

MN S. Ct: Inmates and the Right to Remain Silent

Contributed by James Ostgard

In a pair of cases and a pair of dissents, the Minnesota Supreme Court has issued a helpful opinion about the continuing Fifth Amendment right from compelled self-incrimination enjoyed by prison inmates under certain circumstances.

In both cases, prisoners serving sentences for sex offenses had 45 days added to their imprisonment because they refused to discuss their offenses in the sex offender treatment programs required by the Department of Corrections. In the first case, *Johnson v. Fabian*, the inmate's conviction was pending direct appeal when the DOC penalty was imposed. In the second case, *State ex rel. Henderson v. Fabian*, the inmate was contemplating a federal post-conviction petition to challenge his conviction. He'd also testified at his jury trial and denied the offense. Thus he feared being exposed to perjury charges if he were to admit his crime while in treatment.

Addressing the two requisites of the privilege — compulsion and incrimination — the majority had little trouble with the latter in each case. The Minnesota Supreme Court has never specifically held what the rest of us pretty much assumed to be true anyway — that until the appeals process is over, a defendant retains the right to remain silent. Our court makes it official, and specifies that at least until the appeal is decided, or until the time for appeal has run out, our clients risk self-incrimination and may assert the Fifth Amendment protection from compelled statements. This is true in prison programs as well in cases where our clients are being subpoenaed to testify at trials of remaining co-defendants.

The other requisite, "compulsion", took a little more space in the opinion because the Court had to sweep aside a bit of bad precedent on the way to the conclusion. It is in this part of the opinion that those of us who enjoy judges having to dance a little can pause a moment to microwave a bag of popcorn and open a beer before reading further.

On the face of it, it seems pretty simple to agree that letting the government impose a penalty, for instance 45 days additional imprisonment, for an inmate's refusal to admit criminal conduct constitutes a source of "compulsion" for Fifth Amendment purposes. The challenge for the Court, though, was that just recently, in *State ex rel. Morrow v. LaFleur*, 590 N.W.2d 787 (Minn. 1999), the Supremes had decided it was not. Morrow was decided on the rationale that once you've been sent to prison, your ass belongs to the Commissioner of Corrections and it is only by an act of the Commissioner's grace that you get released early. If the Commissioner offers you a chance for early release on condition you cooperate with treatment, you have a "choice" between cooperating, which includes talking about your offense, and remaining silent, which means you serve most or even all of your sentence. Choice is not compulsion.

But six years later, in *Carrillo v. Fabian*, 701 N.W.2d 763 (Minn. 2005), the Court took a look at a United States Supreme Court decision from 1995, *Sandlin v. Conner*, 515 U.S. 472, which held that a prisoner had a right to procedural due process before segregated incarceration could be imposed for some infraction. Sandlin articulated the "atypical and significant hardship" test for purposes of determining whether an action by a correctional authority against an inmate implicates a liberty interest for due process purposes. It says that if the action results in an atypical and significant hardship on the inmate "in relation to the ordinary incidents of prison life", the inmate has a Fifth Amendment right to due process before the action can be taken. The justices found that segregation is such an atypical and significant hardship, and required prison authorities to afford the inmate a hearing before imposing such a sanction.

The Minnesota court applied that test in the context of a scheduled supervised release date in Carrillo, and concluded that the extension of the date was a Sandlin hardship requiring procedural due process before this liberty interest could be compromised.

Then came the United States Supreme Court decision in *McKune v. Lile*, 536 U.S. 24 (2002). This case, arguably, borrows the Sandlin due process test of atypical and significant hardship in determining whether compulsion is being imposed upon an inmate for Fifth Amendment self-incrimination purposes. The prison authorities threatened to take away certain privileges (but not extend the imprisonment) on an inmate who chose to remain silent in a prison sex offender treatment program. McKune said that the loss of privileges, without additional incarceration or segregated incarceration, was not atypical in ordinary prison life, and therefore did not amount to compulsion.

The Minnesota Supreme Court synthesized these cases and concluded Morrow must be overruled. The majority is saying that if the extension of a release date due to loss of good time is the sort of atypical and significant hardship which implicates the due process clause (per Carrillo), it is also the sort of significant hardship which might compel an inmate to give evidence against himself, thus satisfying the compulsion prong of the Fifth Amendment "right to remain silent" clause.

Those of us who've been around awhile remember a little U.S. Supreme Court decision called *Minnesota v. Murphy*, 465 U.S. 420 (1984), in which a poor schmuck on probation confesses a rape and murder to his probation officer, mindful of the requirement that he be truthful in dealing with her. The United States Supreme Court really danced

to avoid the need to suppress that confession, and the result was a strained logic which held that because Murphy could not have been incarcerated under Minnesota law as a result of asserting his right to remain silent when questioned by his probation officer, he was not "compelled" to give evidence against himself within the meaning of the Fifth Amendment, even if, as we all can imagine, he almost certainly was motivated to confess by a genuine belief that if he didn't he'd go to jail for violating probation.

The dissenters in Johnson and Henderson insist that Carrillo and McKune do not require the overruling of Morrow, and considerable writing is done on the question of how to decide what the holding is when dealing with plurality opinions of the U.S. Supreme Court. The dissenters say the discussion by the McKune plurality opinion of the Murphy case demonstrates that McKune does not necessarily mean loss of good time constitutes an atypical hardship. That prompted the following from the majority in Johnson and Henderson:

The problem with this reasoning is not the dissent's understandable reliance on the McKune plurality's characterization of Murphy, but the inaccuracy of the plurality's characterization. In fact, the six-Justice majority in Murphy unequivocally rejected both the McKune plurality's factual premise that Murphy feared more jail time if he remained silent and the plurality's legal premise that the threat of additional jail time does not constitute compulsion...

...as the dissent in McKune stated, "[t]he plurality [wa]s quite wrong to rely on Murphy for the proposition that an individual is not compelled to incriminate himself when faced with the threat of a return to prison." (citations omitted)...

The dissent here may be correct that the McKune plurality's reliance on its mistaken view of Murphy suggests that the plurality would not consider a threat of additional incarceration to constitute compulsion, although that position seems inconsistent with the plurality's earlier reference to the fact that the program challenged in McKune did not extend incarceration or affect eligibility for good-time credits or parole... Moreover, Murphy is, if anything, supportive of our conclusion when the reasoning of the Murphy opinion, rather than the McKune plurality's mischaracterization of it, is considered.

Whew.

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