FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION IN CIVIL CASES

GARY A. UDASHEN
BARRY SORRELS, P.C.
SORRELS & UDASHEN
2301 CEDAR SPRINGS ROAD
SUITE 400
DALLAS, TEXAS 75201
214-468-8100
214-468-8104 FAX
WWW.SORRELSUDASHEN.COM
GAU@SORRELSUDASHEN.COM
BA@SORRELSUDASHEN.COM

I. CONSTITUTIONAL PROVISIONS

U. S. Const., Fifth Amendment:

"No person shall be compelled in any criminal case to be a witness against himself."

Texas Const., Art. 1, Sect. 10:

". . . accused shall not be compelled to give evidence against himself."

The protection of the Fifth Amendment to the U. S. Const. applies to the states under the Fourteenth Amendment to the U. S. Const. *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Spevack v. Klein*, 385 U.S. 511 (1967); *Garrity v. New Jersey*, 385 U.S. 493 (1967).

APPLICATION OF PRIVILEGE TO CIVIL CASES

In *Andresen v. Maryland*, 49 L.Ed.2d 627, 96 S.Ct. 2737 (1976), the Supreme Court noted that the development of the protection against self incrimination was in part a response to certain historical practices, such as ecclesiastical inquisition and the proceedings of the Star Chamber which placed a premium on compelling subjects of the investigation to admit guilt from their own lips, the "historic function" of the privilege having been to protect a natural individual from compulsory incrimination through his own testimony or personal records.

McCarthy v. Arndstein, 266 U.S. 34 (1924). Privilege against self incrimination under the Fifth Amendment "applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it."

Butterfield v. State, 992 S.W.2d 448 (Tex. Crim. App. 1999). The Fifth Amendment

provides that no person shall be compelled in any criminal case to be a witness against himself. The Fifth Amendment privilege can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory. The protection extends equally to civil proceedings because the nature of the protection goes to the questions asked, not the proceeding itself.

Gebhardt v. Gallardo, 891 S.W.2d 327 (Tex. App. - San Antonio 1995). A party does not lose his Fifth Amendment right against self incrimination in a civil suit. Whether or not an indictment is pending, a witness is entitled to assert this fundamental constitutional right. *See*, *Maness v. Meyers*, 419 U.S. 449, 464, 95 S.Ct. 584, 594, 42 L.Ed.2d 574, 587 (1975) (Fifth Amendment may be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory); *Ex parte Butler*, 522 S.W.2d 196, 198 (Tex. 1975) (Texas Constitution, Art. I, sec. 10, guarantees privilege against self incrimination, "fact that the inquiry is made in the course of a civil proceeding does not interdict the witness's privilege"); *Burton v. West*, 749 S.W.2d 505, 507 (Tex. App. - Houston [lst Dist.] 1988, orig. proceeding) (defendant in drug proceeds forfeiture case permitted to assert Fifth Amendment to discovery); *Smith v. White*, 695 S.W.2d 295, 297 (Tex. App. - Houston [lst Dist.] 1985, orig. proceeding) (defendants under indictment entitled to assert Fifth Amendment rights in civil custody dispute).

The assertion of the privilege against self incrimination must be raised in response to each specific inquiry or it is waived. Each assertion of the privilege rests on its own circumstances. Blanket assertions of the privilege are not permitted. *See*, *United States v.*

White, 589 F.2d 1283, 1286-87 (5th Cir. 1979); *Meyer v. Tunks*, 360 S.W.2d 518, 523 (Tex. 1962).

Hoffman v. United States, 341 U.S. 479, 486-87 (1951). Privilege against self-incrimination applies not only to responses that in themselves would sustain a conviction, but also to responses that would furnish a link in the chain of evidence necessary to prosecute the person claiming the privilege. The privilege should be sustained unless it clearly appears that the claim is mistaken, i.e., unless it is perfectly clear from careful consideration of all circumstances that the witness is mistaken and the answer cannot possibly have incriminating effect.

Boler v. State, 2005 WL 525900 (Tex. App. - Houston [lst Dist.] 2005). A trial court "cannot compel a witness to answer unless it is perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken in asserting the privilege, and that the answer cannot possibly tend to incriminate the witness." *Grayson v. State*, 684 S.W.2d 691, 696 (Tex. Crim. App. 1984). In determining whether the witness really apprehends danger in answering a question, the judge cannot permit himself to be skeptical; rather must he be acutely aware that in the deviousness of crime and its detection incrimination may be approached and achieved by obscure and unlikely lines of inquiry. *Id.* When a witness invokes his Fifth Amendment right against self incrimination on the advice of the witness's counsel, the trial court is not obligated to make any further determination. *Chennault v. State*, 667 S.W.2d 299, 302 (Tex. App. - Dallas, 1984, pet. ref'd) (citing *Ross v. State*, 486 S.W.2d 327, 328 (Tex. Crim. App. 1972)).

Ex parte Butler, 522 S.W.2d 196 (Tex. 1975); *Smith v. White*, 695 S.W.2d 295, 297 (Tex. App. - Houston [lst Dist.] 1985). Defendant is not sole judge of right to assert the privilege. Judge must decide if refusal to answer is based on good faith and is justified under the circumstances.

Sinclair v. Savings and Loan Commissioner of Texas, 696 S.W.2d 142 (Tex. App. - Dallas 1985). Trial court should inspect subpoenaed documents to determine if they are potentially incriminating. If incriminating nature is not obvious, trial court should question witness, in camera, to determine validity of Fifth Amendment assertion.

Kugle v. Daimler Chrysler Corp., 88 S.W.3d 355, 361 (Tex. App. - San Antonio 2002). To protect a witnesses privilege against self incrimination a trial court must consider the effect discovery in a civil case may have on pending criminal proceedings. However, pending criminal case does not impair court's authority to proceed with a civil case with same issues or parties.

Burton v. West, 749 S.W.2d 505, 508 (Tex. App. - Houston [lst Dist.] 1988); *Public Safety Officers Association v. Denton*, 897 S.W.2d 757, 763-63 (Tex. 1995). Privilege applies to discovery. However, a blanket objection is improper. It must be made question by question and the validity of the assertion is determined as to each question.

Victoria v. State, 522 S.W.2d 919, 921 (Tex. Crim. App. 1975) privilege may be waived by witnesses testimony with respect to the incriminating matter, but waiver in one proceeding does not necessarily carry over to another proceeding.

Batson v. Rainey, 762 S.W.2d 717, 720 (Tex. App. - Houston [lst Dist.] 1988).

Privilege does not extend to past conduct that cannot be prosecuted because it is barred by the statute of limitations.

Republic Insurance v. Davis, 856 S.W.2d 158, 161 (Tex. 1993). Offensive use of privilege and refusal to comply with discovery can be sanctioned by trial court. Offensive use of privilege occurs when the

1) the party is seeking affirmative relief

2) the party is using a privilege to protect outcome determination information.

3) the protected information is not otherwise available to the other party.

Lefkowitz v. Turley, 414 U.S. 70 (1973). Government may not bar an individual from participating in public contracts based on refusal, on self-incrimination grounds, to testify before the grand jury.

Gardner v. Broderick, 392 U.S. 273 (1968). Employment may not be explicitly conditioned on a waiver of Fifth Amendment rights.

Spevack v. Klein, 385 U.S. 511 (1967). Attorneys refusal, on Fifth Amendment grounds, to produce financial records and testify in disciplinary proceeding was not a constitutionally permissible basis alone for his disbarment.

Baxter v. Palmigiano, 425 U.S. 308 (1976). It is constitutionally permissible to draw an adverse inference from a party's invocation of the Fifth Amendment in a non-criminal proceeding. *See*, *SEC v. Colello*, 139 F.3d 674, 677-78 (9th Cir. 1998) (proper to shift summary judgment burden to a defendant who claimed Fifth Amendment privilege and refused to testify in a civil SEC proceeding). Party cannot be found liable solely on basis of

reliance on Fifth Amendment. *Baxter*, 425 U.S. at 318; *Lefkowitz*, 431 U.S. at 808, n. 5; *Lasalle Banks Lake View v. Seguban*, 54 F.3d 387 (7th Cir. 1995); *National Acceptance Co. of America v. Bathalter*, 705 F.2d 924 (7th Cir. 1963) (assertion of Fifth Amendment in answer to complaint does not constitute an admission of the allegations and does not relieve the plaintiff of the need to adduce proof). There must be other evidence.

Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553 (lst. Cir. 1989). Where police officer properly invoked his right against self incrimination at a deposition regarding shooting of an unarmed civilian, trial court acted within its discretion in precluding officer from testifying at the trial.

Wehling v. Columbia Broadcasting System, 608 F.2d 1084 (5th Cir. 1980). Ordering the staying of discovery in a civil suit until the three year statute of limitations on criminal action expired. *See also*, *United States Kordel*, 397 U.S. 1 (1970) (allowing parallel civil and criminal proceedings).

Draper v. State, 596 S.W.2d 855 (1980). A witness may claim the privilege, but if he answers the incriminating question, he may be compelled to give every detail of the incriminating answer.

Malloy v. Hogan, 378 U.S. 1 (1964). It is not necessary that a witness explain how his answer will tend to incriminate him, since this would compel him to surrender the protection to which the privilege is designed to guarantee. The test for determining if the privilege is validly asserted was set out in *Malloy*. It is "To sustain the privilege, it need only be evidenced from the implication of the question, in the setting in which it is asked, that a

responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosures would result. In applying that test, the judge must be perfectly clear from a careful consideration of all the circumstances in the case that the witness is mistaken and that the answers cannot possibly have such tendency to incriminate."

Garner v. United States, 424 U.S. 648 (1976); *United States v. Kordel*, 397 U.S. 1 (1970). A person who makes incriminating disclosures on his income tax return has waived his privilege, and the disclosures are admissible in a non-tax proceeding. A person must claim his privilege at the time of making his return or he waives it.

Counselman v. Hitchcock, 142 U.S. 547 (1892); *McCarthy v. Arndstein*, 266 U.S. 34 (1924). The privilege against self incrimination extends not only to criminal cases, but also to any trial, investigation, inquiry, or other proceeding in which a witness may be compelled to testify as to facts that could conceivably result in the filing of criminal charges.

Ex parte Muncy, 163 S.W. 29 (Tex. 1913); *McCarthy v. Arndstein*, 266 U.S. 34 (1924). The privilege extends not only to the accused, but also to any witness.

United States v. Wong, 431 U.S. 174 (1977). A witness is called to testify before Grand Jury while under investigation for possible criminal activity but is not warned of his Fifth Amendment right. Witness commits perjury. Can the perjured statements be suppressed at the perjury trial. No. Fifth Amendment does not protect or condone perjury, and even if a witness before the grand jury receives no warning, lying is unjustified and the defendant cannot stand behind the compulsion of testifying or incriminating oneself.

Maness v. Meyers, 419 U.S. 449 (1975). A lawyer may not be held in contempt for

advising his client, during the trial of a civil case, to refuse to produce material demanded by a subpoena duces tecum, when the lawyer believes in good faith the material may tend to incriminate the client. The witness makes the decision himself.

Couch v. United States, 409 U.S. 322 (1973) held that a taxpayer could assert no Fifth Amendment right to withhold from the Internal Revenue Service her books and records which had been turned over to her accountant, the court saying that it was important to reiterate that the Fifth Amendment privilege was a personal one, adhering basically to the person, not to information that might incriminate him, and that in the words of Mr. Justice Holmes, "a party is privileged from producing the evidence but not from its production." The Constitution explicitly prohibited compelling an accused to bear witness "against himself," it necessarily did not proscribe incriminating statements elicited from another, the court noted, and compulsion upon the person asserting it was an important element of the privilege, the prohibition of compelling a man to be a witness against himself being a prohibition of the use of physical or moral compulsion to extort communications from him.

California Bankers Asso. v. Shultz, 416 U.S. 21 (1974) upheld the constitutionality of the Bank Secrecy Act of 1970, it rejected an argument of certain plaintiffs who were customers of the banks that the recordkeeping requirements imposed on the banks by the Act violated the customers' Fifth Amendment rights, the court pointing out that a party incriminated by evidence produced by a third party sustained no violation of his own Fifth Amendment rights.

United States v. Nobles, 422 U.S. 225 (1975), arose from a District Court's order

forbidding an investigator for the defense to testify about his interviews with certain prosecution witnesses unless counsel for the accused made a copy of the investigator's report available to the prosecution. The Supreme Court, holding this not a violation of the self incrimination clause of the Fifth Amendment, pointed out that the Fifth Amendment privilege was an intimate one which protected a private inner sanctum of individual feeling and thought and proscribed state intrusion to extract self-condemnation. The court said that the privilege was a personal privilege, adhering basically to the person, not to information that might incriminate him, and that the constitutional guaranty protected only against forced individual disclosure of a testimonial or communicative nature.

Fisher v. United States, 425 U.S. 391 (1976), held that judicial enforcement of a summons against the taxpayers' attorneys to produce the taxpayers' tax records did not violate the taxpayers' Fifth Amendment privilege against self incrimination. It pointed out that enforcement against a taxpayer's lawyer did not "compel" the taxpayer to do anything, and certainly would not compel him to be a "witness" against himself, the Fifth Amendment being limited to prohibiting the use of physical or moral compulsion exerted on the person asserting the privilege. This is true, the court continued, whether or not the Amendment would have barred a subpoena directing the taxpayer to produce the documents while they were in his hands. The fact that the attorneys were agents of the taxpayers did not change this result, the court added, because it was the extortion of information from the "accused" which offended one's sense of justice. The court said that agent or no, the lawyer was not the "accused," but the taxpayer was, and that nothing was being extorted from him.

Wilson v. United States, 221 U.S. 361 (1911). Privilege of an individual may not be invoked to refuse to produce corporate records when the subpoena is directed to the corporation. Under *Dreier v. United States*, 221 U.S. 394 (1911), the same is true when the subpoena is directed to the individual corporate officer. Result same when the corporation has been dissolved, *Wheeler v. United States*, 226 U.S. 478 (1913), or where the records of the corporation were in the hands of the sole shareholder, *Grant v. United States*, 227 U.S. 74 (1913). Same principle applies to deny privilege in cases involving officer of the following:

Labor Union - *United States v. White*, 322 U.S. 694 (1944); *Curcio v. United States*, 354 U.S. 118 (1957).

Refugee Committee - *United States v. Fleischmen*, 339 U.S. 349, 357 (1950)

Communist Party - *Rogers v. United States*, 340 U.S. 372, 380 (1951)

Couch v. United States, 409 U.S. 322 (1973); *Curcio v. United States*, 354 U.S. 118 (1957). A person may not be compelled to produce records if the act of production is incriminating, but the records themselves are not privileged. The privilege does extend to testimony about corporate records even if there is no privilege regarding production of the records.

United States v. John Doe, 465 U.S. 605 (1984). Grand Jury investigation regarding corrupt award of contracts, subpoenas to the owner of sole proprietorship for production of business records of his companies. Supreme Court held that the contents of these type of business papers are not privileged under Fifth Amendment since their creation and existence

was not compelled. However, the act of production of the documents cannot be compelled because the act of production is privileged. The act of production could be compelled by giving the person subpoenaed use immunity, prohibiting the use by the government against him the fact he produced the documents.

Ohio v. Reiner, 532 U.S. 17, 121 S.Ct. 1252, 149 L.Ed.2d 158 (2001)

Supreme Court of Ohio held that a witness who denies all culpability does not have a valid Fifth Amendment privilege against self-incrimination.

United States Supreme Court reversed and holds:

1. Privilege protects the innocent as well as the guilty.

2. Fifth Amendment privilege against self-incrimination is available to those who claim innocence, since innocent witnesses' truthful responses may provide government with incriminating evidence from the speakers own mouth.

3. Babysitter called as a witness in prosecution of father of baby who had died of shaken baby syndrome could assert Fifth Amendment privilege against self-incrimination even though she had denied any involvement in the death; babysitter had reasonable cause to apprehend danger from her answers, since she had spent extended periods alone with baby preceding death and defenses theory was that babysitter was responsible.

ASSERTING THE PRIVILEGE
WHAT TO SAY

I refuse to answer based on my rights under the Fifth Amendment to the U. S. Constitution.