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Criminal Procedure--Trial of Co-Defendants-- Right of Silence Violated

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the defense when induced by a law enforcement officer. The query remains, why should one not be punished if he commits a crime?

The problems raised go far deeper than the time and space allotted to this comment. However, in the final analysis, the basic problem appears to be one of law enforcement rather than one of judicial interpretation. The courts may never be able to formulate an adequate criterion for determining when or how the defense should be applied. Instead, the answer to the injustice and the inequality that often result should be found in newer and better methods of detection of those crimes which are now plagued by the defense.

Robert William Burk, Jr.

Criminal Procedure—Trial of Co-defendants—Right of Silence Violated

D was convicted of receiving and facilitating transportation and concealment of narcotic drugs, and purchasing and acquiring narcotic drugs in violation of the Narcotic Drugs Import and Export Act. Before trial *D*'s co-defendant moved for a severance. Motion was denied. Although *D* did not take the stand, the co-defendant did testify, and imputed all the blame to *D*. Co-defendant's counsel made repeated comments on *D*'s failure to testify and engaged in extended colloquy with the court and *D*'s counsel over these comments. The court overruled *D*'s motion for mistrial and instructed the jury of *D*'s right to decline to testify and that such failure to testify should not be considered in arriving at a verdict. *Held*, reversed. *D* had a constitutionally guaranteed right to silence free from prejudicial comments, even when they came only from co-defendant's attorney. Considering the collision between the two defendants, the imputation of guilt to *D* arising from the references to silence could not be cured by instructions to the jury to disregard the comments. *De Luna v. United States*, 308 F.2d 140 (5th Cir. 1962).

Most of the issues raised by this case are not new or unusual as applied to federal court practice. Rule 14 of the Federal Rules of Criminal Procedure states that a court may order separate trials if it appears that a defendant or the government is prejudiced by a joinder of offenses. FED. R. CRIM. P. 14. It is clear that severance rests within the sound discretion of the court, and a refusal of sev-

erance is not assignable as error unless abuse of discretion is affirmatively shown. *Stilson v. United States*, 250 U.S. 583 (1919). Thus, the trial court in the principal case clearly had the power to refuse to grant separate trials.

It is also firmly established that one has the right to refuse to testify in a proceeding in which he is a defendant. U. S. CONST. amend. V. Although at common law a defendant was not competent as a witness at his own trial, this rule was long ago abandoned and the contrary is now universally true. However, in spite of the fact that one may be a competent witness in his own defense, his failure to testify cannot create any presumption against him. *Bradford v. United States*, 130 F.2d 630 (5th Cir. 1942); 18 U.S.C. § 3481 (1958). To reinforce the requirement that no presumption of guilt shall arise from a defendant's failure to testify, the federal courts have held that no comment or argument about defendant's failure to take the stand is permissible. *Stewart v. United States*, 366 U.S. 1 (1961); *Wilson v. United States*, 149 U.S. 60 (1893). Although it has been held that comment on a defendant's failure to testify is ground for mistrial, *Stewart v. United States, supra*, the inference raised by the comment may be cured by the court's instructions. *Langford v. United States*, 178 F.2d 48 (9th Cir. 1949). Thus, whether the prejudice may be overcome by the court's instructions seems to depend on the nature and extent of the comments and the circumstances of the case. The Fifth Circuit Court of Appeals was therefore clearly within its rights in declaring that, in the principal case, the prejudice resulting to *D* was so great that it could not be cured by the court's directions to the jury that they were not to consider *D*'s failure to take the stand.

The most disturbing and perplexing elements of the opinion in the principal case is the inference that counsel for the co-defendant has the right to comment on *D*'s failure to testify. It is not patently clear from the opinion of the majority of the court that co-defendant's counsel has the right. See *De Luna v. United States, supra* at 143 and 154. However, the implication that such a right exists is so strong that one member of the court made this the subject of a special concurring opinion. The concurring judge points out that a rule allowing co-defendant's counsel the right to so comment must necessarily result in one of three alternatives: (1) elimination of joint trials where there is a representation to the court that one co-defendant does not expect to testify; (2) a right to a mistrial during final arguments; or (3) built-in reversible error, all in the

discretion of the defendants. *De Luna v. United States*, *supra* at 156. Although the cases are clear on the point that a prosecutor may not comment on a defendant's failure to take the stand, no case is found squarely holding that a co-defendant's counsel may not make such comment. On principle, it would appear that there is no difference in the two situations as far as the protection of the non-testifying defendant is concerned. Indeed, the prejudice may be greater in the case of comment by counsel for a co-defendant, since the prosecutor as the representative of the state might be expected to recognize the responsibility for fair comment while counsel for the defendant, in his zeal for his client's cause, might not be expected to exercise as much discretion. Therefore, the concern for one defendant's right to silence free from prejudice must be balanced against the high dignity of the duty which counsel owes to his client to avail himself of every allowable opportunity to protect that client.

In West Virginia persons jointly indicted for a felony have an absolute right to be tried separately. W. VA. CODE ch. 63, art. 3, § 8 (Michie 1961). The existence of a joint defendant's right to separate trial was recently recognized by the West Virginia Supreme Court for the first time in a case in which that question was actually in issue. *State ex rel. Zirk v. Muntzing*, 120 S.E.2d 260 (W. Va. 1961). See 64 W. VA. L. REV. 110 (1961).

The courts of the various states have generally followed the federal rule in refusing to allow comment on a defendant's failure to testify in his own behalf. The only states which appear to allow such comment are California, Ohio, Connecticut, Iowa, New Jersey, and New Mexico. 8 WIGMORE, EVIDENCE § 2272 (McNaughton rev. 1961). In West Virginia, it is specifically provided by statute that a defendant's failure to testify shall create no presumption against him and shall not be the subject of comment before the court or jury by anyone. W. VA. CODE ch. 57, art. 3, § 6 (Michie 1961). This provision of the Code has been interpreted by the court to entitle a defendant to a new trial if the state's attorney comments on his failure to testify. See *State v. Self*, 130 W. Va. 515, 44 S.E.2d 582 (1947); *State v. Jones*, 108 W. Va. 264, 150 S.E. 728 (1929); *State v. Costa*, 101 W. Va. 466, 132 S.E. 869 (1926). The court has held, however, that the error may be cured by excluding the comment and directing the jury to disregard it. Thus, the West Virginia statute does not provide that every violation shall require setting aside the verdict, and the trial court may therefore decide whether,

in its judgment, such harm has been done to the accused as to require a new trial. *State v. Chisnell*, 36 W. Va. 659, 15 S.E. 412 (1892).

In West Virginia, as in the federal courts, the specific question of whether or not a co-defendant's attorney may comment on defendant's failure to testify has not been decided. However, the court has strongly implied that it will construe the provisions of the statute very strictly, and will permit no comment whatsoever on a defendant's failure to testify. In *State v. Taylor*, 57 W. Va. 228, 234, 50 S.E. 247, 249 (1905) which involved comment on an accused's failure to call his wife to corroborate his testimony, the court said that the statutory terms are very broad and that ". . . all persons are forbidden to make any reference to his failure [to testify]."

Thus, the dilemma presented by *De Luna v. United States*, *supra*, seems not to arise in West Virginia. The co-defendant's absolute right to be separately tried, coupled with the statutory prohibition against any comment concerning an accused's failure to take the stand, furnishes as perfect a solution to the problem as could reasonably be expected. Perhaps the problem could be best resolved in the federal courts by providing for separate trial of jointly indicted defendants where it is shown that one expects to take the stand to testify and the other expects to remain silent.

Robert Edward Haden

Evidence—Federal Shop-Book Rule—Admissibility of Hospital Records

P brought an action for injuries sustained when struck by *D*'s automobile. The trial court refused to admit in evidence the results of a test for intoxication conducted on *P* at the Navy hospital where he was treated. The district court rendered a judgment for *P* and *D* appealed. *Held*, reversed and remanded for a new trial. The court of appeals held that prejudicial error was committed in excluding from evidence the hospital records showing results of the intoxication test, such being properly admissible in evidence under the federal shop-book rule. *Thomas v. Hogan*, 308 F.2d 355 (4th Cir. 1962).