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Criminal Procedure: Fifth Amendment: Requested Instruction on Failure to Testify Required. Carter v. Kentucky, 101 S. Ct. 1112 (1981).

Thomas A. Schuessler

where none exists. Thus, if Congress intends to allow contribution, it must state its intent in definite terms before the Court will recognize that right.

IV. CONCLUSION

The Supreme Court has attempted to resolve the conflict as to whether contribution should be allowed under federal regulatory statutes which do not expressly provide for contribution. By deciding that it cannot imply a private right to contribution unless Congress explicitly provides for one, the Court has thrown the ball into Congress' court. Congress must now evaluate the equity and policy factors and determine whether violators of federal regulatory statutes should be entitled to contribution. Whatever the outcome when and if Congress makes that determination, it is unlikely that the Supreme Court, as presently composed, will interfere.

MARNA M. TESS-MATTNER

CRIMINAL PROCEDURE — Fifth Amendment — Requested Instruction on Failure to Testify Required. *Carter v. Kentucky*, 101 S. Ct. 1112 (1981). The fifth amendment provides that no person "shall be compelled in any criminal case to be a witness against himself."[1] In *Carter v. Kentucky*,[2] the United States Supreme Court held that upon a defendant's request a trial judge must instruct the jury that it should not infer guilt from the defendant's failure to testify. The Court based its decision in part upon *Griffin v. California*,[3] in which it had held that the fifth amendment forbids adverse comment to the jury on a defendant's refusal to testify. The *Griffin* Court found that such adverse comment is an unacceptable "penalty imposed by courts for exercising a constitutional privilege."[4] In *Carter*, the Court held that failure to give a requested "no adverse inference" instruction is a

1. U.S. CONST. amend. V
2. 101 S. Ct. 1112 (1981).
3. 380 U.S. 609 (1965).
4. *Id.* at 614.

penalty just as severe as adverse comment.[5]

Justice Powell in a concurring opinion,[6] and Justice Rehnquist in dissent,[7] criticized the Court's use of *Griffin* as precedent, claiming that the case had far exceeded the language and purpose of the self-incrimination clause. The *Carter* majority, however, in following the *Griffin* penalty analysis, recognized that protective jury instructions are critical in light of the fifth amendment privilege.[8] If a trial judge penalizes a defendant by refusing to give a requested "no adverse inference" instruction, jurors may infer guilt from the defendant's failure to testify.[9]

The defendant in *Carter* was indicted for third degree burglary.[10] After the state had rested, the trial judge held a conference with the defendant and counsel to discover whether the defendant would testify. The judge and defense counsel informed the defendant that if he testified, the prosecutor could use his prior felony convictions to impeach his credibility.[11] In a private conference, counsel advised Carter that if he testified he would be impeached, but that if he did not testify the jury would probably hold that failure to testify against him. Carter chose not to testify. The defense requested and the trial court refused to give the following jury instruction: "The defendant is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way."[12] The jury found the defendant guilty and recommended a two year sentence. At the recidivist phase of the trial, the defendant was found to be a persistent felony offender,[13] and was sentenced to the maxi-

5. Carter v. Kentucky, 101 S. Ct. 1112, 1119 (1981).

6. *Id.* at 1122-23 (Powell, J., concurring).

7. *Id.* at 1123-24 (Rehnquist, J., dissenting).

8. *Id.* at 1120.

9. *Id.*

10. KY. REV. STAT. ANN. § 511.040(1) (Bobbs-Merrill 1978) (amended 1980) provided that "[a] person is guilty of burglary in the third degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in an uninhabited building."

11. 101 S. Ct. 1112, 1115 (1981). Impeachment by prior convictions does not constitute a denial of the right to testify. McGautha v. California, 402 U.S. 183, 215 (1971).

12. 101 S. Ct. at 1116.

13. KY. REV. STAT. ANN. § 532.080 (Bobbs-Merrill 1980).

mum term of 20 years in prison.[14]

The Kentucky Supreme Court upheld Carter's conviction.[15] The United States Supreme Court granted certiorari to consider Carter's argument that a defendant, upon request, has a right to a "no adverse inference" instruction under the fifth and fourteenth amendments.[16] Holding that a defendant has a right to the requested instruction, the Supreme Court reversed Carter's conviction and remanded the case back to the Kentucky Supreme Court.[17]

I. BACKGROUND

Shortly after ruling in *Malloy v. Hogan*[18] that the fifth amendment privilege applies to the states through the fourteenth amendment, the Supreme Court held that the fifth amendment forbids adverse comment on the accused's failure to testify The defendant in *Griffin v. California*[19] was convicted of first degree murder and sentenced to death. At trial, he chose not to testify on the issue of guilt. The trial court[20] and the prosecution[21] urged the jury to draw inferences unfavorable to the defendant because the defendant had not testified. The Court set aside Griffin's conviction because the trial

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14. 101 S. Ct. at 1116.

15. The memorandum decision of the Kentucky Supreme Court, Carter v. Commonwealth, 598 S.W.2d 763 (1980), is unpublished.

16. Kentucky is one of only five states that prohibits giving such an instruction to the jury. Carter v. Kentucky, 101 S. Ct. 1112, 1114 n.2 (1981). Most states require that a request for a "no adverse inference" instruction be honored. *Id.*

17. *Id.* at 1122.

18. 378 U.S. 1 (1964). Holding that the fifth amendment privilege against self-incrimination applies to the states through the fourteenth amendment, the *Malloy* Court noted that the American system of justice is "accusatorial, not inquisitorial" and that the fifth amendment is that system's "essential mainstay." 378 U.S. at 7 (citing Rogers v. Richmond, 365 U.S. 534, 541 (1961)). The Court added in *Malloy* that the fourteenth amendment guarantees the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty for that silence. 378 U.S. at 8.

At common law, before the time of the *Malloy* decision, a defendant could not be compelled to testify; neither was the defendant permitted to testify. Following the enactment of 18 U.S.C. § 3481 (1969), which provides that a defendant "shall, at his own request, be a competent witness," the states passed laws ruling the defendant competent to testify. For the historical development of the fifth amendment privilege, *see* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968).

19. 380 U.S. 609 (1965).

20. *Id.* at 609-10.

21. *Id.* at 610-11.

court and the prosecution had violated the defendant's constitutional rights under the fifth and fourteenth amendments by commenting on his failure to testify [22]

Justice Douglas, speaking for the seven-member majority, said that "comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice.'"[23] The Court further described California's rule[24] which allowed such comment as "a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly"[25] Therefore, the *Griffin* Court held that the fifth amendment forbids comment by the prosecution on the accused's silence and instructions by the court that such silence is evidence of guilt.[26]

Justice Stewart, in a dissenting opinion joined by Justice White, challenged the majority's holding by focusing on the language of the fifth amendment privilege. Justice Stewart, who wrote the majority opinion in *Carter*, argued in *Griffin* that the defendant was not compelled to testify by the adverse comment. He stated that "whatever compulsion may exist derives from the defendant's choice not to testify, not from any comment by the court or counsel."[27] The dissent noted that comment does not compel testimony by making the jury aware of the defendant's choice not to testify, because the jury will realize that choice even if it goes unmentioned;[28] moreover, any claimed compulsion due to comment on the accused's failure to testify was a "far cry"[29] from the compulsion that existed in the days when an accused was tortured, banished, or imprisoned if he or she did not testify.[30] The defendant in *Griffin,* the dissent concluded, was at no more of a

22. *Id.* at 615.

23. *Id.* at 614.

24. California's rule allowing such comment was based on a state constitutional provision, now repealed, which stated that "in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." CAL. CONST. art. I, § 13 (1934) (repealed 1974).

25. 380 U.S. at 614.

26. *Id.* at 615.

27. *Id.* at 620 (Stewart, J., dissenting).

28. *Id.* at 621.

29. *Id.* at 620.

30. *Id.*

disadvantage under California's comment rule than he would have been in a court which permitted no comment at all.[31]

The *Griffin* dissent stands as a statement against expansion of the fifth amendment privilege and the concept of compulsion. In *Carter,* Justice Powell in a concurring opinion,[32] and Justice Rehnquist in dissent,[33] turned to the *Griffin* dissent in their analysis of the concept of compulsion; they claimed that failure to give a requested "no adverse inference" instruction has nothing to do with compulsion to testify. However, Justice Stewart, speaking for the majority in *Carter,* did not follow the restrictive approach to compulsion enunciated in his *Griffin* dissent. In *Carter,* Justice Stewart turned to the precedent and the rationale of the *Griffin* majority, that courts may not "[cut] down on the privilege [to remain silent] by making its assertion costly,"[34] and concluded that a defendant has a constitutional right to a requested protective jury instruction on the privilege.[35]

In *Lakeside v. Oregon,*[36] the major case following *Griffin* and preceding *Carter* on the subject of the fifth amendment and related jury instructions, the trial judge gave such a protective instruction over defense counsel's objection. The trial court instructed the jury that the defendant's choice not to testify gave rise to no inference of guilt.[37] The defendant argued that the instruction infringed upon his constitutional privilege not to testify, relying on *Griffin's* holding that the Constitution forbids comment by the court on the accused's silence.[38] Justice Stewart, speaking for the six-member majority, rejected the defendant's argument, stating that an instruction that the jury must draw no adverse inferences from the defendant's failure to testify is comment entirely different from the adverse comment held unconstitutional in *Griffin.* The "no adverse inference" instruction did not encourage the jury to draw adverse inferences from the defendant's silence,

31. *Id.* at 621.
32. Carter v. Kentucky, 101 S. Ct. 1112, 1122-23 (Powell, J., concurring).
33. *Id.* at 1123-24 (Rehnquist, J., dissenting).
34. 380 U.S. at 614.
35. 101 S. Ct. at 1119 (1981). *See* the text accompanying note 46 *infra.*
36. 435 U.S. 333 (1978).
37. *Id.* at 335.
38. *Id.* at 338.

as in *Griffin*. Rather, the instruction benefitted the accused because the jury was told to remove any unspoken inferences.[39] Since the "no adverse inference" instruction benefitted the accused, the defense could hardly argue that giving this instruction compelled the defendant to testify The *Lakeside* Court thus held that giving such an instruction over the defendant's objection did not violate the fifth amendment.[40]

II. THE CARTER DECISION

The *Carter* Court reviewed prior case law in concluding that a defendant has a constitutional right to a requested "no adverse inference" instruction. First, the Court followed *Lakeside* in rejecting Kentucky's claim that giving the requested "no adverse inference" instruction would have been adverse comment by the court under *Griffin*, because it would have emphasized the accused's failure to testify. The Court stated that a "no adverse inference" instruction would have benefitted the accused and would not have been comment by the court of the sort forbidden in *Griffin*.[41] Second, the Court refused to hear Kentucky's claim that, in view of the overwhelming evidence against the defendant, failure to give the requested instruction was at most harmless error under *Chapman v. California*.[42] In dismissing the harmless error claim,

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39. 435 U.S. at 340. However, Justice Stevens took issue with the majority's claim that the "no adverse inference" instruction benefits the accused.

> In some trials, the defendant's silence will be like "the sun shining with full blaze on the open eye." State v. Cleaves, 59 Me. 298, 301 (1871). But in other trials — perhaps when the whole story has been told by other witnesses or when the prosecutor's case is especially weak — the jury may not focus on the defendant's failure to testify. For the judge or prosecutor to call it to the jury's attention has an undeniably adverse effect on the defendant.

Id. at 345 (Stevens, J., dissenting). For further discussion of whether *Lakeside* is inconsistent with the *Griffin* rule against adverse comment, see 62 MARQ. L. REV. 74 (1978).

40. 435 U.S. at 340-41. The Court noted, however, that "it may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection." *Id.* at 340. Justice Stevens in a brief concurrence in *Carter*, joined by Justice Brennan, also noted that the *defendant* should decide whether such an instruction should be given. Justice Stevens stated that the Court's holding that a defendant has a right to such an instruction is limited to cases where the defendant has *requested* the instruction. Carter v. Kentucky, 101 S. Ct. 1112, 1123 (Stevens, J., concurring).

41. 101 S. Ct. at 1120-21.

42. 386 U.S. 18 (1967). The Court refused to reach Kentucky's harmless error claim in *Carter*, because that issue had not been considered by the Supreme Court of

because it had not been presented to the Kentucky Supreme Court, the Court cited *Bruno v. United States*.[43] There the Court had held, in construing a federal statute, that failure to give the requested "no adverse inference" instruction was more than a mere "technical error"[44] which courts might disregard.[45]

Although the Court followed *Lakeside* in rejecting Kentucky's adverse comment claim and noted *Bruno* in dismissing Kentucky's harmless error argument, *Griffin* stands as the *Carter* Court's major precedent.[46] According to *Carter*:

> The *Griffin* case stands for the proposition that a defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify. The penalty was exacted in *Griffin* by adverse comment on the defendant's silence; the penalty may be just as severe when there is no adverse comment, but when the jury is left to roam at large with only its untutored instincts to guide it, to draw from the defendant's silence broad inferences of guilt. Even without adverse comment, the members of a jury, unless instructed otherwise, may well draw adverse inferences from a defendant's silence.[47]

The *Carter* Court therefore based its decision on the *Griffin* Court's approach to the fifth amendment privilege against

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Kentucky. 101 S. Ct. at 1121 (citing Sandstrom v. Montana, 442 U.S. 510, 527 (1979)).

43. 308 U.S. 287 (1939).

44. *Id.* at 293-94.

45. 101 S. Ct. at 1121 (citing 308 U.S. at 293). Although the Court did not reach the harmless error issue in *Carter*, the Court noted that "[i]t is arguable that a refusal to give such an instruction similar to the one that was requested here can never be harmless " *Id.*

46. Kentucky also claimed that other instructions by the trial court and arguments of defense counsel before the jury were sufficient to prevent the jury from drawing adverse inferences from Carter's silence. The trial court had told the jury that the defendant is presumed to be innocent. Defense counsel also told the jury that the defendant was free to remain silent. Thus, Kentucky argued, the requested "no adverse inference" instruction was unnecessary. The Court quickly dismissed those arguments, stating that although the presumption of innocence and the fifth amendment privilege are closely aligned, those two principles nevertheless serve different functions such that the jury can benefit from additional guidance on the fifth amendment privilege. The Court further stated that arguments by defense counsel do not have the effect that instruction from the trial judge on the fifth amendment would have. 101 S. Ct. at 1120-21.

47. *Id.* at 1119.

compulsory self-incrimination. In *Griffin* the Court decided that adverse comment on a defendant's silence imposes a penalty on the exercise of the constitutional privilege "by making its assertion costly."[48] Failure to give a requested "no adverse inference" instruction likewise amounted to a penalty, according to the *Carter* Court, because it "exacts an impermissible toll on the full and free exercise of the privilege."[49]

Justice Stewart, speaking for the majority, did not follow his *Griffin* dissent by directly confronting the language of the fifth amendment privilege. Justice Powell in a concurring opinion,[50] and Justice Rehnquist in dissent,[51] regretted the fact that Justice Stewart switched the focus from the language of the Constitution to the authority of case precedent and to the *Griffin* majority's "penalty" analysis. For example, Justice Powell argued in a concurring opinion that the *Carter* decision was not required by the Constitution, but only by the questionable case law of *Griffin*.[52] Justice Powell quoted with approval Justice Stewart's *Griffin* dissent to criticize the *Griffin* Court's departure from the language and purpose of the Constitution:

> "We must determine whether the petitioner has been 'compelled . to be a witness against himself.' Compulsion is the focus of the inquiry.
>
> I think the Court in this case stretches the concept of compulsion beyond all reasonable bounds, and that whatever compulsion may exist derives from the defendant's choice not to testify, not from any comment by court or counsel "[53]

Justice Powell stated that he would have joined Justice Stewart's dissent in *Griffin*.[54] Nevertheless, Justice Powell recognized that *Griffin* was precedent and concluded that the defendant was entitled to the "no adverse inference" instruction

48. Griffin v. California, 380 U.S. 609, 614 (1965).
49. 101 S. Ct. at 1121.
50. *Id.* at 1122-23 (Powell, J., concurring).
51. *Id.* at 1123-24 (Rehnquist, J., dissenting).
52. *Id.* at 1122.
53. *Id.* (quoting Griffin v. California, 380 U.S. 609, 620 (1967) (Stewart, J., dissenting)).
54. *Id.* at 1122-23.

which he had requested.[55]

Justice Rehnquist in a dissenting opinion also disapproved of the *Carter* majority's reliance on the *Griffin* Court's penalty analysis. By following *Griffin's* proposition that a defendant must pay no court-imposed price for choosing to remain silent, the *Carter* majority, according to Justice Rehnquist, employed "Thomistic reasoning . . now carried from the constitutional provision itself, to the *Griffin* case, to the present case, and where it will stop no one can know."[56]

Justices Powell and Rehnquist thus criticized the *Carter* majority's failure to focus on the language of the fifth amendment, that no person be "compelled . . to be a witness against himself." As Justice Rehnquist stated, "no one here claims that the defendant was forced to take the stand or testify against himself inconsistently with the provisions of the Fifth Amendment."[57] Of course, in *Carter,* the defendant was not literally compelled to testify; he in fact did not testify at all. Justice Powell claimed that a "defendant who *chooses not to testify* hardly can claim that he was *compelled to testify.*"[58] Neither was the defendant compelled under a less literal interpretation of the right to remain silent, since he was not coerced with physical harm, with threats of harm or with the contempt sanction. Rather, the defendant's claim of compulsion rests on the fact that the trial court imposed a penalty for the exercise of his constitutional right to remain silent by refusing to give the requested "no adverse inference" instruction. Justices Rehnquist and Powell, however, did not recognize that such a refusal by the trial court could psychologically pressure a defendant to testify in violation of his unconditional right to remain silent.

Rejecting the penalty analysis adopted by *Griffin* and followed by the *Carter* majority, Justices Powell and Rehnquist appeared to follow the *Griffin* dissent's emphasis on the cruel forms of compulsion practiced centuries ago. In the *Griffin* dissent, Justice Stewart suggested that the Court should compare any claimed compulsion with the harsh procedures which

55. *Id.*
56. *Id.* at 1124 (dissenting opinion).
57. *Id.* at 1123 (dissenting opinion).
58. *Id.* at 1122 (concurring opinion) (emphasis in original).

lay behind enactment of the fifth amendment, such as physical torture and incarceration, employed in the past to compel a suspect to speak.[59] However, it is axiomatic that compulsion under the fifth amendment is not limited to torture and the comtempt sanction. For example, in police interrogation cases the Court has recognized that psychological pressure is just as intolerable as physical abuse.[60] In *Carter*, the defendant claimed that the Court imposed such pressure upon him to testify when it refused to give the requested "no adverse inference" instruction.[61] In claiming that the *Carter* majority's penalty analysis has nothing to do with compulsion, Justices Powell and Rehnquist challenged the Court's long-standing position that compulsion includes psychological pressure.

The *Carter* majority, however, reaffirmed that psychological pressure to testify is within the concept of compulsion by following *Griffin's* penalty analysis.[62] The penalty in *Carter*,

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59. 380 U.S. at 620 (dissenting opinion).

60. *See* Miranda v. Arizona, 384 U.S. 436, 460-69 (1966); Haynes v. Washington, 373 U.S. 503, 513 (1963).

61. Brief for Petitioner at 20-21, Carter v. Kentucky, 101 S. Ct. 1112 (1981).

62. 101 S. Ct. at 1119. Despite the *Griffin* rule, the Court in recent years has found constitutional, government practices which arguably burden the defendant's right to remain silent. In Brooks v. Tennessee, 406 U.S. 605 (1972), the Court followed the *Griffin* penalty analysis and held unconstitutional the Tennessee practice of requiring the defendant to testify before any other defense witness, or not at all. The *Brooks* Court held that the state had penalized the defendant because it had extracted "a price for his silence by keeping him off the stand entirely unless he chooses to testify first." 406 U.S. at 610. However, in McGautha v. California, 402 U.S. 183 (1971), the Court rejected the defendant's fifth amendment claim. The *McGautha* Court held that a combined trial and sentencing proceeding, which forced the defendant to testify at trial or lose the right to testify at the sentencing, did not place an unconstitutional burden on the defendant's right to remain silent. The Court also ruled against the defendant's fifth amendment claim in Jenkins v. Anderson, 447 U.S. 231 (1980). In *Jenkins*, the prosecutor used the defendant's failure to notify the police, in order to impeach his claim of self-defense. The dissent relied on *Griffin*, and argued that the fact that the prosecutor used the defendant's failure to report to police to impeach his trial testimony, rather than as substantive evidence, did not reduce the burden on his pre-arrest right to remain silent. *Id.* at 250 (Marshall, J., dissenting). The *Jenkins* majority refused to apply *Griffin*, and stated that the "Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.' " 447 U.S. at 236 (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 30 (1973)). For a discussion of the Court's treatment of government practices which make costly the exercise of constitutional rights, including the right to remain silent, to a trial, and to appeal, *see* Ayer, *The Fifth Amendment and the Inference of Guilt from Silence: Griffin v. California After Fifteen Years*, 78 MICH. L. REV. 841 (1980).

according to the Court, was the inference of guilt which arose from the defendant's failure to testify, an inference left unchecked by the court's refusal to give the requested "no adverse inference" instruction.[63] The *Carter* Court stated that good reasons exist for invoking the privilege not to testify, such as Carter's awareness that if he had testified, the prosecutor could have used his prior felony convictions to impeach his credibility.[64] The Court noted that without instructions, jurors may assume that those who invoke the privilege are guilty of crime.[65] Because the trial court refused to instruct the jury not to infer guilt from Carter's silence, the court pressured Carter to testify in violation of his constitutional rights. The Court has stated that a trial judge's influence on the jury is of great weight and his or her "slightest word or intimation is received with deference and may prove controlling."[66] Thus, according to *Carter,* a judge's instruction that a defendant's choice not to testify gives rise to no inference of guilt is a "powerful tool" which a judge must employ upon proper request.[67] In short, if a court imposes a price or penalty on a defendant's right to remain silent, it engages in a subtle form of psychological compulsion. The price paid in *Carter* was failure to give a requested instruction which would have discouraged the jury from inferring guilt from the defendant's

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63. 101 S. Ct. at 1119.

64. In *Carter* the Court stated reasons why the self-incrimination clause was included in the Constitution, including an unwillingness to subject the accused to the trilemma of self-accusation, perjury or contempt, distrust of self-deprecatory statements, and the realization that there are reasons unrelated to guilt or innocence for declining to testify. 101 S. Ct. 1118-19 nn.14-15. As in *Carter,* the defendant may fear that the prosecutor will use a prior conviction or convictions to impeach his or her credibility. The defendant may be reluctant to incriminate others. The Court further noted that,

> It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand.

101 S. Ct. at 1119 n.15 (quoting Wilson v. United States, 149 U.S. 60, 66 (1893)).

65. 101 S. Ct. at 1120 (citing Ullman v. United States, 350 U.S. 422, 426 (1955)).

66. 101 S. Ct. at 1120 n.20 (quoting Starr v. United States, 153 U.S. 614, 626 (1893)).

67. 101 S. Ct. at 1120.

choice not to testify.

The *Carter* Court found the "no adverse inference" instruction a "powerful tool" to guide a jury away from its natural tendency to infer guilt from a defendant's silence. However, the Court has tolerated other "inference" instructions which have a marked effect to the contrary, that is, instructions which have encouraged the jury to infer guilt from a defendant's silence. Certain "inference" instructions allow the judge to tell the jury it may infer guilt or an element of a crime from certain proved facts.[68] Those instructions, which arguably pressure the defendant to testify, have been permitted in cases involving guilty knowledge and unlawful possession. For example, in *Barnes v. United States,*[69] the trial court told the jury that it could infer from proof of the defendant's possession of stolen property "that the defendant knew the property had been stolen."[70] Instructing the jury that it could infer guilty knowledge from possession practically forced the defendant to take the stand because normally the defendant is the only one who can rebut that inference of knowledge.[71] But in *Barnes,* the Court rejected the defendant's claim that the "inference" instruction compelled him to testify.[72]

In *County Court v. Allen,*[73] the defendants were charged with unlawful possession of firearms. The court told the jury it could infer posession from proof of the defendants' presence in the car with the firearms, so long as there was "no substantial evidence contradicting the conclusion flowing from that inference."[74] The Court in *Allen* did not even discuss whether pressure on the defendants to come forward with contra-

68. *See* J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED — TRIAL RIGHTS § 61 (1974). Apart from the fifth amendment's self-incrimination clause, most of the debate over the use of inferences has focused on the due process issue of whether inferences relieve the state of its burden of proving guilt beyond a reasonable doubt. *See* Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity,* 92 HARV. L. REV. 1187 (1979).

69. 412 U.S. 837 (1973).

70. *Id.* at 840 n.3. In *Barnes,* the trial court told the jurors that they could make that inference, but that they were not required to do so.

71. *See* Note, *The Meaning of Defendant's Silence,* 39 S. CAL. L. REV. 120, 123-24 (1966).

72. 412 U.S. at 846 (citing Yee Hem v. United States, 268 U.S. 178, 185 (1925)).

73. 442 U.S. 140 (1979).

74. *Id.* at 160 n.19.

dicting evidence violated their privilege to remain silent. Allowing "inference" instructions such as those in *Barnes* and *Allen* appears inconsistent with the *Carter* principle that a trial judge should use jury instructions to protect a defendant's right against self-incrimination.

In *Carter,* the Court recognized the powerful influence the trial judge has on the jury.[75] The Court noted *Griffin's* rule that a judge's adverse comment on the accused's silence violated the fifth amendment because it encouraged the jury to infer guilt from that silence.[76] The *Carter* Court held that a trial judge must further discourage the jury from inferring guilt from silence by granting the requested "no adverse inference" instruction.[77] But in tolerating "inference" instructions, such as those in *Barnes* and *Allen,* the Court has allowed the trial judge in effect to encourage the jury to infer guilt from silence.[78]

Of course, in unlawful possession cases and other cases where it is probable that only the accused has facts necessary for his or her defense, an inference of guilt from silence might be highly rational. The trial court cannot prevent the jury from expecting the accused to testify as to those facts. But outside of any guilt inferred by jury members from their own experience, the court should not use jury instructions to futher encourage those inferences.[79] As the Court said in *Carter,* "[n]o judge can prevent jurors from speculations about why a defendant stands mute in the face of criminal accusation, but a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that

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75. 101 S. Ct. at 1120 n.20.

76. *Id.* at 1119.

77. *Id.* at 1121-22.

78. In such cases as *Barnes* and *Allen,* the inference directly arises from unexplained facts and not from the defendant's silence. However, where only the defendant can explain those facts but chooses not to testify, the jury in effect is encouraged to infer guilt from the defendant's silence. *See* Note, *The Meaning of Defendant's Silence,* 39 S. CAL. L. REV. 120, 123-24 (1966).

79. Such "inference" instructions as in *Barnes* and *Allen* no doubt help the prosecution prove its case. Arguably, the fact that such instructions aid the prosecution violates the fifth amendment's principle of "fair play which dictates 'a fair state-individual balance by requiring the government in its contest with the individual, to shoulder the whole load' " Carter v. Kentucky, 101 S. Ct. at 1119 (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)).

speculation to a minimum."[80] *Carter* thus stands for the proposition that jury instructions must protect the defendant's right not to testify But the Court, in *Barnes* and *Allen,* has allowed "inference" instructions which burden that right. In view of *Carter's* principle that jury instructions must protect the defendant's right to remain silent, perhaps the Court in the future will object to the use of "inference" instructions which pressure the defendant to testify

III. CONCLUSION

In *Carter v. Kentucky* the United States Supreme Court held that the fifth amendment requires a criminal trial judge to give a "no adverse inference" instruction when requested by a defendant. The Court relied on the principle set forth in *Griffin v. California;* that a trial court may not penalize a defendant for exercising a constitutional right. In *Carter,* the Court found that the trial court penalized the defendant, who chose not to testify, when the court refused to give the requested instruction. Without the requested "no adverse inference" instruction, jurors may infer guilt from the defendant's failure to testify The Court recognized in *Carter* that the trial judge has a powerful influence on the jury Therefore, upon the defendant's request, the judge must use that influence to protect the defendant's privilege not to testify by instructing the jury not to infer guilt from the defendant's silence.

The *Carter* decision will not cause immediate major changes in criminal procedure because most states require that a request for a "no adverse inference" instruction be honored. However, the *Carter* Court's rationale, that the trial judge must use the "powerful tool" of jury instructions to protect a defendant's right to remain silent, may raise questions about the constitutionality of certain "inference" instructions. Trial courts commonly instruct juries that they may infer an element of the crime from proven facts. Such "inference" instructions may force the defendant to come forward with evidence to rebut the inference. Tolerating "inference" instructions which pressure the defendant to testify appears inconsistent with *Carter's* principle that jury instructions

80. 101 S. Ct. at 1120.

should protect and not burden the defendant's right to remain silent.

THOMAS A. SCHUESSLER