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The Privilege to Remain Silent and the Presumption of Larceny Based on Unexplained Possession

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> Electronic surveillance strikes deeper than at the ancient feeling that a man's home is his castle; it strikes at freedom of communication, a postulate of our kind of society.[30]

Any electronic surveillance hereafter permitted must fall within the rigid limitations recognized in the instant case or must be a product of an antecedent order judicially sanctioning such intrusion. If these guidelines are adhered to the rights of the individual will be protected in our modern society.

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Based upon stolen goods found in his possession, the defendant, who did not take the stand, was convicted of breaking and entering with intent to steal following the court's instruction to the jury that *unexplained* possession of such goods was a fact from which the defendant's guilt might be inferred. The District Court of Appeal, Fourth District, reversed and remanded on the grounds that the *Miranda* decision precluded such an instruction as a violation of the accused's constitutional privilege to remain silent, and that the privilege would be valueless if the defendant's silence might be used against him at the trial.[1] On certiorari to the Supreme Court of Florida, *held*, quashed and remanded: The *Miranda* decision discussed an accused's silence in the face of custodial interrogation, not a defendant's failure to testify at trial. In the instant case, the defendant was free to testify or remain silent, since the instruction concerned the fact of possession as circumstantial evidence of guilt (a fact that the defendant could rebut through explanation), not his silence *per se*. *State v. Young*, 217 So.2d 567 (Fla. 1968).

The Fifth Amendment's prohibition of compulsory self-incrimination applies to the states through incorporation into the Fourteenth Amendment Due Process Clause.[2] Unexplained possession of recently stolen property is an inference of fact which the jury may either weigh as evidence of guilt or find as sufficient evidence to support conviction, depending on the rule applicable in the given jurisdiction.[3] The court may generally so instruct the jury.[4] A majority of courts faced with a self-incrimination challenge to the presumption of guilt based

30. Lopez v. United States, 347 U.S. 427 (1963) (dissenting opinion).

1. Young v. State, 203 So.2d 650 (Fla. 4th Dist. 1967).
2. Malloy v. Hogan, 378 U.S. 1 (1964).
3. 3 H. UNDERHILL, CRIMINAL EVIDENCE § 601 (5th ed. 1957).
4. 1 F. WHARTON, CRIMINAL EVIDENCE § 146 (12th ed. 1955).

on unexplained possession of stolen property as held that the presumption is constitutional as it does not compel the defendant to be a witness against himself.[5]

The Florida Supreme Court's concept that the presumption of guilt based on unexplained possession is nothing more than a rule of evidence that does not compel the defendant to testify against himself may be traced to *Yee Hem v. United States*,[6] the leading United States Supreme Court case. In *Yee Hem*, the defendant was convicted, under a federal statute, of concealing smoking opium after importation, with knowledge that it had been illegally imported. A second federal statute provided the basis for conviction: that any smoking opium found in the United States would be presumed to have been imported subsequent to 1909 (the date of passage of the first statute). Defendant was found in possession fourteen years after the designated date. Mr. Justice Sutherland stated in the majority opinion:

> The point that the practical effect of the statute creating the presumption is to compel the accused person to be a witness against himself may be put aside with slight discussion. The statute compels nothing. It does no more than to make possession of the prohibited article prima facie evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case.[7]

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5. Dunson v. United States, 404 F.2d 447 (9th Cir. 1968); McClain v. Florida, 185 So.2d 707 (Fla. 2d Dist. 1966); People v. Kulig, 373 Ill. 102, 25 N.E.2d 73 (1939); Pugh v. State, 416 P.2d 637 (Okla. Crim. 1966); State v. Kurowski, 100 R.I. 25, 210 A.2d 873 (1965).

But cf. State v. Marsin, 82 Ariz. 1, 307 P.2d 607 (1957), wherein the court held that, while the privilege against self-incrimination precluded testimony by another witness as to the accused's pretrial silence in response to interrogation, the defendant waived such privilege when he took the stand at trial. The court's rationale, that the defendant was not compelled to testify against himself because he voluntarily took the stand, ignores the defendant's right to object to a given question or area of questioning on grounds of self-incrimination. The court in People v. McFarland, 58 Cal. 2d 748, 26 Cal. Rptr. 473, 376 P.2d 449 (1962), held that, while the privilege against self-incrimination precluded comment upon the defendant's failure to testify, the trial court's instruction to the jury that unexplained possession of stolen property accompanied by even slight corroborating evidence would be sufficient to sustain conviction, was not erroneous because defendant gave false explanations as to how he acquired some items and left possession of other items unexplained. *McFarland* was followed by People v. Champion, 71 Cal. Rptr. 113 (Ct. App. 1968), in which the court found the inference of guilt of larceny due to unexplained possession qualified by the constitutional privilege to remain *completely* silent.

6. 268 U.S. 178 (1925).

7. *Id.* at 185. *Accord*, Thomas v. United States, 372 F.2d 252 (5th Cir. 1967); Rosenburg v. United States, 13 F.2d 369 (9th Cir. 1926). Holdings in these cases ignore the fact that the defendant is not just another witness; he is the defendant, and the possibility is that if he fails to take the stand, the instruction as to the presumption may be construed as transforming his silence into testimony against himself, especially absent the testimony of other witnesses rebutting the presumption in defendant's behalf.

In *Tot v. United States*,[8] the United States Supreme Court held that an evidentiary presumption is constitutional where there is a "rational connection" between the fact proven and the fact sought to be proven. Courts applying the *Yee Hem* rationale have based constitutionality on the "rational connection" test when confronted with arguments based on grounds of self-incrimination.[9]

As early as 1949, in *Garcia v. People*,[10] a presumption of larceny was successfully challenged on the ground that the presumption violated the defendant's privilege not to be compelled to testify against himself. The basis, however, for the present argument against the presumption of larceny lies generally in the expansion of the scope of the privilege against self-incrimination by the courts during the 1960's. Development of the modern argument began with the United States Supreme Court's reversal of the defendant's conviction in *Griffin v. California*,[11] in which comments by the trial court and the prosecution on defendant's failure to testify were held to penalize defendant's invocation of his constitutional privilege to remain silent. In the majority opinion, Mr. Justice Douglas stated, "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."[12]

Griffin has resulted in conflicts for the trial judge; it precludes him from giving the jury an instruction as to an evidentiary presumption as required by state statute, since such an instruction would constitute comment on the defendant's silence.[13] Where a defendant's failure to testify as to possession of recently stolen property was called

8. 319 U.S. 463 (1943).

9. State v. Kurowski, 100 R.I. 25, 210 A.2d 873 (1965) (presumption of guilt of larceny based on unexplained possession of stolen goods); Burnette v. Commonwealth, 194 Va. 785, 75 S.E.2d 482 (1953) (presumption of guilt of possession of burglary tools with intent to commit burglary based on unexplained possession).

10. 121 Colo. 130, 213 P.2d 387 (1949). In *Garcia*, the defendant, accused of larceny of one head of neat cattle, testified that he bought the animal from another, could not remember the brand, and left the hide with the seller. The prosecution could not directly prove ownership of the calf, but the defendant was convicted under a statute declaring that one who butchers any neat animal is presumed guilty of larceny where ownership of the animal is alleged unknown and where the accused fails to produce the hide for brand identification. The court's instruction to the jury, that such circumstances constituted prima facie evidence of larceny, was held to be reversible error on the grounds, *inter alia*, that the presumption violated defendant's privilege not to be compelled to testify against himself.

11. 380 U.S. 609 (1965).

12. *Id.* at 614. Mr. Justice Douglas' view is expanded by the following remarks from his dissenting opinion in United States v. Gainey, 380 U.S. 63, 74 (1965), wherein defendants were convicted of operating an illegal distillery following a jury instruction that proof of unexplained presence at a still allows the jury to infer that defendants were operating the still:

> I believe the charge in that form runs counter to the federal policy that forbids conviction on compelled testimony, not only because, as my Brother BLACK points out, it puts direct pressure on the defendant to come forward and testify, but also because it amounts in practical effect to an improper comment on the defendant's silence where, as here, he resists the pressure and does not take the stand in his own behalf.

13. State v. Nales, 28 Conn. Supp. 28, 248 A.2d 242 (1968).

to the jury's attention by the prosecution, it has been held that the ultimate constitutionality of a presumption based on a defendant's silence is whether or not the jury's attention was called to the fact that possession was unexplained.[14]

When *Miranda v. Arizona*[15] is read in connection with the line of cases following the *Griffin* rationale, the self-incrimination argument against the presumption of larceny which was rejected by the Florida Supreme Court in *State v. Young*[16] becomes clear. Chief Justice Warren stated in *Miranda* that:

> At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. . . . It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury.[17]

One inescapable implication of Chief Justice Warren's remarks is that there should be no jury instruction as to presumption of guilt through unexplained possession, as such a future use of silence would be a present weapon in the hands of an interrogator and would nullify the protection afforded the accused by his silence in the custodial interrogation setting.

Thus, in accordance with recent treatment of the privilege against self-incrimination, the rule on the presumption of guilt of larceny based on the unexplained possession of stolen goods may well be discarded in the near future. The better view would be that the fact of possession is admissible evidence, but that the fact of lack of explanation of such possession is inadmissible as violative of the defendant's constitutional privilege to remain silent, a view adopted in the dissenting opinion by Justice Thornal in *State v. Young*.[18]

The privilege against self-incrimination was originally a reaction to inquisitorial compulsory interrogations of an accused by ecclesiastical and early common law courts.[19] The major policy basis for retaining the privilege is to encourage law enforcers and prosecutors to obtain the best evidence they can procure independently, rather than to rely on statements made by the accused, which could prove

14. State v. Kennedy, 396 S.W.2d 595 (Mo. 1965).
15. 384 U.S. 436 (1966).
16. 217 So.2d 567 (Fla. 1968).
17. Miranda v. Arizona, 384 U.S. 436, 467-68 (1966).
18. 217 So.2d 567 (Fla. 1968).
19. Miranda v. Arizona, 384 U.S. 436 (1966); State v. Marsin, 82 Ariz. 1, 307 P.2d 607 (1957); F. INBAU, SELF-INCRIMINATION—WHAT CAN AN ACCUSED PERSON BE COMPELLED TO DO? 3-5 (1st ed. 1950).

to be less dependable.[20] There is evidence that the right to privacy will lend significant support to retention of the privilege against self-incrimination.[21] Population is burgeoning at a Malthusian rate. Advanced "snooping" devices and record keeping systems are becoming more widely, accurately, and subtly used. In view of these factors, it is reasonable to assume that, in the future, the right to privacy will be at a premium, and that compelling an accused to give even a truthful, innocent explanation of possession of stolen goods may be highly objectionable.

On the other hand, the population explosion and resulting depletion of natural resources will make possession of property a right of particular importance, thus demanding strict rules of enforcement and evidence in larceny cases. This would be especially true if the current trend toward a more mobile population continues, making apprehension and prosecution in larceny cases increasingly difficult. Therefore, while the rule on the presumption of guilt of larceny based on the unexplained possession of stolen goods may well be discarded in the near future, whether the rule will later be returned to constitutional grace will depend on society's relative needs as regards the right to privacy and the right to possess property.

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20. F. INBAU, SELF-INCRIMINATION—WHAT CAN AN ACCUSED PERSON BE COMPELLED TO DO? 7 (1st ed. 1950); J. MAGUIRE, EVIDENCE OF GUILT 12 (1959).

21. In 1890, attention centered on the right to privacy when Warren and Brandeis noted:

> To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

The connection between the right to privacy and the privilege against self-incrimination was clearly stated by Mr. Justice Stewart in Tehan v. United States *ex rel.* Shott, 382 U.S 406, 416 (1966):

> [I]nsofar as strict application of the federal privilege against self-incrimination reflects the Constitution's concern for the essential values represented by "our respect for the inviolability of the human personality . . . 'to a private enclave where he may lead a private life,'" any impingement upon those values resulting from a State's application of a variant from the federal standard cannot now be remedied.