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THE UNITARY CRIMINAL PROCEEDING: DENIAL OF THE PRIVILEGE AGAINST SELF-INCRIMINATION

In American courts the criminal defendant is guaranteed the privilege against self-incrimination.[1] This privilege protects him from being compelled to give testimony against himself which will tend to incriminate him.[2] In *Johnson v. Commonwealth*[3] an argument advanced by the defendant on appeal indicated that there is a crucial relationship between the privilege against self-incrimination and the use of a two-stage trial procedure. This procedure provides separate trials on the issues of guilt and punishment in capital cases.[4] It is based upon the theory that the jury can only reach a rational decision on the assessment of punishment *after* a thorough study of the prior criminal record and general background of the defendant which is

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[1]U.S. CONST. amend. V, provides, in part:

> [N]or shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law....

Similar provisions are found in the constitutions of nearly all the states. *E.g.*, VA. CONST. art. 1, § 8.

[2]Emspak v. United States, 349 U.S. 190 (1955); Hoffman v. United States, 341 U.S. 479 (1951); Blau v. United States, 340 U.S. 332 (1951); United States v. Gordon, 236 F.2d 916 (2d Cir. 1956). For cases dealing with state constitutional privileges against self-incrimination, *see Ex parte* Blanche, 40 Cal. App. 2d 687, 105 P.2d 635 (1940); Jenkins v. State, 73 Ga. App. 515, 37 S.E.2d 230 (1946); People v. Tavenier, 384 Ill. 388, 51 N.E.2d 528 (1943); Duckworth v. District Court, 220 Iowa 1350, 264 N.W. 715 (1936); Fitzgerald v. Commonwealth, 269 Ky. 800, 108 S.W.2d 1041 (1937); Commonwealth v. Frank, 159 Pa. Super. 271, 48 A.2d 10 (1946).

[3]208 Va. 481, 158 S.E.2d 725 (1968).

[4]In the first phase of the trial the sole issue is guilt or innocence; then, if the defendant is found guilty and the death penalty can be imposed, further proceedings are held on the issue of punishment. At this second phase of the trial, evidence is admissible concerning any circumstances surrounding the crime, the defendant's background and past history, and any facts in mitigation or aggravation of the crime. For a discussion of the penalty trial procedure, *see* Note, *The California Penalty Trial*, 52 CALIF. L. REV. 386 (1964). *See generally* Knowlton, *Jury Discretion in Capital Cases*, 101 U. OF PA. L. REV. 1099, 1135-36 (1953); 110 U. OF PA. L. REV. 1036 (1962); 19 U. OF PITT. L. REV. 670 (1958).

The split trial cures the major problem in sentencing capital cases, which is not present in non-capital cases. In non-capital cases the function of the jury in nearly all jurisdictions is limited to determining guilt or innocence. *See* Handler, *Background Evidence in Murder Cases*, 51 J. CRIM. L.C. & P.S. 317 (1960) for a collection of these statutes. Fixing the penalty is the function of the court, which may receive any additional information relevant to sentence. However, in capital cases the jury must fix the penalty without the aid of additional information that is available to the court in non-capital cases.

unavailable in the unitary procedure.[5] The two-stage procedure has been adopted by five states[6] and is advocated by the Model Penal Code.[7]

Johnson was convicted of first degree murder and the jury assessed his punishment at death. Witnesses placed Johnson near the scene of the crime and the ten year old son of the deceased, who was present at the commission of the crime, identified the defendant. On appeal, the defendant contended that the Virginia procedure of simultaneously submitting to the jury the issues of guilt and assessment of punishment[8] precludes a rational decision by the jury and burdens the defendant's privilege against self-incrimination.[9] The defendant argued that if he wanted to personally present information concerning his background and character to be used by the jury in the assessment of punishment, he would have to waive his privilege

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[5]*See* MODEL PENAL CODE § 201.6, Comment 5 (Tent. Draft No. 9, 1959), which concludes that "[t]here is no reason to insist upon a choice between a method which threatens the fairness of the trial of guilt or innocence and one which detracts from the rationality of the determination of the sentence. The obvious solution ... is to bifurcate the proceeding, abiding strictly by the rules of evidence until and unless there is a conviction, but once guilt has been determined opening the record to the further information that is relevant to sentence." *See also* United States v. Curry, 358 F.2d 904, 914 (2d Cir. 1966); United States *ex rel.* Thompson v. Price, 258 F.2d 918, 922 (3d Cir. 1958) (dictum), *cert. denied,* 358 U.S. 992 (1956). *See* MODEL PENAL CODE § 1.02(2) (Proposed Final Draft No. 1, 1961), for a discussion of the objectives of such a sentencing system.

[6]CAL. PEN. CODE § 190.1 (Supp. 1967) provides, in part:

> The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty ... there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty.

Accord, CONN. GEN. STAT. ANN. § 53-10 (Supp. 1966); N. Y. REV. PEN. LAW § 125.30 (1967); PA. STAT. ANN. tit. 18, § 4701 (1963); TEX. CODE CRIM. PROC. art. 37.07 (1966).

[7]The Code provides:

> [I]t [the court] shall conduct a separate proceeding to determine whether the defendant should be sentenced for a felony of the first degree or sentenced to death ... in the proceeding, evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, [and] mental and physical condition .... Any such evidence which the Court deems to have probative force may be received, regardless of its admissibility under the exclusionary rules of evidence ....

MODEL PENAL CODE § 210.6 (Proposed Official Draft, 1962).

[8]VA. CODE ANN. § 19.1-291 (1960).

[9]158 S.E.2d at 730.

against self-incrimination and testify before the issue of guilt had been determined.

Although it rejected the defendant's argument on the ground that there was no authority to support it, the court intimated that it favored such a procedure.[10] The court, noting the language of *Frady v. United States*,[11] which held that a two-stage procedure is most desirable even if the Constitution is not thought to require it, indicated that such an innovation should be initiated by the legislature.

Despite the fact that the Virginia court found no satisfactory authority for the defendant's argument, there is persuasive authority for such a proposition. In general, it is well established that a penalty may not be imposed for the exercise of a constitutional right. In *United States v. Curry*,[12] the United States Circuit Court of Appeals, ruling on an almost identical argument,[13] stated:

> Since the unitary trial poses these fundamental problems, [the possible denial of due process] we do not interpret the silence of Congress on this question as precluding the trial judge from confining the first presentation to the jury to the issue of guilt when the defendant's right to a fair trial would be jeopardized by a unitary trial.[14]

The theory underlying both *Frady* and *Curry*, as well as the defendant's argument in the principal case, is that the unitary trial penalizes the defendant for invoking his privilege not to testify, and thereby denies him due process of law. Whether the unitary procedure is a penalty could depend upon two factors: (1) the scope of the definition accorded the word "penalty"; (2) the practical degree of hardship the defendant must bear for invoking his fifth amendment privilege.

Until recently, the fifth amendment guarantee was confined to the federal courts and to the historic types of compulsions which originally gave rise to the privilege. However, in 1964 the Supreme Court of

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[10] *Id.* at 730-31.

[11] 348 F.2d 84, 92 (D.C. Cir. 1965) (concurring opinion), *cert. denied*, 382 U.S. 909 (1965).

[12] 358 F.2d 904 (2d Cir. 1966).

[13] The defendant argued that the unitary procedure compelled him to take the stand and present matters relevant to his sentence before the issue of his guilt had been determined. 358 F.2d at 913.

[14] 358 F.2d at 914. However, Curry's conviction was affirmed because the court concluded that, on the particular facts before it, the defendant's right had not been prejudiced. *See also* United States *ex rel.* Thompson v. Price, 258 F.2d 918 (3d Cir. 1958) *cert. denied* 358 U.S. 992 (1958); State v. Cameron, 126 Vt. 244, 227 A.2d 276 (1967).

the United States in *Malloy v. Hogan*[15] overruled an entire line of decisions[16] and extended the fifth amendment privilege against self-incrimination to state criminal proceedings through the due process clause of the fourteenth amendment. The result of *Malloy* and subsequent decisions has been to cast doubt upon the criminal procedure of the several states and on the ultimate bounds of the fifth amendment privilege.[17]

In the past three years, the Supreme Court of the United States has considered two cases that deal with the meaning of "penalty" with respect to the fifth amendment privilege and its application to the states. In *Griffin v. California*,[18] the Court held unconstitutional a provision of the California Constitution[19] which permitted the court and counsel to comment on the failure of the defendant to take the stand in his own behalf. The Court noted that the effect of such comment was to allow the state to use the silence of the accused as additional evidence of his guilt, thereby penalizing the accused for invoking a constitutional privilege.[20] The significance of the decision is best explained by the dissenting opinion. The dissent argued that the fifth amendment privilege had only been applied to those harsh types of compulsions, such as incarceration or banishment, which historically gave rise to the privilege and noted the comment rule did not fall within such category of abuses.[21] Thus, the *Griffin* majority significantly broadened the area to which the definition of penalty applies.

Then in *Spevack v. Klein*,[22] an attorney appealed his disbarment for invoking the fifth amendment privilege upon refusing to testify

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[15]378 U.S. 1 (1964).

[16]Knapp v. Schweitzer, 357 U.S. 371 (1958); Palko v. Connecticut, 302 U.S. 319 (1937); Snyder v. Massachusetts, 291 U.S. 97 (1934); Twining v. New Jersey, 211 U.S. 78 (1908).

[17]*See* Dionisopoulos, *New Dimensions to the Privilege Against Self-Incrimination: The Supreme Court and the Fifth Amendment*, 44 CHI.-KENT L. REV. 1 (1967); Hofstadter & Levittan, *Immunity and the Privilege Against Self-Incrimination—Too Iittle and Too Much*, 39 N.Y.S.B. J. 105 (1967); Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion*, 10 ST. LOUIS L. REV. 327 (1966); 53 CALIF. L. REV. 611 (1965); 78 HARV. L. REV. 223 (1964).

[18]380 U.S. 609 (1965).

[19]CAL. CONST. art. 1, § 13. The relevant provision reads:

> [I]n any criminal case, whether the defendant testifies or not, his failure to explain or deny by his testimony any evidence or facts in the case against him may be commented on by the court and by the counsel, and may be considered by the court or by the jury.

[20]380 U.S. at 613.

[21]*Id.* at 620-21.

[22]385 U.S. 511 (1967).

or produce records at a judicial inquiry. The Supreme Court, mindful of its decision in *Griffin,* further extended the definition of penalty:[23] "In this context [fifth amendment privilege] 'penalty' is not restricted to fine or imprisonment. It means ... the imposition of any sanction which makes the assertion of the fifth amendment privilege 'costly'."[24] Moreover, "[t]he threat of disbarment and loss of professional standing ... are powerful forms of compulsion to make a lawyer relinquish the privilege [against self-incrimination]."[25] If loss of economic or professional standing is a powerful form of compulsion, *a fortiori,* the risk of the death penalty rather than a prison sentence assumed by the defendant who invokes his right not to testify, is a powerful form of compulsion and therefore a penalty within the meaning of *Griffin* and *Spevack.*

The practical degree of hardship faced by the accused in a capital case when he invokes his privilege against self-incrimination is very great because the death sentence is left to the discretion of the jury.[26] When the defendant does take the witness stand it is generally agreed that evidence in mitigation of punishment may be introduced.[27] Thus, evidence of environment,[28] motive,[29] mental defect,[30] provocation,[31] age of the defendant,[32] and intoxication[33]

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[23]*Spevack* expressly overruled *Cohen v. Hurley,* 366 U.S. 117 (1961), a case identical to *Spevack,* which had allowed New York to construe her own privilege against self-incrimination and to exclude from it judicial inquiries.

[24]385 U.S. at 515.

[25]*Id.* at 516.

[26]*See* Knowlton, *Problems of Jury Discretion in Capital Cases,* 101 U. OF PA. L. REV. 1099, 1100 (1953), for a discussion of the statutes of 35 states which provide that the jury shall determine whether the death sentence should be imposed.

[27]United States v. Minieri, 303 F.2d 550 (2d Cir. 1962); Miller v. State, 40 Ala. App. 533, 119 So. 2d 197 (1959); Wright v. State, 93 Ga. App. 542, 92 S.E.2d 229 (1956); People v. Lindstrom, 9 Ill. App. 2d 570, 133 N.E.2d 532 (1961). *See also* 5 F. WHARTON, CRIMINAL LAW AND PROCEDURE § 2212 (12th ed. 1957).

[28]State v. Henry, 196 La. 217, 198 So. 910 (1941); State v. Mount, 30 N.J. 195, 152 A.2d 343 (1959); Commonwealth v. Mount, 416 Pa. 343, 205 A.2d 924 (1965).

[29]Ray v. State, 253 Ala. 329, 45 So. 2d 4 (1950); People v. Wooten, 162 Cal. App. 2d 804, 328 P.2d 1040 (1958); State v. Hoffer, 238 Iowa 820, 28 N.W.2d 475 (1947); Ivey v. State, 210 Tenn. 422, 360 S.W.2d 1 (1962).

[30]People v. Williams, 200 Cal. App. 2d 838, 19 Cal. Rptr. 743 (Dist. Ct. App. 1962); State v. Gramenz, 256 Iowa 134, 126 N.W.2d 285 (1964); Swartz v. State, 118 Neb. 591, 225 N.W. 766 (1929); Commonwealth v. Thompson, 389 Pa. 382, 133 A.2d 207 (1957); State v. Collins, 50 Wash. 2d 740, 314 P.2d 660 (1957).

[31]Hill v. State, 27 Ala. App. 55, 166 So. 60 (1936); People v. Brust, 47 Cal. App. 2d 776, 306 P.2d 480 (1957); Rountree v. State, 113 Fla. 443, 152 So. 20 (1934); Ward v. State, 96 Tex. Crim. 278, 257 S.W. 536 (1924).

[32]Ridge v. State, 28 Okla. Crim. 150, 229 P. 649 (1924).

[33]State v. Hudson, 85 Ariz. 77, 331 P.2d 1092 (1958); People v. Strader, 23 Ill. 2d 13, 177 N.E.2d 126 (1961); State v. Trantino, 44 N.J. 358, 209 A.2d 117 (1965); State v. French, 171 Ohio St. 501, 172 N.E.2d 613 (1961).

has been admitted in mitigation of sentence. If the accused does not take the witness stand, the jury is deprived of information which would be highly relevant in deciding whether to impose the death sentence.[34] Therefore, as a practical matter, the accused may be compelled to take the witness stand, in which case he is deemed to have waived his privilege against self-incrimination and is thereby subjected to cross-examination and impeachment to the same extent as any other witness.[35]

When the accused does not take the witness stand, the closing argument is the only opportunity for the jury to hear information relevant to the sentence; it is generally agreed that counsel may argue the issue of punishment.[36] While this gives the prosecution an opportunity to ask for the death sentence, it places the counsel for the defense in a particularly unfavorable position. The defense attorney must first argue that the defendant is not guilty, and then argue even if he is guilty, capital punishment should not be imposed.[37] To avoid this anomoly, a defense attorney must often ignore the issue of capital punishment—a course of conduct made necessary by the unitary procedure.

Even if the framework of the unitary trial were modified to permit the defendant to testify solely on matters relevant to the assessment of sentence,[38] the practical consequence of such a change would still

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[34]Where the accused does not take the witness stand, the prosecution may still introduce certain evidence detrimental to the defendant. Evidence of the defendant's prior misconduct is admissible if it is relevant for some purpose other than merely showing that the defendant is the sort of person likely to commit the charged crime. Montgomery v. United States, 203 F.2d 887 (5th Cir. 1953); United States v. Krulewitch, 145 F.2d 76 (2d Cir. 1944); 1 F. WHARTON, CRIMINAL EVIDENCE § 233 (12th ed. 1955).

See also Note, *Procedural Protections of the Criminal Defendant*, 78 HARV. L. REV. 426, 437 (1964); Comment, *Other Crimes Evidence at Trial*, 70 YALE L.J. 763 (1961).

[35]Brown v. United States, 356 U.S. 148 (1958); Brown v. State, 243 Ala. 529, 10 So. 2d 855 (1942); Grigsby v. Commonwealth, 299 Ky. 721, 187 S.W.2d 259 (1945); People v. Dupounce, 133 Mich. 1, 94 N.W. 388 (1903); People v. Shapiro, 308 N.Y. 453, 126 N.E.2d 559 (1955).

[36]Burgunder v. State, 55 Ariz. 411, 103 P.2d 256 (1940); House v. State, 192 Ark. 476, 92 S.W.2d 868 (1936); People v. Goodwin, 9 Cal. 2d 711, 72 P.2d 551 (1937); Biggers v. State, 171 Ga. 596, 156 S.E. 201 (1930); Howell v. State, 102 Ohio St. 411, 131 N.E. 706 (1921); Commonwealth v. Brown, 307 Pa. 515, 164 A. 726 (1933); State v. Buttry, 199 Wash. 228, 90 P.2d 1026 (1939).

[37]While this problem is alleviated by the two-stage trial procedure, there are several undesirable effects of the two-stage procedure. See Note, *The California Penalty Trial*, 52 CALIF. L. REV. 386 (1964), for a discussion of the undesirable effects of the two-stage trial in cases where the defendant pleads insanity as a defense.

[38]There is no constitutional requirement that the defendant in a criminal case be allowed to testify on the issue of punishment. However, a sentence will