



10-1980

## Carter v. Kentucky

Lewis F. Powell Jr

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/casefiles>



Part of the [Criminal Law Commons](#)

---

### Recommended Citation

*Carter v. Kentucky*. Supreme Court Case Files Collection. Box 80. Powell Papers. Lewis F. Powell Jr. Archives, Washington & Lee University School of Law, Virginia.

This Manuscript Collection is brought to you for free and open access by the Lewis F. Powell Jr. Papers at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Supreme Court Case Files by an authorized administrator of Washington and Lee University School of Law Scholarly Commons. For more information, please contact [christensena@wlu.edu](mailto:christensena@wlu.edu).

Could leave this  
to Fed #/C

Trial court refused to give  
an instruction; when requested,  
that a  $\Delta$ 's ~~is~~ failure to testify  
in her own defense creates no  
inference of guilt.

This Q was left open in Griffin v.  
Calif., & is a troublesome one.

There appears to be no ~~state~~

PRELIMINARY MEMORANDUM

Summer List 22  
Sheet 3

No. 80-5060

CARTER

v.

KENTUCKY

decision holding that the  
Court requires a state court  
to give such an instruction.

Cert to Ky. Supreme  
Court  
(Per Curiam)

State/Criminal

Timely

1. SUMMARY: Petr argues that it was a violation of his Fifth and  
Fourteenth Amendment guarantees against self-incrimination for the state  
court to refuse to instruct the jury that his failure to take the stand  
cannot prejudice him or be used against him as an inference of guilt.

2. FACTS: Petr was convicted after jury trial of third-degree  
burglary, for which he received two years, and of being a first-degree  
persistent felony offender, for which he received 20 years. Petr did not  
take the stand. Counsel tendered, and the trial court refused, the

There is nothing for this court in petr's complaint  
that the prosecutor commented on his failure to  
testify. But the question whether a trial judge must  
give a cautionary instruction on request is a  
significant one. That question was left open in Grif-  
fin. I'm undecided. Perhaps we could wait to see



following instruction: "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." In his closing argument, defense counsel argued to the jury: "Why didn't Mr. Carter take the stand and testify? Let me tell you why . . . he doesn't have to take the stand in his own behalf. He doesn't have to do anything." The prosecution, in its closing argument, referred to the evidence against petr as "not controverted" and also urged the jury to "consider only what you have heard up here as evidence in this case and not something that you might speculate happened or could have happened . . . ."

3. DECISION BELOW: The Ky. S. Ct. affirmed petr's convictions, citing Green v. Commonwealth, 488 S.W.2d 339 (Ky. 1972), wherein the court had held that a trial court did not err in refusing to give an instruction similar to that offered by petr. The court also referred to KRS 421.225, which provides: "Testimony of Defendant. -- In any criminal or penal prosecution a 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" (emphasis supplied). As for any comments made by the prosecutor, the court noted that defense counsel's opening comments "were an invitation to the Commonwealth's attorney to attack, which he did." The court also noted that defense counsel had made no objection to any of the prosecution's closing argument.

4. CONTENTIONS: Petr argues that the trial court's refusal to give his offered instruction violated his Fifth Amendment rights. He relies primarily on the rationale of three Supreme Ct. opinions. Recognizing that Bruno v. United States, 308 U.S. 287 (1939), only considered the interpretation of a federal statute, petr nonetheless argues that the



logic of Bruno, recognizing the psychological operation of the jury's mind in considering a criminal defendant's failure to testify, supports his position here. While the instant question was specifically left open in Griffin v. California, 380 U.S. 609, 615 n.6 (1965), petr quotes the dissenting opinion in that case for the proposition that "whenever in a jury trial a defendant exercises this constitutional right, the members of the jury are bound to draw inferences from his silence ... Without limiting instructions the danger exists that the inferences drawn by the jury may be unfairly broad," id. at 623 (Stewart, J., dissenting). Finally, petr relies on the recent opinion in Lakeside v. Oregon, 435 U.S. 333 (1978), where this Court rejected the argument that the protective instruction requested here constituted comment within the meaning of Griffin. Petr concludes his argument by pointing out that the Kentucky rule is contrary to the rule in at least thirty-two states.

Resp stresses that Bruno involved the "narrow question" whether a specific federal statute required federal courts to give a "no inference" instruction, and that Griffin involved the entirely different question of adverse comment. In Lakeside the Court touched upon the gravamen of the instant dispute when it noted that "[i]t may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection. And each state is, of course, free to forbid its trial judges from doing so as a matter of state law." 435 U.S. at 340.

5. DISCUSSION: None of the decisions relied upon by petr support requiring the states, as a matter of constitutional law, to give a "no inference" instruction. In Bruno, 308 U.S. at 294, Griffin, 380 U.S. at 621-23 (Stewart, J., dissenting), and Lakeside, 435 U.S. at 339-40, id. at 347 (Stevens, J., dissenting), there was dispute over whether an accused was benefitted or adversely affected by instructions on his right



to remain silent. In Bruno the matter was resolved by reference to Congress' decision; analogously the instant question should be left to the states. Under Lakeside the state can give a "no inference" instruction even if the accused believes he is better off without one. Symmetry would seem to counsel leaving it up to the state not to give such an instruction, again even if the accused believes he would be better off with one.

There is a response.

8/21

Roberts

Op in petn



what the lower fed. ct. do on habeas  
Paul C.



*Announced* . . . . ., 19...

Grant

[illegible]



Reviewed 1/13

pwc 1/12/81

Paul thinks the rationale of  
Griffin requires the giving of  
this instruction

BENCH MEMORANDUM

TO: Mr. Justice Powell  
FROM: Paul Cane  
DATE: January 12, 1981  
RE: No. 80-5060, Carter v. Kentucky

Question Presented

The question in this case is the one reserved in Griffin v. California, 380 U.S. 609, 615 n.6 (1965): whether a state trial judge constitutionally must, upon the defendant's request, instruct the jury not to place any weight on the defendant's failure to testify in his own behalf.



### Background

This case is another in a series involving the problems that arise when a defendant does not testify in his own behalf. It has long been established that the prosecution cannot force the defendant to testify. Indeed, the Fifth Amendment specifically so provides.<sup>1</sup> Nevertheless, for many years it was not clear what action the prosecution could take when a defendant exercised that constitutional right.<sup>2</sup> In Griffin v. California, supra, the Court held that neither the prosecution nor the court may comment on the fact that the accused did not testify. The Court noted that

not everyone . . . can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however

---

<sup>1</sup>The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . .

<sup>2</sup>In federal cases, a statute makes clear that the trial judge is obliged to give the instruction requested in this case. See Bruno v. United States, 308 U.S. 287 (1939).



honest, who would, therefore, willingly be placed on the witness stand.

380 U.S. at 613, quoting Wilson v. United States, 149 U.S. 60.

However, that the State cannot compel a defendant to testify does not necessarily mean that it cannot comment when a defendant refuses to do so. Indeed, the very fact that a defendant refused to testify demonstrates that he resisted any compulsion. The Griffin Court did not see this distinction as significant. According to the Court, for the prosecution or judge to comment on the absence of testimony is to penalize the defendant "for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." Id. at 614.

After Griffin, cases in this Court and elsewhere focused on the nature of impermissible comment. One such case was Lakeside v. Oregon, 435 U.S. 333 (1978). In Lakeside, the trial judge had given a "no inference" instruction over the defendant's objection. The defendant contended that the instruction itself was impermissible comment because it "encourage[d] the jury to draw adverse inferences from" his silence. Id. The Court rejected this argument. The defendant's claim rested on two "very doubtful assumptions." Id. at 340. The first was the the jurors did not notice the



defendant's failure to testify. The second was that the jury would disregard the judge's instruction. The Court deemed that neither was likely. Accordingly, the Court affirmed the conviction.

This case presents essentially the converse of the issue in Lakeside. Here, the defendant wanted the "no inference" instruction, but the judge refused to give it.

### Discussion

#### A. Petr's Arguments

The Fifth Amendment establishes that a criminal defendant has the right to decline to testify. A necessary corollary of that right is that a defendant may not be penalized when he invokes it. Griffin v. California, supra, at 614. Thus, it is common learning that neither the judge nor the prosecution may comment adversely when the defendant elects not to testify.

This case does not present a problem of adverse comment. The problem here is that jurors, noting that a defendant has not testified, will assume that the defendant had no truthful exculpatory story to tell. According to petr, therefore, "if the right against compulsory self-incrimination is to be more than a mirage," the trial court must instruct the



jurors not to place any weight on the defendant's failure to testify.

Petr argues that his position is compelled by the Fifth Amendment, made applicable to the States through the Fourteenth, and also by the due process clause. It is a grave threat both to a defendant's privilege not to testify, and also to the fact-finding process itself, if jurors are permitted to give evidentiary weight to their unfulfilled desire to hear testimony from the defendant. Trial judges must instruct jurors to disregard their natural instincts.

Petr contends that whenever the defendant asks for such an instruction a per se constitutional rule requires the judge to give it. In the alternative, petr contends that such an instruction was constitutionally required on the facts of this case. With respect to the latter argument, petr points out several factors in the case which, he says, emphasized to the jury that he had not testified. First, a continuing theme throughout the trial was that petr had refused to explain his conduct. Police witnesses testified that he had refused to sign a Miranda waiver form or to speak to them.<sup>3</sup> Second,

---

<sup>3</sup>There appears to have been a plain violation in this case of the incipient majority position in Edwards v.



petr's lawyer in his opening statement essentially told the jury that petr, when he testified, would explain incriminating circumstantial evidence. The jury surely was surprised when petr did not do so. Third, petr declined to testify for reasons unrelated to guilt or innocence. The trial judge ruled that, if petr testified, he could be impeached with two prior felony convictions. It probably was a wise strategic decision not to testify in light of that prospect.

These circumstances suggest that it was particularly important in this case to instruct the jury not to place any weight on petr's failure to testify. Otherwise, the natural instincts of the jurors would lead them to attach an unwarranted negative inference to petr's invocation of a constitutional privilege.

#### B. Resp's Arguments

The Fifth Amendment primarily was directed at coerced testimony of the kind obtained in the notorious Star Chamber.

---

Arizona. But that issue was not preserved for review because petr failed to object to the introduction of testimony at trial. Although petr cannot prevail on this theory, and indeed did not present this issue in his petition for certiorari, the circumstances nevertheless may be highly relevant to the need for a "no inference" jury instruction.



The lurid practices that prompted the adoption of the Fifth Amendment are not at issue in this case. This case has nothing to do with coerced testimony, nor even with a statement by the prosecutor or judge pointing out that the defendant elected not to testify. Rather, petr seems to insist that a court has an affirmative duty in effect to "tell the jury to ignore the fact that something did not happen."

Kentucky's policy is not to give the instruction petr seeks.<sup>4</sup> Such an instruction is not in the best interests of the accused. Any comment, even a "no inference" instruction, calls to the attention of jurors the fact that the defendant did not testify. Kentucky, in prohibiting the "no inference" instruction, helps save the defendant from his own folly. States should be free to formulate their own rules in this respect.

In any event, the evidence of guilt in this case was

---

<sup>4</sup>KRS 421.225 provides that, "[i]n 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." The current position of the Kentucky courts is that this statute prohibits a "no inference" instruction even when the defendant requests it.



overwhelming. He was found near the scene of the crime after a chase by police. He made incriminating statements to officers.<sup>5</sup> The trial judge did instruct the jury that the prosecution had the burden of proving its case beyond a reasonable doubt. Thus, any error that might have been committed was harmless.

### C. Criticism & Analysis

I tend to think that petr has the better of the arguments. Kentucky's rationale for not giving the "no inference" instruction is flimsy. The State advances as its sole interest a purpose to provide more fairness in trials by not permitting its trial judges to comment, in the form of a "no inference" instruction, on a defendant's failure to testify. Lakeside, however, established that even the defendant has no constitutional interest in preventing the judge from giving a "no inference" instruction. Thus, Lakeside stands for the proposition that such instructions can do no constitutionally cognizable harm. If a criminal defendant has no constitutional interest in being tried without a "no inference" instruction, I think it follows a fortiori that the

---

<sup>5</sup>But see note 3 supra.



state has no valid interest in protecting defendants from the perceived harm of that instruction.<sup>6</sup>

Of course, the fact that the State has no particular interest in banning the "no inference" instruction does not mean that petr's conviction is constitutionally defective. Petr still must demonstrate some way in which the absence of the instruction infringes on some constitutional right. On the facts of this case, I tend to think he has made the necessary showing.

To be sure, there is a difference between the Griffin situation (in which the judge instructed the jury that it could draw inferences from the defendant's failure to testify) and the situation here (in which the trial court said nothing). I am not sure that this difference is constitutionally significant. As Justice Stewart has pointed out, "the jury will, of course, realize" when the defendant has not testified, whether or not the prosecution or court comments adversely about it. Griffin, supra, at 621 (Stewart, J., dissenting). Moreover, the jury, unless instructed to the contrary, will

---

<sup>6</sup>It is significant that the State does not assert that it has an interest in trying to keep jury instructions short.



expect the defendant to offer evidence to contradict that of the State. When the defendant does not do so, again unless instructed to the contrary, the jury probably will construe his omission as relevant to guilt.

In Griffin, the Court recognized that a defendant's Fifth Amendment right necessarily requires that the defendant not be penalized when he exercises that right. According to the Court, a defendant is penalized if jurors attach significance to his failure to testify. Human nature being what it is, I think jurors will attach significance to the defendant's failure to testify unless instructed to the contrary. As Justice Stewart noted in Griffin, it cannot be said that "the inferences drawn by a jury will be more detrimental to a defendant [when the judge or prosecution comments unfavorably on his failure to testify] than would result if the jury were left to roam at large with only its untutored instincts to guide it, to draw from the defendant's silence broad inferences of guilt." 380 U.S. at 621 (Stewart, J., dissenting).

#### Summary

Griffin prohibited judges and prosecutors from commenting on the defendant's failure to testify. The case so



held because the defendant is penalized in the exercise of his Fifth Amendment rights if the jury attaches significance to the defendant's failure to explain himself. Jurors are prone to construe a defendant's silence as evidence of guilt unless properly instructed. Id. That inclination on the part of jurors burdens the defendant's Fifth Amendment right by exacting a cost for its exercise. To combat the natural, but improper impulses of jurors, I believe the state trial judge in this case should have instructed them not to attach significance to the defendant's failure to testify. On the facts of this case, see ante at 4-5, the defendant appears to have a substantial interest in that instruction; the State does not even claim that it would suffer any burden from having to give it.

P.W.C. 1/13/81



100  
1/24/81  
1/24/81  
1/24/81  
1/24/81  
1/24/81



Mc Nally (Ant Public Advocate, Ky) for Petr.

Primarily reliance on facts of their case.

But argues that, if requested, judges must instruct jury that ~~there is~~  $\Delta$ 's failure to testify creates no inference of guilt. This issue was left open in Griffin.

$\Delta$  ~~was~~ elected not to testify because of fear of impeachment on basis of prior convictions. T.M. noted that "reason" for not testifying is irrelevant.

Great of authority - most states - support giving of this instruction upon request.

~~the~~

Bulluck (Ant. AG - Ky)

Lakeside helps State in this case (Const. permissible for trial judge to give "no inference" instruction over  $\Delta$ 's objection - a state may allow this).



As the judge should give instruction, not at all sure Const. - as applied to states - require it.

## Revere 8-1

80-5060 Carter v. Kentucky

Conf. 1/16/81

The Chief Justice ~~wait~~ decided, ~~he~~ voted to Reverse

In Fed Ct & 42 states, rule is that if Δ requests an instruction on silence of accused, it should be given.

Also here prosecutor was out of bounds in her comments.

Griffin reserved his Q. See Lakeside See ABA Standards. But most defense lawyers prefer no instruction & no reference to subject.

Mr. Justice Brennan Reverse - only on D/P ground.

Not inclined to Constitutionalize a rule in this case. Should not impose this type Q on a state. This is properly left to Rule making.

But on special facts of this case, ~~simple case~~ the court should have given instruction on matter of D/P.

X X X

After discussion, W J B said he may change mind on Const. Q

Mr. Justice Stewart Reverse

This is a Const Q, & the 5<sup>th</sup> amend applies - self-incrimination.

Reasoning of Taylor v Ky, as well as Griffin, requires a Const. rule.



Mr. Justice White Reverie

Prior cases point to requiring  
that this instruction be given  
if counsel request it.

Would not go on D/P ground

The privilege not to self-  
incriminate - as Court has  
construed it - applies.

Mr. Justice Marshall Revised

Mr. Justice Blackmun Reverie



Mr. Justice Powell Reverse

I may have voted differently  
in Griffin as our law unduly  
handicaps the prosecution, & the  
one person a jury should be entitled  
to hear is the A.

But Griffin is the law & its  
rational controls here. Agree with  
P.S. & B.R.W.

Mr. Justice Rehnquist Affirm

Would overrule Griffin —  
a weakly reasoned decision.  
Should leave to States —  
not a Court rule.

Mr. Justice Stevens Reverse

Not sure how would have voted  
in Griffin

But Griffin now substantially  
controls this case.

Const. right only if instruction  
is requested.

Agree



100

$\frac{150}{45}$

$\frac{16}{3} \cdot 4800$

~~5000~~  
2

$\frac{88}{12}$

23,000

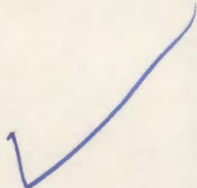
i.



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

February 18, 1981

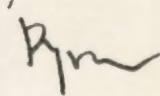


Re: 80-5060 - Carter v. Kentucky

Dear Potter,

Under the compulsion of previous decisions that are unlikely to be disturbed, I join your opinion.

Sincerely yours,



Mr. Justice Stewart

Copies to the Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

February 18, 1981

Re: No. 80-5060 Carter v. Kentucky

Dear Potter:

In due course I shall circulate a short dissent from your draft opinion in this case.

Sincerely,

Justice Stewart

Copies to the Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

February 19, 1981

Re: No. 80-5060 - Carter v. Kentucky

Dear Potter:

Please join me.

Sincerely,

*J.M.*  
T.M.

Justice Stewart

cc: The Conference



lfp/ss 2/19/81

80-5060 Carter v. Commonwealth of Kentucky.

JUSTICE POWELL, concurring.

In joining the opinion of the Court, as I do, I write briefly to make clear that for me this is required by precedent, not by what I think the Constituion either requires or should require.



JUSTICE POWELL, concurring.

Although joining the opinion of the Court, I write briefly to make clear that, for me, this result is required by precedent, not by what I think the Constitution should require.

10

The Fifth Amendment, applicable to the States through the Fourteenth, provides that no person "shall be compelled in any criminal case to be a witness against himself." The question in Griffin v. California, 380 U.S.

609 (1965), was whether this proscription was violated if jurors were told that they could draw inferences from a defendant's failure to testify. The Court held that neither the judge nor the prosecutor could suggest that jurors draw such inferences. ~~It is axiomatic, of course,~~

~~that~~ <sup>hardly can claim</sup> a defendant who chooses not to testify ~~cannot be said~~ <sup>that he was</sup> to have been compelled to testify. The Court held,

20



It is often overlooked that the purpose of a criminal trial, conducted according to law, is to convict <sup>the</sup> ~~a~~ guilty <sup>and acquit the innocent @</sup> defendant. Our Rules of Procedure and Evidence are designed to facilitate the ascertainment of the truth. The one person who usually knows the most about the critical facts is the accused. For reasons deeply rooted in the history we share with England, the Bill of Rights included the self incrimination clause that enables a defendant in a criminal trial to elect to make no contribution to the fact finding process. ~~I can perceive of no~~ reason why jurors, who <sup>have</sup> ~~has~~ been instructed that the defendant is presumed to be innocent and <sup>that</sup> this presumption can be overridden by evidence beyond a reasonable doubt, <sup>only</sup> should ~~not~~ <sup>be told that they are</sup> ~~be free~~ to draw unfavorable inferences when a defendant elects to remain silent.

But nothing in the self incrimination clause requires that



persuasively  
responded to his departure  
from the language and  
purpose of the self-incrimination  
clause.

nevertheless,

however, that any "penalty imposed by courts for

exercising <sup>[this]</sup> a constitutional privilege" cannot be tolerated

because "[i]t cuts down on the privilege, <sup>[against being compelled to testify]</sup> by making its  
assertion costly." Id., at 614.

JUSTICE STEWART <sup>is</sup> dissented in Griffin. He wrote:

We must determine whether the petitioner has been "compelled . . . to be a witness against himself." Compulsion is the focus of the inquiry. Certainly, if any compulsion be detected in the California procedure, it is of a dramatically different and less palpable nature than that involved in the procedures which historically gave rise to the Fifth Amendment guarantee. When a suspect was brought before the Court of High Commission or the Star Chamber, he was commanded to answer whatever was asked of him, and subjected to a far-reaching and deeply probing inquiry in an effort to ferret out some unknown and frequently unsuspected crime. He declined to answer on pain of incarceration, banishment, or mutilation. And if he spoke falsely, he was subject to further punishment. Faced with this formidable array of alternatives, his decision to speak was unquestionably coerced.

Those were the lurid realities which lay behind enactment of the Fifth Amendment, a far cry from the subject matter of the case before us. I think that the Court in this case stretches the concept of compulsion beyond all reasonable bounds, and that whatever compulsion may exist derives from the defendant's choice not to testify, not from any comment by court or counsel. . . . [T]he jury will, of course, realize th[e] quite evident fact [that the defendant has chosen not to testify], even though the choice goes unmentioned. Id., at 620-621 (STEWART, J., dissenting)

Trials are to ascertain truth. That goal is not well served--nor, as the dissent in Griffin pointed out, are the essential purposes of the privilege against self-incrimination furthered--when the jury is told not to draw



inferences from the defendant's failure to explain  
circumstances that cry out for explanation. As former

California Chief Justice Traynor commented, judges and  
prosecutors should be able to explain that "a jury [may]  
draw unfavorable inferences from the defendant's failure  
to explain or refute evidence when he could reasonably be  
expected to do so. Such comment would not be evidence and  
would do no more than make clear to the jury the extent of  
its freedom in drawing inferences." Traynor, The Devils  
of Due Process in Criminal Detection, Detention, and  
Trial, 33 U. Chi. L. Rev. 657, 677 (1966); accord,  
Schaefer, Police Interrogation and the Privilege Against  
Self-Incrimination, 61 Nw. U. L. Rev. 506, 520 (1966).

I therefore would have joined JUSTICE STEWART<sup>S</sup> in<sup>and White</sup>  
dissent in Griffin. But Griffin is<sup>now</sup> the law, and based on  
that case the present petitioner was entitled to the jury  
instruction that he requested. I therefore join the  
opinion of the Court.

70

75

80



JUSTICE POWELL, concurring.

Although joining the opinion of the Court, I  
write briefly to make clear that, for me, this result is  
required by precedent, not by what I think the  
Constitution should require.

The Fifth Amendment, applicable to the States  
through the Fourteenth, provides that no person "shall be  
compelled in any criminal case to be a witness against  
himself." The question in Griffin v. California, 380 U.S.  
609 (1965), was whether this proscription was violated if  
jurors were told that they could draw inferences from a  
defendant's failure to testify. The Court held that  
neither the judge nor the prosecutor could suggest that  
jurors draw such inferences. A defendant who chooses not  
to testify hardly can claim that he was compelled to  
testify. The Court held, nevertheless, that any "penalty  
imposed by courts for exercising [this] constitutional  
privilege" cannot be tolerated because "[i]t cuts down on

5

10

15

20



the privilege by making its assertion costly." Id., at 614.

JUSTICE STEWART's dissenting opinion in Griffin, in which JUSTICE WHITE joined, responded persuasively to this departure from the language and purpose of the self-incrimination clause. JUSTICE STEWART wrote:

We must determine whether the petitioner has been "compelled . . . to be a witness against himself." Compulsion is the focus of the inquiry. Certainly, if any compulsion be detected in the California procedure, it is of a dramatically different and less palpable nature than that involved in the procedures which historically gave rise to the Fifth Amendment guarantee. . . .

\* \* \*

I think that the Court in this case stretches the concept of compulsion beyond all reasonable bounds, and that whatever compulsion may exist derives from the defendant's choice not to testify, not from any comment by court or counsel. . . . [T]he jury will, of course, realize th[e] quite evident fact [that the defendant has chosen not to testify], even though the choice goes unmentioned. Id., at 620-621 (STEWART, J., dissenting).

~~Trials are to ascertain truth.~~ The one person who usually knows most about the critical facts is the accused. For reasons deeply rooted in the history we share with England, the Bill of Rights included the self-incrimination clause that enables a defendant in a criminal trial to elect to make no contribution to the fact-finding process. But nothing in the clause requires that jurors--who have been instructed that the defendant



the privilege by making its assertion costly." Id., at 614.

JUSTICE STEWART's dissenting opinion in Griffin, in which JUSTICE WHITE joined, responded persuasively to this departure from the language and purpose of the self-incrimination clause. JUSTICE STEWART wrote:

We must determine whether the petitioner has been "compelled . . . to be a witness against himself." Compulsion is the focus of the inquiry. Certainly, if any compulsion be detected in the California procedure, it is of a dramatically different and less palpable nature than that involved in the procedures which historically gave rise to the Fifth Amendment guarantee. . . .

\* \* \*

I think that the Court in this case stretches the concept of compulsion beyond all reasonable bounds, and that whatever compulsion may exist derives from the defendant's choice not to testify, not from any comment by court or counsel. . . . [T]he jury will, of course, realize th[e] quite evident fact [that the defendant has chosen not to testify], even though the choice goes unmentioned. Id., at 620-621 (STEWART, J., dissenting).

~~Trials are to ascertain truth.~~ The one person who usually knows most about the critical facts is the accused. For reasons deeply rooted in the history we share with England, the Bill of Rights included the self-incrimination clause that enables a defendant in a criminal trial to elect to make no contribution to the fact-finding process. But nothing in the clause requires that jurors--who have been instructed that the defendant



is presumed to be innocent and that this presumption can be overridden only by evidence beyond a reasonable doubt-- should be told not to draw logical inferences when a defendant chooses not to explain incriminating circumstances. As former California Chief Justice Traynor commented, judges and prosecutors should be able to explain that "a jury [may] draw unfavorable inferences from the defendant's failure to explain or refute evidence when he could reasonably be expected to do so. Such comment would not be evidence and would do no more than make clear to the jury the extent of its freedom in drawing inferences." Traynor, The Devils of Due Process in Criminal Detection, Detention, and Trial, 33 U. Chi. L. Rev. 657, 677 (1966); accord, Schaefer, Police Interrogation and the Privilege Against Self-Incrimination, 61 Nw. U. L. Rev. 506, 520 (1966).

I therefore would have joined JUSTICES STEWART and WHITE in dissent in Griffin. But Griffin is now the law, and based on that case the present petitioner was entitled to the jury instruction that he requested. I therefore join the opinion of the Court.



FIRST PRINTED DRAFT

CONCUR (A)

Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

No. 80-5060, Carter v. Kentucky

From: Mr. Justice Powell

Circulated: FEB 26 1981

Recirculated: \_\_\_\_\_

JUSTICE POWELL, concurring.

Although joining the opinion of the Court, I write briefly to make clear that, for me, this result is required by precedent, not by what I think the Constitution should require.

The Fifth Amendment, applicable to the States through the Fourteenth, provides that no person "shall be compelled in any criminal case to be a witness against himself." The question in Griffin v. California, 380 U.S. 609 (1965), was whether this proscription was violated if jurors were told that they could draw inferences from a defendant's failure to testify. The Court held that neither the judge nor the prosecutor could suggest that jurors draw such inferences. A defendant who chooses not to testify hardly can claim that he was compelled to testify. The Court <sup>also</sup> held, nevertheless, that any "penalty imposed by courts for exercising [this] constitutional privilege" cannot be tolerated because "[i]t cuts down on the privilege by making its assertion costly." Id., at 614.



JUSTICE STEWART's dissenting opinion in Griffin, in which JUSTICE WHITE joined, responded persuasively to this departure from the language and purpose of the self-incrimination clause. JUSTICE STEWART wrote:

// We must determine whether the petitioner has been compelled . . . to be a witness against himself." <sup>b</sup> Compulsion is the focus of the inquiry. Certainly, if any compulsion be detected in the California procedure, it is of a dramatically different and less palpable nature than that involved in the procedures which historically gave rise to the Fifth Amendment guarantee. . . .

\* \* \* \*

Ⓟ I think that the Court in this case stretches the concept of compulsion beyond all reasonable bounds, and that whatever compulsion may exist derives from the defendant's choice not to testify, not from any comment by court or counsel. . . . [T]he jury will, of course, realize th[e] quite evident fact [that the defendant has chosen not to testify], even though the choice goes unmentioned. <sup>u</sup> Id., at 620-621 (STEWART, J., dissenting).

The one person who usually knows most about the critical facts is the accused. For reasons deeply rooted in the history we share with England, the Bill of Rights included the self-incrimination clause that enables a defendant in a criminal trial to elect to make no contribution to the fact-finding process. But nothing in the clause requires that jurors--who have been instructed that the defendant is presumed to be innocent and that



this presumption can be overridden only by evidence beyond a reasonable doubt--should be told not to draw logical inferences when a defendant chooses not to explain incriminating circumstances. As former California Chief Justice Traynor commented, judges and prosecutors should be able to explain that "a jury [may] draw unfavorable inferences from the defendant's failure to explain or refute evidence when he could reasonably be expected to do so. Such comment would not be evidence and would do no more than make clear to the jury the extent of its freedom in drawing inferences." Traynor, The Devils of Due Process in Criminal Detection, Detention, and Trial, 33 U. Chi. L. Rev. 657, 677 (1966); accord, Schaefer, Police Interrogation and the Privilege Against Self-Incrimination, 61 Nw. U. L. Rev. 506, 520 (1966).

I therefore would have joined JUSTICES STEWART and WHITE in dissent in Griffin. But Griffin is now the law, and based on that case the present petitioner was entitled to the jury instruction that he requested. I therefore join the opinion of the Court.



2-27-81

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-5060

Lonnie Joe Carter, Petitioner,		On Writ of Certiorari to the	
v.			Supreme Court of Ken-
Commonwealth of Kentucky.			tucky.

[March —, 1981]

JUSTICE POWELL, concurring.

Although joining the opinion of the Court, I write briefly to make clear that, for me, this result is required by precedent, not by what I think the Constitution should require.

The Fifth Amendment, applicable to the States through the Fourteenth, provides that no person "shall be compelled in any criminal case to be a witness against himself." The question in *Griffin v. California*, 380 U. S. 609 (1965), was whether this proscription was violated if jurors were told that they could draw inferences from a defendant's failure to testify. The Court held that neither the judge nor the prosecutor could suggest that jurors draw such inferences. A defendant who *chooses not to testify* hardly can claim that he was *compelled to testify*. The Court also held, nevertheless, that any "penalty imposed by courts for exercising [this] constitutional privilege" cannot be tolerated because "[i]t cuts down on the privilege by making its assertion costly." *Id.*, at 614.

JUSTICE STEWART's dissenting opinion in *Griffin*, in which JUSTICE WHITE joined, responded persuasively to this departure from the language and purpose of the self-incrimination clause. JUSTICE STEWART wrote:

"We must determine whether the petitioner has been 'compelled . . . to be a witness against himself.' Compulsion is the focus of the inquiry. Certainly, if any compulsion be detected in the California procedure, it



is of a dramatically different and less palpable nature than that involved in the procedures which historically gave rise to the Fifth Amendment guarantee. . . .

“I think that the Court in this case stretches the concept of compulsion beyond all reasonable bounds, and that whatever compulsion may exist derives from the defendant’s choice not to testify, not from any comment by court or counsel. . . . [T]he jury will, of course, realize th[e] quite evident fact [that the defendant has chosen not to testify], even though the choice goes unmentioned.” *Id.*, at 620–621 (STEWART, J., dissenting).

The one person who usually knows most about the critical facts is the accused. For reasons deeply rooted in the history we share with England, the Bill of Rights included the self-incrimination clause that enables a defendant in a criminal trial to elect to make no contribution to the fact-finding process. But nothing in the clause requires that jurors—who have been instructed that the defendant is presumed to be innocent and that this presumption can be overridden only by evidence beyond a reasonable doubt—should be told not to draw logical inferences when a defendant chooses not to explain incriminating circumstances. As former California Chief Justice Traynor commented, judges and prosecutors should be able to explain that “a jury [may] draw unfavorable inferences from the defendant’s failure to explain or refute evidence when he could reasonably be expected to do so. Such comment would not be evidence and would do no more than make clear to the jury the extent of its freedom in drawing inferences.” Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial*, 33 U. Chi. L. Rev. 657, 677 (1966); accord, Schaefer, *Police Interrogation and the Privilege Against Self-Incrimination*, 61 Nw. U. L. Rev. 506, 520 (1966).



I therefore would have joined JUSTICES STEWART and WHITE in dissent in *Griffin*. But *Griffin* is now the law, and based on that case the present petitioner was entitled to the jury instruction that he requested. I therefore join the opinion of the Court.



2-27-81

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-5060

Lonnie Joe Carter, Petitioner, | On Writ of Certiorari to the  
v. | Supreme Court of Ken-  
Commonwealth of Kentucky. | tucky.

[March —, 1981]

JUSTICE POWELL, concurring.

Although joining the opinion of the Court, I write briefly to make clear that, for me, this result is required by precedent, not by what I think the Constitution should require.

The Fifth Amendment, applicable to the States through the Fourteenth, provides that no person "shall be compelled in any criminal case to be a witness against himself." The question in *Griffin v. California*, 380 U. S. 609 (1965), was whether this proscription was violated if jurors were told that they could draw inferences from a defendant's failure to testify. The Court held that neither the judge nor the prosecutor could suggest that jurors draw such inferences. A defendant who *chooses not to testify* hardly can claim that he was *compelled to testify*. The Court also held, nevertheless, that any "penalty imposed by courts for exercising [this] constitutional privilege" cannot be tolerated because "[i]t cuts down on the privilege by making its assertion costly." *Id.*, at 614.

JUSTICE STEWART's dissenting opinion in *Griffin*, in which JUSTICE WHITE joined, responded persuasively to this departure from the language and purpose of the self-incrimination clause. JUSTICE STEWART wrote:

"We must determine whether the petitioner has been 'compelled . . . to be a witness against himself.' Compulsion is the focus of the inquiry. Certainly, if any compulsion be detected in the California procedure, it



is of a dramatically different and less palpable nature than that involved in the procedures which historically gave rise to the Fifth Amendment guarantee. . . .

“I think that the Court in this case stretches the concept of compulsion beyond all reasonable bounds, and that whatever compulsion may exist derives from the defendant’s choice not to testify, not from any comment by court or counsel. . . . [T]he jury will, of course, realize th[e] quite evident fact [that the defendant has chosen not to testify], even though the choice goes unmentioned.” *Id.*, at 620–621 (STEWART, J., dissenting).

The one person who usually knows most about the critical facts is the accused. For reasons deeply rooted in the history we share with England, the Bill of Rights included the self-incrimination clause that enables a defendant in a criminal trial to elect to make no contribution to the fact-finding process. But nothing in the clause requires that jurors—who have been instructed that the defendant is presumed to be innocent and that this presumption can be overridden only by evidence beyond a reasonable doubt—should be told not to draw logical inferences when a defendant chooses not to explain incriminating circumstances. As former California Chief Justice Traynor commented, judges and prosecutors should be able to explain that “a jury [may] draw unfavorable inferences from the defendant’s failure to explain or refute evidence when he could reasonably be expected to do so. Such comment would not be evidence and would do no more than make clear to the jury the extent of its freedom in drawing inferences.” Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial*, 33 U. Chi. L. Rev. 657, 677 (1966); accord, Schaefer, *Police Interrogation and the Privilege Against Self-Incrimination*, 61 Nw. U. L. Rev. 506, 520 (1966).



I therefore would have joined JUSTICES STEWART and WHITE in dissent in *Griffin*. But *Griffin* is now the law, and based on that case the present petitioner was entitled to the jury instruction that he requested. I therefore join the opinion of the Court.



SUPREME COURT OF THE UNITED STATES

No. 80-5060

Lonnie Joe Carter, Petitioner, | On Writ of Certiorari to the  
v. | Supreme Court of Ken-  
Commonwealth of Kentucky. | tucky.

[March 9, 1981]

JUSTICE POWELL, concurring.

Although joining the opinion of the Court, I write briefly to make clear that, for me, this result is required by precedent, not by what I think the Constitution should require.

The Fifth Amendment, applicable to the States through the Fourteenth, provides that no person "shall be compelled in any criminal case to be a witness against himself." The question in *Griffin v. California*, 380 U. S. 609 (1965), was whether this proscription was violated if jurors were told that they could draw inferences from a defendant's failure to testify. The Court held that neither the judge nor the prosecutor could suggest that jurors draw such inferences. A defendant who *chooses not to testify* hardly can claim that he was *compelled to testify*. The Court also held, nevertheless, that any "penalty imposed by courts for exercising [this] constitutional privilege" cannot be tolerated because "[i]t cuts down on the privilege by making its assertion costly." *Id.*, at 614.

JUSTICE STEWART's dissenting opinion in *Griffin*, in which JUSTICE WHITE joined, responded persuasively to this departure from the language and purpose of the self-incrimination clause. JUSTICE STEWART wrote:

"We must determine whether the petitioner has been 'compelled . . . to be a witness against himself.' Compulsion is the focus of the inquiry. Certainly, if any compulsion be detected in the California procedure, it



is of a dramatically different and less palpable nature than that involved in the procedures which historically gave rise to the Fifth Amendment guarantee. . . .

“I think that the Court in this case stretches the concept of compulsion beyond all reasonable bounds, and that whatever compulsion may exist derives from the defendant’s choice not to testify, not from any comment by court or counsel. . . . [T]he jury will, of course, realize th[e] quite evident fact [that the defendant has chosen not to testify], even though the choice goes unmentioned.” *Id.*, at 620–621 (STEWART, J., dissenting).

The one person who usually knows most about the critical facts is the accused. For reasons deeply rooted in the history we share with England, the Bill of Rights included the self-incrimination Clause, which enables a defendant in a criminal trial to elect to make no contribution to the fact-finding process. But nothing in the Clause requires that jurors not draw logical inferences when a defendant chooses not to explain incriminating circumstances. Jurors have been instructed that the defendant is presumed to be innocent and that this presumption can be overridden only by evidence beyond a reasonable doubt. California Chief Justice Traynor commented that judges and prosecutors should be able to explain that “a jury [may] draw unfavorable inferences from the defendant’s failure to explain or refute evidence when he could reasonably be expected to do so. Such comment would not be evidence and would do no more than make clear to the jury the extent of its freedom in drawing inferences.” Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial*, 33 U. Chi. L. Rev. 657, 677 (1966); accord, Schaefer, *Police Interrogation and the Privilege Against Self-Incrimination*, 61 Nw. U. L. Rev. 506, 520 (1966).



I therefore would have joined JUSTICES STEWART and WHITE in dissent in *Griffin*. But *Griffin* is now the law, and based on that case the present petitioner was entitled to the jury instruction that he requested. I therefore join the opinion of the Court.



[illegible]



# Time for Action

The nation may be on the verge of experiencing a badly needed and too-long-delayed all-out war on violent crime.

Last Sunday's dramatic call from Chief Justice Warren Burger for strong anti-crime measures has drawn favorable comment, even from some sources that normally differ sharply with the chief justice on judicial philosophy.

Then on Wednesday came the welcomed report that Justice Department officials, in the new Reagan administration, are developing proposals to beef up the federal government's ability to fight violent crime. One purpose, as a news story put it, is to counter-balance what administration officials see as "the courts' longstanding emphasis on the legal rights of defendants."

Under consideration are proposals to make murder-for-hire a federal offense, to permit judges to keep potentially dangerous accused persons in custody pending trial instead of requiring release if bail is provided, to establish a victim compensation fund, to provide new protections for crime victims and witnesses, and to make a prison sentence mandatory for any person committing a crime in which a weapon is used or someone is injured.

"We have established a system of criminal justice that provides more protection, more safeguards, more guarantees for those accused of crime than any other nation in all history," Chief Justice Burger declared in his speech to the American Bar Association. So many safeguards, he suggested, that there now may be "a dangerous imbalance" in favor of the accused.

One reason for the imbalance is found in such court decisions as that in *Griffin vs. California*, a case decided on a 6-to-2 vote of the Supreme Court in 1965.

An issue in that case was whether a prosecutor could comment on the failure of a defendant to take the witness stand in his own trial. The court held that the defendant's Fifth Amendment right against self-incrimination would be violated by such comment.

It is reaching far into left field to read any such prohibition into the amendment's statement that "no person . . . shall be compelled in any criminal case to be a witness against himself." The protection is against the defendant being forced to testify; calling attention to the fact that a defendant has availed himself of that protection is not forcing him to testify.

Former Chief Justice Walter V. Schaefer of the Illinois Supreme Court put the matter in perspective when he wrote:

"It is entirely unsound to exclude

from consideration at the trial the silence of a suspect involved in circumstances reasonably calling for explanation, or of a defendant who does not take the stand. It therefore seems to me imperative that the privilege against self-incrimination be modified to permit comment upon such silence."

Justices Potter Stewart and Byron White, who were on the court in 1965 and are on the court today, dissented on the Fifth Amendment decision, declaring that "the court in this case stretches the concept of compulsion beyond all reasonable bounds . . ." They said if a prosecutor called attention to a defendant's failure to take the stand, the defendant's lawyer would have the opportunity to offer reasons for that failure, if he wished to do so. We suspect that several of the colleagues of Justices Stewart and White on the present court — a markedly different court from that of 1965 — would agree with the dissenters in the 1965 case, but the court is so reluctant to overturn previous decisions that it probably would not change the ruling if an opportunity to do so arose.

Meanwhile, evidence that the public is fed up with violent crime and is demanding action is pointed out in Richard Reeves' column on the opposite page today. He cites a Los Angeles newspaper poll revealing that 77 percent of those persons questioned believe the courts do not deal harshly enough with criminals. Says Reeves: "People, at least the ones I've talked with, are scared and angry — much more so than I can ever remember."

If the people get angry enough, the administrative, legislative and judicial branches of government at all levels will respond with forceful action against crime. It is a response that is long overdue.

## THOUGHTS OF MAN



Public opinion is stronger than the Legislature, and nearly as strong as the Ten Commandments.

CHARLES DUDLEY WARNER

1981 by Chicago Tribune-N.Y. News Synd. Inc.  
All Rights Reserved



Chas Mc Dowell - Gridiron

- White House Correspondents - 4/25

Clifford Evans - 638-1750