In the

Supreme Court of the United States

UNITED STATES, Petitioner,	)	
vs	)	No. 74-364
WILLIAM G. HALE, Respondent.	)	

Washington, D. C.
April 14, 1975

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UNITED STATES,

Petitioner,

v. No. 74-364

WILLIAM G. HALE,

Respondent.

Washington, D. C.,

Monday, April 14, 1975.

The above-entitled matter came on for argument at 1:18 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ANDREW L. FREY, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Petitioner.

LARRY J. RITCHIE, ESQ., Georgetown University Law Center, 600 New Jersey Avenue, N. W., Washington, D. C. 20001; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 74-364, United States against Hale.

Mr. Frey, you may proceed whenever you're ready.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FREY: Mr. Chief Justice, and may it please the Court:

This case is here on the government's petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, which reversed respondent's robbery conviction.

Government's evidence against respondent Hale at the trial in this case consisted of four principal matters:

First, there was the eye-witness identification by the victim, Mr. Arrington;

Second, there was the fact that Mr. Arrington had told the police, prior to the time Mr. Hale was arrested, that one of the robbers might be named Billy Hale;

Third was the fact of Hale's attempted flight, when a police officer sought to arrest him after Arrington had identified Hale on the street as one of the robbers;

Fourth was Hale's possession in his trousers' pocket of $123 in cash at the time of his arrest.

It's on the latter piece of evidence that this case

focuses, and that much of the trial focuses.

Arrington testified that the robbers took an estimated $96 from him, that it was taken by co-defendant Anderson, and that he saw it handed by Anderson to respondent Hale.

One of the arresting officers testified to finding and seizing the money at the time of Hale's arrest.

It was also brought out that Hale was unemployed.

The defense also concentrated on the money found in respondent's possession after the robbery. Six of its seven witnesses testified on that subject.

The defense explanation was that respondent's estranged wife had received her welfare check that morning, cashed it, and given $150 to respondent for the purpose of purchasing certain money orders. She had written a list on a scrap of paper of the money orders to be purchased, which, respondent testified, he threw away the day after his arrest.

At the time of his arrest, three or four hours after he had received the money from his wife, respondent testified that he was on his way to buy the money orders which she had requested.

The closing arguments of counsel also devoted significant attention to the question of the money.

Now, the particular questioning that led to the reversal of respondent's conviction came during cross-examina-

tion of him by the prosecutor.

The prosecutor asked him -- and this is at page 4 of the Appendix -- "Did they find some money on you?

"Yes, they did.

"Did you in any way indicate where that money came from?

"No, I didn't.

"Why not?

"I didn't feel that it was necessary at the time.

"You were advised of your rights, were you not?

"Yes."

At that point the court interjected, stated that: "He is not required to indicate where the money came from. There is no responsibility on his part in regard to that."

And then in response to objections by defense counsel, the court further stated, "I indicated to the jury that it is clearly an inappropriate question. You may disregard it, ladies and gentlemen. The defendant is not required to give any explanation whatsoever at the time of his arrest."

The Court of Appeals found this questioning to be improper and reversed the conviction because of it.

Now, in analyzing this case, there are two distinct questions which I think it's important to keep separate.

The first is whether respondent's silence at the time he was arrested was so lacking in probative value that its

disclosure to the jury was more likely to impede than to foster a factually accurate verdict by the jury.

QUESTION: Did the district judge give that admonition to the jury without -- on his own, without any request on the part of the defendant?

MR. FREY: Well, he initially interrupted the questioning without any objection by defense counsel to indicate that it was an improper question. There then was a request that the question and answer be stricken, and he responded by telling the jury that they may disregard it. I'm not sure what that -- how the jury took that.

But there was a harmless error contention raised in the Court of Appeals, and it was rejected, and we have not petitioned on the question of whether the error, if there was one, was harmless in this case.

Now, the second question, apart from the probative vlue prejudicial effect question, is whether even if the disclosure of respondent's silence was likely to contribute to an accurate verdict, there is some overriding constitutional policy dictating that a preference be accorded to suppression of the evidence, even at the expense of the truth-seeking function of the trial.

QUESTION: Mr. Frey, I have trouble with the silence point. He had no obligation to say anything at all.

MR. FREY: That's correct. There's no question

about that.

QUESTION: And this money was not counterfeit, was it?

MR. FREY: No.

QUESTION: It wasn't contraband, was it?

MR. FREY: No.

QUESTION: Well, why should he -- I mean, they took out his keys; he didn't say anything about those either, did he?

MR. FREY: Well --

QUESTION: Why should he -- why did he have the obligation of opening his mouth about --

MR. FREY: We don't in any way suggest that he had any obligation to give any explanation. The question here is whether it was sufficiently likely that a person in his circumstances would have volunteered an explanation, would have chosen to explain;that his failure to do so sheds some light on the truthfulness of his testimony at trial.

QUESTION: That the fact that he had money in his pocket, he was obliged to explain it?

MR. FREY: He was not obliged to explain it to the police, he was not obliged to explain it at trial. He elected not to explain it --

QUESTION: Well, why was he asked the question?

MR. FREY: He was asked the question because his

failure to explain it, even though he was not obliged to explain it, was nevertheless probative, and I think I'm --

QUESTION: Well, was it probative that he had a watch on, and didn't explain that?

Was it probative that he --

MR. FREY: Well, it would have been --

QUESTION: -- if he had a pack of cigarettes and he didn't explain that?

MR. FREY: No; the reason the money was probative and was considered to be probative, and this is why I indicated the amount of attention that was paid to it, was that it was presumably, under the circumstances, unusual for somebody in Hale's condition to have such a large sum of money on him.

QUESTION: What condition?

MR. FREY: Well, he was unemployed.

QUESTION: Did they know that? I thought they asked him, and he didn't say. How did they know it?

MR. FREY: He didn't say, but his wife testified on cross-examination that he was unemployed.

QUESTION: I'm talking about when the question was asked; they hadn't talked to his wife.

MR. FREY: Well, I'm not sure that I understand --

QUESTION: You say -- we're talking about, to use your words, the condition he was in when he was arrested. He was a person, walking down the street, with money in his

pocket.

MR. FREY: That's right. It was an unusually large sum of money in his pocket.

QUESTION: A hundred and twenty-three dollars, in this day and age, is a large sum of money?

[Laughter.]

MR. FREY: Well, I think it was unusually large under these circumstances.

QUESTION: He could get a steak with it!

Hunh?

MR. FREY: Well, --

QUESTION: Why was it -- is it a large sum of money or not?

MR. FREY: Well, I think for a -- in Hale's circumstances, this --

QUESTION: Well, what were his circumstances?

MR. FREY: The circumstances were that he was arrested shortly after a robbery in which a similar, although slightly lesser, sum of money had been stolen from the victim; that Mr. Hale was unemployed; that he was not --

QUESTION: But they didn't know he was unemployed at that time.

MR. FREY: But that's not the question, it's not whether the police knew at that time --

QUESTION: You assumed -- you assumed he was unem-

ployed. Why?

MR. FREY: Well, the question is not what the police knew, Mr. Justice Marshall, the question is what the jury would know in evaluating the truthfulness of Hale's testimony at trial, of his explanation, and I think it's --

QUESTION: And they had just told him that he had a right to be silent.

MR. FREY: Yes, they had.

QUESTION: And he was silent.

MR. FREY: Yes, he was.

QUESTION: And so he's penalized for that.

MR. FREY: Well, no, I don't think he's penalized for it, I think that there is a consequence that attached, once he elected to get on the stand and to explain to the jury why had had the money, he --

QUESTION: Well, why did the U. S. Attorney ask that question: "You were advised of your rights, weren't you?" Why did he ask that question?

MR. FREY: Well, I'm not sure why he asked that question, but I think --

QUESTION: Is it now the question that once you give Miranda warnings, you can do anything you want to do? Is that why he asked that question?

MR. FREY: I don't -- I'm not sure that I understand.

The purpose of the Miranda warnings is to insure --

QUESTION: But he asked the witness, he said: "But you were given the warnings, weren't you?"

MR. FREY: Well, I think that the reason that question was asked, I think it's appropriate to call to the jury's attention, as Judge Gesell did here, that there is no duty to answer questions, and the reason it's appropriate is that that's a factor that the jury ought to take into consideration in evaluating whether or not the defendant's testimony has been impeached, whether they believe the defendant's testimony.

It is a factor in the defendant's favor that he didn't have a duty to speak and that he was so advised. In terms of --

QUESTION: I feel it's the fact that money was stolen rather than a watch or a package of cigarettes that makes a question about money relevant, whereas a question about a watch or cigarettes might not have been.

MR. FREY: That's correct. And the money was, after all, at trial, one of the principal pieces of evidence against Hale. When Hale chose to testify, one of the burdens that he obviously undertook was to explain how it came about that he had this sum of money on him in order to rebut the inference that the jury might otherwise draw from his possession of this money.

When he sought to do that, the question then arose

whether we could seek to impeach his testimony by showing his silence before the police.

Now, the Court of Appeals --

QUESTION: That was not -- as I remember the record, they asked him, "Were you searched at the time you were picked up?" And he said no.

"When were you?" He said, "When I got to the precinct."

"When you got to the precinct, what happened?" "They searched me."

That was during that part of his testimony, it wasn't the part about the $45 in one-dollar bills, you know.

MR. FREY: Well, this was cross-examination by the prosecutor.

QUESTION: That's right.

MR. FREY: He had -- his testimony -- on cross-examination the prosecutor asked him whether they found money. Because one of the theorires of the prosecution, one of the factual theories that was submitted to the jury was that this was the money that was stolen --

QUESTION: But that was already in evidence from the policeman, wasn't it?

MR. FREY: Well, I understand that the factor of his possession of the money was already in evidence, but what was also in evidence at the point that this cross-examina-

tion took place as his explanation of how he came to have the money.

Now, the Court of Appeals said there was nothing inconsistent, as I think you're suggesting, between his silence at the police station and his explanation at trial. We don't agree with that. We think it's important to inquire into what is meant by the word "inconsistent".

The Court of Appeals and respondent here use it to mean necessarily contradictory. That is, that the testimony and the prior inconsistency can't both be true, and they seek to distinguish cases like Harris and Walder on the grounds that there there was that kind of inconsistency.

Now, the question is, in order to be probative for impeachment purposes, must evidence be wholly and inevitably inconsistent, or does it suffice if it's probably inconsistent? If it tends to impeach the witness's testimony.

Now, we think that the latter is sufficient. And in this connection I refer the Court to the definition of "relevant evidence" which is contained in Rule 401 of the Federal Rules of Evidence.

"Relevant evidence" is there defined as evidence having any tendency to make the existence of any fact that is of consequance to the determination of the action more probable or less probable than it would be without the evidence.

Applying that standard here, it's clear that respon-

dent's prior silence should have been admitted, that, having at least some tendency to show that his testimony at trial was not truthful.

In this connection, I'd like to advert to what Mr. Justice Frankfurter said in his concurring opinion in Adamson v. California about this matter. He said:

> "Sensible and just-minded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which it is within his power to contradict. The notion that to allow jurors to do that which sensible and rightminded men do every day violates the 'immutable principles of justice' as conceived by a civilized society is to trivialize the importance of 'due process'. ... To deny that the jury can be trusted to make such discrimination, that is, assess the reasons for silence, is to show little confidence in the jury system."

This is an empirical question. And the degree to which silence tends to impeach a subsequently proffered explanation will vary from case to case.

Here its impeaching effect is high. If Hale's testimony at trial was true, it seems to us, and we think it would have seemed to the jury, extremely unlikely that he would have failed to tell the same story to the police.

By telling the story, by explaining to the police what happened at the time, he would have capitalized on an opportunity possibly to prevent prosecution altogether, or, at the very least, to neutralize a damaging piece of evidence.

This opportunity was evanescent. If he didn't tell the police at that time where this money came from, he could never afterwards convince the police that his subsequent explanation was not fabricated.

QUESTION: Did he make any effort to show, after this episode, did he make any effort to show, through his wife, precisely where she had gotten the cash?

MR. FREY: Yes, that was shown in great detail. There was evidence showing that she received the check. They had someone from the welfare office testify as to when the check was sent out, someone from the Treasury Department testified about when the check was cashed. It was clear that she had received the money that day, and then of course there was her word and Hale's that she had given the money to him.

Now, finally, a point that I think is very significant in assessing whether his silence was probative, whether it would have meant anything to a rational jury, is the fact that it seems to me most unlikely that somebody in Hale's situation would have sat quietly by, let the police take from him the money which belonged to his wife, which was her welfare check, which was all the money that she and their two

children had to live on for the next month, and would simply have said absolutely nothing.

Of course he had a right to say nothing, but that's not the issue; the issue is whether it was likely under those circumstances that he would have said nothing. If it was unlikely under those circumstances that he would have said nothing, then surely it bears substantially on the veracity of his testimony to let the jury know.

QUESTION: Are you telling us that if he had said, "That was my wife's money", they would have given it back to him and turned him loose?

MR. FREY: Well, I'm not sure what the police --

QUESTION: You don't really mean that. He was already being booked.

MR. FREY: Well, I'm not saying that they would have given him --

QUESTION: He was even being searched. Am I right? Wasn't he being booked?

MR. FREY: I think he was -- I'm not clear whether he was being booked at the time he was searched; but I think it's probably true to say that they would not have given him back the money without checking it out.

But, on the other hand, they would have checked the story out before he had a chance to speak with his wife, before he had a chance to fabricate a story.

After all, the contention of the government at trial and the purpose of the impeachment was that this was a story that he fabricated for purposes of trial.

We were trying to show that he didn't have a story. He had no explanation at the time he was in the station house, and that's why he was silent. And we think that, of course he could explain to the jury, that's another important point, Mr. Justice Marshall; he could explain to the jury why he was silent. The jury could see him. If they believed his explanation that his silence was not because the story was fabricated, but because he was relying on his rights as he understood them, because he was intimidated, for whatever reason, then the jury would discount the impeaching effect of that cross-examination.

QUESTION: In point of fact, he was asked to explain his possession of the money --

MR. FREY: He was. According to the colloquy --

QUESTION: -- at the time that he was searched, wasn't he?

MR. FREY: -- between counsel and the court, of course this inquiry into his silence was cut off --

QUESTION: And so the jury never knew that he was asked?

MR. FREY: The jury never knew that he was asked, that is correct.

QUESTION: Unh-hunh.

MR. FREY: I mean, I picture further cross-examination would have gone into the kind of things, such as: "Could you stand there quietly and let them take your wif'es welfare money?" And then he might say, "Well, I knew I wouldn't get it back anyway." And then the jury could see whether they believed him, when he gave the explanation.

Now, it's instructive here to compare the Grunewald case on which the Court of Appeals relied. What this Court did in Grunewald was it looked at the answers that Mr. Grunewald gave at trial, at the testimony -- or, rather, Halperin, the defendant who was involved in that aspect of the case.

They looked at the answers and they said: Indeed, these answers could have been incriminating if they had been given to the grand jury. Therefore, under the other circumstances which we've adverted to in our brief, we think it has no probative value in the special circumstances of this case, that he invoked the Fifth Amendme-t before the grand jury.

But let's look here at what it is that Mr. Hale said. A completely exculpatory statement. A statement which, if true, couldn't possibly have gotten him into trouble. If true.

Now, also in terms of prejudicial effect, there is

a distinction between this case and Grunewald. Grunewald involved the balancing, as is traditionally the function of the trial court, between the probative value and any potential prejudicial effects.

In Grunewald, in light of the conditions at the time with regard to the Fifth Amendment, and this was in the height of the McCarthy era, the Court felt that to tell the jury that the witness had taken the Fifth Amendment before the grand jury was to introduce a substantial risk of prejudice that the jury would impermissibly conclude from that that he must have been guilty.

Here, the jury was not told, this line of questioning did not suggest any claim of the Fifth Amendment privilege against self-incrimination; this line of questioning did not even indicate whether he was otherwise silent before the police.

It was sharply focused on a particular inquiry by the police, and on a particular piece of his testimony, to wit, his explanation of the money.

Under these circumstances, there was very, very little hazard of prejudicial effect.

Now, I've deferred discussion of the Fifth Amendment issue, both because they have been considered at greater length in our brief and because I don't believe that, properly analyzed, this is really a Fifth Amendment case.

The Court of Appeals based its holding on Griffin, and on Miranda; but neither of those cases, we submit, supports the results that it reached.

Griffin is critically different because it involved a non-testifying defendant. Thus, it was not concerned, as here, with specific impeachment use of silence. The whole truth policy of the Harris line of cases was not implicated, nor was the waiver concept of Raffel implicated in the Griffin situation.

Moreover, in this case, unlike Griffin, respondent had the opportunity to explain his silence; the non-testifying defendant at the criminal trial has no such opportunity.

Also, I think it's a little clearer that Griffin's refusal to take the stand was an invocation of his Fifth Amendment privilege, in the sense that Hale's silence was not.

Now, the Miranda dictum, I submit, was also not intended to apply to impeachment use of silence. Rather, it was a reference to use in the case in chief.

In summary, we think that this case fits within the Raffel-Harris line of cases, in which this Court has rejected Fifth Amendment claims of a testifying defendant, emphasizing the importance of fully testing the truthfulness of a defendant's testimony, of getting the whole truth, rather than the defendant's tailored version of it.

It's recognized in those cases that the protection

of the Fifth Amendment are intended for the benefit of those who do not wish to testify and not for the benefit of those who, as Hale, do wish to testify.

One final note I'd like to make: A ruling in favor of the government's position in this case will not have any effect of encouraging police misconduct in interrogating arrested suspects. We can compare this case with the arguments that were made in the recently decided case of Oregon v. Hass, where the dissent took the position that there would not be any impediment to the police, once a request for counsel had been made, to persist in their questioning, since they had everything to gain and nothing to lose.

The Court nevertheless felt that the "whole truth" policy of the Harris line of cases was of overriding importance there.

Here, however, we have a situation in which the police, far from being given an incentive to coerce the statement, are given a situation in which, even if the defendant remains silent, there may be some prosecutive benefit down the road from such a chain of events.

So that, to the extent that there is any tendency here to affect police conduct, the tendency will be to enforce the duty or reinforce the duty of the police to give the arrested suspect a free choice between voluntarily remaining silent and voluntarily speaking.

Mr. Hale had that choice.

Finally, I'd like to mention to the Court the Barnes case, which it decided two terms ago, in 412 U.S. at 846, we didn't include that in our brief, but I think there are some parallels.

That case involved the question of the inference that could be drawn from possession of recently stolen goods -- unexplained possession of recently stolen goods.

There was a Fifth Amendment contention that this put pressure on a defendant to proffer an explanation of his possession, since otherwise the jury would be told that they could infer his guilt from unexplained possession, and the Court rejected that contention.

Also I'd like to point out that at page 31 of respondent's brief, they rely on a case called Miranti, and that case has been limited to its facts by a subsequent Second Circuit decision in United States v. Sewald, 450 F.2d 1129.

I'd like to reserve the remainder of my time for --

QUESTION: May I just ask you, before you sit down, Mr. Frey: What if the trial judge had not told the jury what he did in this case, i.e., what if he had not told them that the defendant was not required to give any explanation whatever at the time of his arrest?

MR. FREY: Well, we think that -- well, there are two

pieces. We think, of course, that he was completely wrong in saying that it was an improper question.

I don't think that we would object to the Court reminding the jury, although the defendant has the opportunity to so testify, that there is no duty on the part of the defendant to speak.

I think the jury ought to understand, in the context of evaluating a defendant's silence, that he has been given Miranda warnings.

It would be appropriate for the defendant to explain that, if that's his explanation for his silence, for his counsel to bring it out on redirect, or even for the Court to instruct. I don't think we have any objection to that.

What we want is for the jury to know what we consider to be a very salient fact, in evaluating the truthfulness of his testimony.

QUESTION: But you don't contend you were privileged to -- to put on his silence on your side of the case?

MR. FREY: We're not contending that we could put this on as evidence in chief. I mean, an argument could be made, but much of the authority on which we rely would be inapplicable to such an argument.

QUESTION: And so you think it would be error if the Court didn't instruct the jury that it's usable only for impeachment?

MR. FREY: You mean, assuming that the defendant requested such a limiting instruction?

QUESTION: Well, yes.

MR. FREY: For purposes of the ruling that we seek here, we don't seek a ruling that it can be used as evidence in chief, and in fact --

QUESTION: Well, you -- it's your position that it can't.

MR. FREY: That it cannot?

QUESTION: Isn't it?

MR. FREY: Well, when the case arose in which there were some -- I would have to look at a concrete case and see what, how I would evaluate the --

QUESTION: As I read your brief, I thought you made it -- I thought you were taking the position that --

MR. FREY: Well, --

QUESTION: -- it could not be used for --

MR. FREY: -- it can't be used for the general purpose of showing guilt. That is, it can't be used to ask the jury to make the inference that because he remained silent at the time of arrest, he's guilty.

QUESTION: Well, then, you really are using -- this isn't just for impeachment, then, is it? Even when you ask it on cross-examination, when he takes the stand, --

MR. FREY: It isn't --

QUESTION: -- you're really using it as substantive evidence of his guilt.

MR. FREY: No. No. Here it's clearly --

QUESTION: Well, you're using it to cast in doubt the content, the truthfulness of his explanation.

MR. FREY: Of a particular part of his explanation. This is an important distinction that I think that respondent fails to understand in discussing the Stewart case. There's a difference between general impeachment, impeachment of his character, impeachment of his general credibility; and a specific impeachment, directed at specific testimony.

QUESTION: But you're saying to the jury -- in effect saying to the jury: "If his explanation were really true, he would have said something about it"?

MR. FREY: That's what we're saying --

QUESTION: So you're saying his explanation is not true?

MR. FREY: That's what -- that's right. Now, that's an impeachment use as I understand the concept.

QUESTION: Well, I --

MR. FREY: In any event, we certainly contend that that's a legitimate use of that evidence, however it should be labeled.

QUESTION: You have not made a point, if I recall your brief, of the fact that no objection was made by the

defense here.

MR. FREY: Well, there was an objection after the court first, himself, spoke --

QUESTION: After the judge alerted them to the fact.

MR. FREY: -- and then the defense said, "Well, we object, too"; and we don't make a point of that.

QUESTION: They also made a motion to strike.

MR. FREY: Well, I think they did, but --

QUESTION: They also made a motion to strike.

MR. FREY: Well, of course, we think there was no -- the contention that we make is that they had no right to have it stricken.

QUESTION: But they did make the motion?

MR. FREY: Yes. But we're not relying on -- we're not saying that they were silent to their det riment, we're not saying that they should be penalized for any failure on the part of defense counsel to do anything.

QUESTION: What was this colloquy down on -- in the Appendix on -- under the asterisks on page 5? That was at the conclusion of the evidence, when they were discussing the instructions to the jury, was it?

MR. FREY: No. That was shortly after, in connection with the discussion of the -- there was a request for a mistrial by the defense at that point. One of the grounds on

which mistrial was requested was this improper cross-examination. The court --

QUESTION: That was at the bench?

MR. FREY: Yes. And the court said: I don't think you're entitled to a mistrial, because I think I've corrected it.

Of course, we think the court's correction was incorrect.

QUESTION: And the jury didn't hear this?

MR. FREY: The jury did not hear the material under the asterisks; that's correct.

I would like to save the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Ritchie.

ORAL ARGUMENT OF LARRY J. RITCHIE, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. RITCHIE: Mr. Chief Justice, and may it please the Court:

Prior to discussing whether the impeachment here was really proper impeachment or not, I think it's important to follow up on a few of the points that were just made with regard to the prejudice that was involved.

We disagree that the Fifth Amendment isn't involved here; indeed, we think the issue is whether the Fifth

Amendment was violated by the prosecution placing before the jury this evidence of the defendant's prior silence at the police station.

The privilege gives the accused the right to remain silent. That right extends to both innocent and guilty alike; the reasons for that are that the policy underlying the Fifth Amendment really has nothing to do with protecting the guilty.

Rather, the privilege exists to protect our system of criminal justice, the accusatory system, in which the government has the burden of proving guilt. They must shoulder the entire load without any help from the defendant.

Such a system represents a fair state individual balance in that it protects the individual from possible inhumane treatment by the government, in trying to secure statements from him which could be used against him.

It also insures the dignity of the individual by insuring the individual the right to privacy. He doesn't have to respond to the questions of the police; he doesn't have to dignify those questions, those accusations, by responding to them.

Unfortunately, most laymen don't know or don't understand the policy reasons behind, underlying the Fifth Amendment. The silence of the accused at the time of his arrest is probably all too often equated with guilt. There is that possibility.

It was for that reason that the "no comment" rule was really made a part of the Fifth Amendment by the Griffin case.

If the defendant elects to remain silent, then the prosecution can't comment on that silence because of the danger that the jury will draw that impermissible inference of guilt. The privilege would really be meaningless if the defendant had the right to remain silent and then the prosecution could bring out that silence to be used against him.

That danger is present whether the silence is brought out in the case in chief, whether it's brought out in closing argument, whether it's brought out on cross-examination in impeaching the jury. /sic/ Silence is still before the jury, and the jury still may draw that impermissible inference of guilt.

Instructions just can't cure that problem.

QUESTION: Well, that's true in the Griffin situation, where the -- in other words, where the defendant doesn't elect to take the witness stand at his own trial, that's -- the jury sees that and is aware of it, and nobody can prevent whatever inference they may draw from being drawn; isn't that true?

MR. RITCHIE: That's correct. That's why here the danger is much more --

QUESTION: Whereas, in this case --

MR. RITCHIE: -- because the jury would not know of his prior silence.

QUESTION: Right.

MR. RITCHIE: Unless it were brought to the attention of them by the prosecutor.

QUESTION: And yet -- and yet nobody's ever held that the -- and you couldn't, so long as there is a right of the defendant not to testify at his trial; a fact that if he doesn't testify, that the jury is well aware of; that obviously is not prejudicial error, is it?

MR. RITCHIE: The fact --

QUESTION: The jury's awareness of his silence at his trial certainly is, with or without an instruction, is not prejudicial error so long as the instruction is not that they can draw an inference of the kind that --

MR. RITCHIE: Well, the --

QUESTION: -- was made in the Griffin case.

MR. RITCHIE: -- the jury, by the instruction to limit this to credibility, is really being told that they can consider the silence in the -- to infer that the defendant is lying on the stand when he says that he is innocent, but that they can't consider his silence to infer guilt.

I just don't think that the jury can really successfully engage in such mental gymnastics and understand that explanation completely.

QUESTION: Well, does it not, as Mr. Justice Stewart just suggested, involve some struggle on the part of the jury to listen perhaps for four or five days to witnesses

testifying against the defendant and then never hear from the defendant? Is there not some -- somewhat the same kind of problem there?

MR. RITCHIE: Yes, there is. The -- in fact --

QUESTION: Can you think of any cure for that?

MR. RITCHIE: The only cure for that is going back many years ago before the federal statute and many State statutes that were passed, relieving the defendant of his incompetency to testify at all. Indeed, that was the law until the federal statute was passed a number of years back.

One of the arguments has been, by some scholars in Law Review articles, that that statute should never have been passed because this inference could be drawn, if they don't take the stand when they've got a right to.

The statute itself provided that no presumption shall be drawn; but, you are correct, the fact that is before the jury, they know he has the right to take the stand, and if he does not, they can see that. But here --

QUESTION: When it's an uninstructed and unguided --

MR. RITCHIE: Unguided -- they can see --

QUESTION: -- action on the part of the jury, then; isn't it?

MR. RITCHIE: That is correct.

QUESTION: And here they had -- they did have the benefit of some instruction on the subject, didn't they?

MR. RITCHIE: They did, but here they couldn't see it, Your Honor. Here, it wasn't his refusal to take the stand at his trial, here it was his refusal to speak at the police station. They had no way of knowing that; it wasn't something that they could see.

QUESTION: Do you have any hypothesis to suggest why, given your view of the case, your necessary view of the case, that there wasn't an objection as soon as the first question was asked, "Did you in any way indicate where that money came from?"

Wouldn't that, from your point of view,call for an objection, right then and there?

MR. RITCHIE: I think it did, Your Honor. I can only go by the record. I don't know what counsel was doing at the time, whether he was rising to make an objection or whether he just remained seated until the judge spoke; I don't know what happened.

QUESTION: Well, it looks as though he at least remained silent, whether seated or otherwise, until the judge acted, and then he thanked the judge for intervening for, in effect, making the objection.

MR. RITCHIE: That is the way the record appears.

QUESTION: At that time, from your point of view, it was too late to do anything to remedy it?

MR. RITCHIE: That is correct.

QUESTION: You think a mistrial should have been granted?

MR. RITCHIE: I do.

In Grunewald --

QUESTION: You left out one point: they did make a motion to strike. Or did you see that in the record?

MR. RITCHIE: Yes. After the judge initially made his statement, there was a motion to strike, and following that, shortly, there was a motion for a mistrial.

QUESTION: Right; motion for mistrial. And both were denied.

MR. RITCHIE: That is correct.

Grunewald itself discussed the prejudice because of this possible impermissible inference of guilt being drawn by the jury. There, a credibility instruction had been given; it was brought out that Mr. Halperin was silent at the grand jury for purposes of testing his credibility. And there was, in that case, an instruction telling the jury to consider it only for purposes of credibility.

In that case, the Court nevertheless found that the instruction could not cure it; that the impermissible inference was possible because the evidence had been placed before the jury.

It is really that placing of the silence before the jury which causes this impermissible inference of guilt which

may well be a bad thing, even where impeachment is proper; but in this case, we would argue that impeachment wasn't proper to begin with.

Obviously, one of the rules of evidence is that a person can be impeached by prior inconsistent statements. And the government is arguing that this case is similar to Harris. It is not, for two reasons.

The first reason is that Harris didn't really involve a violation of the Fifth Amendment, it just involved a violation of those procedural rules, those prophylactic rules which were set out to protect the defendant against possible violation of Fifth Amendment rights by police officers.

QUESTION: If there were no Fifth Amendment -- no privilege against self-incrimination, just as a matter of evidence and proof, you wouldn't argue that silence in the facts of this case wouldn't have been relevant -- or that some proper inference might have been drawn from the silence?

MR. RITCHIE: Yes, I would.

QUESTION: How is that?

MR. RITCHIE: The reason why silence would not be relevant, the government's argument is really that if the defendant had this exculpatory testimony available to him, he had been given the money by his wife, then when he was arrested by the police he would have told them that. He didn't

do that. He was silent.

We think that that silence is, at best, ambiguous conduct. He has -- the defendant has just been arrested and taken into the police station --

QUESTION: I know,but if the police say, "You obviously stole this money; we're about to charge you with it", and he says, "Wait. Here's where I got the money."

You don't think there is some sort of an inference there?

MR. RITCHIE: No, I do not, and the reason I don't is really twofold.

One reason is because of the fact that he was under arrest. With our mass media television shows, I think it's common knowledge of a great deal of society that possibly the best strategic policy to exercise at the police station is to remain silent. At least until he has an opportunity to confer with counsel. That is prevalent advice given by counsel to their clients.

The defendant may be confused, embarrassed, he may fear misquotation, he may fear misconstruction of his words. There are a lot of reasons.

QUESTION: But the hornbooks, I think, are solidly against you on that point, absent Fifth Amendment considerations. There may be many reasons that may be advanced by the defendant after the evidence is adduced as to why it isn't

inconsistent. But it tends to prove that,at least it arguably proves that. And as long as it arguably proves that, that's all you need to get it into evidence.

MR. RITCHIE: Mr. Justice, there are a number of State courts -- and considering this sort of an issue with regard to the tacit admission doctrine, if it had held that arrest is a per se rule, indicates that silence after that arrest is not probative, it is not an admission of guilt of any form.

QUESTION: But isn't that in the context of the Fifth Amendment?

MR. RITCHIE: To some degree it is, but I think the other thing that we have to pay attention to here is that the police themselves have just told the defendant that he has the right to remain silent, that he has the right not to answer any questions until he confers with counsel. The interrogators have just told him that. He is exercising his rights. He's doing what the interrogators have just told him he could do.

I don't see how --

QUESTION: Yes, but the fact that he was told he could do it, doesn't mean that he's told he has to do it.

MR. RITCHIE: No, it doesn't. He is informed that he has the right to remain silent, and that anything he says may be used against him.

QUESTION: Both of which are true and both of which were relied on in this case.

MR. RITCHIE: He might also infer that if he is silent, he will not get into any particular trouble: it will not be used against him.

QUESTION: Well, that's his inference, certainly; that's nothing that the police told him.

MR. RITCHIE: No, but it's certainly implied, I think, in the warnings. It wouldn't be unreasonable for him to get that sort of feeling from the warnings that are actually given.

QUESTION: Well, if it's a vested implication, why isn't the best way to handle it as an evidentiary matter to say that he can adduce that on redirect?

In other words, the government shows silence; he comes back and says, "It was only natural. I was scared. I thought maybe I should have remained silent."

Why not treat it as a factual issue, one that -- rather than one that depends on privilege?

MR. RITCHIE: Well, I think that is a question where the Fifth Amendment privilege does come into play, because of the impermissible inference of guilt that's associated with that silence.

The jury, as I mentioned earlier, I don't think will be able to understand it. As a matter of fact, they can't go

through the mental gymnastics in understanding this is only for credibility and can't be used to infer guilt; and as a matter of law --

QUESTION: Well, you're saying that Harris and Walder and Oregon v. Hass are wrong, because that's exactly what the jury was told in each of those cases.

MR. RITCHIE: Those cases did not involve a violation of the Fifth Amendment. Those cases involved a statement by the defendant which was clearly inconsistent.

QUESTION: Well, they involved a statement that was made in violation of the Miranda rules, which you've described as prophylactic and not part of the Fifth Amendment.

MR. RITCHIE: That is correct.

QUESTION: Well, why are those rules any less a part of the Fifth Amendment than the Griffin holding that comment violates it? I mean, that isn't written into the Fifth Amendment.

MR. RITCHIE: No, it isn't written into the Fifth Amendment. The Fifth Amendment says that no person shall be compelled to be a witness against himself in a criminal case.

It seems to me that if his silence is brought out, even on impeachment, then he is being a witness against himself in a criminal case.

QUESTION: All these -- what you've argued and in response -- the way you've responded to Justice Rehnquist --

all these matters could be brought out (a) by his redirect examination and (b) in a closing argument to the jury; the members of the jury presumably see as many television programs as your client does, or other people do.

Isn't this sort of the same thing as evidence of flight, which the general rule is, it's admissible, and which can be explained often?

MR. RITCHIE: These things could be brought out on rebuttal. I just fear that the danger that's involved here is the jury not really understanding the policy reasons underlying the Fifth Amendment, that it does not necessarily mean that a person is guilty; that inference may be drawn by them. They are being told by the judge, in instructions --

QUESTION: Well, of course, that objection goes to -- if that's valid, then the whole business of impeachment of credibility through questions which bring out such things as prior offenses and so on would be invalid; and yet that's been accepted in --

MR. RITCHIE: Well, I think we've got a special danger here, where the Fifth Amendment is involved.

QUESTION: If your argument is that the jury will not be able to comprehend the limiting instructions as to the use of what was brought out on cross-examination, that's a very broad attack on the whole use of impeachment --

MR. RITCHIE: Oh, I think not. In the normal

situation, where impeachment is being used, I don't think there is anywhere near the danger that the jury is going to misunderstand.

QUESTION: Prior offenses and so on.

MR. RITCHIE: Prior offenses and -- it's a great deal different, I think, in the privilege against self-incrimination.

QUESTION: And prior inconsistent testimony, not in this context?

MR. RITCHIE: That's right. Yes, Your Honor.

The defendant who is testifying in front of the jury, I think it must be remembered, obviously is going to be looked at by the jury as a person who has a special interest in the case. In fact, they will be told that by instructions, more than likely. And I think that with those instructions, with his position in the case, it's going to be hard for them to rationally understand any explanation that they might have and to feel strongly about it and believe that over the possible inference of guilt that may be drawn from his prior silence.

QUESTION: Mr. Ritchie, I wonder if almost all of your arguments would not also be directed at the well-accepted rule that unexplained possession of recently stolen property affords the jury an opportunity to draw an inference of guilt, not just an inference of want of reliability as a

witness, or credibility, but an inference of guilt.

MR. RITCHIE: I think not. In the Barnes situation, in the recent presumption from recently -- possession of recently stolen property, if in fact in this case Mr. Hale had money on him which was marked in some way that clearly could be tied to the complaining witness, then I don't think he would be required to tell the police, to explain to the police his possession of the money.

Rather, it's a question more of trial tactics. The inference from the possession is a reasonable one, which he can choose, at his trial, to either get up and explain or to let the jury draw the inference. He has the advantage of counsel defending here, that the police station doesn't have the advantage of counsel.

QUESTION: What if, in this particular situation, the evidence of the government showed that the amount stolen from the victim was $157.33, and that that turned out to be precisely the amount of money in his pocket when they caught up with him, and that the denominations corresponded to the denominations of the money taken, would you -- where would that fall? Would that fall into the category of possession of recently stolen property or where would it fall, in your view?

MR. RITCHIE: It may. Again, I think, in that situation the only thing that Mr. Hale would be required to do,

would feel any pressure about at all, would be at his trial, to make a determination of whether he is going to take the stand to rebut the inference that the jury may draw from that fact.

Again, here, we're talking about Mr. Hale at the police station, where he has just been arrested, he does not have counsel present, there is no -- there should be no pressure on him to explain at that time to the police.

QUESTION: Of course, Mr. Justice Frankfurter's opinion, to be sure, it was a concurring opinion, not an opinion of the Court, was to the effect that in the ordinary run of the generality of human experience, if people have an explanation, a valid explanation, they give it; and that therefore the failure to do what is found to be the generality of human experience is something a jury is entitled to hear about and consider.

But I take it you would reject Mr. Justice Frankfurter's view on the matter?

MR. RITCHIE: Yes, I would. That view was expressed prior to the time that the "no comment" rule was held -- or that the Fifth Amendment, excuse me, was held applicable to States, in a State case; and I just would reject that view.

With regard to the pressure on --

QUESTION: Well, aren't you giving up more than you have to? In this case, I would assume that he'd take the

position that that small amount of money he had, he had no obligation to do it.

MR. RITCHIE: No, that is correct; I take that position.

QUESTION: Well, you haven't abandoned that, I hope.

MR. RITCHIE: Oh, no, I certainly have not.

QUESTION: Well, if it were $5,000 and it had been a bank robbery or a supermarket robbery, where they'd have that kind of money these days, would you say that the rule of law would be different? Five thousand instead of a hundred and fifty?

MR. RITCHIE: No, I would not. Still I don't think he would have to explain that at the police station.

QUESTION: Well, that isn't quite consistent with what, at least, I understood you to respond to Mr. Justice Marshall.

MR. RITCHIE: The pressure to explain at trial by the presumption that exists when a person is found in possession of recently stolen property is a different sort of pressure than the pressure at the police station, that a defendant might feel to talk to the police.

QUESTION: I'm talking about the explanation at the same point in time, the only difference from this case in my hypothetical --

MR. RITCHIE: At trial.

QUESTION: -- is five thousand dollars, or, to make it clearer, twenty thousand dollars.

But you think there is no more -- the government could make no more use of his unexplained possession of twenty thousand dollars than of one hundred and fifty?

MR. RITCHIE: I'm sorry, Your Honor. You're talking about at trial now.

In that case it seems to me that before the presumption that arises from the possession of recently stolen property can come into effect, the property must be shown to be the recently stolen property. It may be that the circumstances would be such as the two examples suggested by you might raise that presumption, that this was the stolen property. It might show that. And if that's the case, then the inference may properly be drawn.

We certainly don't have that case here.

QUESTION: But the only difference is the amount of the money, isn't it?

MR. RITCHIE: It's the amount of the money. He had $123 in his pocket, $35 in his wallet; total of 158. The complaining witness initially told the police 65 had been stolen; he later changed that to 96.

There is a difference in the amount of the money. There's no way to necessarily link that to the money that was actually taken.

QUESTION: Mr. Ritchie, in light of Justice Harlan's opinion in Grunewald, is it necessary for you to rely as strongly as you do on the Fifth Amendment?

MR. RITCHIE: Well, I think it is, for the reason that Grunewald was a case in which the Court exercised their supervisory power over the lower federal courts.

QUESTION: It was not a constitutional decision.

MR. RITCHIE: That is correct.

QUESTION: Now, the four dissenting Justices would have made it a constitutional holding.

MR. RITCHIE: Yes, Your Honor.

QUESTION: So the majority decision really turned, as I read it, on the question of whether or not the evidence had probative value in light of the Fifth Amendment.

MR. RITCHIE: That is correct, Your Honor.

The reason why I have to rely on the constitutional argument is really because this case is a case arising under the laws of the District of Columbia. And, as this Court has held in the Griffin case -- in the other Griffin, Griffin vs. the District of Columbia, and in the Johnson case, when the local federal district court is sitting on a case which involves the trial of an offense applicable only to the District of Columbia, it will be considered to be acting as a local court.

That being the case, there would be no federal supervisory power over the courts in this case.

QUESTION: Well, is that still true, after the D. C. Court Reorganization Act, do you think?

MR. RITCHIE: Yes, I do. This was prior to the Reorganization Act. This case was tried back in 1971.

QUESTION: I thought the Court Reorganization Act was '70.

MR. RITCHIE: It was. It arose in the system prior to the changeover after the Court Reorganization Act. So it was tried in federal district court.

QUESTION: Today it would have to be tried in the Superior Court.

MR. RITCHIE: Today it would be tried in the Superior Court.

QUESTION: Unh-hunh.

But certainly there is still some supervisory power, is there not, at least over the federal district courts in the District of Columbia?

MR. RITCHIE: Yes, I think there is.

QUESTION: I mean there's just a non-constitutional error is all that -- in a federal trial, is what supervisory power means.

MR. RITCHIE: The government has argued that there would be no -- by the ruling that it seeks, there would be no way that the police could possibly violate -- use such a ruling to violate the rights of the accused.

I just want to disagree with that, because I think that if indeed the government gets the ruling they're seeking in this case, where a defendant's silence can be used against him, they can confront him at the station house with a very similar sort of technique, as mentioned in Miranda; when they were discussing the police manuals in Miranda, they pointed out that one technique mentioned was where the police officer tells to the accused: "Joe, you've got the right to remain silent; I'm not going to take that right away from you; I wouldn't do anything to do that. But if you don't tell me or explain to me what the situation is, if you remain silent, I'll have to assume that you're guilty. You can certainly see that. And everybody else will assume the same thing."

That sort of statement by the police was viewed in Miranda as amounting to a form of psychological coercion, and I think it does, if the government seeks -- gains the rule they seek today, then the police could properly tell the accused that, it would be a proper statement to give them.

That would result in a great deal of pressure being placed on the defendant's right to remain silent at the police station. He can invoke that right to remain silent only on the condition that it may be used in evidence against him, an impeachment.

It seems to me that puts a great deal of pressure on him to talk, to give up his right to remain silent. It does

result in a cost, exacts a cost on the privilege.

I think the government in relying on Williams and McGautha and Barnes really overlooks the fact that in those cases where trial tactics was often discussed, the defendant had counsel. Here, the defendant has just been arrested at the police station, he did not have counsel.

This wasn't a question of trial tactics on his part. He didn't have counsel, he didn't have any idea, he had -- maybe what his defense would be -- he hadn't conferred with counsel. I think there's a great deal of difference between this case and between the cases of McGautha and Williams, and Barnes.

As far as waiver is concerned, the government argues that by taking the stand he waived his right to remain silent. In a single proceeding, obviously taking the stand will waive the right to remain silent. He must answer the questions. He must not evade questions directed to him by the prosecution. If he does, then the jury could possibly infer guilt and maybe rightly so. But here we're talking about two separate proceedings: the right to remain silent at the time of arrest, and the right to remain silent at his trial.

There is no reason for the waiver by taking the stand to be a retroactive waiver.

In the Raffel case, which is relied on by counsel, the only basis which was suggested for extending the scope

of the waiver -- or against extending the scope of the waiver, was the possible pressure on the defendant to testify at his first trial. The court rejected that because that pressure really wouldn't exist. He wouldn't be expected to have a second trial. He couldn't anticipate that he would get a mistrial.

Here, on the other hand, at the police station he may well expect to have a trial. He's probably looking forward to one.

QUESTION: Let me see if I understand you. You feel that an affirmance here would result in an overruling of Raffel?

MR. RITCHIE: I'm not sure that it would. I think Raffel has been limited to its facts pretty much by more recent cases, by Stewart, in particular. Grunewald and Stewart both fail to follow Raffel.

QUESTION: But they didn't overrule it.

MR. RITCHIE: They did not overrule it.

QUESTION: And it was a unanimous opinion in a court which included Justices Holmes and Brandeis.

MR. RITCHIE: That is correct.

QUESTION: In fact, Justice Brandeis wrote the opinion.

MR. RITCHIE: That is correct.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Ritchie.

You have, I think, two minutes left, Mr. Frey.

REBUTTAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FREY: Thank you. I'll try to be quick.

The reason my opponent can't rely on Grunewald, Mr. Justice Powell, is that I think on a fair reading of Grunewald it more closely supports us than them.

The kind of analysis in which the Court engaged in Grunewald would not lead to the same conclusion as applied to the facts of this case.

With respect to what Mr. Hale could reasonably infer from the warning that was given to him at the time he was arrested, I don't think he could reasonably infer that his silence wouldn't hurt him. There are many ways in which his silence would hurt him. His silence would cause him to be charged with a crime. His silence would cause him to lose the opportunity to neutralize the piece of evidence. His silence might cause him to lose whatever opportunity he had to get this money back.

The silence carries many prices. The price of possible impeachment if he's brought to trial and if he decides to testify, by his silence, seems to me a very remote one, very unlikely to control his conduct at the time, extremely unlikely to put impermissible pressure on him in violation of the Fifth Amendment.

And I think it's important to note that his silence was not the product of any violation of the Fifth Amendment.

Obviously, his right to remain silent was honored. And even then I think that it's by no means clear that what was referred to in Miranda as the right to remain silent is actually a Fifth Amendment right.

You have a right not to be compelled to speak, and Michigan v. Tucker suggests that that right is somewhat different and somewhat more narrow, and it might be more accurate if the Miranda warnings, instead of describing a right to remain silent, advised the arrestee that he has no obligation to speak or perhaps that he can't be compelled to speak.

In any event, I think there was no real likelihood of prejudicial effect. By "prejudicial effect", what is meant is that the jury will impermissibly draw an improper conclusion; and I don't think that could be the case here.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Frey.

Thank you, Mr. Ritchie.

The case is submitted.

[Whereupon, at 2:19 o'clock, p.m., the case in the above-entitled matter was submitted.]

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