



2002

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Recommended Citation

Taylor, Brenda N. (2002) "Recent Developments: *Gray v. State*: A Court Has Discretion to Allow a Witness Accused by the Defendant of Committing the Crime to Invoke the Fifth Amendment in the Jury's Presence," *University of Baltimore Law Forum*: Vol. 33 : No. 1 , Article 10.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol33/iss1/10>

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Gray v. State:**A Court Has Discretion to Allow a Witness Accused by the Defendant of Committing the Crime to Invoke the Fifth Amendment in the Jury's Presence**

By: Brenda N. Taylor

In a case of first impression, the Court of Appeals of Maryland held a court has discretion to allow a witness, accused by the defendant of committing the crime, to invoke the Fifth Amendment in the jury's presence. *Gray v. State*, 368 Md. 529, 564, 796 A.2d 697, 717 (2002). The court further stated when a court does not allow a "Gatton witness" to invoke the Fifth Amendment before a jury, the court should instruct the jury that the witness invoked his right against self-incrimination and is unavailable to the defendant. *Id.* at 564, 796 A.2d at 717-18.

James Gray ("Gray") was charged with the murder of his wife, Bonnie Gray ("Bonnie"), whose body was found in her car trunk on December 6, 1995. *Id.* at 533, 796 A.2d at 699. During the trial, which began on March 17, 1998, Gray insisted his wife's lover, Brian Gatton ("Gatton"), murdered her. *Id.* Witnesses testified that Bonnie and Gatton had an affair. *Id.* Additional evidence was proffered implicating Gatton in Bonnie's murder. *Id.* at 533-34, 796 A.2d at 699.

The Circuit Court for Charles County, following a hearing on the Motion in Limine, did not permit Gray's witness, Evelyn Johnson ("Johnson"), to testify about

Gatton's statements to her and in her presence, which implicated Gatton in Bonnie's murder. *Gray*, 368 Md. at 536, 796 A.2d at 701. The court refused to admit Johnson's hearsay testimony as a statement against penal interest made by Gatton under Maryland Rule 5-804(b)(3). The court reasoned Gatton made the statements while high and drunk or while threatening Johnson after he raped her. *Id.* at 537, 796 A.2d at 701. The court also refused to allow Gatton to invoke his Fifth Amendment right in the jury's presence and denied Gray's request to instruct the jury that Gatton invoked his Fifth Amendment privilege. *Id.* at 534, 796 A.2d at 699-700. The jury convicted Gray of first-degree murder and sentenced him to life imprisonment. *Id.* at 532, 796 A.2d at 698. Gray appealed to the Court of Special Appeals of Maryland, which affirmed the circuit court's decision. *Id.* The Court of Appeals of Maryland granted Gray's petition for writ of certiorari and reversed and remanded for a new trial. *Id.* at 532, 796 A.2d at 699.

The Court of Appeals of Maryland first reviewed whether Johnson's hearsay testimony should have been admitted and held "it was prejudicial error for the trial court to refuse to admit in evidence,

through Johnson's testimony, the declaration against Gatton's penal interest." *Gray*, 368 Md. at 565, 796 A.2d at 718. Under Maryland Rule 5-804(b)(3), when a declarant is unavailable as a witness, a declarant's inculpatory statement that exculpates an accused must be corroborated. *Id.* at 536, 796 A.2d at 701. Gatton's statements made to Johnson before the rape substantially corroborated his post-rape statements. *Id.* at 546, 796 A.2d at 706. Additional evidence was proffered to corroborate Johnson's testimony about Gatton's statements against interest. *Id.*

Next, the court addressed whether a defendant is entitled to question an alternate suspect in the presence of a jury when the court knows the witness will invoke the Fifth Amendment. *Id.* at 532-33, 96 A.2d at 699. Prior cases dealt with a prosecution or court witness called to testify for inculpatory purposes when it was known or should have been known the witness intended to invoke the Fifth Amendment. *Id.* at 558, 796 A.2d at 713-14. In the instant case, Gray, the defendant, wanted Gatton, who was not an accomplice, to testify or invoke the Fifth Amendment in the jury's presence for exculpatory

evidentiary purposes. *Gray*, 368 Md. at 558, 796 A.2d at 714.

The majority concluded a court must exercise its discretion to determine if a defendant is unfairly prejudiced if the court does not allow the defendant to call a potentially exculpatory witness when the court knows that the witness will invoke the Fifth Amendment privilege before a jury. *Id.* at 561, 796 A.2d at 716. Whether a criminal defendant may request a witness to testify before a jury when it is known he will reasonably and in good faith invoke the Fifth Amendment privilege is determined by applying Maryland Rules 5-401 and 5-403. *Id.* at 560, 796 A.2d at 715. The court noted there could be probative value to a witness's assertion of the privilege in a criminal case. *Id.* A court, in exercising its discretion, must remember a "defendant is entitled to have his defense fully presented to the jury." *Id.* at 561, 796 A.2d at 716.

A court must, on the record, first determine if sufficient other evidence was proffered, which "if believed by any trier of fact, might link the accused witness to the commission of the crime." *Id.* at 564, 796 A.2d at 717. If such evidence exists, the court may allow, and limit as appropriate, the defendant to question the witness about his involvement in the crime and have him invoke the Fifth Amendment privilege in the jury's presence. *Gray*, 368 Md. at 564, 796 A.2d at 717.

In a concurring opinion, Judge

Raker stated the court erred in refusing to allow Gatton to invoke the Fifth Amendment privilege before the jury. *Id.* at 565, 796 A.2d at 719. Judge Raker further stated "in 'single culprit crimes,' ... a defendant is not barred, as a matter of law, from calling a witness before the jury" to invoke the Fifth Amendment privilege and to attempt to convey to the jury, by inference, his claim of innocence. *Id.* at 578-79, 796 A.2d at 726. Judge Raker would require a defendant to notify the court if a witness is an alternate suspect. *Id.* at 579, 796 A.2d at 726. However, Judge Battaglia, the lone dissenter, stated that allowing adverse inference from the invocation of the Fifth Amendment privilege undermines "the integrity of the constitutional right to remain silent." *Id.* at 601, 796 A.2d at 740.

Finally, the court addressed whether a trial court, after refusing to permit the defendant to question an alternate suspect, is obligated to explain to the jury why the defense has not questioned the alternate suspect. *Id.* at 564, 796 A.2d 717-18. If a court does not allow a "Gatton witness" to invoke the Fifth Amendment privilege in the jury's presence, the court, if requested, should instruct the jury that the witness invoked his right against self-incrimination and is unavailable to the defendant. *Gray*, 368 Md. at 564, 796 A.2d 717-18. The court noted either party may be entitled to a jury instruction, even if the "Gatton witness" invokes his privilege in the jury's presence. *Id.* at 564, 796 A.2d at 718.

The guidance offered by the Court of Appeals of Maryland gives Maryland courts discretion to allow a defendant, who claims he is wrongly accused, to place an alternate suspect on the witness stand. The alternate suspect may invoke the Fifth Amendment privilege so long as there is sufficient other evidence to support the defendant's accusation. When adequate evidence exists, defense attorneys should not hesitate to call a "Gatton witness" to create reasonable doubt in the minds of the jury.