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Witness - Privilege against Self-Imcrimmination - Federal Officials Barred from Using Testimony Elicited under State Immunity Statute

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political liberty and personal freedom, I cannot agree that a state may make that rule a part of its law and binding on citizens, despite the Constitution of the United States.[30]

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WITNESSES—PRIVILEGE AGAINST SELF-INCRIMINATION—FEDERAL OFFICIALS BARRED FROM USING TESTIMONY ELICITED UNDER STATE IMMUNITY STATUTE—The United States Supreme Court, in the recent case of *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 84 Sup. Ct. 1594 (1964), was confronted with the problem of whether a state could compel a witness, who had been given immunity from prosecution under its laws, to give testimony which might be used to convict him of a federal crime. The Court overruled its prior decisions[1] by holding that compelled testimony and its fruits, elicited under a state immunity statute, may not be used in any manner by federal officials in a criminal prosecution against the witness.

This case must be considered in conjunction with the case of *Malloy v. Hogan*,[2] decided the same day, which held that the Fifth Amendment privilege against self-incrimination was fully applicable to the States through the Fourteenth Amendment "due process clause" and that the state standard must be the same as the federal standard in determining whether a witness is justified in refusing to answer on the grounds that it might tend to incriminate him.

In the *Murphy*[3] case, the petitioners were subpoenaed by the Waterfront Commission of New York Harbor to testify in regard to a work stoppage at certain piers located in New Jersey. The petitioners were

30 Twining v. New Jersey, 211 U.S. 78, 126-27, 29 Sup. Ct. 14, 31 (1908).

1 United States v. Murdock, 284 U.S. 141, 52 Sup. Ct. 63 (1941); Feldman v. United States, 322 U.S. 487, 64 Sup. Ct. 1082 (1944); Knapp v. Schweitzer, 357 U.S. 371, 78 Sup. Ct. 1302 (1958).

2 378 U.S. 1, 84 Sup. Ct. 1489 (1964). Malloy had been arrested for the crime of pool selling, and after pleading guilty had served 90 days in jail. Sixteen months after his plea of guilty, he was subpoenaed to testify at an inquiry into alleged gambling and other criminal activities in Hartford County, Connecticut. Malloy refused to answer questions designed to ascertain for whom he worked when arrested for pool selling. The Connecticut Supreme Court of Errors had held that the Fifth Amendment was not applicable to the States and that Malloy was not justified in refusing to answer because of the defenses of double jeopardy and the running of the one year statute of limitations on misdemeanors (pool selling), so that his answers could not possibly subject him to prosecution under any state law. Malloy v. Hogan, 150 Conn. 220, 187 A.2d 744 (1963). The United States Supreme Court reversed holding that Malloy could invoke the Fifth Amendment in a state proceeding and refuse to answer because to answer might subject him to federal prosecution and that the disclosure of the name of the man for whom he worked might furnish a link in a chain of evidence which might connect him with a more recent crime for which he might be prosecuted.

3 Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 84 Sup. Ct. 1594 (1964).

granted immunity from prosecution under the laws of New York and New Jersey. However, they still refused to answer certain questions on the grounds that their answers might tend to incriminate them under federal law. The immunity granted by the Commission did not purport to extend to federal crimes. The petitioners were held in contempt for their refusal to answer and the state courts of New Jersey upheld the contempt convictions on the ground that a witness may constitutionally be compelled to give testimony, even though such testimony might be used against him in a federal prosecution.[4] On petition for certiorari, the United States Supreme Court vacated the state court's judgment of contempt, but upheld the state court's ruling that petitioners may be compelled to answer because such compelled testimony, obtained by grant of immunity from prosecution under state law, could not constitutionally be used to prosecute them under federal law.

One of the most firmly established common law principles is that a witness may refuse to answer any question which may tend to incriminate him. The Fifth Amendment to the Federal Constitution states that no person "shall be compelled in any criminal case to be a witness against himself." Most state constitutions contain a similar provision. Courts do have the inherent power to compel the attendance and testimony of witnesses regarding any relevant facts of a case pending before them, subject of course to certain privileges, one of which is the privilege against self-incrimination. The Fifth Amendment privilege against self-incrimination is a declaration of the framers' abhorrence to the Inquisition and Star Chamber proceedings which were resorted to in Europe and England in early times. Although it is recognized that an occasional guilty man may go free, this result is thought to be a lesser evil than allowing the prosecution to build a criminal case by use of the accused's compelled disclosures.[5]

The privilege against self-incrimination protects a citizen from being compelled to furnish testimony which would tend to subject him to criminal prosecution and punishment, penalty, or forfeiture of property. Generally, the penalty must be for a public wrong, as distinguished from a private wrong (such as treble damages for a patent infringement), in order for the privilege against self-incrimination to avail.[6] The privilege prevents compelling a person to take the stand in any criminal, quasi-criminal, or penal proceeding, whereas in a civil proceeding a witness may not refuse to take the stand. However, once on the stand he may refuse to answer questions which might tend to subject him to criminal responsibility.[7]

The witness' privilege of refusing to testify by invoking the Fifth Amendment is strictly personal and may not be claimed by anyone other

4 Application of Waterfront Comm'n of New York Harbor, 39 N.J. 436, 189 A.2d 36 (1963).

5 Ullmann v. United States, 350 U.S. 422, 76 Sup. Ct. 777 (1956).

6 58 Am. Jur., *Witnesses* 43 (1948).

7 *Id.* § 45.

than the witness himself,[8] but may be waived by the witness by volunteering the testimony. Generally, a witness having once opened the door by narrating on direct examination a portion of a transaction, may not thereafter refuse on cross-examination to give the details on the grounds that it may incriminate him.[9] To allow the witness to give only his side of the story and not permit his testimony to be impeached on cross-examination, violates the principles of our adversary system of justice. In order for an individual to invoke the privilege and refuse to answer questions on the ground that such answers might tend to incriminate him,

> . . . the danger to be apprehended must be real and appreciable, with reference to the ordinary course of things,—not a danger of an imaginary and unsubstantial character. . . .[10]

The first eight Amendments to the Constitution have been held to be a limitation upon the Federal Government only, although some of the personal rights may also be protected against state action. To refuse to protect these personal rights in a state action would be a denial of "due process of law," which is forbidden by the Fourteenth Amendment.[11] However, the Fifth Amendment has, until *Malloy v. Hogan*,[12] consistently been held not to be a limitation upon the states. The *Malloy* case now holds that the Fifth Amendment privilege against self-incrimination is applicable in a state action through the due process clause of the Fourteenth Amendment. The five-to-four decision in the *Malloy* case is in line with the Supreme Court's other recent decisions extending the scope of the Fourteenth Amendment to include personal rights contained within the first eight Amendments.[13] After holding that the same standard must be used in either a federal or a state court in determining whether an accused's silence is justified, the Court quoted from *Hoffman v. United States*,[14] which elaborated on the federal standard, as follows:

> "The privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which furnish a link in the chain of evidence needed to prosecute . . . if the witness, upon interposing his claim, were required to prove the hazard . . . he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive

[8] *Id.* § 48.

[9] *Id.* § 95 (1964 Supplement).

[10] Mason v. United States, 244 U.S. 362, 365, 37 Sup. Ct. 631, 626 (1917) quoting from Reg. v. Boyes, 1 Best & S. 311, 121 Eng. Rep. 730 (1861).

[11] Twining v. New Jersey, 211 U.S. 78, 29 Sup. Ct. 14 (1908).

[12] 378 U.S. 1, 84 Sup. Ct. 1489 (1964).

[13] Mapp v. Ohio, 367 U.S. 643, 81 Sup. Ct. 1684 (1961) held that the Fourth Amendment (search and seizure) provisions are fully applicable to the States; Gideon v. Wainwright, 372 U.S. 335, 83 Sup. Ct. 792 (1963) held that the Sixth Amendment (right to counsel) is a "fundamental right, essential to a fair trial" in state criminal prosecutions, as well as in federal cases.

[14] 341 U.S. 479, 71 Sup. Ct. 814 (1951).

> answer to the question or an explanation of why it can not be answered might be dangerous because injurious disclosure could result." We also said that, in applying that test, the judge must be "'*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *can not possibly* have such tendency' to incriminate."[15]

The constitutional provision permitting a witness to refuse to give evidence which may tend to incriminate him is inapplicable if the witness is not in danger of conviction. Therefore, if a legislature grants immunity from prosecution to a witness, which is in fact coextensive with the protection afforded by the Constitution, incriminatory testimony may be compelled.[16] However, the immunity applies only to past offenses and the witness may be prosecuted for perjury committed while testifying under a grant of immunity.[17] In order for an immunity statute to be valid, it must protect the witness from prosecution, penalty, or forfeiture arising out of his testimony, but need not protect him from personal disgrace or social penalties.[18]

After reviewing the policies of the privilege and most of the relevant prior English and American cases, Justice Goldberg stated, in the majority opinion of the present case:

> . . . [T]he constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law.[19]

The court then pointed out the holding in the case of *Counselman v. Hitchcock*[20] that immunity legislation must be as broad in scope and effect as the constitutional privilege in order to replace it. Therefore, since the court had already held that the Fifth Amendment privilege against self-incrimination was fully applicable to the States and that the federal standard must be used in a state proceeding in determining whether the witness' refusal to answer is justified, it held the constitutional rule to be:

> . . . [A] state witness may not be conpelled (sic) to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Government must be prohibited from making any use of compelled testimony and its fruits.[21]

15 Malloy v. Hogan, 378 U.S. 1, 84 Sup. Ct. 1489 (1964) quoting from Hoffman v. United States, 341 U.S. 479, at 486-487, 488, 71 Sup. Ct. 814, at 818, 819 (1951).

16 Counselman v. Hitchcock, 142 U.S. 547, 12 Sup. Ct. 195 (1895); McCarthy v. Arndstein, 266 U.S. 34, 45 Sup. Ct. 16 (1924).

17 Glickstein v. United States, 222 U.S. 139, 32 Sup. Ct. 71 (1911).

18 Brown v. Walker, 161 U.S. 591, 16 Sup. Ct. 644 (1896). *Contra:* United States v. James, 60 Fed. 257 (N.D. Ill. 1894).

19 378 U.S. 52, —, 84 Sup. Ct. 1594, 1609 (1964).

20 142 U.S. 547, 12 Sup. Ct. 195 (1891).

21 Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, —, 84 Sup. Ct. 1594, 1609 (1964).

It seems quite clear from the majority decision that the Court intended to establish a constitutional rule that immunity from prosecution in one jurisdiction must extend to another jurisdiction in order to compel incriminatory testimony. Although there were no dissents in the *Murphy* case, four Justices—White, Stewart, Harlan and Clark, all of whom dissented from the decision in the *Malloy* case, which extended the Fifth Amendment to the States—wrote or joined in concurring decisions in *Murphy* which would limit the requirement of granting immunity from prosecution in another jurisdiction. For instance, Justice Harlan stated that the rule preventing federal officials from using incriminating testimony compelled in a state proceeding, should be enforced by excluding such testimony or its fruits by exercising the Supreme Court's supervisory power over the federal courts, and not as a constitutional rule.

Congress has passed legislation which extends to a witness in a federal proceeding immunity from prosecution, both as to federal and state crimes. State immunity statutes, however, have never extended immunity from federal crimes because to do so would probably violate the "supremacy clause" of Article VI of the Constitution.[22] However, the cases of *Counselman*,[23] which requires the immunity to be coextensive with the constitutional provision it replaces; *Malloy*,[24] which makes the Fifth Amendment applicable to the States and the state and federal standard the same; together with *Murphy*,[25] which holds that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner; would seem to require that state immunity statutes be extended to protect the witness from federal prosecution. At the very least, the rule established in *Murphy* requires that the Federal Government establish that it had an independent source of evidence upon which to prosecute, should there have been a prior state inquiry in which the witness was compelled to give incriminatory testimony in return for a grant of immunity.

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CONSTITUTIONAL LAW—DUE PROCESS OF LAW—STATUTE DENYING PASSPORTS TO ALL COMMUNIST PARTY MEMBERS VIOLATIVE OF DUE PROCESS CLAUSE—In the recent case of *Aptheker v. Secretary of State*, 378 U.S. 500, 84 Sup. Ct. 1659 (1964), the Supreme Court of the United States was faced for the first time with a challenge to the constitutionality of Section 6 of the

22 The authority of state laws or their administration may not interfere with the carrying out of a national purpose, and where enforcement of a state law would handicap efforts to carry out the plans of the United States, the state enactment must give way. United States v. Mayo, 47 F. Supp. 552 (N.D. Fla. 1942), *aff'd*, 319 U.S. 441, 63 Sup. Ct. 1137 (1943).

23 Counselman v. Hitchcock, 142 U.S. 547, 12 Sup. Ct. 195 (1891).

24 Malloy v. Hogan, 378 U.S. 1, 84 Sup. Ct. 1489 (1964).

25 Murphy v. Waterfront Comm'n of New York Harbor, *supra* note 25.