

Basics of Right against Self-Incrimination

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- I. **[Defendant's right not to take stand]** Under the Fifth Amendment, a criminal defendant has the right not take the stand. If a defendant decides not to testify:
 - A. The State may not call the defendant to the stand;
 - B. The court may not call the defendant to the stand; *and*
 - C. A co-defendant may not call the defendant to the stand at their joint trial. *See Jones v. State*, 586 A.2d 55 (Md. App. 1991).

- II. **[Witness's right not to answer]** Under the Fifth Amendment, a witness has the right to refuse to answer questions if:
 - A. The answer may tend to "incriminate" the witness (see III., below);
 - B. The witness is not "immune" from prosecution (see IV., below); *and*
 - C. The witness has not "waived" the privilege (see V., below).

- III. **[Witness's rights: meaning of "incrimination"]** A witness has the right to refuse to answer questions that may tend to incriminate him or her.
 - A. An answer is incriminating if it would constitute a direct admission of guilt, furnish a link in a chain of evidence tending to prove guilt, or even provide a lead to evidence that might ultimately establish guilt. *See* 1 BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 126, at 403–04 (6th ed. 2004); *Hoffman v. United States*, 341 U.S. 479, 488 (1951) (it must be "perfectly clear" that a witness's answers "cannot possibly" incriminate him or her).
 - B. If a question on its face calls for an answer that may incriminate a witness, the judge must uphold the witness's refusal to answer. 1 BRANDIS & BROUN, *supra*, at 417.
 - C. If it is unclear whether a question calls for an incriminating answer, the judge may conduct a limited inquiry into the basis for the refusal but must stop once it is apparent that answering the question may tend to incriminate the witness. *Id.*

- IV. **[Witness's rights: meaning of "immunity"]** A witness may not refuse to answer an incriminating question if the witness has immunity from prosecution.
 - A. Immunity includes a formal grant of immunity by the prosecutor as provided in G.S. 15A-1051.
 1. The District Attorney must comply with the steps required in G.S. 15A-1052.

2. "Use" immunity as afforded under the statute is sufficient. "Transactional" immunity is not required. *See also Murphy v. Waterfront Commission*, 378 U.S. 52 (1964) (immunity granted in state court protects witness from use of testimony in federal court).
- B. Immunity may include acquittal, pardon, running of statute of limitations, and other bars to prosecution.
1. If the question calls for information that may be incriminating regarding conduct for which prosecution is *not* barred (for example, an acquittal covers some but not other conduct by the witness), the witness may still refuse to answer.
 2. The judge may conduct a limited inquiry if necessary to determine whether the answer may tend to incriminate the witness.
- V. **[Witness's rights: meaning of "waiver"]** A witness may not refuse to answer an incriminating question if the witness has waived the privilege against incrimination.
- A. A witness does not have the right to refuse to take the stand on Fifth Amendment grounds; nor does a witness waive the privilege by taking the stand.
- B. A witness waives the Fifth Amendment privilege if he or she does not timely assert the privilege during questioning. *See Minnesota v. Murphy*, 465 U.S. 420 (1984).
1. The witness must wait until asked a question that calls for an answer that may tend to incriminate him or her and then assert the Fifth.
 2. If a witness testifies to part of the facts constituting a transaction, the witness cannot then refuse to answer further questions relating to that transaction.
 3. Because of the risk of waiver, witnesses tend to assert the Fifth Amendment early in their testimony.
- VI. **[Advisement]** The court is not required to, although may, advise a defendant or witness of self-incrimination rights. *See State v. Poindexter*, 69 N.C. App. 691 (1984) (no requirement that court advise *pro se* defendant of Fifth Amendment right); *State v. Lashley*, 21 N.C. App. 83 (1974) (to same effect); 1 MCCORMICK ON EVIDENCE § 131, at 556–57 (6th ed. 2006) (generally witness has no right to warning, although judge is not barred from alerting witness to self-incrimination right).