In the

Supreme Court of the United States

JEFFERSON DOYLE,

Petitioner

v. No. 75-5014

OHIO; and

RICHARD WOOD,

Petitioner

v. No. 75-5015

OHIO

Washington, D. C.
February 23, 1976

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v.	:	No. 75-5014
OHIO; and RICHARD WOOD, Petitioner	:	
v.	:	No. 75-5015
OHIO	:	

Washington, D. C.

Monday, February 23, 1976

The above-entitled matter came on for argument at 10:07 o'clock a.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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JAMES R. WILLIS, ESQ., 1212 Bond Court Building, 1300 East Ninth Street, Cleveland, Ohio 44114
For Petitioners

RONALD L. COLLINS, ESQ., Prosecuting Attorney for Tuscarawas County, Ohio, Court House, New Philadelphia, Ohio 44663

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in 75-5014, Doyle against Ohio and 75-5015, Wood against Ohio.

Mr. Willis.

ORAL ARGUMENT OF JAMES R. WILLIS, ESQ.

ON BEHALF OF PETITIONER

MR. WILLIS: Mr. Chief Justice, and may it Please the Court:

Jefferson Doyle and Richard Wood, the Petitioners in this case, were convicted and sentenced to serve penal terms of 20 to 40 years for the sale of majijuana.

This Court granted certiorari to consider, among other things, the question left unanswered in U.S. versus Hale. That is, whether the Constitution prohibits the prosecution from showing that one who had been advised of his right of silence and of his right of counsel properly subjects himself to questions designed to show he availed himself of such rights.

Also involved here are serious questions as to whether an accused can be asked why he failed to disclose his defense at the preliminary hearing where he appeared with counsel and whether a defense witness arrested and charged with the same offense can be asked comparable questions.

These include why they did not consent to a search of the car. Then there is the further fact that these points were vigorously argued to the jury.

The relevant facts are not in serious dispute.

Doyle and Wood were arrested shortly after they had been seen emerging from a parking lot. An informer had preceded them. He was carrying a ten-pound bag of marijuana which he indicated had been purchased from the Petitioners.

Their defense was that they had been framed.

The facts show that they had driven about the city, according to their defense, in search of the person that framed them and they were stopped and arrested by the local police who were aided by the Sheriff's Department.

The Court of Appeals expressly viewed the asking of the assailed questions as properly designed to test credibility. The related arguments were approved on the basis of this determination.

In a nutshell, we contend here that to the extent Raffel may have somehow survived as a viable concept, this Court's decisions in Johnson, Grunewald and Griffin may have even been invigorated by Harris, this Court's decisions in Miranda and Hale certainly, when viewed in tandem, mandate that Raffel should be expressly relegated to the archives of antiquity.

The State and the Government in its amicus brief would have this Court declare in spite of the clear and unambiguous thrust of Miranda and Griffin that the failure of an accused based on his right of silence and to counsel to reveal the details of his defense during police interrogation is a factor that bears on credibility.

While it is doubtless true that the Grunewald, Hale conclusion that mere silence is not inconsistent with innocence is a valid premise, it is also true that a request to consult with counsel should not create a negative force against the believability of an exculpatory defense, as was the case here.

Raffel, of course, held that it was proper to show at a subsequent trial that the accused did not testify at his first trial. For me, it is most difficult to square Raffel with the Griffin principle that one can be penalized for not having testified.

The elementary fairness concept expressed in Johnson makes the fact that the Miranda warnings were given these Petitioners a most crucial consideration.

The same is true of Grunewald as it is hard to see how this Court's supervisory powers over the lower federal courts could possibly be more sensitive to the rights of an accused to a fair trial than is the Constitution itself.

As counsel reads Hale, absent a duty to speak, and absent a threshold inconsistency between a failure to do so and later exculpatory testimony, proof of silence lacks a significant probative value and should be excluded.

Here, of course, as was the case in Grunewald, the focus on Doyle and Wood following their arrests, was so intense that it was natural for them to feel they were being questioned solely for the purpose of providing evidence that could be used against them.

Indeed, there is simply no basis in this record, even for the strained hope by them, that the revelation of their defense to the police during interrogation could have possibly resulted in their release.

Raffel, of course, was based on an assumption, rejected in Grunewald and again in Hale, that silence is inconsistent with a later exculpatory defense but, as the Court has recognized -- and I think it is salient here -- that there is simply no proof that an innocent person would tend to make an exculpatory statement whereas the guilty person will remain silent.

We contend that there is simply something wrong with the rule which permits the conversion of one's permissible use of the Fifth Amendment shield into evidence of guilt.

This, of course, is the point made in the

concurring opinion in Grunewald, which we contend was adopted in Griffin and, certainly, impeachment tends to demonstrate its untruth by implication, which was a point made in one of the concurring opinions in Miranda.

The interesting aspect of this case, of course, lies in the fact that in Ohio there were decisions which had expressly excluded the ability of the prosecutor to comment on the failure of the person to appear before the Grand Jury.

The Supreme Court of Ohio had indicated that this, of course, was improper and that no amount of instruction could cure this fault on the part of the state.

There were decisions which indicated it was impermissible to comment on the fact that one did not reveal his defense at a preliminary hearing.

Again, the Supreme Court of Ohio has taken the position that an instruction was insufficient and then there was the Stevens case out of Ohio which indicated that it was impermissible to argue to the jury that at the point of arrest would have been a good time for the defendant to have revealed his exculpatory defense.

There was a statute in Ohio which was, of course, applicable at the time this case was tried and that statute expressly provided that when an accused person appeared

at a preliminary hearing without counsel he should be expressly advised that he need not make any statement and that the failure to make a statement could not be used against him at the time of trial.

Thus, we have the anomalous situation where one appears with counsel and he is, of course, penalized because he did not reveal his defense at the preliminary hearing. To put the issue in its proper context, I think that a slight emphasis should be given to some of the questions that were asked of Mr. Wood and Mr. Doyle.

The point, of course, is that Doyle was tried -- Wood was tried first. Doyle appeared as a witness in the Wood case. Doyle was tried and Wood appeared as a witness so that we do have a sophisticated aspect of some of the questions which deal with whether or not the same standards apply to a witness who appears testifying in the defense of a co-defendant or whether or not the Fifth Amendment right of silence, which also was given to him at the time of his arrest are to be exposed to the jury to impeach his credibility when he appears as the witness.

The trial court, in ruling on a motion for judgment of acquittal, a post-trial indicated that different rules applied.

We contend that the rights having been given to both these defendants and both having indicated that they

desire to rely on their rights and they wanted to consult with an attorney that it doesn't make any difference whether he appears at a post-trial -- or whether he appears at a trial post-indictment; it doesn't make any difference whether he appears as a witness or that the implications are exactly the same.

In this case, when Doyle and Wood were stopped, the officer indicated and it is a fact, he told them that they had the right to remain silent and they had the right to consult an attorney. Both indicated that they wanted to consult an attorney.

Later, they came to the incarceration area and indicated to Wood, "You don't have any objections to us searching your car."

He said, "I want to consult with an attorney about that"and that was his evidence on the point and Doyle, of course, gave comparable indication.

Then, of course, the state then went to the problem of getting a search warrant and they located in the car some money and of course, they were asked at the trial, "Why didn't you consent to the search of the car?" and "Why was it that you didn't reveal this framed defense to the police on the night of the arrest," and "Why, when you appeared at the preliminary hearing, didn't you reveal the contents of your defense?"

And the question about the counsel was brought to the fore by questions asked of one of the Petitioners. He said, "Well, why didn't you relate the essence of your defense?" and he indicated that, "I wanted to consult with an attorney."

He said, "Well, you appeared at the preliminary hearing. You had an attorney at that time, didn't you?"

And he said, "Yes."

And, "Well, why didn't you tell the judge at that preliminary hearing that you had been framed? That would have been a wonderful time to have revealed to the judge that you had been framed."

And all of these questions, of course, were asked over objections and the only instruction given the court related to the testimony of one who appeared as a rebuttal witness in the Wood trial. He was asked, on rebuttal, "Did Mr. Wood at any time protest his innocence?" And we again objected and the Court indicated "Did Mr. Doyle at any time protest his innocence?"

Doyle, testifying as a witness in the Wood trial. And the Court instructed the jury that that went to impeach the credibility of Mr. Doyle, who had appeared as a witness on behalf of Mr. Wood.

QUESTION: Do you think there is any inconsistency between the Defendants' silence at the time of

arrest and his testimony at trial?

MR. WILLIS: Do I see any inconsistency?

QUESTION: Yes.

MR. WILLIS: Mr. Justice Stevens, I see none. I feel that the Constitution, as interpreted by Miranda, having conferred upon the accused the absolute right to remain silent, I see no inconsistency between that and the position taken by this Court in --

QUESTION: Assuming that the Court should disagree with you on the question of whether there is inconsistency or not, would your position then fail?

Does your case turn on the question of whether or not there is inconsistency, in other words?

MR. WILLIS: I would say so, in the light of Harris versus New York; the position taken by the Court there, of course, related to inconsistent statements which were at variance with the later defense and I think, although I am not in agreement necessarily with Harris, but, given Harris, I don't think that this case would turn on that point because here --

QUESTION: Do you think, Mr. Willis, there could ever be a case in which silence would be inconsistent with trial testimony?

MR. WILLIS: I would suppose so, using the Third Circuit's case of U.S. ex rel -- the Burt case, whatever

it is, there the indication was that the man was arrested and at some time after a person had been killed and later he was charged with the murder and his defense was accident and he was questioned as to whether or not or why he had not reported the fact that he had accidentally injured someone.

I think in that instance at least I could live with that opinion and then there is the Fifth Circuit opinion in Ramirez, where the person testified at trial that he was coerced into selling the contraband. I think there I can see how he might have been under some duty to speak and I think that is the point.

Absent a duty to speak, I have problems with it and I have even greater problems when the man is given the Miranda warnings, which is to the effect that he has the right to remain silent and I think that he certainly can rely on that and there is an old opinion rendered in the Sixth Circuit. I think it is probably McCarthy and it is probably back in the twenties and the point there was made that if a person could be penalized for exercising his right of silence, that you ought to change the warning to read that anything that you say can be used against you and if you don't say anything, that can be used against you, too and I think that makes sense.

It just seems that there is something wrong to

tell a man that you have the right to remain silent. You have the right to consult with an attorney and he says, "Very good. I want to exercise those rights."

And then later he is penalized for having done so and I just can't reconcile that with the position taken by Mr. Justice Douglas in Johnson and I cannot take --

QUESTION: You would seem to accept that if there is inconsistency between silence and his later trial testimony.

MR. WILLIS: Inconsistency, but I do not accept the premise that silence is necessarily inconsistent.

QUESTION: At the time of the arrest, the officer can't really know what the man is going to testify to later. So, why would he have to give him that warning?

MR. WILLIS: The Court said he must be warned in Miranda and I am relying on that. This Court --

QUESTION: The warning that your silence may be used against you. You say, your silence may be used against you if you testify later in a way inconsistent with silence.

MR. WILLIS: But I am not agreeing --

QUESTION: Just remember that circumstance in which it would be permissible.

MR. WILLIS: I admit that some of the decisions tend to suggest that this is the case. Again, the

Third Circuit opinion in Burt and Ramirez decision out of the Fifth Circuit tends to say that there are some circumstances in which silence is inconsistent with innocence and later exculpatory testimony and for that reason was admissible, that for that reason this Court ought to articulate a standard under which all of us can live and I believe that that is one of the real problems that confronts defense counsel.

If you recall -- I think it was Mr. Justice Jackson in Watts versus Indiana indicated that any lawyer worth his salt will advise his client not to make any statement under any circumstance and --

QUESTION: Well, sure, your client is free and you are free to argue to the jury that no inference should be drawn or that it is such a debateable inference that he may as well just have been following his Miranda warnings. Why convert it into a question of law rather than simply something that the jury should evaluate one way or the other?

MR. WILLIS: Well, I take this position, Mr. Justice Rehnquist, that any defendant who does not testify goes against the grain and certainly, if you can't penalize him for not testifying to a jury in open court, why should you penalize him because he does not desire to risk distortion by the police officers as to what he might

have said when questioned on the public highway and for that reason and because the drift, as I apprehend from the Court's decisions is that he has this right to remain silent. Why should he be penalized?

QUESTION: Well, why do you say you are penalizing him? I mean, you let in a lot of statements made by the defendant to third parties at a trial. You don't regard those as penalizing him, do you?

MR. WILLIS: Well, I don't say he is being penalized but I think he probably subjects himself to testimony that tends to prove him guilty when it is provided by others but I think the Fifth Amendment says he doesn't have to provide any testimony himself which is incriminating and this is at least the thrust of the position I am trying to defend.

Certainly I don't see how one can conclude that because a person is told he can remain silent and he decides to remain silent that he must be guilty and that this has some evidentiary value insofar as the question of guilt or innocence is concerned.

QUESTION: You seem to be accepting, as a premise, Mr. Willis, the idea that the silence is incriminating. You say that he is not obliged to answer because this tends to incriminate him.

MR. WILLIS: No, I am not saying that I am not

necessarily saying that. If I am, then I am not -- what I am trying to say I am not saying very well.

What I am really trying to say is that this Court indicated in Miranda that the man has the right to remain silent and he has to be told of this and that he has a right to counsel and he has to be told of this.

Now, it seems to me that there is something basically unfair to then turn that around and penalize him by exposing to the jury that he elected to remain silent when he had an option which would have permitted him to waive these constitutional rights and reveal to these police officers, possibly in some secret session or in the presence of five or six other police officers who may very well distort what he has to say -- I think he has a right to reveal his defense in an open court where it can be fully evaluated.

QUESTION: Well, do you mean he has a right to reserve totally any statement about his defense until he is in open court with his counsel?

MR. WILLIS: That is it. That is precisely the point. I feel that he has no duty to speak when interrogated by the police officers and I think this Court has made that point very clear and this is the point that I think Mr. Justice Douglas made in Johnson when the particular defendant was told by the court that he could

refuse to answer questions based on his Fifth Amendment rights and then later, the prosecutor was able to argue that the man had exercised his right of silence.

Certainly, the -- it is something fundamentally wrong to penalize a person for having exercised the right that is extended to him and this is the point upon which I place my basic emphasis.

QUESTION: Mr. Willis, you referred to Justice Jackson's often-quoted observation that if a lawyer is called in, any lawyer worth his salt will tell his client to say nothing whatever.

In the Miranda opinion, Chief Justice Warren, you will recall, added at some point in his discussion of the setting that we are talking about and he goes on to say that, "It can be assumed that in such circumstances, that is, when a lawyer is called in and the client tells the lawyer he is innocent and can exculpate himself," his statement goes on, "a lawyer would advise his client to talk freely to police in order to clear himself."

Certainly, there is some inconsistency between those two observations of the two justices.

MR. WILLIS: Yes, and --

QUESTION: Of course, neither of them is a ruling of law but an observation.

MR. WILLIS: This is the point I was going to

make. I think that the statement by Mr. Justice Warren, of course, was dicta and it certainly -- I don't agree with that particular statement and I feel that as counsel for a person who is under accusation that I have the choice of giving him the advice which I consider to be consistent with the client's best interests. I think that that is traditionally the role that defense counsel has to bear when he assumes the obligation of defending one accused client.

I see nothing improper in indicating to a person against whom there is arrayed some suspicious circumstances that he should exercise his right to reserve, as the Court has indicated, his right to defend against these charges in open court, particularly when the likelihood that if he were to make all sorts of exculpatory statements is not going to result in his release in any way.

In any event, or avoid the problem of going to trial and having the issue decided by a jury.

QUESTION: Mr. Willis, do you draw a distinction between the circumstances that exist at the time of arrest when the Miranda warnings are given and those that exist at the preliminary hearings?

MR. WILLIS: Yes. In this case I do because at the preliminary hearing, the man appeared with counsel.

QUESTION: Right.

MR. WILLIS: And certainly if he retains counsel, he ought to follow counsel's advice and at that point we can assume that counsel had evaluated all the facts and circumstances and in this particular case he has conducted a pretrial motion to suppress which had been defeated and the likelihood was good that the man was going to get indicted by the grand jury.

Also, we had the state statute which expressly indicated that if persons had appeared without counsel, the Court had to advise them that they would not make any statements and their failure to make any statements could not be used against them at the time of trial so are we to say that counsel can't give the same advice to his client that the Court would be required to give if he appeared without counsel?

I hope that answers the Court's question.

QUESTION: He took the stand, didn't he?

MR. WILLIS: At the trial, yes.

QUESTION: At the trial and his election not to testify or to offer any explanation of his original silence at the preliminary hearing as a trial tactic -- as lawyers would perhaps say --

MR. WILLIS: Well, I wouldn't necessarily call it, Mr. Justice, a trial tactic although it probably results in being just that but the point was that it would

have been futile for him to have testified at the preliminary hearings.

Now, the burden there is only a probable cause to believe that this person was implicated in some crime and it is then up to the grand jury to determine whether or not he should be indicted so the likelihood of him forestalling this situation at that point was too remote for him even to involve himself in trying to explain his particular defense at that time.

QUESTION: In a marijuana case, once you lose your motion to suppress you are a dead pigeon anyhow, aren't you? So far as the gran jury is concerned.

MR. WILLIS: Oh, so far as the grand jury is concerned, yes.

I'd like to reserve whatever time I have left.

QUESTION: Mr. Willis, could I ask you one question on the facts?

MR. WILLIS: Yes. Yes.

QUESTION: It was the defense theory at the trial that the informant had framed the defendant, as I understand it.

MR. WILLIS: That is correct.

QUESTION: Was it part of the theory that the arresting officers were parties to the frame?

MR. WILLIS: Not precisely, no. I would say

no. That was not a part of the defense.

The point was that the particular informant had already been sentenced to the penitentiary and he had been brought back and was out on bail pending a habeas corpus ruling and he sought out these officers in an effort to try to do something to help himself. He admitted as much.

QUESTION: All right, thank you.

MR. WILLIS: And we were concerned that he was trying to get these people to go to the penitentiary in his place.

MR. CHIEF JUSTICE BURGER: Mr. Collins.

ORAL ARGUMENT OF RONALD L. COLLINS, ESQ.

ON BEHALF OF STATE OF OHIO

MR. COLLINS: Mr. Chief Justice --

QUESTION: May I ask you a question before you commence? Is the State of Ohio so impoverished that it can't afford to print briefs filed in the United States Supreme Court?

MR. COLLINS: I am sorry, your Honor. I thought that we had complied with the rule.

QUESTION: You have complied with the rule but my question was directed to the fact that the great State of Ohio comes to our Court with a brief that is not printed whereas most people who do appear here manage to find the means to print their briefs and it just puzzles me.

MR. COLLINS: Your Honor, I had expected that since the Petitioners had come in here with -- in the form of pauper, that we could have replied in kind if we had chosen to do so.

QUESTION: You have a perfect right to do it under the rules and I understand.

QUESTION: You didn't take a pauper's oath, did you?

[Laughter.]

MR. COLLINS: Excuse me?

QUESTION: Ohio didn't take a pauper's oath, did it?

MR. COLLINS: No, your Honor.

May it please the Court, my name is Ronald L. Collins. I am the prosecuting attorney for Tuscarawas County, Ohio. I wish to deal a little bit with the facts in this case and then I wish to stress five points in argument for clarification and amplification of the written briefs which we have provided the Court.

Before we get into those matters, I do have one thing to indicate to the Court lest the Court place undue emphasis on the matter that was brought to the attention of the Court by Mr. Willis of the Defendants being sentenced to 20 to 40 years in Ohio Penitentiary and as the Court is aware in the case of Downey versus Parini,

which has been sent back to the Sixth Circuit and to Ohio for further determination, Ohio has retroactively changed its penalties in marijuana cases and this will apply to these defendants.

As Mr. Willis pointed out to the Court, the facts here are relatively simple. I think they are complicated only by the disbelieved testimony of the Petitioners -- or the Defendants below in that they are very important facts, very important to this particular case.

I think they are important in the light of Mr. Willis' concession here that inconsistency turns this case and that Ramirez is such a case. We contend it is but a short step and perhaps even backwards from Ramirez to our case.

In the facts of our case, on April 28th, 1973, the informant notified the Multi-County Narcotics Bureau, which is the local bureau in our country, Tuscarawas County, Ohio, that he had set up a deal with one of the defendants, Mr. Jefferson Doyle, to purchase a quantity of marijuana from him.

The deal was for ten pounds of marijuana, a grocery-sack full, as it turned out. The price was to be $175 a pound or $1,750 for the ten pounds.

The Bureau had trouble getting this amount of

money on the short notice that they had. However, they did gather some amount of it, about $1,320 or $1,340 as I recall and had some part of that money photocopied so that they had the serial numbers.

The Informant was searched so that they found no drugs on him and the surveillance team and, in fact, several surveillance teams were set up to watch the Informant as he went to his rendez-vous. The photocopied money -- or, some of the money was photocopied and all that was given to him, including the photocopied money and he set off for his rendez-vous with the Petitioners, the Defendants below.

The exchange was made. The Informant gave the Defendants his money and the Defendants gave the Informant the marijuana.

Later, after a search warrant, the money including that which was photocopied was found in the locked, rented car of the Petitioners balled up under the floor mat on the passenger side of the car.

At trial and the trial testimony of the Defendants who testified for and in their own behalf at separate trials and in each other's behalf as witnesses in the separate trials, their testimony essentially was that they were involved in this matter but it was only one of the Defendants, Mr. Doyle, who wanted to buy marijuana, not to

and that it was the Informant -- who, I might point out, the evidence showed knew he was under surveillance at the time this rendezvous took place was framing -- the Informant was framing the Defendants, that the marijuana was his ten pounds and not the Defendants, that the money -- how did they explain the money?

Well, apparently it had been thrown in the window into the back seat at the time that they turned down the deal to purchase the marijuana, according to their story.

Then it was their testimony that after they left this rendez-vous they discovered this money in the back seat and being scared, not knowing what to do, they hid it under the floor mat. Yes, they did hide it and --

QUESTION: Before you go on, counsel, how do these facts relate to the legal and constitutional claims presented to us?

MR. COLLINS: Well, it is going to be the contention, as I get to it in my argument of the state that in considering the question of consistency or inconsistency, with the silence at the time of the arrest, the Court must consider the nature of the trial testimony and what I am setting forth here is the nature of the trial testimony.

QUESTION: In other words, your claim is that not all silence -- that silence may not be used to impeach

under all circumstances but under some circumstances and that this is one of the cases where it may be so used.

MR. COLLINS: That is correct, Mr. Chief Justice.

The Petitioners also went on to testify in their part of their case that they were chasing this Informant after they found the money to find out what was going on, maybe some ten or fifteen, twenty minutes and that after they had driven around some several blocks they wanted to find out what was going on and my question is, were they perhaps wanting to know what had happened to the other $400 that they had wanted since they had indicated in their testimony that they did count the money.

At this point, they were picked up and they did not talk to the law enforcement officers who did pick them up, who had found out about this through the Informant going through the Sheriff's Department and later a radio communication telling them -- telling the other officers what had happened.

At trial, the prosecutor cross-examined on the silence of the Defendants at the time of their arrest. That is clear.

Now, in argument, I would like to stress five points.

First, it has been mentioned what is being penalized by the prosecutor's cross-examination. I want to

deal with exactly what is being penalized.

Second, how the silence of the Defendants at the time of the arrest became meaningful conduct, not just silence.

Third, I would like to deal with the purpose of the Prosecutor's questions.

Fourth, the inapplicability of Miranda and fifth, some due process considerations.

QUESTION: Are you going to talk about the preliminary hearing, too?

MR. COLLINS: I will if you have a question, sir.

QUESTION: Well, do you think it is important?

MR. COLLINS: I think not, because I think that the preliminary hearing goes along with the same kind of point that we contend obtained at trial; in other words, that the prosecution could make no use of the silence of the Defendants in their case in chief and this certainly couldn't be brought up in the only side of the case presented at the preliminary hearing, the state's case and therefore, there was no occasion, since the Defendant did not take the stand at the preliminary hearing, there was no occasion for this issue to come up.

The warning that the Court gave is very similar to the warning which police officers give as the Miranda --

QUESTION: Let me put the question this way. Do

you think there is the same degree of inconsistency between failing to take the stand at a preliminary hearing on advice of counsel and the failure to make a volunteered statement at the time of arrest?

MR. COLLINS: Yes. In the particular -- given the particular facts --

QUESTION: Do you think they are equally inconsistent with the trial testimony?

MR. COLLINS: This particular trial testimony.

QUESTION: Well, is it true that the prosecutor argued to the jury that he didn't talk at the preliminary hearing?

MR. COLLINS: Absolutely.

QUESTION: I thought you said it wasn't in the case.

MR. COLLINS: I said that it is not in the case that they took the stand.

QUESTION: It is not in your part of the case.

MR. COLLINS: It is not in the preliminary hearing, Mr. Justice Marshall.

QUESTION: But the prosecutor did argue that the failure to testify at the preliminary hearings was evidence to be considered against the Petitioners.

MR. COLLINS: That is correct.

QUESTION: What if the government had used his

silence on its side of the case?

MR. COLLINS: Well, that absolutely would have been error.

QUESTION: Under what?

MR. COLLINS: Well --

QUESTION: Under Griffin?

MR. COLLINS: No, I don't think Griffin applies to this type of case.

QUESTION: Why not? If the Defendant was silent.

MR. COLLINS: Yes, in that case Griffin would have some application. I think what makes Griffin have more application in our particular case is the fact that the Defendants took the stand.

QUESTION: Well, I know, but suppose the Government put somebody on the stand and said, well, he didn't take the stand and explain anything at his preliminary hearing -- or at any other time did he say -- on their side of the case.

MR. COLLINS: I think that's --

QUESTION: You think that is error.

MR. COLLINS: Yes.

QUESTION: Well, let's suppose the government does that on their direct side of the case and then the Defendant takes the stand and they impeach him, or they ask him the same questions about his preliminary hearing.

Did you -- were you silent at the preliminary hearings? And did you ever explain this? And he says no.

And you say that is permissible but using it on their side of the case is not.

MR. COLLINS: That is correct.

QUESTION: And you are --

MR. COLLINS: I think Miranda compels that.

QUESTION: And you are suggesting that. Well, is the silence just for impeachment purposes?

MR. COLLINS: That is correct.

QUESTION: Not as substantive evidence.

MR. COLLINS: Absolutely, not as evidence of guilt but evidence for impeaching purposes that his story, that these stories that they are telling are exculpatory stories, are later fabrications.

The first point in the argument that I would like to make is about penalizing and Mr. Willis and the Petitioners would contend that the state by their questions on cross-examination, that the state was penalizing the Defendants for their exercising of their constitutional privilege.

We contend that if there is any penalty at all, that it was not a penalty for the exercise of the constitutional privilege.

The penalty was for the taking the stand and

giving this fabrication, this fabricated, exculpatory story.

If they had not taken the stand, the prosecution couldn't have said a thing about their silence or their silence at the time of arrest.

QUESTION: Well, don't we have to change the Miranda rulings to bide by what you say, which is that you are hereby warned that if you make any statements, it would be used against you if you take the stand?

MR. COLLINS: No, I don't think that needs to be done.

QUESTION: Well, isn't that what you are arguing?

MR. COLLINS: What I am arguing is that --

QUESTION: Aren't you arguing, once he takes the stand, the Miranda ruling means nothing?

MR. COLLINS: I am arguing that when the trial testimony turns out to be inconsistent with silence, that the Miranda warning means nothing.

QUESTION: So once he takes the stand and testifies, that is inconsistent, isn't it, with silence?

MR. COLLINS: No, not --

QUESTION: Talking is inconsistent with silence, isn't it?

MR. COLLINS: Yes, talking is inconsistent with silence.

QUESTION: Well, so don't you have to tell him, whatever you tell us, we'll use against you it you take the stand?

MR. COLLINS: No, I think the trial court has got to view it as a factual matter, listen to the testimony of the Defendant, which exculpates them, and determine whether the nature of that testimony is such as it would call for something other than silence.

QUESTION: Well, can you imagine any testimony, exculpatory testimony of the defendant that wouldn't justify you in using the Miranda business?

MR. COLLINS: Yes, I would point out the Hale case.

QUESTION: Well, the Hale case was the supervisor, I think.

MR. COLLINS: I understand that, but I am talking about the fact pattern in the Hale case, where -- and I think it is a close case, but the factors that were brought out in that trial --

QUESTION: Would you be satisfied if we applied Hale to the State of Ohio?

MR. COLLINS: Yes.

QUESTION: You would be?

MR. COLLINS: Yes. As a matter of fact, I think I argue that in the written brief.

QUESTION: Well, Hale was just an evidentiary opinion and just the fact of saying this testimony was inconsistent, right?

MR. COLLINS: Well, Hale --

QUESTION: So if it were applied to the state, what would you say the constitutional basis would be for applying it to the state? Due process -- that silence just isn't any evidence.

MR. COLLINS: Well, I am not saying that --

QUESTION: It certainly wouldn't be a Fifth Amendment matter, would it?

MR. COLLINS: No, I think it would have to be due process and I think due process considerations would come down on our side. I don't think --

QUESTION: Well, it doesn't sound like you are satisfied with Hale as applied to this case.

MR. COLLINS: Well, I view Hale as not reaching the constitutional question at all and either constitutional question on due process or Fifth Amendment and I don't think this is a Fifth Amendment case. I don't think Hale was a Fifth Amendment case. If it was anything, it was a due process case and that is the same thing that I think this is.

The point is a related point and that is that in light of the trial testimony of the Defendants, their

silence at the time of their arrest became conduct because here they are with this marked money, this photocopied money in their car. They have all these things that they have testified to and which are set out in detail and I don't want to dwell on the facts of them, which made them -- this conduct made them voiceless in the presence of the realities that they were facing.

A third point is -- related to this as well, that the prosecutor asked about -- and this has been a question before, asked about the defendant's silence, not to show guilt, but to show that they were lying on the witness stand.

I think the fourth point I would like to stress here is that in my view, Miranda has no proper application to either Hale or to this case. The warnings in Hale and in this case were given, were heeded. The Defendants said nothing.

I contend that there is a different line of cases here entirely separate from Miranda -- Raffel versus United States, Grunewald versus United States, Harris versus New York and the United States versus Hale.

As a matter of fact, throughout the Appellate argument of this case, this state has relied on the language in Harris and I think the prosecution does have a right to rely on the language in Harris, some of which shows that

Miranda does not apply.

The Court, at page 224 in Harris had said, "Some comments in the Miranda opinion can, indeed, be read as indicating a bar to use of a counsel's statement for any purpose." A discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling.

Miranda barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from Miranda that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided, of course, that the trustworthiness of the evidence satisfies legal standards.

I think the Miranda rationale is important here, that of deterring improper police conduct and getting rid of coercion.

Here, the conduct of the police was entirely proper. They gave the Miranda warnings. There was no compulsion, no element of compulsion or coercion at all. The Petitioners, Defendants made their free choice to take the witness stand at trial. They made their free choice to remain silent at the time of their arrest and so that is an additional reason why I think there is no Fifth Amendment question here.

There is no element of compulsion, there is no compelling at all.

Due process and the Constitution, in my opinion, amount to fairness and I don't think that there is anything fair about presenting a lop-sided version to the jury. I think that the Defendants in this case, Petitioners, should not have been allowed to tell their story to the jury unimpeded by being impeached by things which would go directly to the issue of whether there was a fabrication or not -- was there a recent fabrication after the Defendant had listened to the state's case throughout the preliminary hearings, throughout discovery procedures and trial twice -- two separate trials.

I think the jury had a right to weigh the credibility of the Defendants and I think that the proper -- the prosecution had properly used this silence, given the facts and the nature of the Defendants' testimony, as impeachment, as showing that this was a recent fabrication, that they did not have a story at the time they were arrested and now all of a sudden, at trial, they do have a story.

There should be a full and not just a selective development of the recent fabrication and credibility issues.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Willis.

REBUTTAL ARGUMENT OF JAMES R. WILLIS, ESQ.

QUESTION: Let me put a hypothetical question to you, Mr. Willis. I am not sure whether you conceded, in answer to Mr. Justice Stevens, that in some circumstances silence might have a probative value. But take this hypothetical case, a setting the same as you have here except that the charge is inflicting serious injury while driving an automobile under the influence of liquor, three men in the car and at a point after insignificant preliminaries, the policeman turns to the driver who has furnished his driver's license and shown that he is the owner of the car and says, "You are now under arrest for driving while under the influence of liquor and it is my duty to warn you," and then he goes on with the usual warning.

And the owner of the car makes no response. Then, at a preliminary hearing, he appears with a lawyer. Makes no statement, no preliminary response at all and then at the trial, his defense is, he wasn't driving the car at all, he was sleeping the back seat and the other two passengers were -- the other two men were in the front seat and one of them was driving.

Would you say that the silence in these two first circumstances or in either of them is inconsistent with innocence or that it has probative value?

MR. COLLINS: I would say that it is not inconsistent with innocence and I would like to correct any impression that I may have given. I did not concede that there were any circumstances in which silence could be inconsistent with innocence.

I indicated that there were some cases, Burt versus New Jersey and Ramirez, where the Court took the position that in those circumstances, it was inconsistent with innocence.

I said I could see how the Court came to that conclusion although I don't agree with it but I am indicating that this case does not fall in that ilk. This is a different case in its entirety.

My position is that silence can never, following the warnings -- that that eliminates any duties or impulse that the accused might otherwise have to explain incriminating circumstances and that he has a right to rely on the warnings given to him by Miranda and that would apply across the board in all cases.

That is the position I have attempted to assert here.

Certainly, if these Defendants had the right to remain silent, then the police did not have the right to create the evidence out of their exercise of the right to remain silent.

I feel that this Court's decison in Hale ought to be applied full-strength to the facts and the factual pattern involved here.

Certainly we have to concern ourselves about them asking these Petitioners about consenting to a search of the car. I feel that they don't have to consent to the search of the car . They asked Mr. Wood about this. He was the lessor of the car. He indicated, "I want to discuss that with my attorney."

Now, how can you then torture that legitimately in the light of Grunewald and all these other cases into some evidence that can be used against these particular Petitioners?

I feel that the Court ought to follow the suggestion made by Mr. Justice Black in his concurring opinion in Grunewald and ought to eliminate Raffel from the books of this Court as a viable opinion.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 10:57 o'clock a.m., the case was submitted.]