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Supreme Court of the United States

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In the Matter of:

Docket No. 39

ENRIQUE PEREZ

Petitioner

vs.

CALIFORNIA

Respondent

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Place Washington, D. C.

Date November 14, 1968

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C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

October [redacted], 1968

- x

Enrique Perez :

Petitioner :

vs. :

: No. 39

California :

Respondent :

- x

Washington, D. C.
Thursday, November 14, 1968

The above-entitled matter came on for argument at 12:42 p.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

PETER G. FETROS
1318 G Street
Sacramento
California
Attorney for Petitioner (appointed by this Court)

EDSEL W. HAWS
Sacramento
California
Attorney for Respondent

P R O C E E D I N G S

CHIEF JUSTICE WARREN: No. 39, Enrique Perez versus California.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Fetros.

ORAL ARGUMENT OF MR. PETER G. FETROS

ON BEHALF OF PETITIONER

MR. FETROS: Mr. Chief Justice, and may it please the court, my name is Peter G. Fetros. I represent the appellant in this case, Mr. Enrique Perez.

In this case there was a four count indictment, four count complaint filed against my client concerning three different instances. The first two counts of the indictment at the trial the defendant took the stand and testified upon. On the third and fourth counts, which involved one incident which was separate from the first two, the defendant did not make any statement on the stand, and upon being cross-examined or attempted to be cross-examined by the district attorney -- his defense attorney raised an objection which was sustained by the trial court. Thereafter there was no further attempt to cross-examine the defendant on the separate incident -- the third and fourth counts. In addition to these three incidents involved in the case there was a collateral crime which was brought into the case on the grounds that it was a similar modus operandi. The court allowed the collateral claim to come in, but here again

there was no cross-examination of the defendant when he was on the witness stand.

During closing arguments, since Griffin had not been decided by this court, the prosecutor made comment on the fact that defendant did not testify as to counts three and four nor was he able to cross-examine him concerning counts three and four because the judge had told him that he was not able to cross-examine the defendant.

Then the instruction was given which is the same instruction contained in the Griffin case. We have before us now a clear case to determine the scope of the waiver of the privilege of self-incrimination when a person takes the stand on a multi-count indictment.

We have an unusual situation here in one respect: that the trial court determined that the district attorney could not cross-examine on counts three and four.

The Supreme Court of the State of California said that was in error, that the counts 3 and 4 formulated a common plan and design and therefore cross-examination under the California statute was permissible.

It then went on to say that due to the federal decisions that had been rendered in federal cases concerning the scope of the waiver of the privilege that the privilege extended to all that which encompassed legitimate cross-examination and the Supreme Court of California therefore held that the man,

when he took the stand, waived his right to self-incrimination as to counts 3 and 4, could have been examined by them and could not now complain.

I say this is wrong for three reasons, actually four.

First, the crimes three and four were not a common plan and design by any stretch of the imagination although the Supreme Court held that in that case. The case which came later now says that the Perez case, the one on appeal here, is to be very limited in scope when determining what is modus operandi.

The crimes which were charged involved holdups of grocery stores and taverns. The collateral crime which was brought in was another holdup of a tavern, the timing of the holdups were different. There were holdups in the seven o'clock area, there were holdups in the 1:30 area, the number of people involved differed, the weapons were different, ranging from sawed-off rifles to pistols. The descriptions of the people who supposedly committed the crimes were different.

Therefore I say that there was not this common plan or design and cross-examination was not permissible at the state court level.

But even if there was a common plan and design in the specific case, as other cases have ruled, if examinations where evidence is admissible for a particular purpose is probative in effect may be outweighed by the amount of prejudice which can be let in against the defendant.

In these multi-count complaints the man is on trial for each separate crime that he is charged with. He can be punished on each separately. The district attorney has to prove each crime separately. Therefore, when a question is asked in cross-examination concerning one of the other two crimes we have the direct situation where the man is being asked to testify against himself on those particular counts.

Q There is a statement in your brief which is not quite clear to me, on page 6. You talk about the sentence imposed upon your client. You say on counts 1 and 2 to run consecutively and counts 3 and 4 concurrently.

Does that mean that 3 and 4 were consecutive to 1 and 2 but concurrent with each other, or does it mean they were concurrent with counts 1 and 2?

A. Concurrently with counts 1 and 2. His maximum sentence, therefore, would be at the expiration of count 2.

Q Count 2. Now, 3 and 4 sentence imposed were fully concurrent with the consecutive sentences imposed upon counts 1 and 2.

A. That is correct. Unfortunately in California we have an undertermined sentence. We have this situation where the parole board meets and determines what the sentence will be, based on the past record and they will also take into consideration the fact he was convicted of these crimes in determining what he would be eligible to do.

Q Counts 3 and 4 would never end later than under 1 and 2 under these sentences?

A That is correct, although it could make a different reason on whether or not 1 and 2 were extended during this indeterminate period because this is within the power of the parole board.

Q I suppose the parole board could consider anything including the fact he was accused of other crimes.

A That is correct. But I think it would have much greater bearing to know that he was actually convicted of two crimes after a jury trial. This is the thing we are concerned with. There is a third point in this --

Q What is the relief you are asking. Which convictions are you asking us to set aside?

A I am asking you to set aside 3 and 4.

Q 3 and 4?

A Yes, because I do not think the error was as harmless --

Q Then he remains in jail on 1 and 2, does he not?

A No, I was going to finish --

Q I beg your pardon.

A My argument is that since this trial was a long protracted trial, it was an unusual trial. How many trials do we have where the witness identifies the defense attorney as a defendant? These things all occurred in the trial. With the

instructions given at the end of this trial on 3 and 4 the confusion was completely compounded. This tainted the convictions on 1 and 2.

Q You are not asking us to set them aside?

A. Yes.

Q You are?

A. Yes.

Q You want all 4 set aside.

A. Yes. I want them severed when they are re-tried and a clear determination made by the jury if he is guilty of 1,2, 3 and 4.

There is a line of cases in the federal courts that would indicate that if the judge says when a man takes the stand you are not waiving the privilege against self-incrimination -- you cannot turn right around and say afterwards -- the judge made a mistake. This is a situation where in the Johnson case the man took the stand and he testified as to income tax evasion counts. I think in 1932, 1933, 1934, 1935 and 1936.

They asked the question -- what about 1938, which is a similar collateral crime?

The judge said "You cannot ask because that is beyond the cross-examination."

This court reversed on the basis that the man could have explained something possibly if he was forced to testify, and so here in Perez maybe the man could have explained some-

thing if the objection which his defense attorney had raised was not sustained.

Instead what happened, he sustained the objection, and then they made the improper argument at the end concerning the inferences to be drawn.

I should make it clear that this last method of finding convictions 3 and 4 of all the convictions to be set aside is the easy way out because I think that the time has come for the court to indicate how much a person waives when he takes the stand. Does he waive it as to all cross-examination or does he waive it as to matters which are only within his knowledge? Caminetti has been quoted time and time again -- as being the case that says all of the old relevant cross-examination was allowed. You have the privilege of cross-examination as well as incriminations to that extent.

That is not what it is saying. The reason the court has focused into Griffin rule is that the comment and the instructions which are given focus attention to the fact that a man is silent. In effect it is shattering to constitutional right to remain silent.

Basically the man cannot testify to a lot of these things because he does not have them in his own knowledge.

There was a companion case in Perez in the lower court level called Ng. Dr. Ng was charged with a couple of counts of rape by the use of drugs. They brought in three

collateral crimes with three different people. He was not charged on these crimes. He did not testify as to those crimes. They made the comment concerning the fact that he did not testify.

What would happen if instead of the Perez case where there was some possible explanation and knowledge on his part in the cross-examination area that the specific question he was asked on cross-examination was "Why were you at so and so's house with the two men immediately after the robbery which occurred in counts 3 and 4?"

If we change the facts just a little tiny bit and say that counts 3 and 4 were there and there was no such question, are we to say that because it is a similar crime which I am not agreeing to, but if we say because it is a similar crime a man can be cross-examined as to each one of the elements of a crime, I do not think he can.

How can he reasonably be expected to know, to explain and defend himself to these elements which are beyond his knowledge? What we are saying is that the quick-witted or the dull-witted should be made equal with the quick-witted. When they are asked a question about where they were at a particular time both can say we are not going to answer rather than the quick-witted one can make something up and the dull-witted one cannot. That is the real substance of the Griffin rule, I think.

If that is the case then what I am saying is that on

each count in an indictment for a complaint, the man should be able not to say anything which is beyond his knowledge on those matters and no inference can be drawn from the fact that he remained silent. He just did not know.

"What were you doing on November 10, 1964?"

How can he defend something like that? Maybe it is usually peculiarly within his knowledge but I think that in this day and age everyone realizes that unless something unusual happens he is not going to remember what happened on that particular day.

Q If everyone realizes that, then the jury can be assumed to realize that, too.

A. That is right. Then we get into the idea of what the instruction focuses attention on the fact that he remained silent and did not explain something. This is where the problem comes in, just like in Griffin. You are focusing attention on something you are attempting to protect.

Q You are his lawyer and if a lawyer is representing what you are making clear to us he can make clear to the jury, can he not? It is a matter of the factual realities of life.

A. It is just like the factual realities of life when any instruction is given to the jury. They are supposed to be able to understand instructions. How about the cases that say when you have A and B on trial and you have A's confession and then don't apply it to B?

This court held recently that you cannot desegregate these people that closely.

In the federal system we do not really have the problem that is before us here. This is probably a unique problem to California and perhaps a few other states.

Q I don't quite understand this. I gather count 1 concerned a robbery on January 3 at a Viking Club -- count 2 a robbery at a corner market and counts 3 and 4 robberies at still third and fourth places on January 13, is that right?

A No, there is just one place on counts 3 and 4. One man was a --

Q On January 13?

A That is right.

Q And he took the stand and testified in his own defense on the accusations of robberies on January 3 and January 13? He was examined and cross-examined, I take it?

A Yes sir. He had alibis for those --

Q Well, I do not understand how you can say that those convictions were tainted by the comment by counsel.

A I don't think you can be reasonably certain that after the jury went into the jury room they took all of the evidence and were able to pass it out. This is what I am saying. If we could find, but I don't think we can in this case.

Q Does this touch on the harmless error problem at all? On the Chapman rule at all? Was there a harmless error finding

here at all?

A. In the Supreme Court?

Q Yes.

A. I believe they did find it was harmless.

Q My difficulty is that these are concurrent sentences, as you already said we cannot get convictions on 1 and 2 unless we find that this comment on 3 and 4 somehow infected convictions on robberies which were on different days, and I take it that involved separate facts and you suggest the defense alibied as to those two?

A. Yes, sir. That is right. When this inference came in as to 3 and 4 they were attempting to segregate 3 and 4 but they could not do it without scope of the trial and the type of evidence that came in. This witness who identified the defense attorney was a witness in counts either 1 and 2. She said "That is the man who did it." There is the defense attorney sitting there. They took off the man's shoes in the trial. It was a rather strange trial.

Q The defendant did testify himself as to counts 1 and 2, didn't he?

A. Yes, sir, also his mother and a brother or brother-in-law who testified as to where they were.

Q I suppose his evidence, whatever he testified to or did not testify to as to counts 1 and 2, could have been commented on.

A. Yes, definitely. The problem there is what sort --

Q. Yet you say failure to talk about 3 and 4 tainted his convictions on 1 and 2?

A. That is right. They were narrowing in on his failure to be cross-examined on 3 and 4. There was no question on that. The next case that comes up will perhaps be a case where they would have no comment on 3 and 4 but they try to say that he failed to explain something back in 1 and 2.

Q. You agree, don't you, that we have to get to counts 1 and 2 before you can get any relief on any of these counts?

A. No, you could reverse as to 3 and 4 and not reverse as to 1 and 2.

Q. It is not even a case in controversy, is it?

A. I am sorry. I just can't answer that.

Q. You are familiar with the ordinary rules, are you not?

A. Yes, sir.

Q. Concurrent sentences -- it is conceded at least that two of the convictions must stand?

A. I have not conceded that.

Q. I know you haven't. You said they were tainted. I am trying to find out in exactly what respect you say that convictions by the jury on one and 2 for those separate trials were tainted by the comment of the prosecutor on his failure to testify as to 3 and 4.

A. Because on 3 and 4 you are also bringing in the idea

that by finding him guilty of 3 and 4 they are saying it is a similar type crime.

Q. Yes, but you have to say, don't you, that they convicted him on 1 and 2, in part because they felt he was not to be believed in his defense of 1 and 2 if he did not take the stand as to 3 and 4?

A. That is correct.

Q. That is what you are saying.

A. That is correct. We cannot say how much they discounted it, though. Maybe it was just right there on the border line and just shoved it over because of this inference. That is the basis of what I am saying. It would be fairer to send it back to re-trial and sever the counts if that is what we have to do.

In the federal system when there is a joinder of counts and there is prejudice possible to the defendant they sever as a matter of right-- if this is brought out as a matter of trial. In California we do not have that.

Based on that we are requesting a dismissal and we are requesting also a reversal and a broad rule in respect to when a person does take the stand what does he waive -- his right to the overall, to the offenses charged, or both?

Thank you.

MR. CHIEF JUSTICE WARREN: Mr. Haws.

ORAL ARGUMENT OF MR. EDSEL W. HAWS

FOR RESPONDENT

MR. HAWS: Mr. Chief Justice, and may it please the court.

We have the California comment rule here again today but under much different circumstances than presented in Griffin and in the Chapman case. In Griffin, as you recall, the defendant did not testify. It was there held that that part of the comment rule of California which permitted comment by the prosecutor and a standard instruction by the court cut down and violated his Fifth Amendment privilege against self-incrimination.

Today we have the other side of the coin, as it were, of our comment rule. Our California constitution permits comment in those situations as here where he does take the stand and fails to explain evidence, fails to explain or deny evidence within his knowledge.

It is respondent's position that the privilege does not apply and the California comment rule is valid here in this situation where he does take the stand but fails to explain or deny facts within his knowledge.

We think this conclusion follows from the proposition and the many cases that by taking the stand voluntarily as here he waives his privilege against self-incromination.

The waiver, of course, under the holding below, is

not unlimited. The waiver in this case and in the many federal cases cited in our brief is determined by the scope of relevant cross-examination.

The landmark case cited in our brief is Caminetti. That has been followed in such leading cases as Johnson versus the United States, which has held that the waiver of the privilege is not limited by the fact that defendant's answer might tend to establish guilt of a collateral offense for which he was fully prosecuted.

Now this to me seems important. Does this waiver of the privilege concept conflict in any way with our comment rule, in other words, do those rules hit head on? I don't think they do if we consider the history underlying the privilege. That was detailed precisely in the court's Griffin case.

The court pointed out the two main policy considerations underlying the rule. The first is that not all people have the ability, however innocent, to withstand the perils of the witness stand. In that situation the court noted that comment cuts down on that right.

It is readily apparent that that is not the situation here. The petitioner, while represented by counsel, the public defenders of Sacramento County, voluntarily took the stand. They must have weighed the possibilities of relying upon the presumption of innocence or the advantages of putting forth their versions and facts. Of course, after weighing that the decision

was made to take the stand.

Another reason given in Griffin is that some defendants will not take the stand -- not that they cannot explain the present charge against them but due to the fear of impeachment by prior convictions, that reason has no validity here because the petitioner did have prior convictions -- they were alleged in the accusatory pleading.

Q May I ask, Mr. Haws? I don't find in your brief that you make any argument based on the concurrent sentences.

A No,sir, I don't.

Q Do you think there is an argument to be made?

A Well, Your Honor, I thought about that. I gave that considerable thought and of course, we would take that argument if we had to but we thought that this case was so clear that --

Q You wanted us to willy-nilly to decide the Williams question, is that it?

A We thought that the principles of waiver were so clear that --

Q I know, but if it is not really presented by the case in light of the concurrent sentences, shouldn't we dispose of it on that ground?

A As I say, your statement is entirely in my favor and I would perhaps have to take that. We had considered briefing it but we didn't.

Q We are supposed to decide every constitutional question

that is raised --

Q And you might lose the waiver rule --

A. Well, Your Honor, that was weighed. On the fear of not taking the stand because of prior convictions that has no validity here, because two prior convictions charged to this petitioner -- he admitted them and one was used for impeachment when he did take the stand. So that fear could not have deterred the defendant from taking the stand.

California in this case and in the companion case of People versus Ng on the waiver principle followed the rule that has been followed in the federal courts; that is, that the waiver extends to permissible or relevant cross-examination, and the court below reasoned this case, as it did in the companion case of Ng, that counts 3 and 4 showed a planned scheme of modus operandi, and in view of the general denial as to counts 1 and 2, and when you have a general denial cross-examination is extremely wide and goes to his motive, his scheme, his plan, that those counts 3 and 4 were within the scope of permissible cross-examination.

Counsel mentioned the error of the trial court in sustaining the objection to cross-examination and seems to conclude that some prejudice resulted to the petitioner by that ruling.

We contend that that error of the trial court was an error in favor of the defendant.

The Johnson case, of course, points out that where the privilege is claimed, when a witness takes the stand if a privilege is claimed and granted as in the Johnson case, and then there is comment -- of course that is not playing the game fairly and there would be prejudice. But that was certainly not the situation here.

Q What would happen if there was an objection to the cross-examination about counts 3 and 4 and the objection that was sustained so there was no testimony about 3 and 4 from him, but there was comment --

A. That is right --

Q Then when the California Supreme Court said no, the law of California is that there was no privilege as to counts 3 and 4 --

A. That is right --

Q So he should have testified.

A. Should have been allowed to be cross-examined.

Q And should have been forced to testify.

A. I don't think they said that, Your Honor.

Q What if he has no privilege and he is asked a question on cross-examination, an un-privileged question, and he refuses to answer? What happens in California?

A. I understand. That point, Your Honor --

Q What do you think the defendant would have done if he had found out he had mistakenly claimed his privilege and it was

mistakenly upheld? Would he rather have his comment or would he rather have testified?

A. I don't know, Your Honor. Here there was no claim of privilege.

Q. There was not?

A. No.

Q. What was the objection based on?

A. Beyond the scope of direct examination. So you see, there --

Q. I know, but he is claiming the privilege now.

A. Now, but you see the prejudice would have to relate to a factual situation, Your Honor, as in Johnson the defendant did claim a privilege which the trial judge granted.

Q. Do you think that the Supreme Court of California also said that this was unprivileged?

A. They didn't discuss that.

Q. They said this is not beyond the scope of cross-examination.

A. That is right, and since it is not--

Q. And do you think they also ruled it was unprivileged?

A. I think that would follow.

Q. Wouldn't they have to in order to --

A. I think it would follow that if it is within the scope, the privilege is waived and therefore he should have answered.

But here under the factual situation I would say that

the error of the trial court benefited the defendant because he did not have to attempt to explain what happened to the --

Q A situation in which the witness was told that he could avail himself of the privilege, he did, and then he was prosecuted for contempt, and the Supreme Court of Ohio said he should not have been told he could avail himself of the privilege because there was an immunity statute and therefore he had to testify.

This court held that states cannot do that with witnesses and claim denial of due process.

How do you distinguish this? As I understand it, what happened here is that there was an objection which was sustained on the ground that it was not relevant cross-examination. Then the Supreme Court says -- yes, the trial judge applied the wrong rule of law. That is what this petitioner acted on, isn't it?

A. Your Honor, his direct examination was in on counts 1 and 2. Certainly he had made no claim of privilege.

Q He couldn't obviously.

A. That is right.

Then when he was asked the question as to counts 3 and 4 the objection was not on that you are going --

Q So the point here is that the objection was made, whatever the gound of the objection was.

A. The objection was made not that you are requiring him

to incriminate himself on a matter not charged but you are going into matters --

Q Beyond the direct testim ony.

A. That is correct.

Q But unless you utilize the concurrent sentences rule Mr. Justice Brennan was asking you about it seems to me that something in Ohio and Murphy versus Waterfront and cases like that really are not very relevant. I am not so sure that if it was known he would have to testify, he would rather testify than have the privilege because the Supreme Court upheld that comment.

A. Yes, upon this ground which was within the xcope of relevant cross-examination. Of course, at the time of the trial, Justice White, Griffin had not been decided at that time so the standard instruction and the comment was proper under California law at that time.

The way I view the cross-examination is that since the defendant was not required to answer questions which undoubtedly would have been incriminating it was to his benefit.

Q Anyway, then, he did have a choice in the sense that he knew there was going to be comment if he did not testify. That was the California law then.

A. In any event whether he took the stand or not comment would have been permissible at the time of the trial.

Q Mr. Haws, I am having trouble in seeing myself here

as to what happened in the California appellate courts. I am looking at page 11 of the Appendix Index where there purports to be an opinion of the District Court of Appeals of the Fifth Appellant District which, if you look at page 32 said, "The judgment is affirmed as to counts 1 and 2 of the information and reversed as to counts 3 and 4."

There then follows, beginning on page 23, what appears to be the opinion of the Supreme Court of California which ends up on page 29 "the judgment is affirmed."

Does that mean the judgment of the District Court of Appeals affirming as to counts 1 and 2 and reversing as to counts 3 and 4 is affirmed? That is what it seems to say.

A. No, Your Honor, that language relates to the judgment of the trial court.

Q. That wasn't the judgment, was it, that the Supreme Court of California was reviewing. It was reviewing the judgment of the District Court of Appeals.

A. No, Your Honor, when our Supreme Court of California grants a hearing it is reviewing the conviction or judgment. The case is set aside in the Third District Court of Appeals.

So as the case stands before the court today all counts of the convinction have been affirmed.

Q. So I consider the judgment is affirmed -- the judgment and the conviction on all four counts?

A. That would have been a full explanation, yes, Your

Honor. Just on that one point, I notice that in the dissenting opinion by Justice Peters, in a concurring opinion, he would have agreed with the Fifth District Court of Appeals.

Counsel has made some mention about some prejudice because of California's joinder provision. Just generally the joinder provision provides that offenses connected together in their commission, or on offenses of the same class, such as here, robbery, against a single defendant, may be joined. Of course that was done in this case. There is some implication in petitioner's brief that this provision somehow cuts down on privilege. I do not think the factual situation here --

Q Why do you say following Justice Brennan's comments that all the evidence on counts 3 and 4, as a matter of California law, were admissible on the charges under counts 1 and 2 as part of the modus operandi?

A That is correct.

Q So if there never had been counts 3 and 4, if there never had been, that evidence nevertheless would have been admissible in the evidence on counts 1 and 2. Is that right?

A That is true.

Q And the comment would have been justified.

A That is true -- this is my point -- the severence would not have injured the defendant here. What I mean by that is this: if you tried him first on count 1, evidence of the other 3 counts would have come in as collateral offenses to

prove plan, scheme, and so forth. If he took the stand as to count 1, then it would have been within the permissible scope of cross-examination, his privilege would have been waived, and, in even carrying it further, on the second trial, assuming four separate trials on the separate trial, then I would assume that, if his answer on cross-examination had been incriminating, that could have been used against him in the second trial as a judicial admission.

One more point on the joinder provision and cutting down on privilege. You see, this is not unlimited. For example, if this man had been charged with robbery which had no evidentiary connection with another robbery, it would have been beyond the scope of cross-examination. There could have been no cross-examination, and of course no comment by the prosecutor and the privilege would have applied.

Q Because there would have been no waiver with respect to it.

A That is right, Your Honor.

Q I suppose your theory that there was a waiver as to counts 3 and 4 the prosecutor could have said, "I will not examine him, examine the petitioner, as my own witness."

A You cannot do that, Your Honor, under --

Q Why?

A I can't think of the California cases but that has been attempted in California.

Q Your theory is, as I understand it, that there was a waiver of the privilege against self-incrimination as to counts 3 and 4 as well as to counts 1 and 2, is that right?

A That is right, Your Honor.

Q The court excluded cross-examination as to counts 3 and 4 on the evidentiary basis, that that cross-examination would be beyond the scope of the direct. That is right, is it not?

A That is correct.

Q Does it follow that the prosecutor, the privilege having been waived, could have made the petitioner his own witness and proceeded to examine him with respect to counts 3 and 4?

A I don't think that would follow, Justice Fortas.

Q Then I don't understand because it seems to me that it is the necessary logic of your position as a necessary consequence of saying that testimony as to counts 1 and 2 resulted in a waiver of the privilege as to counts 3 and 4.

A I do not think so, Your Honor, because if this examination of this defendant, of course, is within the bounds of the relevant cross-examination --

Q Of the relevant direct examination.

A Direct examination, excuse me.

Q If the privilege is waived why could he not call petitioner as his own witness? Why could not the prosecutor call

petitioner as his own witness just as he called John Jones? You are saying that the privilege was waived.

A. Well, I think that calling him as his own witness would no doubt open up a broader field than what he had to work with and what he could work with under relevant cross-examination.

Q. Then don't you have to say that the privilege was not waived as to counts 3 and 4. The prosecutor presumably could put petitioner on the stand, the petitioner being by hypothesis in possession of relevant information, and he could then examine him on direct as his own witness, as the state's own witness, if the privilege were waived.

A. I would say that the waiver extended to counts 3 and 4 because that would be permissible cross-examination and he can do that because the privilege is waived. I cannot carry on the procedure to where you would have a situation where the prosecutor would then be calling the defendant on the stand --

Q. Why, if the privilege has been waived, can't he?

A. That privilege has been waived but it occurs to me other things might come into involvement there. It seems to be somewhat too coercive for a prosecutor to call a defendant.

Q. That is a value judgment. If you think that is too coercive, perhaps --

A. That is not my judgment but the judgment of the California court.

Q The problem here is whether, off hand it seems the trial court took the position which might be somewhat inconsistent. Let me put it this way: that if the prosecutor said, "The privilege has now been waived. The defendant testified as to counts 1 and 2. Privilege has been waived as to counts 3 and 4. I will now make the defendant my own witness and I will direct some questions to him."

I fail, unless there is some rule in California of which I am unaware, I do not know why that is not the necessary and logical result of a waiver of the privilege if you are right that the privilege was waived as to counts 3 and 4.

A To answer your question all I can say is this: the privilege extends to counts 3 and 4 under the theory that that is proper cross-examination.

I suppose that logically if everything else were excluded you would have a different situation if you wanted to call that cross-examination direct examination.

Q But the court did not allow him to examine as to counts 3 and 4, to cross-examine as to counts 3 and 4 -- on the grounds that it was outside the scope of the direct.

A That is true. Our California Supreme Court said that was error. He should have allowed that cross-examination.

Q On the grounds that there was a waiver of the privilege?

A No, there is a waiver of the privilege, Your Honor,

because it is within the scope of cross-examination. It was proper cross-examination because it showed his plan, a general denial, you see, bringing in the collateral matter.

Q Yes, I see what you mean. But I still suggest to you that if it is your contention that the privilege was waived that would open up the defendant to being called by the state if the state wanted to do it and examine him with respect to the entire scope of counts 3 and 4.

A Your Honor, I would think logically if you could insulate it to this cross-examination waiver problem it would logically follow, perhaps. But as I mentioned, so many other aspects of calling the defendant into the --

Q I understand that, but we have to look at this thing as a matter of principle not to look at the perimeter of the problem as well as its immediate focus. I suggest to you that what you are telling us may result in the logical conclusion that if a defendant takes the stand as to any counts there is a waiver as to all counts, then the net result of that is that prosecutor if he sees fit can examine the witness, examine the defendant as his own witness, with respect to those other courts.

A Your Honor, that has not been the history of the situation in the federal practice. On this principle of waiver to the extent of permissible cross-examination, Caminetti I think was decided in 1917, and no one has contended that under the Caminetti principles, I know of no federal prosecutor who

has contended that by virtue of his waiver he can then put him on the stand.

One final word. Assuming a Griffin error, I would ask you to consider that this is a situation where Chapman could apply. The comment here was not extensive as in Chapman. Considered in the light of the situation that he did take the stand and the jury could draw their own conclusions without the situation in Griffin, without being aided by the prosecutor and the court, I think it points to the conclusion that error, if any, was harmless beyond a reasonable doubt and we submit that California decision should be affirmed.

Q May I ask you, Mr. Haws, suppose the court had not found that these were similar offenses and therefore he could be cross-examined on that scope but put it on the grounds of pure waiver. Could this be sustained?

A Some of the earlier federal cases seem to indicate that the waiver of the privilege was not bounded by the scope of cross-examination. Caminetti indicates that.

Some of the later cases in the federal courts, Johnson, the Brown case, and so forth, would indicate that it is tightened, that the waiver of the privilege extends only to the scope of relevant cross-examination.

If those cases were followed and it was not a connected crime, then Griffin would be violated.

Q Should we have a broader scope of cross-examination

for a defendant than for a witness, an ordinary witness?

A. I would say it would perhaps be broader for the ordinary witness since he is not charged --

Q. Suppose then a witness in this trial had testified as to count 1 only. Would you have cross-examined him as to 2, 3, and 4?

A. An uncharged witness?

Q. Yes.

A. No, Your Honor. I don't think so.

Q. Then there is a difference in scope according to your theory as between a witness and a defendant.

A. That is true.

Q. And it is broader for the defendant.

A. What I meant was that the non-charged witness can be questioned about many things in a much broader area because he is not charged, and I think the privileges would work differently between the non-charged witness and the charged witness.

Have I made myself clear? My time is up, Your Honor.

Q. I do not see how that follows if you say that if he testifies concerning one count he cannot be cross-examined as to the other counts.

A. Your Honor, I think it is the theory that the non-charged witness is not being -- you are not proving anything against him but as to the defendant you are proving an offense

against him. When he makes a general denial he has in effect denied the collateral offense, counts 3 and 4.

Q He did not make a general denial on the witness stand as to 3 and 4, just 1 and 2.

A That is right. But because of that general denial under the rules of evidence he makes a general denial also of counts 3 and 4 and therefore within the scope of cross-examination.

Q Then you would say that even if 3 and 4 were not similar offenses under the similar offenses rule in California, that they could still cross-examine him if he testified concerning 1 and 2.

A I am sorry, Your Honor. I did not mean that. The California court did not hold that. My illustration was that if you have no evidentiary connection between a robbery you could not cross-examine him on it and he would not have waived his privilege. That is the holding below.

Q Could you tell us in just a moment what went to make these similar offenses? Counsel said in his opinion they were not. That is the only reason I ask you.

A I have a chart, and just running across they were similar because of clothing, because on all counts they searched other areas looking for other things such as a radio in count 2, credit cards in count 1, and in counts 3 and 4 they also searched other areas. In all of the offenses they used some

type of mask. I think most significant of all is that you had the admitted robber, David Perez, unrelated to this Perez, you had him as a confessed robber in count 2 and counts 3 and 4 and the evidence showed.

That was used in the Hasten case as a significant similar mark where the admitted robber is present at the uncharged and charged crimes showing plan and scheme.

Thank you.

MR. CHIEF JUSTICE WARREN: Mr. Fetros, I believe you have some time left.

MR. FETROS: I just want to make one very brief comment, that is the use of the term "cross-examination" by the California Supreme Court. It is not being used in the same sense we think of it. There is direct examination and then there is cross-examination which is on the direct.

They are saying that there is a further area which makes the defendant the prosecutor's witness. This is the whole area that this thing opens up. If we allow this type of theory to stand, then in effect on a charged crime the district attorney can ask any question he wants concerning a charged crime which is similar in modus operandi.

He can say, "Where were you, what were you doing? How can you explain this?" He can go through the whole thing as if in a civil case he was calling him as an adverse witness.

The Supreme Court of California's use of the term

"cross-examination" is proper but it is a little different from what we normally think of. The man is on the stand at the time and you are asking him these questions. In effect they are making him -- the district attorney is making him his witness to prove elements of the crime.

If this thing is allowed to stand they are saying that the district attorney can elicit from the defendant as to counts 3 and 4 all of the necessary elements by asking questions which they say are cross-examination and which I say is really direct examination.

They do not have any relationship to the questions which were asked by the defense attorney at all. They can be anything. That is what they are saying.

Thank you.