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Putting an End to the Speculative Jury: Louisiana v. Haddad

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PUTTING AN END TO THE SPECULATIVE JURY: *LOUISIANA v. HADDAD*

On April 29, 1997, Sergeant Brady Buckley ("Buckley") observed a vehicle heading in the wrong direction on a one-way exit ramp to the I-10 Service Road in Metairie, Louisiana.[1] Buckley pursued the vehicle with the intention of ticketing the driver, Lionel Smith ("Smith"), for driving the wrong way on a one-way street and for speeding.[2]

After stopping the car, Buckley ordered Smith out of the vehicle and asked Smith to produce the vehicle's registration papers.[3] Smith replied that he did not know where the papers were located.[4] As Buckley escorted Smith back to the vehicle to retrieve the papers, an altercation ensued between Buckley and the defendant, Anwar Haddad ("defendant"), who had been sitting in the passenger seat of the vehicle. However, the facts are in dispute as to exactly what happened.[5]

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1. *See* Louisiana v. Haddad, 733 So. 2d 662, 664 (La. App. 5th Cir. 1999). Buckley was employed with the Jefferson Parish Sheriff's Office. *See id.* According to Buckley, who was driving north on North Causeway, the vehicle made a U-turn in front of Buckley's vehicle and proceeded north on North Causeway at a high rate of speed. *See id.*

2. *See id.* The facts are unclear on this point. Buckley testified that as the vehicle proceeded north on North Causeway, the driver made erratic lane changes until, finally, the vehicle turned into the parking lot at Lakeside Shopping Center and stopped. *See id.* The passenger/defendant maintained that he was "kind of sleeping" at the time but did remember Smith making "crazy turns." Original Application on Behalf of Anwar Haddad Defendant/Applicant at 13, Louisiana v. Haddad, 733 So. 2d 622 (La. App. 5th Cir. 1999) (No. 99-K-1272) [hereinafter Applicant's Brief]. However, the defendant did not dispute Buckley's allegation that Smith was in violation of several traffic violations. *See id.*

3. *See* Applicant's Brief, *supra* note 2, at 2.

4. *See Haddad*, 733 So. 2d at 664. Smith stated that he did not know where the registration was located because the vehicle belonged to Smith's girlfriend. *See id.* The defendant's brother, Samir, later testified that the vehicle belonged to Samir's girlfriend. *See id.*

5. According to Buckley, as he and Smith approached the vehicle, the defendant, Haddad, while seated in the passenger seat, pulled a weapon from his waistband. *See* Applicant's Brief, *supra* note 2, at 2. Buckley then drew his weapon and ordered the defendant to "freeze." *See Haddad*, 733 So. 2d at 664. Upon that command, the defendant dropped the gun onto the floor of the vehicle. *See id.* The defendant was handcuffed and taken to the police unit. *See id.*

In contrast, the defendant testified that as Smith stopped the vehicle, Smith tossed the gun to

After the altercation, the defendant was ordered to exit the vehicle and lie face down on the ground.[6] After placing the defendant in handcuffs, Buckley retrieved a loaded .380 Lorcin semi–automatic handgun from inside the vehicle.[7] A police search revealed that the gun was listed as stolen.[8] The search also revealed that the defendant had outstanding attachments and prior felony convictions.[9] The defendant was charged with possession of a firearm by a convicted felon.[10]

Prior to jury selection in Haddad's second trial, Smith, when called as a witness at the first trial, stated for the record that he had decided to invoke his Fifth Amendment privilege against self–incrimination and was excused from testifying by the court.[11] At trial, the defense argued that because several witnesses testified to Smith's involvement in the events leading up to the defendant's arrest, the jury would be left to speculate as to why the defendant did not call Smith as a witness.[12] There

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the defendant and advised the defendant to run. *See Haddad*, 733 So. 2d at 665. However, the defendant instead placed the gun beside his leg and informed Buckley that there was a gun in the car. *See id.* According to the defendant, Buckley was unaware that a gun was in the vehicle up to this point. *See id.*

The defendant also maintained Buckley never pulled his weapon, never ordered the defendant to "freeze," and did not order the defendant to place his hands on the interior ceiling of the vehicle. *See* Applicant's Brief, *supra* note 2, at 2–3. Interestingly enough, according to the defendant, Buckley's police report failed to mention that Buckley was forced to draw his weapon, that Buckley ordered the defendant to place his hand's on the ceiling of the vehicle, or that Lionel Smith was used as a "human shield." *See* Applicant's Brief, *supra* note 2, at 3.

6. *See Haddad*, 733 So. 2d at 664.

7. *See id.*

8. *See id.*

9. *See id.*

10. *See Haddad*, 733 So. 2d at 664. Later, on April 21, 1998, the defendant was charged with a second count of possession of a firearm by a convicted felon. *See id.* at 663. The noted case represents the second trial on count one of possession of a firearm by a convicted felon. *See id.* at 663–64.

11. *See id.* at 665. During the first trial, Smith invoked the Fifth Amendment privilege on the witness stand in the presence of the jury. *See* Applicant's Brief, *supra* note 2, at 7. The jury in the first trial was unable to reach a verdict as to count one, but returned a verdict of not guilty as to count two; count one and two were charges of possession of a firearm by a convicted felon. *See Haddad*, 733 So. 2d at 663.

12. *See Haddad*, 733 So. 2d at 665. Defense counsel also raised several objections to inferences the prosecution made to the jury. *See id.* Specifically, the prosecution, in closing argument, commented to the jury:

> [The defendant] talks about . . . Lionel Smith . . . driving erratic [sic] and Lionel Smith is doing this,

fore, the defense asserted that the defendant was entitled to an instruction which would neutralize any inference the jury might draw from the failure of Smith to testify.[13] The trial court noted the defendant's objection, but did not give the special charge to the jury.[14]

On appeal, the defendant argued that the denial of the "neutralizing" charge constituted reversible error and denied the defendant his Sixth Amendment right to present witnesses at trial.[15] The Fifth Circuit Court of Appeal of Louisiana *held* that it is not reversible error when a court refrains to give a "neutralizing" instruction because the verdict is unaffected when (1) a witness invokes the Fifth Amendment privilege and (2) the court declines to give the "neutralizing" instruction. *Louisiana v. Haddad*, 733 So. 2d 662, 667 (La. App. 5th Cir. 1999).

Before the noted case, neither the Louisiana Supreme Court, nor the Louisiana appellate court had directly addressed the issue raised in *Haddad*.[16] However, the United States Supreme Court has established that, upon proper request, the Fifth Amendment requires a trial judge to instruct the jury that no

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and Lionel Smith must be the bad guy .... And what else is interesting? Lionel Smith can have a gun, because he's not a convicted felon .... So why is Lionel Smith going to dump the gun? Is that reasonable? Ladies and gentlemen, that's what it comes back to. When you go in the jury room, ask yourself, 'What's reasonable, and *who do I believe*?'

Applicant's Brief, *supra* note 2, at 14 (citing Transcript, Pages 93–94)(emphasis added)(bold omitted).

13. *See Haddad*, 733 So. 2d at 665.

14. *See id.* Instead, the jury was instructed that:

"In evaluating the testimony of a witness, you may consider their [sic] ability and opportunity to observe and remember the matter about which they [sic] have testified, their [sic] manner while testifying, any reason they [sic] may have for testifying in favor or against the State or defendant, and the extent to which their [sic] testimony is supported or contradicted by other evidence."

Applicant's Brief, *supra* note 2, at 16.

The jury was also told that "in closing arguments, the attorneys are permitted to present for your consideration their contentions regarding what the evidence has shown or not shown and what conclusions they think may be drawn from the evidence...." *Id.* The trial court's instructions also told the jury "[y]ou must determine the facts only from the evidence presented. The evidence which you should consider consists of the testimony of witnesses and any other evidence which the Court has permitted the parties to introduce." *Haddad*, 733 So. 2d at 666.

Finally, the trial judge gave general instructions as set forth in the Louisiana Code of Criminal Procedure. *See id.* (citing LA. CODE CRIM. PROC. ANN. art. 802 (West 1998)).

15. *See* Applicant's Brief, *supra* note 2, at 6.

16. *See Haddad*, 733 So. 2d at 666.

adverse inference can be drawn from a *defendant's* failure to testify.[17]

In *Carter v. Kentucky*,[18] the United States Supreme Court reasoned that "the inclusion of the privilege against compulsory self–incrimination in the Fifth Amendment 'reflects many [of the nation's] fundamental values and . . . our unwillingness to subject those suspected of a crime to . . . self–accusation, perjury or contempt.'"[19] The Court stated that the "Constitution guarantees that no adverse inferences are to be drawn from" the use of the Fifth Amendment privilege.[20]

Moreover, the Court in *Carter* recognized that even without adverse comment, a jury may still draw inferences from a defendant's silence.[21] The jury instruction, the Court reasoned, is a powerful weapon that can be used to protect the constitutional privilege to the extent that jury instructions help prevent jury speculation.[22] Therefore, the trial judge has an affirmative duty to give a neutralizing instruction when a defendant seeks its employment to reduce jury speculation "as to why a defendant stands mute in the face of a criminal accusation."[23] The Court also held that the failure to limit the jury's speculation "was an impermissible toll on the full and free exercise of the [Fifth Amendment] privilege."[24]

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17. *See* Carter v. Kentucky, 450 U.S. 288, 303–04 (1981), *cited in Haddad*, 733 So. 2d at 665.

18. 450 U.S. 288 (1981).

19. *See id.* at 299 (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)).

20. *See id.* at 305.

21. *See id.* at 301. The Court reasoned that a jury can be expected to notice a defendant's failure to testify, and without a limiting instruction, the jury will undoubtedly speculate about the incriminating inferences that can be drawn from the defendant's silence. *See id.* at 304; *see also* United States v. Bain, 596 F.2d 120, 122 (5th Cir. 1979) (finding that the failure to give a limiting instruction constituted reversible error); United States v. English, 409 F.2d 200, 201 (3d Cir. 1969) (finding reversible error because the instructions did not reach the specific point that no presumption arises against a defendant from his failure to testify). Furthermore, the Court recognized that a jury can derive significant additional guidance from the requested neutralizing instruction. *See Carter*, 450 U.S. at 304.

22. *See Carter*, 450 U.S. at 303.

23. *Id.*

24. *Id.* at 305.

Since *Carter*, it has been clear that a neutralizing instruction is required when the defendant invokes the Fifth Amendment and does not testify.[25] However, there is little jurisprudence in support of the contention that a neutralizing instruction is required when a *witness* does not testify.[26] However, some federal courts have approved of the use of a neutralizing instruction when a witness has invoked the Fifth Amendment privilege.[27]

For example, in *Bowles v. United States*[28], the court reasoned that "a neutralizing instruction [is] . . . calculated to reduce the danger that the jury will in fact draw a negative inference from the absence of such a witness."[29] Thus, the court held

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25. Yet, this rule is not absolute. Three years after *Carter*, the U.S. Court of Appeals, in *Richardson v. Lucas*, upheld a conviction even though the neutralizing instruction was not given by the trial judge. *See* Richardson v. Lucas, 741 F.2d 753, 756 (5th Cir. 1984), *cited in Haddad*, 733 So. 2d at 667. In *Richardson*, there was overwhelming evidence placing the defendant at the scene of the crime. *See id.* at 755, 756. At trial, two witnesses positively identified the defendant as the person who committed the charged offense. *See id.* at 756. Although the defendant did not testify after invoking the Fifth Amendment right against self–incrimination, he did state in the presence of the jury that he was not in town when the crime occurred. *See Richardson*, 741 F.2d at 756 n.3. These claims were made by the defendant during defense counsel's direct and cross–examination of the witnesses. *See id.* at 756 n.3.

The court reasoned that the defendant's failure to testify, especially in view of his constant claims that the witnesses were lying, had no effect on the jury's appraisal of the witnesses' credibility. *See id.* at 756. The court held that the evidence was sufficient to support the conviction and was "so overwhelming as to establish guilt beyond a reasonable doubt." *Id.* Thus, there was "no reasonable possibility that the giving of a 'failure to testify' instruction would have affected the verdict of guilty for Richardson." *Id.*

26. *See Haddad*, 733 So. 2d at 665 (emphasis added).

27. *See id.* at 665–66; *see also* United States v. Martin, 526 F.2d 485 (10th Cir. 1975) (finding that the trial court gave a proper neutralizing instruction when the defendant sought to put a witness on the stand to compel the invocation of the Fifth Amendment privilege), *cited in Haddad*, 733 So. 2d at 666; Bowles v. United States, 439 F.2d 536 (D.C. Cir. 1970) (en banc) (finding that a defendant may request a neutralizing instruction which directs the jury not to draw improper inferences from the absence of the defendant's testimony), *cited in Haddad*, 733 So. 2d at 665.

28. 439 F.2d 536 (D.C. Cir. 1970).

29. *See Bowles*, 439 F.2d at 542. Like in the noted case, the witness in *Bowles* invoked the privilege against self–incrimination out of the presence of the jury. *See id.* at 541. However, unlike the noted case, neither the defense nor the prosecution in *Bowles* requested the neutralizing instruction. *See id.*

The defendant in *Bowles* requested that the judge inform the jury that the witness invoked the privilege, but the request was properly refused. *See id.* at 541. *See generally Martin*, 526 F.2d at 487 (holding that it is improper to force a witness to the stand and compel him to take the Fifth

that, had the defendant requested a neutralizing instruction, it would have been erroneous to refuse to grant the request.[30] However, because a neutralizing instruction was not requested, the defendant's conviction was affirmed.[31]

In *United States v. Martin*,[32] a federal circuit court again approved of the use of a neutralizing instruction.[33] The *Martin* court maintained that the use of a neutralizing instruction was proper because the instruction "served to put the entire matter in context" for the jury.[34] Significantly, the *Martin* court rea-

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in the presence of the jury); United States v. Lacouture, 495 F.2d 1237, 1240 (5th Cir. 1974) (counsel was prevented from calling a witness to the stand to invoke the Fifth Amendment privilege in the presence of the jury); United States v. Johnson, 488 F.2d 1206, 1211 (1st Cir. 1973) (holding that a court has discretion to prohibit a witness from taking the stand if it appears that the witness intends to claim a privilege as to essentially all questions); Morrison v. United States, 365 F.2d 521, 524 (D.C. Cir. 1966) (holding that it is appropriate for a judge to instruct the jury that a witness was not called to testify because the witness invoked the Fifth Amendment privilege when both counsels agree), *cited in Haddad*, 733 So. 2d at 665; Louisiana v. Gerard, 685 So. 2d 253, 259 (La. App. 5th Cir. 1996) (holding that a witness is not required to assert the privilege against self–incrimination in presence of jury when injurious disclosures may result), *cited in Haddad*, 733 So. 2d at 665; State v. Willie, 559 So. 2d 1321, 1337–38 (La. 1990) (discussing the impropriety of calling a witness before the jury for the exclusive purpose of having the witness invoke the Fifth Amendment privilege), *cited in Haddad*, 733 So. 2d at 665; State v. Berry, 324 So. 2d 822, 830 (La. 1975) (denying a request to have a subpoenaed witness claim the Fifth Amendment privilege in the presence of the jury), *cited in Haddad*, 733 So. 2d at 665.

30. *See Bowles*, 439 F.2d at 542.

31. *See id.* Judge Wright, dissenting, argued that the lack of a neutralizing instruction meant that the jury was allowed to draw a negative inference. *See id.* at 546 (Wright, J., dissenting). Judge Wright also argued that if a neutralizing instruction had been given, it is reasonable to believe that at least one juror might have been unable to conclude beyond a reasonable doubt that the defendant was guilty of the crime charged. *See id.* Thus, regardless of whether or not the parties requested the neutralizing instruction, a new trial must be held. *See id.*

Chief Justice Bazelon also dissented and held that the failure of the trial court to issue a neutralizing instruction to the jury was too important to be overlooked. *Bowles*, 439 F.2d at 546 (Bazelon, C. J., dissenting). The Chief Justice found this to be especially true when the record indicated that the trial court itself "was aware that no inference unfavorable to the defendant should be drawn" by a witness's failure to testify. *Id.*

32. 526 F.2d 485 (10th Cir. 1975).

33. *See Martin*, 526 F.2d at 487. The facts in *Martin* bear a striking resemblance to those in the noted case: not only was there conflicting testimony, but there were two trials as well. *See id.* at 486. At the first trial, the witness, who could have confirmed or denied the defendant's version of the events, invoked the privilege in front of the jury, and the jury was unable to reach a verdict. *See id.*

In contrast, at the second trial, the trial judge refused to allow the witness to invoke the privilege in front of the jury. *See id.* The second *Martin* jury convicted the defendant. *See id.*

34. *Id.* at 487.

soned that the neutralizing instruction given by the trial judge helped prevent the jury from drawing negative inferences from the fact that the witness chose to assert the Fifth Amendment privilege and did not testify.[35]

Although neither the Louisiana Supreme Court nor the Louisiana appellate courts have directly addressed the question of whether a defendant is entitled to a neutralizing instruction when a witness invokes a Fifth Amendment privilege, the Fifth Circuit Court of Appeal of Louisiana, like the *Bowles* and *Martin* courts, has approved the use of a neutralizing instruction.[36]

For example, in *Louisiana v. Gerard*,[37] the defendant argued that the trial court erred in refusing to instruct the jury as to the relevance of a co–defendant's invocation of his Fifth Amendment privilege against self–incrimination.[38] The *Gerard* court rejected this argument and affirmed the trial court's holding by noting that "the trial judge instructed the jury 'to draw no inference for or against either the state or the defendant from the fact that certain persons were mentioned or called as witnesses but did not actually testify.'"[39]

Conversely, the Louisiana Fifth Circuit Court of Appeal in *Haddad* abandoned the *Gerard* position in the noted case with regard to the proper use of neutralizing instructions when a witness opts not to testify by invoking the Fifth Amendment privilege. The court in *Haddad* noted the rule established by the United States Supreme Court in *Carter* that, upon proper request, a neutralizing instruction is required when a defendant does not testify.[40] The *Haddad* court also noted *Martin* and *Bowles* which approved of the use of neutralizing instructions

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35. *See Martin*, 526 F.2d at 487. The instructions given to the *Martin* jury were as follows:
> There has been testimony in this case about an informant.... As a result of a hearing held outside the presence of the jury, the Court has determined [the informant] is not available to be called as a witness by either side in this case. The jury may not draw any inference from the fact that [the informant] did not appear as a witness in this case.

Id. at 486–87.

36. *See Haddad*, 733 So. 2d at 666.

37. 685 So. 2d 253 (La. App. 5th Cir. 1996).

38. *See Gerard*, 685 So. 2d at 256.

39. *Id.* at 259. The Louisiana Fifth Circuit Court of Appeal decided both *Gerard* and the noted case. *See Haddad*, 733 So. 22 at 662; *Gerard*, 685 So. 22 at 253.

40. *See Haddad*, 733 So. 2d at 665.

when a witness did not testify.[41] Nevertheless, the *Haddad* court concluded that there were no recent federal cases or Louisiana Supreme Court cases which directly addressed the issue presented in *Haddad*: is a neutralizing instruction required when a witness invokes the Fifth Amendment privilege?[42]

Therefore, the court shifted its analysis to the jury instructions given by the trial judge in light of the requirements of the Louisiana Code of Criminal Procedure.[43] The court also noted that the Louisiana Code of Criminal Procedure allows a special jury charge.[44] However, the court reasoned this special charge was not needed in this case because, when read as a whole, the instructions were adequate to inform the members of the jury not to draw negative inferences from Smith's refusal to testify.[45]

Moreover, the court in *Haddad* ruled that even if the trial court did err in failing to give the special instruction, it was harmless error.[46] The court reasoned that the jury apparently

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41. *See Haddad*, 733 So. 2d at 665–66.

42. *See id.* at 665–67. The *Haddad* court did recognize the existence of the issue in *Gerard*, but concluded that because the issue was waived in *Gerard*, it was not helpful to its analysis in the noted case. *See id.* at 666; *see also Gerard*, 685 So. 2d at 259.

43. Article 802 of the Louisiana Code of Criminal Procedure provides that the general charge given to the jury shall be as follows:

> 1) As to the law applicable to the case;
> 2) That the jury is the judge of the law and of the facts on the question of guilt or innocence, but that it has the duty to accept and to apply the law as given by the court; and
> 3) That the jury alone shall determine the weight and credibility of the evidence.

LA. CODE CRIM. PROC. ANN. art. 802 (West 1998).

44. Article 807 of the Louisiana Code of Criminal Procedure provides that in addition to the general charges, a defendant may request special jury charges; however, a special charge need not be given if it is included in the general charge or in another special charge given to the jury. *See* LA. CODE CRIM. PROC. ANN. art. 807 (West 1998).

45. *See Haddad*, 733 So. 2d at 666–67. In reaching this decision, the court reasoned that the jury was adequately informed that they were only to consider the evidence presented. *See id.*

46. *See id.* An erroneous jury instruction is subject to harmless error review. *See id.* (citing State v. Jynes, 652 So. 2d 91, 98 (La. App. 5th Cir. 1995)), *cited in Haddad*, 733 So. 2d at 667; *see also* Sullivan v. Louisiana, 508 U.S. 275, 279 (1993); Chapman v. California, 386 U.S. 18, 24 (1966); State v. Crossley, 653 So. 2d 631, 635–36 (La. App. 5th Cir. 1995), *cited in Haddad*, 733 So. 2d at 666; *Jynes*, 652 So. 2d at 98. "The appropriate standard for determining harmless error is 'not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered . . . was surely unattributable to the error.'" *Haddad*, 733 So. 2d at 667.

found Sergeant Buckley's testimony credible and based the guilty verdict on that testimony.[47] Thus, relying on *Richardson*, the court held that "the outcome of the case was not attributable to the trial court's refusal to give a 'neutralizing' instruction" to the jury.[48]

In shifting its focus to the jury instructions and relying on *Richardson*, the court failed to recognize facts that distinguish *Richardson* from the noted case.[49] In addition, the court failed to recognize the persuasiveness of *Bowles* and *Martin*, both of which approved of the use of a neutralizing instruction.[50]

The effect on a jury when the court fails to explain a witness's absence cannot and should not be ignored.[51] When a witness for the defense or prosecution fails to testify, it can have a seriously detrimental effect on the jury's appraisal of the credibility of the side that failed to produce the witness. This effect is exacerbated when there is contradictory evidence that only the non–testifying witness can resolve. The jury may conclude that credibility is lacking because of the prosecution or defense's failure to produce the witness. Thus, the question is raised whether there was sufficient evidence to meet the burden of proof and support the conviction.

Moreover, when the witness fails to testify, it is reasonable to believe that at least one juror would be unable to conclude beyond a reasonable doubt that the defendant was guilty. As a result, the verdict will be negatively impacted. This impact can be reduced or even eliminated by the use of a neutralizing instruction.

To illustrate, in the noted case, it is likely that every juror was aware that Smith was not called as a witness to testify. Smith's name was consistently referred to throughout the trial

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47. *See Haddad*, 733 So. 2d at 667.

48. *Haddad*, 733 So. 2d at 667. The court in *Richardson* held there was no reasonable possibility that a neutralizing instruction would have affected the verdict. *See Richardson*, 741 F.22 at 756; *see also supra* note 24.

49. *See supra* notes 5 & 24.

50. *See Martin*, 526 F.2d at 487; *Bowles*, 439 F.2d at 542.

51. *See supra* notes 11 & 20.

by both the prosecution and the defense.[52] Yet, the jury was left to speculate why Smith was not called to testify. The failure to produce Smith may have severely weakened the defendant's credibility in the eyes of the jury because Smith's testimony could have given credit to the defendant's version of the events.[53]

As the Supreme Court stated in *Carter*, the trial judge has a powerful tool in the jury instruction, and an affirmative duty arises to use this tool when its employment is sought to reduce the jury's speculation.[54] Moreover, the failure to limit the jury's speculation is an unacceptable burden on the application of the Fifth Amendment privilege.[55]

According to jurisprudence, the Constitution guarantees that no adverse inferences are to be drawn from exercising the Fifth Amendment right.[56] While in *Carter*, it was the defendant who invoked the Fifth Amendment privilege, the Court's reasoning should be similarly applicable when a witness has invoked the Fifth Amendment privilege as in *Bowles*, *Martin* and the noted case. There is no indication that the Framers of the Constitution intended to extend this guarantee only to defendants. To the contrary, the argument that the Constitution guarantees that negative inferences are prohibited when *any* person invokes the Fifth Amendment privilege is a more reasonable assumption of the Framer's intent. This protection extends to defendants and witnesses, especially those key witnesses that could confirm or deny a prosecution or defendant's account of the events.

Juries can only benefit from the use of a neutralizing instruction. The jury determines the credibility of witnesses. If a witness, who is repeatedly referred to by the parties, fails to testify, a neutralizing instruction will remind the jury that negative inferences cannot be drawn from that witness's absence.[57] Thus, the neutralizing instruction encourages that the jury will consider only the evidence presented.

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52. *See supra* note 12.
53. *See supra* note 5.
54. *See Carter*, 450 U.S. at 303.
55. *See id.* at 305.
56. *See id.*
57. *See Martin*, 526 F.2d at 487.

When only a non–testifying witness can resolve a fact dispute, the use of a neutralizing instruction can justify the jury's verdict.[58] There will be no question that every juror concluded the defendant was guilty beyond a reasonable doubt because each juror was made aware that they are to remain neutral in the face of a defendant's or a witness's silence. Again, it forces the jury to weigh only the evidence presented.

In effect, the neutralizing instruction guarantees that each party has met their burden of proof. When the request of a neutralizing instruction is denied, there is a danger that the jury will rely on their own speculations instead of the actual evidence. Thus, the failure of the trial court to issue a neutralizing instruction to the jury is too important to be overlooked.[59]

The Constitution protects the individual who chooses to remain silent and forbids negative speculation as a result of invoking the Fifth Amendment. The major implication of the noted case is the deprivation of that vital protection. The use of neutralizing instructions by the trial judge is an effective safeguard that helps to prevent the jury from relying on their own speculation instead of the evidence. If, when a witness has not testified, it is reasonable to believe that at least one juror might draw a negative inference against a party, then at the very least, a neutralizing instruction should be given.

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58. *See Martin*, 526 F.2d at 487; *Bowles*, 439 F.2d at 542; *Gerard*, 685 So. 2d at 259.
59. *See Bowles*, 439 F.2d at 546 (Bazelon, J. dissenting).