

21. 332 So. 2d 245 (La. 1976).

The reasons commonly advanced for excluding inferences from a witness's assertion of a privilege are not sufficient when the inferences are to be used in favor of the defendant. The impossibility of cross-examination[22] by the opposing party should not bar the use of inferences in favor of the defendant, since the prosecution has no constitutional right of cross-examination and the impossibility of cross is clearly not an absolute bar to admissibility.[23]

Nor can the assertion of a privilege be deemed never to have probative value. That a witness invokes a privilege may often be irrelevant, just as the privileged information itself may be. But in some situations, invoking a privilege will tend to prove what the defense believes the privileged testimony would tend to prove. For example, where the evidence establishes that the crime was committed by a single person, the witness's refusal to answer on fifth amendment grounds when questioned about the crime would tend to show that the witness committed the crime and thus that the defendant did not. The witness's claim of privilege tends to make the defendant's contention that he did not commit the crime more probable than it would be without the claim of privilege, and therefore meets the requirement of relevancy.[24] The effect on the jury of the assertion of the privilege cannot always be deemed to be so prejudicial as to outweigh its probative value. It has been suggested that it is unlikely that the jury will give undue weight to inferences favorable to a defendant or will easily become prejudiced against the prosecution.[25] Just as with any other evidence, the judge should weigh the probative value against the prejudicial effect under the particular circumstances.[26]

Another consideration is that the defendant's sixth amendment right

22. 8 WIGMORE, *supra* note 2, § 2272 at 437 n.9. The impossibility of cross-examination is a compelling reason for keeping the inference out when the prosecution attempts to use it against the defendant, since the defendant does have a constitutional right of cross-examination.

23. The exceptions to hearsay are examples of admissable evidence which is not subject to cross-examination. *See* FED. R. EVID. 803 & 804. *See also* Chambers v. Mississippi, 410 U.S. 284 (1973).

24. FED. R. EVID. 401 (definition of relevancy); MCCORMICK, *supra* note 2, § 185 at 434.

25. "It is particularly important for the court to realize that the jury may not be as likely to give undue weight to the evidence and that the inability to cross-examine may not be significant when it is the defendant's, rather than the prosecutor's witness." Comment, *An Extension of the Fifth Amendment Right Against Self-Incrimination*, 52 B.U. L. REV. 149, 164 (1972); Note, 33 U. CHI. L. REV. 151, 160 (1965).

26. Comment, *An Extension of the Fifth Amendment Right Against Self-Incrimination*, 52 B.U. L. REV. 149, 164 (1972).

to present a defense, as recognized in *Washington v. Texas*[27] and *Chambers v. Mississippi*,[28] may require that the inference be allowed. The United States Supreme Court in *Washington* held that a statute preventing a co-defendant from testifying for the defendant arbitrarily denied the defendant his right to call a witness who "was physically and mentally capable of testifying to events that he had personally observed and whose testimony would have been relevant and material to the defense."[29] In *Chambers*, it was held that the hearsay and the voucher rules may not be applied together in such a way as to deny the defendant critical evidence that he needs in order to present a defense.[30] These cases and others[31] establish that a defendant has a constitutional right to probative evidence crucial to his defense.

When the fifth amendment acts to exclude testimony needed by the defense, a conflict arises between the witness's constitutional right not to give the testimony and the defendant's constitutional right to obtain it. Some courts have resolved this problem by concluding that the defendant's sixth amendment right yields to the witness's fifth amendment right.[32] Various commentators have suggested that the proper solution is to give the defendant the power to grant immunity to the witness.[33] In many

27. 388 U.S. 14 (1967).

28. 410 U.S. 284 (1973).

29. 388 U.S. at 23 (1966).

30. In *Chambers*, a third person made a sworn confession to committing the crime for which the defendant was charged, and subsequently told three other persons that he had committed the crime. The witness repudiated the confession at the defendant's trial. The defendant was prevented from challenging the repudiation in two ways: first, the "voucher" rule prevented him from cross-examining the witness about his testimony, since the defendant had called the witness; second, the hearsay rule prevented the three persons from testifying about what the witness had confessed to them. The Supreme Court reversed the convictions, holding that the two rules under the facts of the case denied the defendant a fair trial. 410 U.S. at 302.

31. *E.g.*, Cool v. United States, 409 U.S. 100 (1972); Webb v. United States, 409 U.S. 95 (1972).

32. *E.g.*, Johnson v. Johnson, 375 F. Supp. 872 (W.D. Mich. 1974); Holloway v. Wolff, 351 F. Supp. 1033 (D. Neb. 1972), *reversed on other grounds*, 482 F.2d 110 (8th Cir. 1973).

33. A suggested procedure is for the judge to hear the privileged testimony *in camera* and decide whether the information should be admitted, weighing its importance to the defendant's case and its possible prejudicial effects. If the court decides that the testomony is needed, the witness would be given immunity and be required to testify. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 713, 815 (1976); Imwinkelried, *The Constitutional Right to Present Defense Evidence*, 62 MIL. L. REV. 225, 264

situations immunity would be a viable solution since the witness has no reason to refuse to testify if what he says cannot be used against him at a later trial. A problem arises, however, when the witness's testimony in open court will prejudice the general public against him so as to deny him an impartial jury when he is later tried.[34] Also, the witness could simply refuse to testify even when granted immunity and threatened with contempt. In both of these situations, allowing the inference from the witness's refusal to testify may be sufficient to protect both individuals' constitutional rights.[35]

When non-constitutional privileges act to exclude evidence, allowing the use of inferences may be required in order to preserve the privilege in some situations. In light of *Davis v. Alaska*[36] and *United States v. Nixon*,[37] it is clear that established privileges can violate a constitutional right. In *Nixon*, the United States Supreme Court dismissed the President's claim of executive privilege over presidential communications, stating that it had to weigh the importance of the privilege of confidentiality against the "inroads of such a privilege on the fair administration of criminal justice."[38] The court concluded that the "fundamental demands of due process of law"[39] must prevail over the generalized interest in confidentiality. The Supreme Court in *Davis* held that a statute which prevented the disclosure of juvenile records denied the defendant his right to confrontation when he wanted to use that information to cross-examine the witness. The court recognized that the state may have a valid interest in protecting juveniles by making their records privileged, but this interest is not strong enough to deny a defendant his constitutional right of confrontation.

(1973); Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71 (1974); Note, 73 MICH. L. REV. 1465 (1975).

34. An example would be a trial with a great amount of press coverage. If the majority of the public knows that the witness exculpated the defendant by inculpating himself, it will be difficult to find an impartial jury at the witness's later trial. Thus, though the testimony itself could not be used, it would be difficult in a highly publicized case to exclude its effect on the jury altogether.

35. If the defendant is convicted, then it may not be considered sufficient for his purposes and we are confronted again with the problem of giving immunity to the defendant while destroying the witness's chances of a fair trial. A possible solution to this may be to have a closed trial so that the immune witness's testimony will not leave the courtroom. *See* Clinton, *supra* note 33, at 827.

36. 415 U.S. 308 (1974).

37. 418 U.S. 683 (1974).

38. *Id.* at 711.

39. *Id.* at 713.

These two cases, while not holding that privileges are inherently unconstitutional, do establish that they are not absolute.[40] The effect on a party's constitutional rights must be considered before a privilege can be invoked to exclude evidence. Since *Davis* and *Nixon* suggest that a non-constitutional privilege must yield to a constitutional right, where such a privilege conflicts with the defendant's sixth amendment right to present a defense, they seem to require that the privilege fall.[41]

What is needed is a way to preserve the privilege while allowing the defendant the benefit of the privileged information. One possible solution is to allow the defendant the benefit of any inference that may result from having the witness invoke the privilege in the presence of the jury. The evidence produced by way of the inference might be sufficient to safeguard the defendant's right to obtain evidence without having to destroy the privilege.

In *Berry*, the defense attorney attempted to put the privileged witness on the stand in order to draw an inference in favor of the defendant. The court's intent was to exclude this inference, yet it relied on the ABA standard which is worded broadly enough to exclude placing a witness on the stand to invoke the privilege even when the intent is other than to draw an inference.[42] One such purpose may be to prevent prejudice against a defendant. When the jury has knowledge of a person who could perhaps exculpate the defendant and the defense is forbidden to call this witness because it is known that he will claim a privilege, the jury may reason that the defendant did not call the witness because his testimony would harm the defendant. In this situation, it would seem necessary to allow the witness to take the stand so as not to prejudice the jury against the defendant. *Berry* does not necessarily bar this result since *Berry* can be limited to its holding that inferences from privileges are to be excluded. The recent case of *State v. Ghoram*[43] indicates that the courts may be willing so to limit *Berry*.

The court in *Berry* failed to consider the possibility that the exclusion of an inference from a severed co-defendant's claim of privilege may have

40. Westen, *supra* note 33, at 176.

41. See note 33, *supra*. These commentators have suggested that privileges that conflict with the defendant's constitutional rights should fall. Therefore they recommend that the defendant have the power to grant immunity so as to save the privileges.

42. See note 15, *supra*.

43. 328 So. 2d 91 (La. 1976). In this case, the prosecution was allowed to have a witness invoke a privilege on the stand to show that the witness was unavailable.

the effect of denying the defendant the use of probative evidence. Where this evidence is crucial to the defendant's case, this denial may constitute a violation of the defendant's constitutional right to present a defense. Finally, even if a court feels it must exclude the use of the inference, it should not exclude calling a witness to invoke a privilege on the stand when it is intended for another purpose.

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LOUISIANA'S RETAIL SALES TAX AND THE REPROCESSING EXCLUSION

Defendant taxpayer purchased five million dollars worth of graphite blades which it used in its manufacturing process for the production of chlorine. The Louisiana Collector of Revenue sued to collect the sales tax which he alleged was due on the purchase. Defendant claimed that no sales tax was due because the purchase did not constitute a retail sale under subsection 301(10) of title 47 of the Louisiana Revised Statutes, which excludes "sales of materials for further processing into articles of tangible personal property for sale at retail." The supreme court, reversing the decision of the court of appeal,[1] and reinstating the decision of the trial court,[2] *held* that the exclusion under subsection 301(10) does not apply where the inclusion of the material purchased in the end product results from an unintentional inefficiency of the manufacturing process, is of no benefit to the end product, and is an impurity rather than an integral part of the finished product. *Traigle v. PPG Industries, Inc.*, 332 So.2d 777 (La. 1976).

Pursuant to constitutional authorization,[3] the Louisiana legislature passed the present general Louisiana sales and use tax in 1948 which levied a tax on retail sales.[4] In conjunction with this sales/use tax, the

1. Traigle v. PPG Indus., Inc., 315 So. 2d 859 (La. App. 3d Cir. 1975). The court of appeal had held that the graphite was exempt from the sales tax by its mere presence in the end product regardless of whether it was beneficial to the end product.

2. Doc. No. 100,147 (14th Jud'l Dist. Ct., January 3, 1975).

3. La. Const. art. X, § 1 (1921). *See also* LA. CONST. art. VII, § 1.

4. LA. R.S. 47:302 (1950) provides in part: "(A) There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows: (1) At the rate of two per centum (2%) of the sales price of each item or article of tangible personal