THE RIGHT AGAINST SELF-INCRIMINATION IN CPS CASES

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I. The 5th Amendment of the United States Constitution

   No person shall be compelled to be a witness against himself.

For a communication to qualify it must be compelled, incriminatory, and testimonial in nature. *Hubel v. 6th Dist. Ct. of Nevada*, 562 U.S. 577 (2004).

A. History

   The 5th Amendment provision of the United States Constitution that protects against self-incrimination is a unique right originating from England. The right was a defense developed to combat the practice of placing persons under oath and compelling them to either remain silent and be tortured, tell the truth, or lie and be punished as a perjurer, and often executed.

   In the United States, at common law and until after the Civil War (1864), a defendant could not take the stand to testify at all. The right against self-incrimination was primarily used as a right of witnesses not to be compelled to give evidence against themselves that would result in criminal or civil liability or public embarrassment.

B. The 5th Amendment has been greatly expanded

   (1) Originally, the defendant could not be called to testify by either the defense or the state. The right against self-incrimination includes all witnesses not just the defendant. There was a need to protect witnesses from governmental abuse.


   (3) Compulsion includes anything which physically or psychologically overcomes the will of a person. It includes not just compulsion from the courts but any governmental agency such as the police or its agents. It may include persons from the private sector if they are directed or encouraged by the state. *Welch v.*

(4) The right not only includes spoken words, but also anything which reveals the contents of the mind. Doe v. U.S., 487 U.S. 201 (1988).

C. When the 5th Amendment does not fully protect those utterances, the state constitutions and statutes often do.

D. The Right Against Self-Incrimination applies to both civil and criminal cases, formal or informal. McCarthy v. Anderson, 266 U.S. 34 (1924). The focus is not on the type of proceeding, but on whether the answers to the questions could subject the person who answers to criminal liability in the future. Lefkowitz v. Turley, 414 U.S. 70 (1973).

E. In a civil case, the state has the right to call the opposing party as a witness. However, that individual continues to have their right against self-incrimination if they reasonably fear that the answer sought may be incriminating. Texas Dept. of Pub. Safety Officers Ass’n v. Denton, 897 S.W.2d 757, 760 (Tex. 1995).

F. The right against self-incrimination is automatic in criminal case and one cannot hold it against the defendant or draw any negative inference. However, in civil matters, if the witness fails to testify you can hold it against the witness and make a negative inference. Further, in civil cases, even though any party can call the opposing party as a witness, the Judge rules on whether the witness can assert his 5th amendment right to a given question. The party may not make a blanket assertion against self-incrimination in a civil case. In re Verbois, 10 S.W. 3d 825, 828 (Tex. App. – Waco 2000).

II. The Texas Constitution, Article 1 Section 10.

A person cannot be compelled to give evidence against one’s self.

The Texas version of the 5th Amendment of the United States Constitution is Article 1 Section 10 of the Texas Constitution.
A. History

Originally, Texas gave a fairly broad reading to the Texas Constitution. Texas provided greater protection to its citizens than many of those found in the United States Constitution. At one time, the DWI roadside sobriety tests were considered a violation of this provision. See Beachum v. State, 162 S.W.2d 206 (1942); Apodoca v. State, 146 S.W.2d 381 (1941); Dudley v. State, 548 S.W.2d 706 (Tex.Cr.App. – 1977); Sanchez v. State, 707 S.W.2d 575 (Tex.Cr.App. – 1986). In the 1970s, Texas decided that its Constitution and the United States Constitution were to be interpreted identically. Fortunately, Texas came through this era and now interprets its Constitution independently. Heitman v. State, 815 S.W.2d 681 (Tex.Cr.App. – 1991).

B. Present Time

Texas continues to provide its citizens with more rights and greater protections. The Texas Constitution, Article 1 Section 10, indicates that a person cannot be compelled to give evidence against one’s self, which is more expansive than the 5th Amendment of the United States Constitution which provides that a person cannot be compelled to testify against one’s self.

C. To preserve the right on appeal, one must argue independent state grounds.

III. The Texas Exclusionary Rule, Article 38:23

No evidence obtained in violation of any provision of the United States or Texas Constitutions or laws shall be admitted into evidence against the accused.

A. History

The Texas Exclusionary Rule was passed during prohibition to protect farmers from religious zealots. At that time, private individuals often would join peace officers to recover illegal whiskey. They indicated this aid was to bring to justice those who violated liquor laws. Issues of the United States Constitution 4th
amendment against unreasonable search and seizure and the evidence obtained in violation of said right became applicable to almost every prohibition case. Due to law enforcement and others going onto people’s land at will, and to protect citizens, the Texas Exclusionary Rule was created. The Texas Exclusionary Rule came into being forty years before the United States Exclusionary Rule was applicable to the states.

B. The Exclusionary Rule applies to private persons as well as state officials. State v. Johnson, 939 S.W.2d 596 (Tex.Cr.App. – 1996). The right does not automatically apply, it must be asserted.


IV. Key Concepts

A. State Compulsion

The key factor triggering the 5th Amendment’s protection is state compulsion. If compulsion is present, then the declarant is entitled to immunity. Baltimore v. Boutknight, 493 U.S. 549 (1990); Lefkowitz v. Turley, 414 U.S. 70 (1973).

Caveat - In Texas, immunity must be approved by the court and in writing.

B. Assertion of the Right Against Self-Incrimination.

(1) A trial court cannot compel the disclosure when the right is asserted. If asserted in good faith, the attorney is protected from contempt. Maness v. Meyers, 419 U.S. 449 (1974).

(2) The right against self-incrimination is to be liberally construed unlike other evidentiary privileges. Ullman v. U.S., 350 U.S. 442 (1956).

C. The Balancing Test

Disclosures which may be considered incriminating may be required to be disclosed despite the 5th Amendment. Most of the time they are the result of a regulatory scheme or a state statute which further some compelling state interest. *California v. Beyers*, 402 U.S. 424 (1971); *Baltimore v. Boutknight*, 493 U.S. 549 (1990).

The rationale is the use of the state’s police power which requires that before the state may use its police or coercive power against an individual it must: (1) have a compelling state interest, (2) use the power in the least restrictive manner, and (3) show that the state interest outweighs the individual’s interest. *Marchetti v. U.S.*, 390 U.S. 42 (1968); *Leary v. U.S.*, 395 U.S. 6 (1969).

In Texas, when arguing the balancing test, rights such as the privacy right carry greater weight than they would in other states. Your creative intellect may be of great value in figuring out a least restrictive way to get the result the state seeks.

Keep in mind that a child also has privacy rights. *In re Gault*, 387 U.S. 1 (1967). Texas recognizes this right as a fundamental constitutional right. *State Emp. Union v. Dept. of Mental Health*, 746 S.W. 2d 203 (Tex. 1987).

D. Immunity

(1) Types of Immunity- Transactional, Derivative Use, and Use immunities.


Under Texas Law, the court must approve any granting of immunity. Always make sure to get it in writing.

V. Defensive Strategies and Trial Tips

A. Grand Jury

1. Avoid Appearance

Tell the district attorney that you are going to assert the privilege, and ask that you not be brought before the grand jury. The general rule is that the state is not allowed to call a witness if it is known that individual will assert their 5th Amendment right.

2. Motion to Quash the subpoena

Things to tell the trial court in conference: (a) assert the right, (b) indicate that it is a waste of time, (c) advice that opposing party is acting in bad faith or a political move, (d) offer compromise by turning over the affidavit of testimony.

3. Give the client instructions - write them down.

4. Turn the lemon into lemonade.

B. Pretrial Hearings


2. Have a fallback position if *Simmons* fails.

3. Use all your tools when using the 5th Amendment such as Motion in Limine or approach The Bench to assert the privilege. See TRE 103, 104. See also, *Namet v. U.S.* , 373 U.S. 179 (1963).
(4) Ask the State to stipulate to issues that would have required your client or a witness to testify.

C. Trial

(1) Voir Dire

(a) If the 5th Amendment is an issue in the trial then ask a few questions about whether the jury would follow the law.

(b) Consider using the 5th Amendment to eliminate undesirable jurors. Preemptory challenges—when exercising use the jurors’ views of the 5th Amendment.

(c) The 5th Amendment can be used to set opposing counsel up.


(3) You cannot call a witness if you know they are going to assert the 5th Amendment. This applies equally to both the state and the defense. U.S. v. Reed, 173 F.App. 184 (3rd Cir. 2006); Harman v. McVicar, 95 F.3d 620 (7th Cir. 1996). However, some courts have discretion to allow it. Gray v. Maryland, 796 A.2d. 697 (Md.Ct.App. – 2002); Porth v. State, 868 P.2d 236 (Wyoming – 1994).


(5) Be familiar with Doyle v. Ohio, 426 U.S. 610 (1976), and Sanchez v. State, 707 S.W.2d 575 (Tex.Cr.App. 1986). These cases held silence after the Miranda Warnings are given may not be used against a defendant (likely the most frequent error in local trials).

(6) Remember if there is a violation of the 5th amendment, there is probably a violation of several other amendments and rights such as privacy, the 1st
Amendment, 4th Amendment, 6th Amendment, and corresponding Texas Constitutional Amendments Article I, Sections 3, 9, 10, 12, 19, and 29.

(7) Do not forget you are playing to the Jury. Let them in on some of the argument. You can submit 5th Amendment claims to them.

(8) Remember constitutional claims have a priority on the error scale. Use constitutional objections when available. Always have a twist.

(9) Make sure you have a ruling on all of your objections, and get the State and the court to make comments if possible.

VI. Key Cases

A. Maness v. Meyer, 419 U.S. 449 (1975): A lawyer is not subject to the penalty of contempt for advising his client, during the trial of a civil case, to refuse on 5th Amendment grounds to produce evidence when the lawyer believes in good faith that the material may tend to incriminate his client (9-0 decision). A lawyer should have the benefit of an appellate decision before he must surrender 5th Amendment material.

B. Baltimore City Dept. of Social Services v. Bouknight, 493 U.S. 549 (1990): This case raises the question: Can the Department compel a parent to reveal the location of their child or require him/her to produce the child under the 5th Amendment? The court answered yes, the Department could compel the production of the child without violating the 5th Amendment. The court went on to state that should the compelling interest prove to be incriminating, then a grant immunity under the 5th Amendment would need to be raised.

C. Lefkowitz v. Turley, 414 U.S. 70 (1973): The 5th Amendment applies to inquiries into job performance. In this case, the court found that employees do not forfeit their constitutional privilege and that they may be compelled to respond to questions about the performance of their duties but only if their answers cannot be used against them in subsequent criminal prosecutions. Additionally, one cannot compel testimony through threats without giving immunity.
D. U.S. V. Doe, 465 U.S. 605 (1984): The 5th Amendment privilege applies to more than testimony it also applies to compelled production of documents. The act of producing subpoenaed documents cannot be compelled without a statutory grant of use immunity.

E. Gates V. Texas Dept. of Family and Protective Services, 537 F.3d 404 (5th Cir. 2008): In this case, the Texas Department of Family and Protective Services (TDFPS) received an anonymous tip concerning the father of the child punishing the child for an eating disorder. TDFPS attempted to interview the other children in the home, however, the father refused. TDFPS went into the home while the father was not present and interviewed the children. Subsequently the children were seized and removed from the home. The court found the TDFPS violated the 4th Amendment by entering the home, interviewing the children without permission, and seizing them.

In many CPS cases, the 4th Amendment and the 5th Amendment are issues that arise together, as they did in the Gates case.