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Why Did Derek Chauvin Take the Fifth?

By Joel Cohen

"A defense lawyer at trial even mentioning the Fifth Amendment in open court seems bizarre."

Derek Chauvin has been convicted. And, clearly, not because his lawyer formally asked him on the record, albeit without the jury present, whether he was taking the Fifth Amendment.

But still! The morning after Chauvin's defense rested, the N.Y. Times headline read, "Chauvin Passes Up His Chance To Address Jury." No surprise. After all, every TV talking head had imparted his or her opinion, solicited or not, that he wouldn't. Some privately adding that Chauvin simply didn't have the balls, or with words similar.

Every prosecutor or former prosecutor in America had privately reveled gesticulating in the mirror about the deadly cross they would have administered had Chauvin stepped up to the plate. That is, unless Chauvin had somehow recognized the total impossibility of defeating the manslaughter charge, and so agreed with his lawyer to pony up, if necessary, crocodile-teared testimonial remorsefulness.

Anyway, below the Times headline was a large photograph of Chauvin seated adjacent to his lawyer, microphone in hand. This, the first time that the courtroom spectators had actually heard his voice, aside from when a recording showed him overruling his fellow officer while sitting on George Floyd's neck—cynically telling his cohorts that Floyd would remain right there, prone, under Chauvin's knee and weight.

Now, however, Chauvin was astonishingly answering his own lawyer's question, "Have you made your decision today whether you intend to testify or whether you intend to invoke your Fifth Amendment privilege?" The compliant Chauvin simply responded, "I will invoke my Fifth Amendment privilege today."

What? I quickly conducted an impromptu Rolodex email poll among people in the know. Each more or less scratched his head: How could this be?

Of course, judges should always want to "protect the record." Too often, convicted defendants who hadn't testified have claimed their trial lawyer's "ineffective assistance." And most often, it is that the lawyer didn't advise the defendant that he had an absolute right to testify—which was, indeed, the defendant's exclusive choice. Or, more often, that the lawyer basically browbeat him into not testifying. The latter often occurs when a defendant's testimony, as the lawyer is better able to determine, would be suicidal—even though it's the client's decision.

That so, and to preclude such post-conviction claims (which are often false), before the defense rests most judges conduct a simple voir dire of the defendant designed to help obviate the issue in the event that jailhouse lawyers begin whispering in the convicted defendant's ear. To forfend against this, increasingly more judges ask on the record, without the jury present: "Did your attorney advise you that you have an absolute right to testify? Did she tell you that the decision is absolutely yours? So, after having discussed it with your

attorney, is the decision to forgo testifying your own decision?" Makes total sense, given what the jailhouse bar association might later impart to an inmate in the jailhouse cafeteria.

What occurred, however, with Chauvin was radically different. In the biggest case in America and in open view of everyone, Chauvin's own lawyer was asking him if he was asserting his *Fifth Amendment privilege*—against self-incrimination. Not simply that he was deciding not to testify (which typically has nothing to do with self-incrimination). He was asking Chauvin to invoke "the Fifth Amendment"—the inferentially incriminating nature of which every television-watching fifth grader knows. (I actually polled five Minnesota criminal lawyers why formally "Taking 5" on the record seemed to be Minnesota's practice despite its prejudicial nature. I didn't get a satisfactory answer.)

We will likely never know if Chauvin had actually wanted to testify and that his lawyer, after conducting a mock cross-examination or otherwise, persuaded Chauvin not to. Or if Chauvin—after all, a police officer, presumably with at least some courtroom experience—had reached the decision on his own. Or whether there was a bitter confrontation between the two—it does happen—over this critical trial issue. Indeed, a decision whether or not to testify is often very difficult (although probably not particularly so in *Chauvin*). And yes, typically, in high publicity cases, defense lawyers might put on the record or generate to the press innocuous comments designed to cover the defendant for not testifying.

All said, a defense lawyer at trial even mentioning the Fifth Amendment in open court seems bizarre. Doing so might mean precious little in a run-of-the-mill case with no one watching. But in *Chauvin*?

The Fifth Amendment is sacrosanct and televised coverage, as here, often shines a light on issues that courts nationwide might want to pay better attention to. That said, there's no reason, even to "protect the record," for a criminal trial proceeding to ever require a criminal defendant to formally announce that he's asserting the Fifth Amendment. Yes, in the Patty Hearst trial in the '70s, she testified in her defense. On advice of her counsel, F. Lee Bailey, she asserted the Fifth Amendment to many questions posed by the prosecutor on cross-examination. A totally different situation, though.

It is true that in a civil case, a litigator can properly remind the jury that the adverse party asserted the Fifth Amendment in a pre-trial deposition. And the judge will actually instruct the jury that it may draw a negative inference against the adverse party as a result.

The criminal process, though, is far different, and needs to remain that way. There is no burden whatsoever on a defendant. Thus, requiring him to affirmatively invoke a constitutional right to avoid testifying is simply wrong.

Judges should indeed act to protect against later frivolous claims of ineffective assistance when a trial has gone badly for a defendant. But not at penalty of compelling a criminal defendant to publicly assert the Fifth Amendment. Requiring him to say, "I've fully discussed it with my lawyer who has told me I have a right to testify, and it's my own decision not to" should be sufficient.

Let's hope that, going forward, the *Chauvin* case will simply have been an aberration—for a whole lot of reasons.

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