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## Constitutional Law - Fifth and Fourteenth Amendments - Privilege against Self-Incrimination - Procedure in State Criminal Trials - Jury Instructions

Terry J. Trexler

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# Recent Decisions

CONSTITUTIONAL LAW—FIFTH AND FOURTEENTH AMENDMENTS—PRIVILEGE AGAINST SELF-INCRIMINATION—PROCEDURE IN STATE CRIMINAL TRIALS—JURY INSTRUCTIONS—The Supreme Court of the United States has held that a state criminal trial judge has a constitutional obligation, on a defendant's request, to instruct a jury that no inference of guilt may be drawn from a defendant's failure to testify.

*Carter v. Kentucky*, 101 S. Ct. 1112 (1981).

In December, 1978, Lonnie Joe Carter was arrested in Kentucky and charged with burglarizing a local hardware store.<sup>1</sup> Subsequently, a Kentucky grand jury indicted Carter for third-degree burglary<sup>2</sup> and for violation of Kentucky's persistent felony offender statute.<sup>3</sup> Before trial, on *voir dire*, the trial judge briefly instructed the prospective jurors on the presumption of innocence and the reasonable doubt standard.<sup>4</sup> In his opening statement to the jury, defense counsel also stressed the presumption of innocence.<sup>5</sup>

After the prosecution's case, the trial judge held a conference out of the jury's presence to determine if Carter would testify.<sup>6</sup> The judge explained to Carter that his prior felony convictions could be used to impeach his credibility.<sup>7</sup> After a private conference with his attorney and before returning to open court,

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1. *Carter v. Kentucky*, 101 S. Ct. 1112, 1114 (1981).

2. *Id.* See KY. REV. STAT. ANN. § 511.040 (Baldwin 1975). In Kentucky, burglary in the third degree is a class D felony punishable by imprisonment for one to five years. KY. REV. STAT. ANN. § 532.060(2)(d) (Baldwin 1975).

3. 101 S. Ct. at 1114. See KY. REV. STAT. ANN. § 532.080 (Baldwin 1975). The indictment alleged that the petitioner was convicted of two prior felonies. Brief for Petitioner at 1 n.2.

4. 101 S. Ct. at 1114 n.3. *Voir dire* was conducted solely by the trial judge. *Id.* at 1114.

5. *Id.* at 1115.

6. *Id.* With the judge present, defense counsel explained to Carter that the fact of Carter's prior felony convictions could be used to impeach his credibility, and that this would seriously impact on the jury. *Id.*

7. *Id.* The trial judge indicated that it was within his discretion to admit evidence of the prior convictions. *Id.*

Carter told the judge that he had decided not to take the stand.<sup>8</sup> Then, back in open court, the defense rested and asked that the jury be instructed to draw no inference of guilt from the defendant's failure to testify.<sup>9</sup> The trial judge refused the request.<sup>10</sup> In his closing remarks, the prosecutor noted that the evidence against the defendant had not been controverted nor had any reasonable explanation been given for his conduct at the scene of the burglary.<sup>11</sup>

The jury returned a guilty verdict and recommended a two-year sentence.<sup>12</sup> Then, at the recidivist phase of the trial, the jury sentenced the defendant to twenty years in prison, the maximum sentence under Kentucky's persistent felony offender statute.<sup>13</sup>

On appeal,<sup>14</sup> the Kentucky Supreme Court rejected Carter's argument that the fifth and fourteenth amendments require a criminal trial judge to give the requested jury instruction and affirmed the conviction.<sup>15</sup> The court held that the requested instruction would have required the trial judge to directly comment on the defendant's failure to testify, in violation of a Kentucky statute which provides that a criminal defendant's failure to testify on his own behalf shall not be commented upon or create any presumption against him.<sup>16</sup>

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8. *Id.* During this private conference, defense counsel told the petitioner that if he testified, the prosecutor would attempt to impeach his testimony, and if he did not, the jury would probably use his failure to testify against him, whether the prosecutor commented on it or not. *Id.* n.4.

9. *Id.* at 1115-16. The requested instruction read: "The defendant is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way." *Id.* at 1116.

10. *Id.*

11. *Id.* Defense counsel, in his closing argument, remarked that it was the state's duty to prove the petitioner guilty beyond a reasonable doubt. He stressed that the petitioner did not have to take the stand in his own behalf, and that, in fact, he did not have to do anything. *Id.* n.6.

12. *Id.* at 1116.

13. *Id.* During the recidivist phase, the jury considered evidence of Carter's prior felony convictions. The defense presented no evidence. *Id.*

14. There is a right of direct appeal to the Kentucky Supreme Court from a judgment of a circuit court imposing a sentence of imprisonment of 20 or more years. KY. R. CRIM. P. 12.02.

15. 101 S. Ct. at 1116.

16. *Id.* The Kentucky competency statute provides: "In any criminal or penal prosecution the defendant, on his own request, shall be allowed to testify

The United States Supreme Court granted certiorari<sup>17</sup> and reversed Carter's conviction.<sup>18</sup> The Court, by an 8-1 majority, held that to ensure that no inference of guilt is drawn by a jury from a defendant's failure to testify, a state trial court judge has a constitutional obligation<sup>19</sup> to provide a "no inference" instruction on a defendant's request.<sup>20</sup>

Justice Stewart, author of the majority opinion,<sup>21</sup> first noted that the Court had specifically reserved the constitutional question presented in *Carter* in two prior decisions, *Griffin v. California*<sup>22</sup> and *Lakeside v. Oregon*,<sup>23</sup> both involving the fifth and fourteenth amendments and jury instructions in state trial courts.<sup>24</sup> He pointed out, however, that as a matter of federal statutory law, the question had been decided already in *Bruno v. United States*,<sup>25</sup> in which the federal competency statute<sup>26</sup> was construed to require a federal criminal trial judge to give an instruction similar to that sought by Carter.<sup>27</sup>

in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him." KY. REV. STAT. ANN. § 421.225 (Baldwin 1979). The court cited its decision in *Green v. Commonwealth*, 488 S.W.2d 339 (Ky. 1972), as controlling. See notes 98 & 99 and accompanying text *infra*.

17. 449 U.S. 819 (1980).

18. 101 S. Ct. at 1122.

19. The court referred to the defendant's fifth amendment right against self-incrimination. *Id.* at 1121. The fifth amendment to the United States Constitution provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V. The fifth amendment is applicable to the states through the fourteenth amendment. *Malloy v. Hogan*, 378 U.S. 1 (1964). See note 28 *infra*.

The fourteenth amendment provides in pertinent part: "No State shall . . . deprive any person of . . . liberty . . . without due process of law . . ." U.S. CONST. amend. XIV, § 1.

20. 101 S. Ct. at 1121-22.

21. Justice Stewart's majority opinion was joined in by Chief Justice Burger and by Justices White, Marshall, and Blackmun. Justice Powell filed a concurring opinion in which Justice Brennan joined. Justice Rehnquist filed a dissenting opinion.

22. 380 U.S. 609 (1965). See notes 100-02 and accompanying text *infra*.

23. 435 U.S. 333 (1978). See notes 103-05 and accompanying text *infra*.

24. 101 S. Ct. at 1116.

25. 308 U.S. 287 (1939).

26. 18 U.S.C. § 3481 (1976). The statute provides in pertinent part: "In a trial of all persons . . . [the defendant] shall, at his own request, be a competent witness. His failure to make such a request shall not create any presumption against him."

27. 101 S. Ct. at 1116 & n.7. In *Bruno* the Court construed the federal com-

Justice Stewart observed that in *Griffin* the Court had held that the fifth and fourteenth amendments prohibit prosecutorial comment on a defendant's silence or a judicial instruction that a defendant's silence may be evidence of guilt.<sup>28</sup> The *Griffin* Court reasoned that such adverse comment would be in effect a court-imposed penalty on a defendant for exercising his self-incrimination privilege.<sup>29</sup>

Justice Stewart then noted that the issue in *Lakeside* was whether the giving of a "no inference" instruction over defense objection violated the privilege against self-incrimination.<sup>30</sup> He observed that the *Lakeside* Court had concluded that *Griffin* prohibited only *adverse* comment on a defendant's failure to testify, and that a judge's instruction that the jury draw no adverse inference was an entirely different kind of comment.<sup>31</sup> The *Lakeside* Court rejected the argument that when a trial judge in any way draws attention to a defendant's silence, his privilege against compulsory self-incrimination is violated.<sup>32</sup>

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petency statute as giving a criminal defendant who did not take the stand an absolute right to a requested "no inference" instruction. 308 U.S. at 292-93.

28. 101 S. Ct. at 1117. The Court decided *Griffin* shortly after it had held in *Malloy v. Hogan*, 378 U.S. 1 (1964), that the fifth amendment privilege against self-incrimination was applicable to the States through the fourteenth amendment. *Id.*

In *Malloy* the defendant was ordered to testify before a referee appointed by a state court to investigate gambling and other criminal activities. He refused to testify on the ground that his answers might incriminate him. *Id.* at 3. The defendant's subsequent contempt conviction was affirmed by the Connecticut Supreme Court of Errors, *Malloy v. Hogan*, 150 Conn. 220, 187 A.2d 744 (1963), *rev'd*, 318 U.S. 1 (1964), which held that the defendant's failure to explain how his answer would incriminate him negated his claim to the protection of the privilege against self-incrimination under state law. *Id.* at 227, 187 A.2d at 748. The United States Supreme Court reversed, holding that the fourteenth amendment prohibits state infringement of the privilege against self-incrimination, and that the same standards apply in both state and federal courts to determine whether a defendant's silence is justified. 378 U.S. at 10-11. *Malloy* overruled *Twining v. New Jersey*, 211 U.S. 78 (1908), and *Adamson v. California*, 332 U.S. 46 (1947), which had held the fifth amendment inapplicable to the states.

29. 101 S. Ct. at 1118 (citing 380 U.S. at 614).

30. 101 S. Ct. at 1118. *See* 435 U.S. 333 (1978).

31. 101 S. Ct. at 1118. The *Lakeside* Court reasoned that the instruction there could not have provided the pressure on a defendant found impermissible in *Griffin*, and that the purpose of a jury instruction is to direct the jurors' attention to important legal concepts that must not be misunderstood. 435 U.S. 339-40.

32. 101 S. Ct. at 1118. The *Lakeside* Court rejected the argument because

Justice Stewart then examined the fifth amendment privilege against self-incrimination, noting that it reflects many of our nation's fundamental values which reveal a concern for the individual.<sup>33</sup> He stated that the principles enunciated in the Court's prior cases construing the privilege lead unmistakably to the conclusion that a judge must give a "no inference" jury instruction upon a defendant's request.<sup>34</sup> Justice Stewart also commented that although the *Bruno* case was decided on statutory grounds, fifth amendment considerations also influenced the Court in that decision.<sup>35</sup>

The Court noted that *Griffin* stands for the proposition that a defendant must pay no court-imposed price for exercising his

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it was based on two faulty assumptions: "First, that the jurors have not noticed that the defendant did not testify and will not, therefore, draw adverse inferences on their own, second, that the jurors will totally disregard the instruction, and affirmatively give weight to what they have been told not to consider at all." 435 U.S. at 340.

33. . 101 S. Ct. at 1118-19. Justice Stewart stated that the fifth amendment privilege against self-incrimination:

reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; . . . our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government, in its contest with the individual, to shoulder the entire load' . . . ; . . . ; our distrust of self-deprecatory statements; and our realization that the privilege while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'

*Id.* (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964)).

The Court also acknowledged reasons unrelated to guilt or innocence for one's declining to testify: excessive timidity or nervousness when explaining transactions or offenses charged, 101 S. Ct. 1119 n.15 (quoting *Wilson v. United States*, 149 U.S. 60, 66 (1893)); fear of being impeached by prior convictions or other damaging information, 100 S. Ct. at 1119 n.15 (citing 380 U.S. at 615); reluctance to incriminate persons loved or feared, 100 S. Ct. at 1119 n.15 (quoting 435 U.S. at 344 n.2 (Stevens, J., dissenting)).

34. 101 S. Ct. at 1119.

35. *Id.* In *Bruno* the Court recognized a defendant's privilege against self-incrimination as more important than procedural rights and formalities and that failure to instruct the jury on a defendant's silence was not merely a technical error. *Id.* (quoting 308 U.S. at 293-94). In addition, Justice Stewart noted that in *Griffin* the Court had relied upon the rationale of *Wilson v. United States*, 149 U.S. 60 (1893), where the federal competency statute was construed as prohibiting adverse comment on a defendant's silence. Justice Stewart concluded that the *Carter* majority could similarly rely upon the federal statutory holding in *Bruno* in reaching its decision. 101 S. Ct. at 1119 n.16.

constitutional privilege not to testify.<sup>36</sup> The Court stated that although the penalty was exacted in *Griffin* by adverse comment on the defendant's silence, the penalty may be just as severe when there is no adverse comment, but the jury is given no instruction on the defendant's silence.<sup>37</sup> In such a case, the Court concluded, jurors may well draw adverse inferences from a defendant's silence.<sup>38</sup>

Justice Stewart then noted that the significance of a cautionary instruction was emphasized in *Lakeside*, where the Court deemed the instruction so important as to permit it to be given over the defendant's objection.<sup>39</sup> The majority pointed out that such instructions are necessary to properly guide the jury in its understanding of basic constitutional principles, to dispel any misconceptions, especially any regarding the fifth amendment privilege against self-incrimination.<sup>40</sup> The Court concluded that a trial judge has an affirmative constitutional obligation, when requested, to reduce jury speculation about a defendant's silence to a minimum by properly instructing the jury on the nature of the fifth amendment privilege.<sup>41</sup>

The Court then considered Kentucky's arguments for prohibiting a "no inference" instruction. First, Kentucky contended that the trial judge was actually protecting the defendant's interests by refusing to grant his request.<sup>42</sup> The Court rejected this argument, stating that the Kentucky court's justification for refusing the defendant's request, which was that the instruction would have emphasized the defendant's failure to testify, had been specifically rejected in *Lakeside*.<sup>43</sup>

The Court also rejected Kentucky's argument that the trial judge's instruction that the jury determine guilt from the

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36. 101 S. Ct. at 1119.

37. *Id.*

38. *Id.*

39. *Id.* at 1119-20.

40. *Id.* at 1120.

41. *Id.*

42. *Id.* at 1120-21. This argument was based on the Kentucky Supreme Court's holding in *Green v. Commonwealth*, 488 S.W.2d 339 (Ky. 1972). See notes 98-99 *infra*.

43. 101 S. Ct. at 1121. The *Lakeside* Court had found that by cautioning the jury not to draw inferences of guilt from the defendant's silence a trial judge could not possibly be penalizing the defendant for exercising his privilege. *Id.*

evidence alone was sufficient to dispel any adverse inferences from the jurors' minds.<sup>44</sup> The majority maintained that the instruction on presumption of innocence was not a substitute for the requested instruction, noting instead that the jury, not knowing the technical meaning of "evidence," could have derived significant additional guidance from a specific instruction on the self-incrimination privilege.<sup>45</sup>

Finally, because the issue had not been considered by the Kentucky Supreme Court, the Court refused to consider Kentucky's argument that the trial court's failure to grant the requested instruction constituted "harmless error."<sup>46</sup>

Justice Powell filed a concurring opinion,<sup>47</sup> accepting the majority's holding, but noting that it was required by precedent, not the Constitution.<sup>48</sup> He first examined the *Griffin* Court's holding that jurors could not be told that they could draw inferences from a defendant's failure to testify and observed that it departed from the purpose and language of the self-incrimination clause.<sup>49</sup> Justice Powell agreed with the *Griffin* dissenters,<sup>50</sup> that any inquiry into the fifth amendment privilege

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44. *Id.* Justice Stewart re-emphasized that "[j]urors are not lawyers; they do not know the technical meaning of 'evidence.' They can be expected to notice a defendant's failure to testify, and, without limiting instruction, to speculate about incriminating inferences from a defendant's silence." *Id.*

45. *Id.* The Court conceded, however, that the fifth amendment privilege and the presumption of innocence are related principles. The majority added that the arguments of defense counsel at trial are not a substitute for the requested instruction. *Id.* See *United States v. Bain*, 596 F.2d 120 (5th Cir. 1979) (defendant who chose not to testify is entitled to an additional instruction besides burden of proof instruction); *United States v. English*, 409 F.2d 200 (3d Cir. 1969) (presumption of innocence instruction not sufficient where defendant requested instruction on failure to testify).

46. *Id.* In *Chapman v. California*, 386 U.S. 18 (1967), the Court indicated that there may be some constitutional errors in a conviction which, under the circumstances of a particular case, are so unimportant that they may be deemed harmless and will not require an automatic reversal of the conviction. Although the Court refused to rule on the issue in *Carter*, 101 S. Ct. at 1121, Justice Stewart cautioned that, arguably, refusal to give an instruction similar to the one requested by *Carter* could never be harmless. *Id.*

47. 101 S. Ct. at 1122 (Powell, J., concurring).

48. *Id.*

49. *Id.*

50. *Id.* Justice Powell took particular note of Justice Stewart's *Griffin* dissent, which was joined in by Justice White. *Id.* See 380 U.S. at 617 (Stewart, J., dissenting). In this dissent, Justice Stewart declared that the fifth amendment



must focus on the presence of compulsion,<sup>51</sup> and judged that a defendant who chooses not to testify cannot claim that he was compelled to do so.<sup>52</sup> He maintained that nothing in the self-incrimination clause requires that jurors not draw logical inferences when a defendant chooses not to explain incriminating circumstances.<sup>53</sup> Justice Powell concluded, however, that because *Griffin* was now the law, the petitioner was entitled to the jury instruction he requested.<sup>54</sup>

Justice Stevens, in a separate opinion,<sup>55</sup> emphasized that the majority's holding is limited to cases in which the defendant has requested the "no inference" instruction.<sup>56</sup> He argued that the question of whether the instruction should be given is one that should be answered by the defendant and his lawyer, not by the state.<sup>57</sup>

In a dissenting opinion,<sup>58</sup> Justice Rehnquist first commented that only the first of the series of steps taken by the Court in reaching its decision can be traced directly to the United States Constitution; but because the majority reversed the judgment of the Supreme Court of Kentucky, it must have found the state court decision to be inconsistent with the United States Constitu-

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inquiry is whether the defendant has been compelled to testify against himself. He maintained that the compulsion found by the *Griffin* majority was dramatically different from and not as palpable as that which gave rise to the fifth amendment guarantee, and that the *Griffin* majority stretched the concept beyond reasonable grounds. Justice Stewart also believed that whatever compulsion existed in *Griffin* emanated not from courts or counsel, but from the defendant's own choice not to testify. 101 S. Ct. 1122 (Powell, J., concurring) (quoting 380 U.S. at 620-21 (Stewart, J., dissenting)).

51. 101 S. Ct. at 1122 (Powell, J., concurring). See note 50 *supra*.

52. 101 S. Ct. at 1122 (Powell, J., concurring).

53. *Id.* Justice Powell concluded that the comment complained of in *Griffin* should not have been prohibited, because it would not have been evidence on which the jury could have based its verdict, and it would have outlined for the jury the extent of its freedom to draw inferences. *Id.* (citing Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial*, 33 U. CHI. L. REV. 657, 677 (1966)).

54. 101 S. Ct. at 1122-23 (Powell, J., concurring).

55. 101 S. Ct. at 1123 (Stevens, J., concurring). Justice Brennan joined in this opinion.

56. *Id.*

57. *Id.* Justice Stevens made a similar argument in *Lakeside*. 435 U.S. at 343-44 (Stevens, J., dissenting). See notes 114 & 115 and accompanying text *infra*.

58. 101 S. Ct. at 1123 (Rehnquist, J., dissenting).

tion.<sup>59</sup> He then pointed out that the constitutional issue in this case is one that the Court had specifically anticipated and reserved in *Griffin* and *Lakeside*; he disagreed with the majority's reliance on *Bruno* to now decide the issue, arguing that because the language of the federal statute construed in *Bruno* does not attempt to govern the procedures or instructions of Kentucky trial courts, the case has no relevance to *Carter*.<sup>60</sup>

Justice Rehnquist next asserted that until the self-incrimination clause was held applicable to the states through the fourteenth amendment,<sup>61</sup> the fifth amendment would not have regulated the conduct of Kentucky criminal trials.<sup>62</sup> He noted that Justice Stewart, dissenting in *Griffin*,<sup>63</sup> had expressed the notion that the formulation of procedural rules to govern the administration of justice in the various states is a matter of local concern.<sup>64</sup> He stated that even *Griffin*, however, by reserving the issue of whether a state court defendant was entitled as a matter of right to a "no inference" instruction, did not go as far as the present opinion, which is a complete retreat from Justice Stewart's *Griffin* dissent.<sup>65</sup>

Finally, Justice Rehnquist maintained that the majority's concept of "burdens" and "penalties," taken from the *Griffin* holding that a defendant must pay no court-imposed price for the exercise of his fifth amendment privilege, is so vague that the decision allows a state criminal defendant to virtually take the control over jury instructions away from the trial judge.<sup>66</sup>

The fifth amendment privilege against self-incrimination, which protects a defendant from being compelled to give self-

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59. *Id.*

60. *Id.*

61. *Id.* See note 28 *supra*.

62. 101 S. Ct. at 1123 (Rehnquist, J., dissenting). But, Justice Rehnquist maintained, even if it did, the claim by the defendant is not that he was forced to testify against his will inconsistently with the provisions of the fifth amendment, but rather that in *Griffin* a jury charge permitting the consideration of any evidence or facts which a defendant could have reasonably been expected to deny or explain violates the privilege against self-incrimination. *Id.* at 1123-24 (Rehnquist, J., dissenting).

63. 380 U.S. at 617 (Stewart, J., dissenting).

64. 101 S. Ct. at 1122 (Rehnquist, J., dissenting) (quoting 380 U.S. at 623 (Stewart, J., dissenting)).

65. 101 S. Ct. at 1122 (Rehnquist, J., dissenting).

66. *Id.*

incriminating testimony, initially emerged as a reaction to the use of the oath *ex officio* by the ecclesiastical courts of thirteenth century England.<sup>67</sup> By the end of the seventeenth century, the oath was abolished,<sup>68</sup> and the privilege became firmly established in English law.<sup>69</sup> At approximately the same time, the privilege began to be assimilated into the laws of the American colonies<sup>70</sup> and eventually became part of the fifth amendment.<sup>71</sup>

Historically, the privilege applied only to pre-trial procedure, because at common law, a defendant was not permitted to testify at trial.<sup>72</sup> Not until 1864 did this practice begin to change in the

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67. The oath *ex officio* was a sworn statement by the defendant to give true answers to whatever questions might be asked of him, without first being formally charged with an offense. After the oath was administered, the accused was required to answer a series of interrogatories intended to extract a confession. L. LEVY, ORIGINS OF THE FIFTH AMENDMENT, THE RIGHT AGAINST SELF-INCRIMINATION 46-47 (1968) [hereinafter cited as LEVY]. Frequently, torture and imprisonment were used to compel accused persons to take the oath. These abuses were most notorious during the reign of Elizabeth I, when the English Court of High Commission made use of the oath procedure in its drive to repress Puritanism and other non-Anglican religious beliefs. *Id.* at 83-135.

68. The oath was abolished following the trial of John Lilburn. Trial of John Lilburn, 3 Howell's State Trials 1315 (1637). Lilburn had refused to take the oath *ex officio* and was subsequently "whipped and pilloried." *Id.* at 1327-28. For a full description of the trial, see 8 J. WIGMORE, EVIDENCE § 2250, at 282-83 (McNaughton rev. 1961) [hereinafter cited as WIGMORE]; LEVY, *supra* note 67, at 266-300.

69. WIGMORE, *supra* note 68, § 2250, at 283-84. In 1641, the English Parliament, by statute, forbade the use of the *ex officio* oath by any ecclesiastical court in any penal cause. *Id.* The reaction against the use of the oath in the ecclesiastical courts also affected English common law courts, so that by the end of the seventeenth century, the privilege against self-incrimination was firmly established. *Id.* at 290-91.

70. The privilege emerged in the colonies as a result of the eventual adoption of many of the principles of the English common law by the colonial governments. Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 766-67 (1935). It was established in the New England colonies in 1641, *id.* at 776, and in Virginia by about 1661. *Id.* at 780. The privilege appeared in other American colonies prior to the Revolution. *Id.* at 781-82.

71. By 1789, the privilege had been inserted into the constitutions or Bills of Rights of seven American states: Virginia, Pennsylvania, Maryland, North Carolina, Vermont, Massachusetts, and New Hampshire. *Id.* at 764-65.

72. Dills, *The Permissibility of Comment on the Defendant's Failure to Testify in His Own Behalf in Criminal Proceedings*, 3 WASH. L. REV. 161, 164 (1928) [hereinafter cited as Dills]. The defendant was disqualified from testifying because of interest, but his confession could still be received. *Id.*

United States with the nationwide enactment of statutes making defendants competent to testify.<sup>73</sup>

In response to the problem of what inferences a jury could draw when the defendant failed to testify, the competency statutes generally provided that the defendant's failure to testify should not be commented upon or create any presumptions against him.<sup>74</sup> From this tradition grew the line of precedent relied upon by the Court in *Carter*.

As a matter of federal statutory law, the question presented in *Carter* was decided in *Bruno v. United States*,<sup>75</sup> which held that the federal competency statute<sup>76</sup> required the trial judge to give, at the defendant's request, an instruction that no inference be drawn from the defendant's failure to testify.<sup>77</sup>

In the state courts, the issue has been addressed with varying results. Most state courts that have ruled on the question have held that the trial judge should give the requested instruction.<sup>78</sup> In some states where the issue has not been specifically addressed, there is implied support for the holding in *Carter*.<sup>79</sup> Only

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73. *Id.* at 164-65.

74. *Id.* at 165. In fact, it was feared that granting a defendant the capacity to testify was in itself a violation of the privilege against self-incrimination. 70 DICK. L. REV. 98, 100-01 (1965).

75. 308 U.S. 287 (1939).

76. *See* note 26 *supra*.

77. 308 U.S. at 293.

78. *See, e.g., Perry v. State*, 368 So. 2d 310, 312 (Ala. 1979) (trial court's refusal to give requested "no inference" jury instruction constitutes reversible error); *State v. Piper*, 113 Ariz. 390, 555 P.2d 636 (1976) (at defendant's request, trial court required to give "no inference" instruction); *Clay v. State*, 236 Ga. 398, 224 S.E.2d 14 (1976) (if timely request made by defendant, error for trial judge to fail to give "no inference" charge); *State v. Spearman*, 84 N.M. 366, 503 P.2d 649 (1972) (giving of requested "no inference" instruction not discretionary, but required by statute); *People v. Britt*, 43 N.Y.2d 111, 371 N.E.2d 504, 400 N.Y.S.2d 785 (1977) (statute requires "no inference" charge at defendant's request); *State v. Hale*, 22 Or. App. 144, 537 P.2d 1173 (1975) ("no inference" instruction should always be given when requested); *Hines v. Commonwealth*, 217 Va. 905, 234 S.E.2d 262 (1977) (instruction should always be given at defendant's request); *State v. McClure*, 253 S.E.2d 555 (W.Va. 1979) (importance of giving "no inference" instruction re-affirmed). *See also* Brief for Petitioner at A1-A3.

79. *See State v. Botts*, 184 Neb. 78, 165 N.W.2d 358 (1969) ("no inference" instruction given sua sponte); *State v. Marmon*, 154 N.W.2d 55 (N.D. 1967) (giving of "no inference" instruction was proper even absent specific request from defendant); *State v. Fowler*, 110 N.H. 110, 261 A.2d 429 (1970) (trial court should accede to defendant's wishes in regard to a "no inference" instruction); *Rowan v. State*, 212 Tenn. 224, 369 S.W.2d 543 (1963) (general charge on presumption

five states, including Kentucky, have specifically held that the trial judge is not required to give the requested "no inference" instruction.<sup>80</sup>

Kentucky case law reflects some uncertainty on the part of the Kentucky Supreme Court<sup>81</sup> about the state's policy toward "no inference" instructions. In a 1903 case, *Tines v. Commonwealth*,<sup>82</sup> the defendant did not take the stand, and the jury was instructed that no inference of guilt should be drawn from his failure to testify.<sup>83</sup> After being convicted of burglary,<sup>84</sup> the defendant appealed to the Kentucky Supreme Court which held that the trial judge had erred in giving the instruction.<sup>85</sup> The court reasoned that under the Kentucky competency statute<sup>86</sup> the defendant was entitled to absolute silence on his failure to testify.<sup>87</sup> Following the *Tines* rationale, subsequent Kentucky cases held that a trial judge's refusal to instruct the jury on a defendant's silence was not prejudicial error.<sup>88</sup>

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of innocence sufficient absent special request for more explicit instruction on failure to testify); *Jaffrion v. State*, 501 S.W.2d 322 (Tex. Crim. App. 1973) (failure to give instruction sua sponte not reversible error), *See also* Brief for Petitioner at A4 & A5.

80. The other four states include Minnesota, Nevada, Oklahoma, and Wyoming. 101 S. Ct. at 1114 n.2. *See State v. Grey*, 256 N.W.2d 74 (Minn. 1977) (trial judge should not mention defendant's failure to take stand); *Jackson v. State*, 84 Nev. 203, 438 P.2d 795 (1968) (failure to give "no inference" instruction not error); *Brannin v. State*, 375 P.2d 276 (Okla. Crim. App. 1962) (giving of "no inference" instruction violates state statute); *Kinney v. State*, 36 Wyo. 466, 256 P. 1040 (1927) (refusal to give requested "no inference" instruction not error).

81. Previously Court of Appeals.

82. 25 Ky. L. Rep. 1233, 77 S.W. 363 (1903).

83. *Id.* at 1234, 77 S.W. at 364.

84. *Id.*

85. *Id.*

86. *See note 16 supra.*

87. 25 Ky. L. Rep. at 1234, 77 S.W. at 364.

88. *See Roberson v. Commonwealth*, 274 Ky. 49, 118 S.W.2d 157 (1938) (trial judge's refusal to instruct jury not to consider fact of defendant's silence upheld); *Hanks v. Commonwealth*, 248 Ky. 203, 58 S.W.2d 394 (1933) (trial judge's refusal to instruct jury that defendant's failure to testify raised no presumption of guilt upheld). *But see Armstrong v. Commonwealth*, 190 Ky. 217, 227 S.W. 162 (1921). In *Armstrong* the Kentucky Supreme Court held that while it is the safer practice for the trial court not to give the instruction, it may not necessarily constitute reversible error in every case. The court distinguished *Tines*, noting that in *Tines* error was also found in the improper admission into evidence of an affidavit which was the sole link between the

Then, in 1945, in *Kelley v. Commonwealth*,<sup>89</sup> the Kentucky Supreme Court stated that it would have been better for the trial judge in that case to have given the requested instruction, but because no reference to the defendant's silence was made by the court, failure to give the instruction did not constitute prejudicial error.<sup>90</sup> In 1963,<sup>91</sup> the court held that where the defendant does not take the stand, the giving of the instruction would constitute prejudicial error,<sup>92</sup> distinguishing *Kelley* as indicating that a "no inference" instruction *may* be required when *requested* by the defendant.<sup>93</sup> In 1971,<sup>94</sup> the court bolstered *Kelley*, holding specifically that the Kentucky competency statute requires that the instruction be given when requested.<sup>95</sup>

Despite this evolution toward requiring the giving of a requested "no inference" instruction, the Kentucky Supreme Court did an about-face one year later. In *Scott v. Commonwealth*<sup>96</sup> the court held that under Kentucky case law a defendant is not entitled to a "no inference" instruction, even if requested.<sup>97</sup> Also that year, in *Green v. Commonwealth*,<sup>98</sup> the court held that the Kentucky competency statute prohibits any comment, whether by the trial judge or prosecutor.<sup>99</sup>

As noted by the *Carter* Court, the constitutional issues raised by the giving of jury instructions in connection with a

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defendant and the crime. 190 Ky. at 222, 227 S.W. at 164. The court expressed doubt whether reversal would have occurred in *Tines* if the giving of the "no inference" instruction had been the only error committed. *Id.*

89. 300 Ky. 136, 187 S.W.2d 796 (1945).

90. *Id.* at 143, 187 S.W.2d at 797.

91. *Hopper v. Commonwealth*, 371 S.W.2d 646 (Ky. 1963).

92. 371 S.W.2d at 648.

93. *Id.*

94. *Spencer v. Commonwealth*, 467 S.W.2d 128 (Ky. 1971).

95. *Id.* at 131. *See* note 16 *supra*.

96. 495 S.W.2d 800 (Ky. 1973), *cert. denied*, 414 U.S. 1073 (1973).

97. *Id.* at 802. The court rejected its earlier statement in *Spencer* as only dictum. *Id.* *See* notes 94 & 95 accompanying text *supra*.

98. 488 S.W.2d 339 (Ky. 1972).

99. *Id.* at 341. The *Green* court refused to accept the defendant's request that the Kentucky statute be interpreted as the United States Supreme Court had interpreted the federal competency statute in *Bruno*. *See* notes 25-27 and accompanying text *supra*. The court reasoned that, unlike the federal statute, the Kentucky competency statute specifically states that "[a defendant's] failure to [testify] shall not be commented upon." *Id.* *See* note 16 *supra*. The court concluded that these words require that a defendant is not entitled to a "no inference" instruction. 488 S.W.2d at 341-42.

defendant's self-incrimination privilege were first considered by the United States Supreme Court in *Griffin*,<sup>100</sup> where the Court determined whether compulsion was present by examining the extent to which the defendant was penalized for exercising his fifth amendment privilege.<sup>101</sup> Applying this "penalty" test, the Court concluded that unconstitutional compulsion was present in a jury instruction that suggests to jurors that they may draw adverse inferences from a defendant's silence.<sup>102</sup>

The issues were further developed in *Lakeside*,<sup>103</sup> where the Court held that the privilege against self-incrimination is not violated when a trial judge gives a "no inference" instruction, even though the defendant objects.<sup>104</sup> Justice Stewart, writing the majority opinion, reasoned that a cautionary "no inference" instruction could not provide the kind of unconstitutional compulsion to testify found in *Griffin*.<sup>105</sup>

Although *Carter* appears to follow this line of precedent, extending a liberal interpretation of the fifth amendment privilege against self-incrimination, such a conclusion may not be accurate. The *Griffin* Court used a "penalty" test to determine whether compulsion was present: any action by the court or prosecution which made it costly for the defendant to exercise his privilege was held to violate the fifth amendment.<sup>106</sup> Justice Stewart dissented,<sup>107</sup> stating that the concept of compulsion was being too liberally extended, and advocating a more conservative approach to fifth amendment interpretation. He argued that in evaluating the validity of jury instructions, more weight should be given to the state's interest in ascertaining truth at trial through the use

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100. 380 U.S. 609 (1965). See notes 28 & 29 and accompanying text *supra*.

101. 380 U.S. at 614. See note 29 and accompanying text *supra*.

102. 380 U.S. at 615. *Griffin* is an indication that the Supreme Court favors a liberal application of the fifth amendment. See Note, *Prosecutorial Comment and Judicial Instruction on a Defendant's Failure to Testify: In Support of a Liberal Application of the Fifth Amendment*, 13 VAL. L. REV. 261, 287 (1978) [hereinafter cited as *Failure to Testify*].

103. 435 U.S. 333 (1978). See notes 30-32 and accompanying text *supra*.

104. 435 U.S. at 340-41.

105. *Id.* at 339. The very purpose of a cautionary instruction, the *Lakeside* Court concluded, is to clarify in jurors' minds certain concepts that must not be misunderstood. *Id.* at 340.

106. See notes 28 & 29 and accompanying text *supra*.

107. 380 U.S. at 617 (Stewart, J., dissenting).

of carefully controlled jury instructions.<sup>108</sup>

The competing interests of the defendant and the state were again at issue in *Lakeside*,<sup>109</sup> and with Justice Stewart now writing for the majority, the Court allowed a "no inference" instruction to be given over the defendant's objection.<sup>110</sup> The basis of the decision was the importance of providing the jury with appropriate cautionary instructions.<sup>111</sup> Thus, the principle for which Justice Stewart had argued in his *Griffin* dissent, ascertaining truth at trial through the use of carefully formulated jury instructions, actually prevailed in *Lakeside*.<sup>112</sup> Also prevailing was Justice Stewart's view that the concept of compulsion was being too liberally extended, for the compulsion necessary to satisfy the *Griffin* test arguably was present in *Lakeside*. As Justice Stevens explained in his *Lakeside* dissent,<sup>113</sup> in some cases, where the whole story is told at trial by other witnesses or where the prosecution's case is very weak, the jury may not focus on the defendant's failure to testify.<sup>114</sup> In such a case, Justice Stevens maintained, a "no inference" instruction may have an adverse effect; for even if the jurors try faithfully to follow the instruction, the connection between silence and guilt, of which they have just been made aware, may be too strong to resist. He concluded that an application of *Griffin* would require that the instruction not have been given.<sup>115</sup>

*Carter* appears to follow *Griffin* in that the "penalty" test was applied to ascertain whether compulsion was present;<sup>116</sup> but because Justice Stewart wrote the *Carter* opinion, ascertaining the degree of compulsion may not be the actual basis for the Court's decision. In *Carter*, Justice Stewart emphasized the importance and necessity of carefully instructing the jury on basic legal concepts,<sup>117</sup> as he did in the *Lakeside* decision.<sup>118</sup>

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108. *Id.* at 622 (Stewart, J., dissenting).

109. See notes 103-05 and accompanying text *supra*.

110. 435 U.S. at 340-41. See note 104 & 105 *supra*.

111. 435 U.S. at 340.

112. See 62 MARQ. L. REV. 74, 83 (1978).

113. 435 U.S. at 342 (Stevens, J., dissenting).

114. *Id.* at 345 (Stevens, J., dissenting).

115. *Id.* at 345-47 (Stevens, J., dissenting).

116. 101 S. Ct. at 1119. See text accompanying notes 37 & 38 *supra*.

117. 101 S. Ct. at 1120. See text accompanying notes 36-39 *supra*.

118. 435 U.S. at 340. This view of the *Carter* majority seems to be shared by Justice Stevens who felt it necessary to emphasize in his concurrence that



After *Carter*, it is not clear what type of analysis the Supreme Court will use in regard to these cases: ascertaining the degree of compulsion present, or forwarding the state's interest in truth at trial through cautionary instructions.<sup>119</sup> One conclusion, based on *Lakeside*, is that the Court prefers that more weight generally be given to the importance of giving cautionary instructions, whether requested by the defendant or not, and is simply paying lip-service in its opinions to the compulsion concept.<sup>120</sup> If this is the case, the real problems for a defendant who fails to take the stand will not arise in cases such as *Carter*, where both the defendant and the Court agreed that a cautionary instruction should be given. It is in the *Lakeside* situation, where the Court's preference and the defendant's interest clash and perhaps endanger one of the protections that shield the individual from his much stronger adversary, the State.<sup>121</sup>

*Terry J. Trexler*

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the decision of whether a "no inference" instruction is to be given should be answered by the defendant and his lawyer, and not by the state. 101 S. Ct. at 1123 (Stevens, J., concurring). See also note 115 and accompanying text *supra*.

119. See generally Ritchie, *Compulsion that Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383, 406 (1977) [hereinafter cited as *The Burger Court's Definition*].

120. See *Failure to Testify*, *supra* note 102, at 294; 62 MARQ. L. REV. 74, 88 (1978).

121. See *The Burger Court's Definition*, *supra* note 120, at 431.