

No. 26425 - State of West Virginia ex rel. Stanley M. Myers v. Honorable David H. Sanders,
Judge of the Circuit Court of Berkeley County

FILED

December 16, 1999

DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED

December 17, 1999

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Maynard, Justice, concurring:

I concur with the majority in this case, but I would go further than the majority is willing to go. In the instant case, the defendant was apparently willing to be deposed in his habeas corpus proceeding, but at some point in the deposition refused to answer certain questions asked by the prosecutor. The defendant claimed that the prosecutor was trying to get him to waive his Fifth Amendment privilege against self-incrimination and that he was asking irrelevant questions. In response, the prosecutor filed a motion to compel, and the circuit court ordered that the defendant could assert his Fifth Amendment privilege, but that adverse inferences could be drawn from his invocation of the privilege. The majority's decision upholds this ruling. While I concur with the majority's decision as far as it goes, I would go further and require the defendant to answer all questions once he waives his Fifth Amendment rights by taking the witness stand.

A criminal defendant's rights under the United States and West Virginia Constitutions can be waived. In fact, every time a criminal defendant decides to testify in a criminal case and takes the stand, he waives his Fifth Amendment witness privilege and must answer all questions propounded to him. Once he elects to testify, he cannot selectively invoke his Fifth Amendment rights and answer some questions and refuse to answer others.

Oddly, the majority's decision in this case allows a criminal defendant to answer some questions in a civil habeas proceeding, yet refuse to answer others by asserting the Fifth Amendment privilege. This simply does not make sense. If a criminal defendant chooses to answer questions in a civil habeas proceeding, then he should not be permitted to assert his Fifth Amendment rights when he is asked a question that he does not want to answer for obvious reasons. To hold otherwise, as the majority does in this case, gives greater protection to a criminal defendant in a civil habeas case than he would enjoy in a criminal case. For those reasons, I write separately in the hope that a more sensible rule will someday result.