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CRIMINAL PROCEDURE—JURY INSTRUCTION ON THE FAILURE OF AN ACCUSED TO TESTIFY: A DEFENSE STRATEGY—Carter v. Kentucky, 450 U.S. 288 (1981)

Patti L. Hakes

NOTES

CRIMINAL PROCEDURE—JURY INSTRUCTION ON THE FAILURE OF AN ACCUSED TO TESTIFY: A DEFENSE STRATEGY—*Carter v. Kentucky*, 450 U.S. 288 (1981).

I. INTRODUCTION

Lonnie Joe Carter was indicted for third degree burglary[1] and also charged with being a persistent felony offender under the Kentucky recidivist statute.[2] At the burglary trial Carter's defense attorney warned him that if he testified in his own behalf, the prosecutor could impeach him by using his record of prior convictions.[3] After deciding not to testify, defendant requested that the following cautionary instruction[4] be given to the jury: "The defendant is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way."[5] The trial court rejected the request and the defendant was convicted. The jury recommended a two year sentence.[6]

On appeal, the Kentucky Supreme Court rejected the argument that the fifth and fourteenth amendments to the United States Constitution required the trial judge to give the requested instruction.[7] The state supreme court held that the instruction would have vio-

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1. Carter v. Kentucky, 450 U.S. 288, 291 (1981).

2. KY. REV. STAT. ANN. § 532.080(3) (Bobbs-Merrill Cum. Supp. 1980). "A persistent felony offender in the first degree is a person who is more than twenty-one (21) years of age and who stands convicted of a felony after having been convicted of two (2) or more felonies." *Id.*

3. Carter v. Kentucky, 450 U.S. 288, 291 (1981). In Kentucky, a judge has discretionary control over the use of prior felony convictions for impeachment purposes. The judge cautioned the prosecutor that reversal was a possibility if more than three prior convictions were introduced. *Id.* at 293.

4. *Id.* at 294. The cautionary instruction is also known as a failure to testify or a limiting instruction.

5. *Id.* The recidivist phase of the trial followed, wherein the prosecutor introduced evidence of Carter's prior felony convictions. The jury found Carter guilty as a persistent felony offender and increased his sentence to a maximum of twenty years. *Id.* at 295.

6. *Id.*

7. *Id.*

lated a state statute[8] forbidding comment on a defendant's failure to testify and that the instruction would have emphasized that petitioner had not testified in his own behalf.[9]

Carter appealed the state supreme court's refusal to give the cautionary instruction. In *Carter v. Kentucky*,[10] the Supreme Court of the United States determined that petitioner had a right to the requested instruction under the fifth amendment privilege against self-incrimination. The Court also held that a state trial judge was constitutionally obligated to give the instruction when a defendant requested it.[11]

The Supreme Court rejected the state interest advanced by Kentucky. The State's purported justification for refusing the requested instruction was its interest in protecting the defendant from any comment on his failure to testify. Kentucky contended that such an instruction constituted a direct comment and an emphasis by the court on the defendant's silence.[12] The State also argued that because the jurors were instructed to determine guilt from the evidence alone, they were already aware that they could not draw adverse inferences from petitioner's choice to remain silent.[13]

In *Carter*, the Supreme Court found these arguments unpersuasive. The Court stated that jurors do not know the technical meaning of evidence and will notice a defendant's silence.[14] Without an instruction, the jurors would draw adverse inferences from the accused's failure to testify.[15] By requiring that the trial court give the requested instruction, the Supreme Court emphasized the constitutional interest in protecting the individual's right to be free from self-incrimination. The *Carter* Court found that refusal to give the cautionary instruction stripped the privilege against self-incrimination of its full force because it increased the danger that the conviction could be based upon adverse inferences, rather than upon the evidence presented at trial.[16]

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8. KY. REV. STAT. ANN. § 421.225 (Bobbs-Merrill Cum. Supp. 1980). "In any criminal or penal prosecution the defendant, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumptions against him." *Id.*

9. Carter v. Kentucky, 450 U.S. 288, 295, 299 (1981).

10. 450 U.S. 288 (1981).

11. *Id.* at 300.

12. *Id.* at 303.

13. *Id.*

14. *Id.* at 303-04.

15. *Id.*

16. *Id.* at 305.

Carter is a substantial departure[17] from the Court's last discussion on the subject of the cautionary instruction. Three years earlier in *Lakeside v. Oregon*,[18] the Court held that giving a cautionary instruction over the objection of the defendant did not violate the privilege against self-incrimination.[19] In *Lakeside*, petitioner had been charged with escape in the second degree.[20] The trial judge gave the following cautionary instruction over defense counsel's objection: "[A] defendant has the option to take the witness stand to testify . . . . If a defendant chooses not to testify, such a circumstance gives rise to no inference or presumption against the defendant, and this must not be considered . . . in determining the question of guilt or innocence."[21]

The *Lakeside* Court determined that although there were times when it might not be wise for a judge to give the instruction over a defendant's objection, each state was entitled to place its own limitations upon a trial judge's discretion.[22] *Lakeside*, therefore, negated defense counsel's professional judgment that the instruction not be given and left the use of the cautionary instruction to the trial judge's discretion as determined by state policy. *Carter*, on the other hand, leaves the choice of the instruction to the defendant and defense counsel.[23] Therefore, *Carter* represents a step toward the devitalization of *Lakeside*. *Carter* demonstrates that the Supreme Court is moving toward expansion of the fifth amendment privilege which *Lakeside* previously had narrowed.

This case note will first explore the background of the fifth amendment privilege against self-incrimination. Following this introductory information, analysis of the use of the cautionary instruction as a defense strategy and the due process consequences of judiciary control of the cautionary instruction will be considered. This note will conclude that *Carter* satisfies the due process concerns

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17. In Griffin v. California, 380 U.S. 609, 615 n.6 (1965) and in Lakeside v. Oregon, 435 U.S. 333, 337 (1978), the Court expressly reserved decision on the issue of whether a defendant had a constitutional right to the cautionary jury instruction. 450 U.S. at 295.

18. 435 U.S. 333 (1978).

19. *Id.* at 340-41. *See infra* notes 76-77 and accompanying text. Defense counsel based his trial strategy specifically on the fact that the defendant had not testified. Counsel was careful to avoid any mention of that fact. Defense counsel, therefore, felt that giving the instruction was similar to "waving a red flag in front of the jury." State v. Lakeside, 277 Or. 569, 571 n.1, 561 P.2d 612, 613 n.1 (1977).

20. 435 U.S. at 334.

21. *Id.* at 335.

22. *Id.* at 340-41.

23. *See infra* notes 63-65 and accompanying text.

regarding the cautionary jury instruction and that the *Carter* decision indicates that use of the cautionary instruction is at defendant's discretion.

II. BACKGROUND

The fifth amendment guarantees that no person will be compelled in any criminal case to be a witness against himself.[24] This guarantee was made applicable to the states through the fourteenth amendment in *Malloy v. Hogan*.[25] In *Malloy*, petitioner had been ordered to testify before a referee of an investigative hearing concerning gambling and other criminal activities.[26] Petitioner refused to testify on the grounds that answering the questions could incriminate him.[27] The hearing referee found petitioner in contempt, reasoning that the fifth amendment privilege was not available to a witness in a state proceeding.[28] The Supreme Court of the United States reversed and held that the fourteenth amendment guaranteed petitioner the protection of the fifth amendment privilege against self-incrimination.[29]

Although *Malloy* did not address the issue of the cautionary instruction, the decision laid the foundation for development of the instruction by recognizing a broader function of the privilege against self-incrimination.[30] The *Malloy* Court broadened the application of the fifth amendment privilege in its holding that state application of the privilege must be consistent with the federal constitutional standard: A person has the right to remain silent unless his choice is to speak in the unfettered exercise of his own free will.[31]

The Court based its decision on the policy considerations underlying a coerced confession: Courts are constitutionally compelled

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24. U.S. CONST. amend. V.

25. 378 U.S. 1 (1964). In establishing that the same standard must be used in state and federal courts to determine the validity of claims arising from the fifth amendment privilege, *Malloy* overruled Twining v. New Jersey, 211 U.S. 78 (1908) and Adamson v. California, 332 U.S. 46 (1947), "both of which had 'adhered to the position that the Federal Constitution does not require the States to accord the Fifth Amendment privilege against self-incrimination.' " 450 U.S. at 297 n.10 (quoting Tehan v. Shott, 382 U.S. 406, 412 (1966)).

26. 378 U.S. at 3.

27. *Id.*

28. *Id.*

29. *Id.* at 8.

30. *See* Note, *Prosecutorial Comment and Judicial Instruction on a Defendant's Failure to Testify: In Support of a Liberal Application of the Fifth Amendment*, 13 VAL. U. L. REV. 261, 274 (1979).

31. 378 U.S. at 8.

to establish guilt by independently secured evidence.[32] The same policy underlies the cautionary instruction. The purpose of the instruction is to direct the jury's attention from any speculation about an accused's failure to testify.[33] In *Malloy*, a violation of the right to remain silent was perceived as tantamount to coercion and was, therefore, prohibited by the fifth and fourteenth amendments.[34] The *Malloy* analysis demonstrated that the Court had shifted its emphasis from historical concerns for federalism to an emphasis on due process and a concern for the free will of the individual.[35]

The Court's perspective turned from state sovereignty toward countervailing concerns for due process, yet *Malloy* did not address the issue of whether comment on a defendant's failure to testify should be barred by the fifth amendment.[36]

In *Griffin v. California*,[37] the Supreme Court dispelled any doubts concerning the applicability of *Malloy* to the issue surrounding comments on the failure to testify. In *Griffin*, the Court reviewed whether the prosecution could comment that the defendant's failure to testify was an implicit admission of guilt.[38] The Court held that such comment could not withstand the fifth amendment challenge.[39] The Court reasoned that such comment acts as a penalty and "cuts down on the privilege [to remain silent] by making its assertion costly."[40]

The Supreme Court, in *Brooks v. Tennessee*,[41] relying on *Malloy*[42] and *Griffin*,[43] struck down a statute requiring that a defendant electing to testify do so prior to any other defense witnesses.[44] The Court held that the state statute was an impermissible restriction on

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32. *Id.* at 7-8; *see* Note, *supra* note 30, at 270-71.

33. *See infra* notes 51-52 and accompanying text.

34. *See* Note, *supra* note 30, at 271.

35. *See id.*, at 271-72.

36. *See generally* 8 J. WIGMORE, EVIDENCE § 2272, at 425-39 (McNaughton rev. ed. 1961); 3 WHARTON'S CRIMINAL PROCEDURE § 399, at 47 n.31 (C. Torcia 12th ed. 1975); Comment, *Comment and Inference Under the Fifth and Fourteenth Amendments*, 25 OHIO ST. L.J. 578 (1964).

37. 380 U.S. 609 (1965).

38. *Id.* at 614-15.

39. *Id.* at 615.

40. *Id.* at 614.

41. 406 U.S. 605 (1972).

42. *Id.* at 609.

43. *Id.* at 611.

44. *Id.* at 607-12. The statute states that: "The failure of the party defendant to make such request and to testify in his own behalf, shall not create any presumption against him. But the defendant desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case." *Id.* at 606 n.1 (citation omitted).

the privilege against self-incrimination because it violated the *Malloy* principle that a defendant should suffer no penalty for asserting his privilege to remain silent.[45] The Court understood that penalizing the accused for declining to speak first impaired his right to remain silent,[46] thereby making assertion of the right too costly.[47] *Brooks* reemphasized the due process concerns of *Malloy* and *Griffin* that an accused has a privilege to remain silent unless he chooses to speak. Neither *Griffin* nor *Brooks*, however, directly addressed the propriety of a bench instruction admonishing the jury to draw no inferences of guilt from a defendant's failure to testify. Even after *Griffin*, in which comment by a prosecutor was proscribed, there existed a conflict in authority as to whether it was proper for a judge to give the cautionary instruction.[48]

The Supreme Court had not addressed definitively the constitutionality of the cautionary instruction, thus the lower courts developed their own theories. Beginning with *People v. Brady*,[49] one line of cases interpreted *Griffin* to stand for the proposition that only adverse comment is prohibited and only those instructions directly authorizing the jury to draw adverse inferences are prevented.[50] These cases infer that *Griffin* expressly prohibits only an instruction by a trial judge that a defendant's silence is evidence of guilt. Under this reasoning, it is proper for a judge to instruct the jury that no inferences should be drawn from a defendant's failure to testify, whether the accused objects or makes no request at all.[51] These courts conclude that the fifth amendment privilege against self-incrimination will be rendered worthless unless the instruction is given, because the jury naturally will presume guilt due to the accused's failure to testify.[52]

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45. *Id.* at 609.

46. *Id.* (citing Malloy v. Hogan, 378 U.S. at 8).

47. *Id.* at 610.

48. Annot., 18 A.L.R.3d 1335 (1968).

49. 275 Cal. App. 2d 984, 990-92, 80 Cal. Rptr. 418, 421-22 (1969).

50. Annot., 18 A.L.R.3d 1335, 1336 (1968).

51. *See* Lakeside, 435 U.S. at 333; Bellard v. United States, 356 F.2d 437 (5th Cir.), *cert. denied*, 385 U.S. 856 (1966); Coleman v. United States, 367 F.2d 388 (9th Cir. 1966); United States v. Kelly, 349 F.2d 720 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966); Blakely v. State, 43 Ala. App. 654, 198 So. 2d 803 (1967); People v. Brady, 275 Cal. App. 2d at 984, 80 Cal. Rptr. at 418; Harvey v. State, 187 So. 2d 59 (Fla. Dist. Ct. App. 1966), *cert. denied*, 386 U.S. 923 (1967); Pearson v. State, 28 Md. App. 196, 343 A.2d 916 (1975); Commonwealth v. Barrett, 6 Mass. App. Ct. 952, 383 N.E.2d 96 (1978); People v. Arnston, 10 Mich. App. 718, 160 N.W.2d 386 (1968); *see* Annot., 18 A.L.R.3d 1335 (1968).

52. *See* People v. Harris, 52 Mich. App. 739, 218 N.W.2d 150 (1974); Green, *The Failure to Testify Instruction*, 14 WILLAMETTE L.J. 43, 45 (1977).

There are other cases stating that it is an error for a trial judge to give the cautionary instruction over a defendant's objection.[53] According to these courts, the intent of *Griffin* was to give full scope to the fifth amendment privilege not to testify.[54] Giving the cautionary instruction over the defendant's objection, therefore, is tantamount to making a comment proscribed by *Griffin*.[55] Even a carefully drafted instruction will emphasize the fact that an accused has not testified and may inadvertently cause the jurors to consider inferences that might not otherwise have been considered. Such an instruction highlights a defendant's failure to testify and thus, is a form of comment.[56]

The latter series of cases asserts that *Griffin* prohibits courts from doing anything to increase the likelihood that the jury will give evidentiary weight to defendant's failure to testify.[57] This view is supported by the rationale that the jury is free to infer whatever it wishes from the evidence without assistance from the court. These same inferences may not be drawn, however, when the court brings the silence into evidence by commenting upon it.[58] The accused must then decide whether his failure to testify should be mentioned to the jury. The *unfettered right*[59] in choosing to testify belongs to the accused, along with the corollary right to decide whether his silence should be highlighted for the jury's attention.[60]

The real cause of the conflict stems from a lack of knowledge related to the cautionary instruction's effect on a jury.[61] Those

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53. State v. Zaragosa, 6 Ariz. App. 80, 430 P.2d 426 (1967); State v. Cousins, 4 Ariz. App. 318, 420 P.2d 185 (1966); Russell v. State, 240 Ark. 97, 398 S.W.2d 213 (1966); People v. Horrigan, 253 Cal. App. 2d 519, 61 Cal. Rptr. 403 (1967); People v. Molano, 253 Cal. App. 2d 841, 61 Cal. Rptr. 821 (1967); Gross v. State, 261 Ind. 489, 306 N.E.2d 371 (1974); State v. Kimball, 176 N.W.2d 864 (Iowa 1970); *See* Annot., 18 A.L.R.3d 1335 (1968).

54. *See, e.g.*, People v. Horrigan, 253 Cal. App. 2d 519, 521, 61 Cal. Rptr. 403, 405 (1967); People v. Molano, 253 Cal. App. 2d 841, 847, 61 Cal. Rptr. 821, 824 (1967); State v. Kimball, 176 N.W.2d 864, 868 (Iowa 1970).

55. People v. Molano, 253 Cal. App. 2d 841, 847, 61 Cal. Rptr. 821, 824 (1967); Annot., 18 A.L.R.3d 1335, 1336 (1968).

56. People v. Molano, 253 Cal. App. 2d 841, 847, 61 Cal. Rptr. 821, 824-25; *see* Annot., 18 A.L.R.3d 1335, 1336 (1968).

57. Green, *supra* note 52, at 46; People v. Molano, 253 Cal. App. 2d 841, 61 Cal. Rptr. 821 (1967); People v. Horrigan, 253 Cal. App. 2d 519, 61 Cal. Rptr. 403 (1967); People v. Elliott, 241 Cal. App. 2d 659, 50 Cal. Rptr. 757, *cert. denied*, 385 U.S. 941 (1966).

58. 380 U.S. at 614.

59. 378 U.S. at 8.

60. Russell v. State, 240 Ark. 97, 100, 398 S.W.2d 213, 215 (1966).

61. Green, *supra* note 52, at 46.

judges who trust juries to follow instructions believe that a cautionary instruction benefits a defendant. Those judges who doubt a jury's ability to give the proper effect to the instruction doubt any beneficial effect accruing to the defendant by the use of the instruction.[62] *Carter* is an attempt to provide a much needed resolution to these divergent opinions.

III. ANALYSIS

A. *Jury Instruction on the Failure to Testify—A Defense Strategy*

In *Carter*, the Supreme Court found that a defendant has the constitutional right to request a cautionary instruction stating that his silence cannot be used as an inference of guilt.[63] It is now firmly established that if a defendant requests a cautionary instruction, the trial judge is constitutionally obligated to give it. In addition, *Carter* implies that the defendant, with the aid of counsel, has the right to determine whether the instruction should be given at all.

The defense attorney, throughout the trial, evaluates the jury's responses to determine a strategy for the best defense.[64] After this evaluation, the defense counsel will confer with the defendant and together they will determine whether the instruction should be given. In contending that the trial judge has the constitutional duty to protect a defendant's privilege against self-incrimination through the use of the cautionary instruction *when a defendant seeks its employment*,[65] *Carter* implies that the choice of the instruction belongs exclusively to the defendant.

B. *Defendant's Right to Waive the Cautionary Instruction*

A defendant has the right to waive his privilege against self-incrimination.[66] The decision to waive belongs exclusively to the accused after full consultation with defense counsel.[67] Because the purpose of the cautionary instruction is to protect the privilege against self-incrimination[68] and because the accused may waive this privilege, the accused has the corollary right to waive his constitu-

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62. *Id.*

63. 450 U.S. at 305.

64. *See infra* notes 81-88 and accompanying text for a discussion of the scope of a trial attorney's authority and responsibilities.

65. 450 U.S. at 303.

66. *See generally* Miranda v. Arizona, 384 U.S. 436, 479 (1966); Rogers v. United States, 340 U.S. 367, 373 (1951) (citing Brown v. Walker, 161 U.S. 591, 597 (1896)).

67. 1 ABA STANDARDS FOR CRIMINAL JUSTICE, § 4-5.2(a) (1980).

68. 450 U.S. at 295-305.

tional right to the cautionary instruction.[69]

Thirty-nine years before *Lakeside*, the right of a defendant to waive his cautionary instruction was supported by *Bruno v. United States*.[70] In *Bruno*, the petitioner, with eighty-seven others, was convicted of conspiracy to violate narcotics laws. Although some of his co-defendants took the witness stand, Bruno did not testify. Petitioner requested an instruction that no inferences of guilt be drawn from a defendant's failure to testify.[71] The trial judge refused to give such an instruction to the jury. A federal statute,[72] stating that a defendant's failure to testify could not create any presumptions against him, was interpreted by the Supreme Court to mean that the defendant not only had an *indefeasible right*[73] to the requested instruction but also the choice as to whether the instruction should be given at all.[74] The *Bruno* Court, by implication, also gave defendant the right to waive his right to the cautionary instruction. The *Lakeside* Court, however, chose not to adopt this view.[75]

In its reliance on *Bruno*, the Supreme Court in *Carter* demonstrated movement away from *Lakeside's* narrow interpretation of the fifth amendment privilege against self-incrimination. The position of the *Carter* Court allowed a defendant the right to waive his privi-

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69. *See supra* notes 59-60 and accompanying text; Russell v. State, 240 Ark. 97, 100, 398 S.W.2d 213, 215 (1966); 450 U.S. at 307 (Stevens, J., concurring). Justice Stevens' concurring opinion in *Carter* states that the determination of whether a cautionary instruction should be given, similar to the decision of whether to testify at all, should be made by the defendant. Stevens' opinion is a reassertion of his dissent in Lakeside v. Oregon, 435 U.S. at 333, wherein he pointed out that the defendant has a constitutional right to waive his fifth amendment privilege to silence without judicial intervention to overrule such choice. At the same time, the defendant, by requesting that no cautionary instruction be given, should be allowed to waive without leave of the court his fifth amendment right to the instruction. The preceding point is based on the premise that the instruction exists solely to protect the fifth amendment privilege of silence. *Id.* at 343-48.

70. 308 U.S. 287 (1939).

71. 308 U.S. at 292. Bruno requested the following additional instruction:

> The failure of any defendant to take the witness stand and testify in his own behalf, does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner.

Id.

72. *Id.* The Court relied on the Act of March 16, 1878, ch. 37, 20 Stat. 30: "[t]he person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him." *Id.* at 292 n.1.

73. *Id.* at 292-94.

74. *Id.* at 294.

75. 435 U.S. at 342.

lege against self-incrimination and, additionally, gave him the corollary right to waive the cautionary instruction. The latter right comes into being only by virtue of the privilege against self-incrimination. By stating that the defendant controls the use of the cautionary instruction, *Carter* removed the discretion given to the trial judge by *Lakeside*.

C. *A* Sua Sponte *Instruction By The Court Usurps The Function Of The Defense Counsel*

Due to the fact that defense counsel was denied the right to waive his client's fifth amendment right to the cautionary instruction, petitioner in *Lakeside* argued that his constitutional right to counsel had been violated. When the judge gave the cautionary instruction over the defendant's objection, his action interfered with defense counsel's trial tactics, which attempted the "studious avoidance"[76] of any reference to the fact that defendant had not testified. Defendant argued that issuance of the instruction over his objection specifically singled out his failure to testify and was tantamount to "waiving a red flag in front of the jury."[77] The *Lakeside* Court disposed of this argument in cursory fashion by stating that it was the judge's responsibility to conduct a fair trial.[78] The Court found that if the instruction itself did not violate the Constitution, then the right to counsel under the sixth amendment was not denied when the instruction was given.[79] The Court further stated that the right to counsel did not confer upon defense counsel the power to veto a trial judge's discretion.[80] The Court, in effect, usurped the function of defense counsel when it affirmed the lower court's *sua sponte* determination to give the cautionary instruction.

In conducting a defense, tactical decisions rest with the attorney, who should have exclusive control after consultation with his cli-

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76. *Id.* at 341.

77. *Id.* at 340; State v. Lakeside, 277 Or. 569, 571 n.1, 561 P.2d 612, 613 n.1 (1977). *See* 435 U.S. at 345 (Stevens, J., dissenting):

> For the judge or prosecutor to call [the defendant's failure to testify] to the jury's attention has an undeniably adverse effect on the defendant. Even if jurors try faithfully to obey their instructions, the connection between silence and guilt is often too direct and too natural to be resisted. When the jurors have in fact overlooked it, telling them to ignore the defendant's silence is like telling them not to think of a white bear.

Id.

78. 435 U.S. at 341-42.

79. *Id.* at 341.

80. *Id.*

ent.[81] These decisions necessarily arise from the attorney's skill and knowledge,[82] and are beyond the control of the presiding judge.[83] The American Bar Association (ABA) Standards related to the administration of criminal justice state that "[t]he decisions on what witnesses to call, whether and how to conduct cross-examination . . . and all other strategies and tactical decisions are the exclusive province of the lawyer after consultation with the client."[84] When a judge controls the use of the cautionary instruction over an attorney's objection, the attorney no longer has control of the tactical decisions utilized to avoid adverse inferences. If the defense requests are ignored, then the attorney's defense tactics are preempted by a judge who is conducting a defense in contravention of the ABA Standards.

The selection of an attorney determines the sphere of strategies that a defendant will possess because law and tradition give the attorney the power to bind a defendant to the consequences of trial strategies.[85] Matters of procedure and trial tactics are all within the attorney's general sphere of authority and the client is bound by the attorney's choice in these matters.[86] Because a defendant is bound by his attorney's choice,[87] it should not be within a judge's power to

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81. Cuyler v. Sullivan, 446 U.S. 335, 344 (1980) (the Court stated that court procedure that restricts an attorney's tactical decision abridges the constitutional right to counsel); Zurich Gen. Accident & Liab. Ins. Co. v. Kinsler, 12 Cal. 2d 98, 105-07, 81 P.2d 913, 917-18 (1938) *overruled on other grounds*, 6 Cal. 3rd 784, 494 P.2d 9 (1972); Timmons v. Holmes, 249 Iowa 888, 890, 89 N.W.2d 371, 372 (1958); State v. Ward, 227 Kan. 663, 666, 608 P.2d 1351, 1354 (1980); State v. Nixon, 223 Kan. 788, 796, 576 P.2d 691, 697-98 (1978); *see also* Duffy v. Griffith Co., 206 Cal. App. 2d 780, 787, 24 Cal. Rptr. 161, 165 (1962); Shores Co. v. Iowa Chem. Co., 222 Iowa 347, 350, 268 N.W. 581, 583 (1936).

82. Duffy v. Griffith Co., 206 Cal. App. 2d 780, 787, 24 Cal. Rptr. 161, 165 (1962) (holding that tactical decisions should be made by defense attorneys).

83. Mitchell v. United States, 259 F.2d 787, 793 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958); Nassif v. District of Columbia, 201 A.2d 519 (D.C. 1964); Bell v. State, 66 Miss. 192, 5 So. 389 (1889); *see* Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434, 1446 (1965).

84. 1 ABA STANDARDS FOR CRIMINAL JUSTICE, § 4-5.2(b) (1980).

85. Faretta v. California, 422 U.S. 806, 820 (1975); United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979); *In re* Konick, 34 Pa. Commw. 502, 506, 383 A.2d 1002, 1004 (1978); *see generally* Chused, Faretta *and the Personal Defense: The Role of a Represented Defendant in Trial Tactics*, 65 CALIF. L. REV. 636 (1977).

86. Zurich Gen. Accident & Liab. Ins. Co. v. Kinsler, 12 Cal. 2d 98, 106-07, 81 P.2d 913, 918 (1938) (quoting Ohlquest v. Farwell & Co., 71 Iowa 231, 233, 32 N.W. 277, 279 (1887)), *overruled on other grounds*, 6 Cal. 3rd 784, 494 P.2d 9 (1972); Shores Co. v. Iowa Chem. Co., 222 Iowa 347, 350, 268 N.W. 581, 583 (1936) (quoting 6 C.J. *Attorney and Client* § 146 (1916)); *In re* Konick, 34 Pa. Commw. 502, 506, 383 A.2d 1002, 1004, *aff'd*, 488 Pa. 544 (1978) (citing Commonwealth *ex rel.* Bell v. Rundle, 420 Pa. 127, 127-28, 216 A.2d 57, 59, *cert. denied*, 384 U.S. 966 (1966)).

87. *See supra* note 85.

interfere with a choice between proper tactical alternatives made by defense counsel. A defendant's constitutionally guaranteed right to counsel requires "untrammelled and unimpaired assistance."[88]

The force of *Lakeside* has been diminished by the language of *Carter*.[89] In holding that a trial judge has the constitutional obligation to give the requested instruction, the *Carter* Court implicitly removed the tactical choice from the trial judge and returned it to the defense attorney.[90]

D. *Judicial Control Of The Cautionary Instruction Violates Due Process*

Petitioner in *Lakeside* presented only two arguments: (1) That the cautionary instruction violated his fifth amendment privilege against self-incrimination; and (2) his sixth amendment right to counsel.[91] In addition, one may view issuance of the cautionary instruction over defense objections as violative of the due process right to effective assistance of counsel.

Inherent in due process is the notion of fairness and a right to the benefit of counsel at every stage of the prosecution.[92] Due process is not satisfied through mere formal compliance with procedure,[93] thus, a defendant must be given the opportunity to inquire into the intrinsic fairness of the criminal process depriving him of his liberty even though the process appears proper on the face of the record.[94] The purpose of the privilege against self-incrimination is an attempt to make the judicial process a fair contest[95] between the state and the individual. In *Murphy v. Waterfront Commission*,[96] the Court found that the privilege placed emphasis on protecting the individual by requiring the government "to shoulder the entire

88. United States *ex rel.* Hart v. Davenport, 478 F.2d 203, 209 (3d Cir. 1973).

89. *See supra* notes 63-65 and accompanying text.

90. 450 U.S. at 305.

91. 435 U.S. at 336.

92. *See* Faretta v. California, 422 U.S. 806 (1975); Argersinger v. Hamlin, 407 U.S. 25 (1972); Anders v. California, 386 U.S. 738 (1967); Gideon v. Wainwright, 372 U.S. 335 (1963); Carter v. Illinois, 329 U.S. 173 (1946); Avery v. Alabama, 308 U.S. 444 (1940); Powell v. Alabama, 287 U.S. 45 (1932).

93. Carter v. Illinois, 329 U.S. 173, 175 (1946); Avery v. Alabama, 308 U.S. 444, 446 (1940).

94. Carter v. Illinois, 329 U.S. 173, 175 (1946).

95. *See* McCORMICK'S, HANDBOOK OF THE LAW OF EVIDENCE § 118, at 252-54 (E. Cleary 2d ed. 1972); 8 J. WIGMORE, *supra* note 36, § 2251, at 317; Note, *supra* note 30, at 273.

96. 378 U.S. 52 (1964).

load."[97]

There is conflict between the fifth amendment policy and due process when a state is permitted to comment in any way on a defendant's failure to testify, despite defense counsel's request that the judge refrain from such comment. The practice of usurping the defense function could encourage adverse jury inferences and thwart the balance by unfairly adding to the state's evidence.[98] By giving a *sua sponte* cautionary instruction and bringing defendant's failure to testify to the jury's attention, the judge upsets the constitutionally required balance by denying defendant the due process right to effective assistance of counsel at the jury instruction stage of the trial.

Petitioner in *Lakeside* argued that his sixth amendment right to counsel, obligatory on the states by the fourteenth amendment, was violated.[99] The Court rejected this argument, stating that the right to counsel, no matter how fundamental, could not prevent a court from instructing the jury on the basic principles of the criminal justice system.[100] The *Lakeside* majority, however, failed to take into account the fact that the right to assistance of counsel is the foundation of the adversary system of criminal justice.[101] In *Powell v. Alabama*,[102] the Court defined the right to effective assistance of counsel as an important aspect of a fair trial within the meaning of the due process clause.[103] Justice Stewart's concurrence in *Chapman v. California*[104] extended this concept by describing it as a right so basic to a fair trial that its violation is not harmless error.[105] Reversal was therefore mandated even in the absence of a particular showing of prejudice and even though the defendant was clearly guilty.[106]

There are numerous ways through which a defendant can be denied "effective assistance of counsel."[107] In *Douglas v. Califor-*

97. 378 U.S. at 55 (quoting 8 J. WIGMORE, *supra* note 36, § 2251, at 317).

98. Note, *supra* note 30, at 290-91; *see* 435 U.S. at 342-48 (Stevens, J., dissenting).

99. 435 U.S. at 341.

100. *Id.* at 342.

101. The Supreme Court established that the right to effective assistance of counsel is fundamental and essential to a fair trial. *See* Gideon v. Wainwright, 372 U.S. 335, 339-45 (1963); Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938); Powell v. Alabama, 287 U.S. 45, 66-68 (1932); *see also* Faretta v. California, 422 U.S. 806, 816 (1975); Smith v. O'Grady, 312 U.S. 329, 334 (1941); Avery v. Alabama, 308 U.S. 444, 445-46 (1940); Grosjean v. American Press Co., 297 U.S. 233 (1936).

102. 287 U.S. 45 (1932).

103. *Id.* at 71.

104. 386 U.S. 18, 43-44 (1967) (Stewart, J., concurring).

105. *Id.*

106. 386 U.S. at 43 (1967) (citing Tumey v. Ohio, 273 U.S. 510, 535 (1927)).

107. United States v. Decoster, 624 F.2d 196, 201 (1976).

nia,[108] in accordance with a state statute, the trial judge was entitled to make an ex parte examination of the record to determine whether appointment of counsel would be an advantage to the petitioner or the appellate court. After the trial court denied the appointment, the Supreme Court held that where the merits of an indigent's only appeal were decided without benefit of counsel, due process was violated.[109]

The Court's decision in *Lakeside*, which allowed the trial judge to give the cautionary instruction over the defendant's objection,[110] is analogous to the constitutional violation of due process in *Douglas*. In *Lakeside*, it was the judge, not counsel, who determined whether there was a need for the cautionary instruction.[111] In *Douglas*, judicial intervention in the form of an ex parte determination by the judge violated due process.[112] Because a judge's ex parte determination of the merits of an appeal violated due process in *Douglas*, a judge's *sua sponte* determination of the value of a cautionary instruction violated due process in *Lakeside*.

In *Ferguson v. Georgia*,[113] the Supreme Court held unconstitutional a Georgia statute permitting a defendant to make an unsworn statement while barring him from having his testimony elicited under oath in direct examination.[114] The Court found that the accused had a due process right to the guidance of counsel at every step in the trial.[115] The *Ferguson* Court, after rejecting the common law notion that a person charged with a crime is incompetent to testify under oath,[116] held that the defendant had the right to be guided by counsel in direct examination.[117]

In *Brooks v. Tennessee*,[118] a state statute required that a defendant who chose to testify do so prior to any other testimony for the defense.[119] The Supreme Court invalidated the statute, ruling that the decision to testify was not only an important constitutional right,

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108. 372 U.S. 353, 354-55 (1961).
109. *Id.* at 354-57.
110. 435 U.S. at 339.
111. *Id.*
112. 372 U.S. at 354-57.
113. 365 U.S. 570 (1961).
114. *Id.* at 592-96.
115. *Id.* at 594-95 (citing Powell v. Alabama, 287 U.S. at 69).
116. *Id.* at 570, 592-96.
117. *Id.* at 594-95.
118. 406 U.S. 605 (1972).
119. *Id.* at 606 n.1. *See supra* note 44.

but also an important tactical decision that should be protected.[120]

The statute at issue in *Brooks*[121] required the defendant to be the first to testify for the defense, or be barred, without the opportunity to first evaluate the tactical wisdom of testifying after considering the evidence presented by the other defense witnesses.[122] The Supreme Court recognized that a defendant might have valid reasons for testifying last.[123] At the close of the state's case an accused may not know whether his testimony will be helpful to his case.[124] Therefore, he may wish to delay the risk of taking the stand until after the other defense witnesses have testified.[125]

In reasoning that counsel for the accused cannot be restricted in his tactical determination of when a defendant should testify, the *Brooks* Court found that the statute conflicted with defense counsel's professional judgment.[126] The defendant, forced to give up the strategically superior choice of waiting to testify after the other defense witnesses, surrendered his due process rights.[127] The Court determined that the risk of a defendant causing his testimony to conform to that of the preceeding witnesses did not override defendant's privilege to remain silent.[128]

The petitioner's situation in *Lakeside* is analogous to *Brooks*. The instruction in *Lakeside*[129] pressured the defendant to take the witness stand in order to avoid the risk that an adverse inferences would be drawn from his choice to remain silent.[130] Judicial discre-

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120. 406 U.S. at 612-13.
121. *See supra* note 44.
122. *Id.* at 610.
123. *Id.* at 609-10.
124. *Id.*
125. *Id.*
126. *Id.* at 612-13.
127. *Id.*
128. *Id.* at 611.
129. 435 U.S. at 335. The trial judge gave the following instruction:

> Under the laws of this State a defendant has the option to take the witness stand to testify in his or her own behalf. If a defendant chooses not to testify, such a circumstance gives rise to no inference or presumption against the defendant, and this must not be considered by you in determining the question of guilt or innocence.

Id.

130. Studies on jury instructions in general have shown that a judge's instruction can have a significant effect on jurors. Reed, *Jury Simulation: The Impact of Judge's Instructions and Attorney Tactics on Decisionmaking*, 71 J. CRIM. L. & CRIMINOLOGY 68, 71 (1980). A recent national public opinion survey conducted for the National Center for State Courts demonstrates the importance of the cautionary instruction. The study revealed that 37 percent of those interviewed wrongfully believed that it was the responsibility of the defendant to prove his innocence rather than the responsibility of the State to

tion in *Lakeside* exacted a price on the defendant's silence by forcing him to forego his privilege to remain silent, in order to diminish any adverse inferences that might otherwise have been drawn as a result of the cautionary instruction. It cannot be said that pressuring a defendant to take the witness stand is a constitutionally permissible means of protecting the defendant from adverse inferences.

The *Lakeside* Court reasoned that the instruction did not exert the same kind of pressure on a defendant that was unacceptable in *Griffin*.[131] In that case the unconstitutional compulsion was produced by comments from the prosecutor implying that the defendant's silence was affirmative evidence of his guilt.[132] In *Lakeside*, however, the Court asserted that the purpose of the cautionary instruction was to remove adverse inferences. The instruction, therefore, was not a form of compulsion because it could not violate the constitutional principle it was intended to protect.[133] Under the *Brooks* rationale, however, the *Lakeside* argument loses force. In *Brooks*, the statute compelling the defendant to testify first was invalidated because, in addition to stripping defendant of his privilege to remain silent, it took a tactical choice away from defense counsel.[134] The judicial discretion in *Lakeside*, therefore, violated due process because it forced the defendant to forego a defense strategy. The *Lakeside* Court's determination that issuance of the instruction did not constitute a form of compulsion is inapplicable to the issue of the due process right to effective assistance of counsel.

Within the tradition of the adversary process, the right to the

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prove guilt. Therefore, the instruction is designed to cure this misconception. 450 U.S. at 303 n.21 (citing 64 A.B.A.J. 653 (1978)).

Nevertheless, the possibility remains that by calling attention to the fact that the defendant has not testified, a cautionary instruction may result in an effect other than the one intended: the jury may place specific emphasis on the defendant's failure to testify. Comment, *supra* note 36, at 585:

> Lack of knowledge of the events which occur in the jury room makes it difficult to postulate the effect which comment has upon a jury. However, it is more probable than not that the subtle adverse influence which the silence of an accused produces is augmented when it is specifically pointed out to a jury by an authoritative figure.

Id.; Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE AND BASIC CRIMINAL PROCEDURE 184 (5th ed. Supp. 1981) (citing 2 Justice Assistance News 6 (1981)). This study states that the average juror probably understands only half of the jury instructions. *Id.*

131. 435 U.S. at 339. *See generally* Berger, *The Unprivileged Status of the Fifth Amendment Privilege*, 15 AM. CRIM. L. REV. 191, 195-98 (1978).

132. 380 U.S. at 614-15.

133. 435 U.S. at 339.

134. 406 U.S. at 612-13.

effective assistance of counsel has been understood to mean the absence of any restrictions on the function of defense counsel.[135] *Lakeside* unfairly restricted defense counsel by nullifying defense strategy at the jury stage of the trial in contravention of the due process standards similar to those set forth in *Herring v. New York*.[136]

In *Herring*, a state statute[137] conferred upon the judge the discretionary power to deny counsel the opportunity to present a closing argument. The statute was found to violate the due process right to effective assistance of counsel.[138] To deny defense counsel the benefit of a closing argument denies the defendant the benefit of any positive inferences that the jury might draw from the closing argument. In its holding that due process was violated because of restrictions placed on the function of defense counsel,[139] the Court stated that defense counsel had a right to make a closing argument regardless of the strength of the prosecution's case.[140] Total denial of such an opportunity deprived the accused of the basic right to make his defense.[141]

In a criminal trial, where the basic purpose is factfinding, the closing argument becomes an important opportunity to advance the evidence for both sides before submission to the jury.[142] Analogous to the constitutionally protected closing argument is the right of the defendant and his attorney to present the defense free from compulsion to testify. There can be no justification for a procedure that allows a trial judge complete discretion to deny a defendant the opportunity to choose whether his failure to testify should be commented on. In denying defendant the benefit of counsel's ability to control jury inferences that might be drawn by defendant's silence, *Lakeside* violates due process because defendant was denied his basic right to the function of defense counsel.

Effective assistance of counsel was found to have been denied

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135. Cuyler v. Sullivan, 446 U.S. 324, 344 (1980) (citing Brooks v. Tennessee, 406 U.S. 605, 612-13 (1972); Geders v. United States, 425 U.S. 80, 91 (1971); Ferguson v. Georgia, 365 U.S. 570, 593-96 (1961)); Herring v. New York, 422 U.S. 853 (1975).

136. 422 U.S. 853 (1975).

137. *Id.* at 854-55 n.1. The statute states: "The court may in its discretion permit the parties to deliver summations. If the court grants permission to one party, it must grant it to the other also. If both parties deliver summations, the defendant's summation must be delivered first." *Id.* (quoting N.Y. CRIM. PROC. LAW § 320.20(3)(c) (1971)).

138. 422 U.S. at 863-65.

139. *Id.* at 864-65.

140. *Id.* at 859.

141. *Id.*

142. *Id.* at 862.

by statutes that: give a judge the exclusive determination of the merits of an appeal;[143] bar a defendant from having his testimony elicited through direct examination by counsel;[144] restrict counsel's decision when to put a defendant on the witness stand;[145] and give a judge the discretionary power to deny closing arguments.[146] These procedures were impediments which constituted direct state interference with a defendant's exercise of his fundamental due process right to effective assistance of counsel.[147] It would be incongruous for the Court to so scrupulously protect the right to effective assistance of counsel in these circumstances and reject the right under the circumstances presented in *Lakeside*. It would be a denial of the due process right to effective assistance of counsel for the judge to give the cautionary instruction over the objection of the defendant.

Carter, on the other hand, returned to defendant the due process right to choose for himself the degree of his silence.[148] *Carter* placed in the hands of defense counsel the task of measuring the risk of adverse inference.[149] It became defense counsel's duty to request an instruction to "minimize the danger"[150] of adverse inferences if he suspected that they may be drawn.

Carter also recognized the need to protect the accused's right to the benefit of counsel. There, the Court stated that "a trial judge has a powerful tool at his disposal to protect the constitutional privilege—the jury instruction—and he has an affirmative constitutional obligation to use that tool *when a defendant seeks its employment*."[151] *Carter* clearly demonstrated that the Court is moving away from the narrow construction of the right to effective assistance of counsel presented in *Lakeside*. *Carter* did not expressly overrule *Lakeside*,

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143. 372 U.S. at 353.

144. 365 U.S. at 570.

145. 406 U.S. at 605.

146. 422 U.S. at 853.

147. United States v. Decoster, 624 F.2d 196, 201 (D.C. Cir. 1976); *see also* Geders v. United States, 425 U.S. 80 (1976), wherein a court order through which the defendant was denied the opportunity to see his attorney during an overnight recess infringed upon the constitutional right to effective counsel. The Court held that the state interest in preventing the possibility of influence on the defendant's testimony during the recess was not a compelling reason to override the right to the assistance and guidance of counsel. Trial strategies and tactics could be discussed during such recess and the sequestration of the defendant would prevent defense preparation. 425 U.S. 80, 88 (1976).

148. 450 U.S. at 305 (citing Malloy v. Hogan, 378 U.S. 1, 8 (1964)).

149. *See supra* notes 81-86 and accompanying text.

150. 450 U.S. at 305.

151. *Id.* at 303 (emphasis added).

but it did weaken the *Lakeside* rationale, making its continued vitality doubtful.

IV. CONCLUSION

Carter eliminated the uncertainties surrounding the cautionary instruction left unresolved by *Griffin* and *Lakeside*.[152] Implicitly, the *Carter* decision stands for the proposition that the discretion of utilizing the cautionary jury instruction belongs to the defendant[153] because it is attached to the privilege against self-incrimination, a privilege exclusively within the control of the accused and his attorney.

The Supreme Court is placing a stronger emphasis on the individual's free will and is not giving deference to the state policy interests that were invoked in *Lakeside*. *Carter* symbolizes that the Court is no longer reaching back to a traditional interpretation of the privilege to remain silent but, instead, seems to be expanding the privilege in the interest of due process. *Carter* reasserts the liberal policy justifications[154] that underlie the privilege against self-incrimination to maximize protection for the individual criminal defendant.

The cautionary jury instruction plays an important role in the criminal justice system. It is essential that its use comport with the highest level of due process protection. *Carter* satisfied this due process requirement by providing the accused full benefit of his counsel's expertise in exercising his discretion over the use of the cautionary instruction. *Carter*, therefore, severely threatens the *Lakeside* rationale by moving toward a more expansive protection of the privilege against self-incrimination, as well as a more expansive view of the due process right to effective assistance of counsel.

Patti Lee Hakes

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152. *See supra* notes 17, 63-65 and accompanying text.

153. *See supra* notes 63-65 and accompanying text.

154. Comment, *supra* note 36, at 591-94; 8 J. WIGMORE, *supra* note 36, § 2251 at 318:

> The significant purposes of the privilege . . . are two: The first is to remove the right to an answer in the hard cores of instances where compulsion might lead to inhumanity, the principal inhumanity being abusive tactics by a zealous questioner. . . . The second is to comply with the prevailing ethic that the individual is sovereign and that proper rules of battle between government and individual require that the individual not be bothered for less than good reason and not be conscripted by his opponent to defeat himself. . . .

Id.