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Criminal penalties for not reporting a felony that one has concealed.

Bill of Rights (Image from the public domain.) Every once in awhile, the media reports on federal prosecutions for "misprision of felony". This blog entry seeks to debunk any notion that it is a crime merely to fail to report a crime, as opposed to concealing a felony cognizable by a federal court and not reporting it. The federal misprision of felony statute is at 18 U.S.C. § 4, which provides: "Misprision of felony. Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both." *Id.* (emphasis added). Consequently, absent proof beyond a reasonable doubt that the defendant took affirmative steps to conceal a felony, no conviction for misprision of felony is permitted. *U.S. v. Daddano*, 432 F.2d 1119, 1124 (7th Cir. 1970), cert. denied, 402 U.S. 905 (1971). How does the federal misprision of felony statute jibe with the Fifth Amendment right against self incrimination? No misprision of felony conviction should be available (except where a guilty plea is entered to misprision of felony, thereby waiving the right to raise the Fifth Amendment defense) where reporting the felony would involve giving up one's Fifth Amendment rights as to the underlying felony (as opposed to the concealment of the felony, which concealment can be committed by a person who had nothing to do with the felony itself and whose reporting the felony would not expose the person to a conviction for the underlying felony (see the next paragraph for more on when the Fifth Amendment may be asserted in a court proceeding by one who is not a party to the criminal prosecution)) and where the defendant has not already waived his or her Fifth Amendment rights (e.g. by denying the alleged crime to investigating FBI agents, rather than asserting the right to remain silent). *U.S. v. Kuh*, 541 F.2d 672 (7th Cir. 1976). In this regard, "It is well settled that the Fifth Amendment privilege against self-incrimination 'must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer.' *Hoffman v. United States*, 341 U.S. 479 (1951)." *Id.* at 674. More recently, the Supreme Court spoke further about when a non-party may refuse to testify in a criminal prosecution pursuant to the Fifth Amendment (and, therefore, by reasonable extension, when a person may avoid a misprision of felony conviction lest reporting the felony would violate one's Fifth Amendment rights as to the underlying felony): "The Fifth Amendment privilege against self incrimination 'extends not only 'to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant.' *Hoffman*, 341 U.S. at 486. 'It need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.' 341 U.S. at 486-87. We have held that the privilege's protection extends only to witnesses who have 'reasonable cause to apprehend danger from a direct answer.' 341 U.S. at 486. That inquiry is for the court; the witness' assertion does not by itself establish the risk of incrimination. *Ibid.* A danger of 'imaginary and unsubstantial character' will not suffice. *Mason v. United States*, 244 U.S. 362, 366 (1917). But we have never held, as the Supreme Court of Ohio did, that the privilege is unavailable to those who claim innocence. To the contrary, we have emphasized that one of the Fifth Amendment's 'basic functions . . . is to protect innocent men . . . 'who otherwise might be ensnared by ambiguous circumstances.'" *Grunewald v. United States*, 353 U.S. 391 (1957) (quoting *Slochower v. Board of Higher Ed. of New York City*, 350 U.S. 551, 557-58 (1956)) (emphasis in original). In *Grunewald*, we recognized that truthful responses of an innocent witness, as well as those of a wrongdoer, may provide the government with incriminating evidence from the speaker's own mouth. 353 U.S. at 421-422. "Ohio v. Reiner", 532 U.S. 17, 21 (2001). Why must a defendant go through all these mental gymnastics over whether the Fifth Amendment precludes exposure to a misprision of felony conviction, which carries a sentence of up to three years? Court resources and justice (including on Fifth Amendment grounds) will be better served by striking the misprision of felony statute in the first place. Jon Katz

Posted by Jon Katz in Criminal Defense at 06:00