Asserting the Fifth Amendment in Court and the Granting of Immunity to a Witness

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The first ten amendments to the U.S. Constitution are commonly known as the Bill of Rights and were ratified on December 15, 1791. It is remarkable how many of these amendments are still resilient today throughout the United States. Their individual freedoms against government interference include: the freedom of speech and religion and the right to peaceably assemble (First Amendment); the right to keep and bear arms (Second Amendment); the protection against unreasonable searches and seizures (Fourth Amendment); double jeopardy and due process protections, the prohibition against compelled self-incrimination, and compensation for private property taken for public use (Fifth Amendment); the right to counsel, speedy and public trial, impartial jury, confronting witnesses, and compulsory process to obtain witnesses (Sixth Amendment); and the protections against excessive bail and fines and cruel and unusual punishments (Eighth Amendment). This post focuses on the Fifth Amendment self-incrimination provision in the courtroom and the granting of immunity to a witness to compel testimony.

The Fifth Amendment privilege protects a person against compelled self-incrimination. A similar privilege exists in section 23 of Article I of the North Carolina Constitution, which has not been interpreted more expansively than the Fifth Amendment. While the privilege protects a person against compelled testimony and similar communications, it does not against compelled nontestimonial acts such as submitting to fingerprints, photographs, and sobriety testing, speaking for identification, appearing in lineups, and giving blood samples. *See e.g.*, Schmerber v. California, 384 U.S. 757, 764-65 (1966) (withdrawal and chemical analysis of blood did not implicate defendant's "testimonial capacities" and thus did not violate Fifth Amendment). The privilege may be invoked in any proceeding, civil or criminal, including a criminal investigation. It protects against any compelled disclosures that a person reasonably believes could be used in a criminal prosecution or could lead to the discovery of other evidence that might be used in a prosecution. Kastigar v. United States, 406 U.S. 441, 444-45 (1972). When a witness invokes the privilege, the trial court must determine whether it may be "reasonably inferred" that the answer may be incriminating, and the invocation should be "liberally construed."

A criminal defendant has the right under the Fifth Amendment privilege to decline to take the stand. If a defendant decides not to testify, the State or a judge may not call the defendant to the stand, and a codefendant may not call the defendant to the stand at their joint trial. However, a defendant who voluntarily takes the stand and testifies in his or her own behalf cannot invoke the privilege on cross-examination concerning matters made relevant by direct examination. When a defendant exercises his or her Fifth Amendment privilege by not testifying at trial, any reference by the State or the trial court about the defendant's election not to testify violates the Fifth Amendment.

A witness who is not a criminal defendant has the right under the Fifth Amendment privilege to refuse to answer a question if: (1) the answer may tend to incriminate the witness; (2) the witness is not immune from prosecution; and (3) the witness has timely invoked the privilege in response to a question. However, a witness who testified on direct examination cannot invoke the privilege on cross-examination concerning matters made relevant by direct examination.

A judge has the discretion whether (1) to advise a witness of his or her right not to answer incriminating questions, and (2) to allow the State or the defendant to call a witness to invoke the privilege before the jury.

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A witness who invokes the Fifth Amendment privilege against self-incrimination in any criminal or civil hearing or proceeding, including a grand jury, may be ordered to testify or produce other information when the witness has been granted immunity under Article 61 of Chapter 15A. Although an order granting immunity may be issued in any criminal or civil matter, only a district attorney is authorized to apply for an order, and the application must be made before a superior court judge. G.S. 15A-1052(a). Thus, almost all applications involve criminal proceedings.

If the State later prosecutes the immunized witness, it has the burden of proving at the later trial that its evidence was obtained completely independent of the compelled testimony or information provided by the immunized witness. Although the standard of the burden of proof has not been decided by North Carolina appellate courts, they likely would follow federal law and require proof by a preponderance of evidence. United States v. Slough, 641 F.3d 544, 550 (D.C. Cir. 2011).

This has been a brief overview. If you are interested in a more detailed discussion, you may access my recently-published section, "Fifth Amendment Privilege and Grant of Immunity," in the North Carolina Superior Court Judges' Benchbook, which is available here.

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