ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1480

TITLE LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, Petitioner V. DAVID WAYNE GREENFIELD

PLACE Washington, D. C.

DATE November 13, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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LOUIE L. WAINWRIGHT, SECRETARY, :
FLORIDA DEPARTMENT OF :
CORRECTIONS, :
Petitioner, :
V. : No. 84-1480
DAVID WAYNE GREENFIELD :

- -x

Washington, D.C.

Wednesday, November 13, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:03 o'clock p.m.

APPEARANCES:

ANN GARRISON PASCHALL, ESQ., Assistant Attorney General of Florida, Tampa, Florida; on behalf of the petitioner.

JAMES D. WHITTEMORE, ESQ., Tampa, Florida; on behalf of the respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Wainwright against Greenfield.

Ms. Paschall, you may proceed whenever you are ready.

ORAL ARGUMENT OF ANN GARRISON PASCHALL, ESQ.,

ON BEHALF OF THE PETITIONER

MS. PASCHALL: Mr. Chief Justice, and may it please the Court, respondent David Greenfield was convicted in a jury trial of sexually battery committed with force likely to cause serious personal injury. Respondent's conviction was affirmed by the Florida appellate courts, and his petition for writ of habeas corpus relief was denied by the Federal District Court for the Middle District of Florida.

The Eleventh Circuit Court of Appeals reversed the decision of the District Court and ordered a new trial. This case presents two issues. The first, and perhaps the most critical, whether the state may use a defendant's most-Miranda warning behavior, including his post-Miranda warning silence, as evidence of his sanity at or near the time of the offense.

The second issue, simply stated, is whether the Eleventh Circuit either ignored or misconstrued Wainwright versus Sikes in holding that respondent's

failure to timely object to the testimony that he challenged in this cause could be excused by 20 subsequent objections to the prosecutor's closing argument.

The facts in this case are somewhat important, and I want to go into them very briefly. Respondent was charged with sexual battery. He initially pled not guilty, and then prior to trial changed that plea to one of not guilty by reason of insanity. In other words, his defense was that at the time of the crime, he was not sufficiently aware to know the nature of the Act that he was committing or to know that it was wrong, to be able to distinguish that which was right from wrong.

The state presented proof that the offense was committed, and then offered the testimony of Officer Russell Pilafont regarding the arrest of respondent some two hours after the offense. Officer Pilafont indicated that Greenfield met the description that he had, and he placed him under arrest. He escorted Greenfield down to the police car, read him his Miranda rights.

Greenfield went on and said, yes, I understand them, I think I would like to talk to an attorney. In the police car on the way to the station the officer again elaborated on those rights. The officer -- Greenfield said, yes, thank you very much for explaining

that to me, I do think I would like to speak to an attorney before I talk with you.

Another police officer gave similar testimony regarding Greenfield's behavior once he arrived at the police station, and no objection was made to the police officer's testimony at the time that it came in. Both sides --

QUESTION: All these times when he said he wanted a lawyer, did they tell him that if he couldn't afford one, one would be appointed for him?

MS. PASCHALL: Yes, they gave the traditional --

QUESTION: I said, after he said he wanted a lawyer, did they then say we will give you a lawyer if you don't have one?

MS. PASCHALL: Yes, they did.

QUESTION: They said that, or just in the form of Miranda? They said that in the Miranda warning and no place else?

MS. PASCHALL: And they advised him -- at the police station he said that he would like to speak to an attorney, and they contacted the public defender's office for him, and he was indeed able to speak to an attorney from the public defender's office.

QUESTION: Was he told that? Was he told

that?

MS. PASCHALL: As part of the standard warnings, and then he did --

QUESTION: Outside of the standard warning, did they tell him that they would get him a lawyer? I didn't find it in the record.

MS. PASCHALL: Not in so many words. They did in fact get him a lawyer to talk to, and he did speak with the attorney. Both sides offered psychiatric testimony, and I think the kindest thing that can be said is, there were two psychiatrists that testified for the defense. One testified for the state. They couldn't have said more entirely different things. They went into great detail as to the basis for their opinions, the sorts of considerations that they looked at, and during closing arguments, the prosecutor argued that Officer Pilafont's testimony regarding respondent's exercise of his Miranda rights, the whole colloquy from the time he met -- it was part of the whole description of Greenfield's behavior from the time Officer Pilafont encountered him on the beach to the arrest which followed, argued this whole chain of behavior as evidence that the jury could consider tending to support sanity.

The defendant objected at this time, and the

objection was overruled by the trial court. The Eleventh Circuit ultimately ordered a new trial in this cause, stating that the prosecutor -- the use of respondent's sanity at his trial violated the decision of this court in Doyle versus Ohio. In so doing, they brought themselves in conflict with Sulie versus Duckworth, the Seventh Circuit case, which basically said that Doyle did not apply in the context of an insanity defense, and that really is the crucial question here, and the distinction the state draws between Doyle in this case.

In Doyle, of course, this Court held that a respondent's silence following the Miranda warnings was insolubly ambiguous, that it should not be used to suggest to the jury that -- I think the inference that we realize juries traditionally make, which is, if this defendant were innocent, if he did not commit this crime, well, then why when confronted with it by the police did he fail to make a statement?

Doyle prescribed this use of silence after the Miranda warning had been given. Our argument today is that where, as in this case, the issue is not whether Greenfield committed the substantive offense, it is virtually uncontroverted that he committed sexual battery.

The question becomes whether he should be held accountable for his conduct at the time of that offense because he allegedly did not know right from wrong, but this evidence was relevant and probative on the sanity question, and the jury had a right to consider it.

QUESTION: Ms. Paschall, just reviewing the quotation that the Eleventh Circuit made on Pages A9, A11 of the brief, petitioner's brief on jurisdiction, a lot of the prosecutor's references there strike me as not having been addressed to the defendant's silence at all coupled to his behavior before he ever received the Miranda warning.

Supposing the issue were just guilt and not insanity. Wouldn't some of that be able to come in under Doyle?

MS. PASCHALL: I think quite probably some of it would come in under Doyle. The problem as I see it with Doyle would be at the point when the prosecutor argues. You know, he spoke to an attorney, and then still he will not speak. That sort of testimony, I think, in the --

QUESTION: But that really just boils down to a couple of sentences of the prosecutor's argument, doesn't it?

MS. PASCHALL: It really does.

QUESTION: Not the whole thing relied on by the Eleventh Circuit.

MS. PASCHALL: That's correct, Your Honor.

QUESTION: Well, isn't one of the events that is the most meaningul, I gather, with respect to the insanity defense is that he asked for a lawyer?

MS. PASCHALL: He asked for a lawyer --

QUESTION: That is hardly silence.

MS. PASCHALL: That is hardly silence. I was -- and it is a -- I have been taken to task sometimes for not focusing enough on the silence. I think you have to look in the record -- at the record in this cause and realize we are talking about a whole sequence of behavior, a whole Pilifont met Greenfield on the beach. This is the exchange that happened.

This was some two hours after the offense, when one of the defense psychiatrists says, well, that is part of why I can tell he was crazy. He would have run from the police officer if he had been in his right mind. So, two hours after the offense we are looking at what he did, what he said, how he acted. We are not standing up here and saying, oh, my, any time the defendant didn't say anything at all, he stood absolutely mute, he must have been sane, he must have known what he was doing.

We are not even suggesting, and I don't think we have to suggest this evidence is conclusive on the sanity issue. It is simply one factor which the jury had a right to consider As I think is true in most jurisdictions, the jury has the right to disregard expert testimony, to give it whatever weight it deems is appropriate.

In this case, what the jury thought they could do with the expert testimony after they heard it, we have defense psychiatrists, number one, who says this defendant was insane at the time of the offense, his is a paranoid schizophrenic, but there is absolutely no evidence that he is an antisocial personality.

Defense Psychiatrist Number 2 says we didn't know right from wrong at the time of the offense, but he is a paranoid schizophrenic, and he is an antisocial personality, keeping in mind the first psychiatrist had said there is no evidence of the antisocial personality, the state psychiatrist says, he knew right from wrong at the time of the offense, he was not a parancid schiozphrenic, there is no evidence of that in the record, he is an antisocial personality. The two conditions are totally inconsistent, and each psychiatrist talks about the basis for their opinions and how they arrived at them.

Dr. Luce particularly says, well, you know, I spoke with him. One of the things I saw was his loosened associations. He didn't -- his responses to my questions were not logical. His affect was flat. This is some two months after the offense. The jury, having had benefit of the psychiatrists all explaining all of the different things they could consider, I think, could properly listen to the testimony as to the exchange that took place between Pilifont and Greenfield, and between Jolly and Greenfield, and give it whatever weight they thought was appropriate.

We are in the somewhat unfortunate situation when we look at the relevancy question because, of course, there was no objection to the officer's testimony below. The testimony -- the objection that was registered for the closing argument was a comment on silence. We never -- apparently it was presumed, if you will, that the testimony was relevant. The second district says it was certainly relevant. It is conceded in the Florida appellate briefs that the testimony was relevant on the sanity issue.

QUESTION: What business is it of a federal court to decide whether evidence in a state criminal proceeding is relevant or not?

MS. PASCHALL: Your Honor, we submit that that

is part of the reason why the Eleventh Circuit's opinion is in error. Their justification, as I understand it, was that Doyle said silence after Miranda was insolubly ambiguous. They make the argument that this evidence was ambiguous, too, so there is no reason -- part of their justification for applying Doyle under these facts.

QUESTION: Do you suppose the Court of Appeals didn't understand which kind of a case they were reviewing, and they think they were reviewing a trial in the District Court rather than the state court?

MS. PASCHALL: Your Honor, I was at that argument in the Court of Appeals. I think they knew what they were reviewing. They reached a conclusion that was contrary to what I had argued to them, but I think we were all aware of what the posture of the case was.

This Court held in Michigan versus Tucker, and it has been said in other cases since, in other contexts, that it is sometimes necessary to balance a defendant's constitutional rights against the need to provide probative and relevant evidence to the trier of fact. We would submit that is certainly true in this case.

QUESTION: May I ask this question? Am I

correct that the appellate court in Florida didn't do any balancing, but it just held one who pleads the insanity as a defense waives the privilege against self-incrimination? Is that their analysis?

MS. PASCHALL: That is true.

QUESTION: So the state court did not balance the way you suggest.

MS. PASCHALL: That is true. Of course, the other problem that we have is that, and the argument that we have continued to make, that since there was no argument, no objection to the trial testimony of these officers, that it was proper to argue that testimony in closing argument. It could come in without objection. It was properly before the court. The Second District Court of Appeal noted that there had been no objection to the officer's testimony. We have contended all along that they addressed the merits of this case basically in the alternative, giving effect to the procedural question as well.

I think I need to talk very briefly at least about the Wainwright versus Sikes issue in this case. There has been some question raised as to whether we are properly before the Court on our Wainwright v. Sikes claim.

The argument, very simply, is, the Court of

Appeals on -- I think it is the second page of the opinion, Footnote 1, says that because the defendant later objected 20 times to the prosecutor arguing the officer's testimony as to silence, we can excuse the failure to comply with the contemporaneous objection rule.

We submit that -- well, first of all, the record is in error -- the Court of Appeals opinion is plainly in error in that there were never 20 objections, there was simply one, the closing argument. Since they chose to reach that issue in their opinion and since they have fashioned for us a rule of law in our circuit which has potential ramifications that undermine our state contemporaneous objection rule, we do think it is properly before the Court.

QUESTION: Do you respond to your opponent's argument that since the Appellate Court, I guess after the Florida Supreme Court had it, they sent it back to the Appellate Court, and then they decided it on the merits. Doesn't that cure the Wainwright failure to object problem, when the state court addresses the merits?

MS. PASCHALL: We argue that, and I guess our argument in response to that -- first, to answer your question, yes, if the state court addresses it on the

merits without addressing it in the alternative, it would cure the Wainwright v. Sikes problem.

We contend, first of all, that the Second District addressed the merits in the alternative in their original opinion. It went up to the Florida Supreme Court on conflict, our own conflict certiorari. The Supreme Court sent it down, back to the Second District, to determine whether the case was in conflict with Clark versus State.

Now, Clark is basically a contemporaneous objection case. It says that if you do not object to a comment on the exercise of the right to remain silent at trial, you have waived it. Our argument is that since they sent it back down to consider in light of a contemporaneous objection case, that that in fact is what the second district was saying, is yes, we are consistent with Clark, we have given effect to the procedural default as Clark did.

QUESTION: I really don't understand why they would do that if they thought that it was -- if there wasn't a problem on the merits, why would they ask the appellate court to take a second look at it. The Appellate Court ruled in favor of the prosecutor, didn't they?

MS. PASCHALL: Yes, they did.

QUESTION: And so what they did is, your view is, they sent it back to say, isn't there a different reason for ruling in favor of the prosecutor?

MS. PASCHALL: Yes.

QUESTION: Appellate Courts generally don't do that.

MS. PASCHALL: And we are left to some extent with speculation on precisely what the motivation was there.

QUESTION: But I suppose at the time you filed your brief on the merits in the Court of Appeals, that is, the Federal Court of Appeals, the reason you didn't argue Wainwright against Sikes must have been that you thought the Appellate Court had addressed the merits.

MS. PASCHALL: The reason --

QUESTION: I shouldn't speculate that.

MS. PASCHALL: The reason we didn't argue Wainwright versus Sikes was, we did not and we made a judgment call at that time. We did want to play the emphasis on the merits of the opinion. We had not cross-appealed -- we had not objected to the magistrate's report and recommendation that said the Second District addressed the case on the merits.

I don't think we had to object to the magistrate's report and recommendation. We didn't

cross-appeal then on the Wainwright v. Sikes issue. We just talked about the merits in the Eleventh Circuit, and quite frankly, if the Eleventh Circuit hadn't jumped into the fray and chosen to address that issue for us, I don't know that we could be here on the Wainwright v. Sikes problem.

I would say just as the federal courts can address an issue on the merits when the state courts don't give effect to their procedural default rules and address the merits of the claim, here, where we have the Eleventh Circuit claim, we are talking about the Sikes issue, and making what we believe is an erroneous determination. We have got an obligation to bring it before this Court.

QUESTION: But what they said in their footnote was that the Florida District Courts of Appeals' willingness to address the merits solves the problem, and I think you agree with that if they did in fact address the merits, so the question is only whether they addressed the merits or not, isn't it, not whether they stated the law incorrectly. That is what the footnote says, anyway, that you called our attention to.

QUESTION: And the magistrate concluded that the Florida courts had addressed the merits, did it not?

MS. PASCHALL: Yes, he did. I don't --

QUESTION: And you had ten days to object, and did not.

MS. PASCHALL: Yes. I don't know that the magistrate is looking at a Florida appellate opinion and making -- and saying that the Court did not address -- that the Court addressed the merits in rejecting our alternative holding. I don't know that we can call that a finding of fact under 2254(d). It would seem to be something that each court can simply look -- you know, we are talking about an appellate opinion here rather than a conclusion that was drawn after a hearing.

QUESTION: Even if it is a legal conclusion, we usually lead to terminations as to what a Florida court did to, you know, a magistrate or a District Court that sits in Florida, or a Court of Appeals opinion written by a judge from Jacksonville.

MS. PASCHALL: That is frequently true, Your Honor. We again -- our argument is that that determination is incorrect in this case.

I believe unless there are additional questions at this time I would like to save the remainder of my time for rebuttal.

CHIEF JUSTICE BURGER: Mr. Whittemore.

ORAL ARGUMENT OF JAMES D. WHITTEMORE, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. WHITTEMORE: Mr. Chief Justice, and may it please the Court, why we are here is because a state prosecutor chose to take advantage of a defendant's exercise of his constitutional rights, to infer to the jury that there is some meaning to that exercise.

QUESTION: There was no objection to the testimony when it went in, was there?

MR. WHITTEMORE: There was no objection, and the trial --

QUESTION: Then what could be objectionable about talking about it later?

MR. WHITTEMORE: There is a distinction, Your Honor, between the mere testimony that the man remained silent and asked for an attorney and the use of that silence, the use of that constitutional right which has been exercised to draw meaning. That is why I would suggest we are speculating to a point and to a point we are not, because there was an evidentiary proceeding before the magistrate in which the trial counsel -- in which I asked the trial counsel, why did you not object? He simply said the bell didn't ring. I don't know whether I didn't hear it or whether I didn't place significance on it, but when I heard the prosecutor making much of it, I objected and did everything I could

to preserve it.

I think, Your Honor, that that is a sufficiently related objection.

QUESTION: Was there a request then by the judge to go back and strike that testimony and instruct the jury to disregard the testimony?

MR. WHITTEMORE: Unfortunately, we don't know. It was an off the record bench conference. It is in parentheses in the record. It was an off the record conference.

QUESTION: If such a claim was made, the counsel could assert that it was made in an off the record bench conference, could he not?

MR. WHITTEMORE: Yes. What counsel responded or how he responded in our evidentiary proceeding was that he cited to the Court the case law as he understood it at the time, which was in essence the pre-Doyle cases precluding comment upon the exercise of rights under the Griffin case.

QUESTION: Since the issue here is the conduct post-Miranda warning, let me ask you a hypothetical question which may or may not have any relevance. Suppose he had said affirmatively to the officer, I have read a lot of books on psychology. I took psychology when I went to college, and I read about schizophrenia

and antisocial behavior, and I know the symptoms, and when I get into court, I am just going to put on an act with all these symptoms. I know what they are.

The policeman then might say, in my hypothetical, well, you may be able to fool the judges, but you will never be able to fool the psychiatrists, and he goes on to say, yes, I know as much about this as the psychiatrists do. I know all the symptoms, and I will make it now.

Would that conversation be admissible?

MR. WHITTEMORE: Absolutely.

QUESTION: Admissible?

MR. WHITTEMORE: He has waived his Fifth Amendment rights by speaking to the officer. I assume that he has been Mirandized. He then tells the officer that he is going to play his trump card, come into court and fool the psychiatrist.

QUESTION: Suppose he said that before he got the Miranda warning.

MR. WHITTEMORE: Well, the recent opinions of this Court suggest that the Mirandizing is a significant point in time. The Fletcher versus Weir case. Up until that Mirandizing of the defendant, he is fair game. His silence can be used if he testifies. In our case, of course, the defendant did not testify, which is a strong

distinguishing factor from the Fletcher case, from the Jenkins v. Anderson case. It is not an impeachment case here. It is a rebuttal. And that is why those cases are helpful but not controlling.

If we look strictly at -- and by the way, I want to preface my next remark. I have reframed the issue for this Court to make sure that we are talking about the silence of the then defendant Greenfield and not his post-Miranda behavior. I think it is perfectly appropriate, and it was in this case, that his post-warnings behavior, his actions, his physical characteristics --

QUESTION: What about his request for a lawyer?

MR. WHITTEMORE: That, Your Honor --

QUESTION: That is not silence.

MR. WHITTEMORE: I would suggest that a reading of Edwards versus Arizona suggests that when a defendant requests an attorney, that is a per se exercise of his Fifth Amendment right, and that is in that opinion, and I agree with it very strongly.

QUESTION: I know, but it isn't silence.

MR. WHITTEMORE: It is not silence, but it is the exercise, the invocation of that right to silence, and that is also protected by the prophylactic

protection of Miranda. The reason we have the Miranda warnings, it was very clear in that opinion.

QUESTION: Well, suppose they give him his Miranda warnings, and they start asking him some questions, he never asks for a lawyer, he answers this question, and then he answers that one, and then he was asked another question. He says, I don't want to answer that one. He answers some others, and then every now and then he says I don't still want to answer that question. Do you think that line of questioning --

QUESTION: I suppose they could introduce the questions that he answered. Could they say -- could they introduce it and say, he refused to answer this?

MR. WHITTEMORE: I think a reading of the Edwards case in Miranda suggests that, yes, he can selectively choose to answer --

QUESTION: Well, I know, but could they point out that he refused to answer some questions?

MR. WHITTEMORE: Under one circumstances only -- one circumstance only.

QUESTION: The question is whether he had sense enough to answer some and not answer others, and can they introduce the whole question and answer session?

MR. WHITTEMORE: I think it depends more that

the defendant takes the stand during his trial and testifies inconsistently with what occurred in that scenario. The footnote in Doyle very explicitly says --

QUESTION: You don't think they could use it to prove that he was sane.

MR. WHITTEMORE: No, sir, and the reason for that, and this -- we tread upon or venture into the evidentiary issue here, and I don't think it is a proper issue for this Court to address. It is an issue for the trial court, but Doyle addresses it. I don't think Doyle was decided based on the evidentiary issue. Doyle was decided based upon the fundamental unfairness of penalizing a defendant in the exercise of his rights by using that silence by commenting upon it during the trial, after he had been warned.

QUESTION: Would you then say that the Eleventh Circuit's discussion of lack of relevance here is just unnecessary to its opinion even -- the issue is, no matter how relevant, it still can't come in.

MR. WHITTEMORE: I think that opinion addressed the ambiguity of silence because Doyle addressed at length, but a close reading of Doyle is clear, it shows that the court turned on the Fifth Amendment fundamental fairness issue, and not so much the ambiguity.

In fact, in a footnote to Doyle, this Court said, we need not address whether silence is probative. We only note that in United States versus Hale we noted its insolubly ambiguous nature. I think the Eleventh Circuit in attempting to fit this case within Doyle necessarily had to address the ambiguity of the silence because there are --

QUESTION: Well, it did more than say -- it did more than say it is ambiguous. It said it was not relevant, and disagreed with two other circuits that said it was.

MR. WHITTEMORE: In this case it is absolutely irrelevant, because the experts tell us and the amicus briefs --

QUESTION: You say it is absolutely relevant or absolutely irrelevant.

MR. WHITTEMORE: Irrelevant, is my point, the silence.

QUESTION: That is what this Court -- that is what the Eleventh Circuit said.

QUESTION: Do you say that is the job of a federal court or of an amicus brief from some psychiatrist to tell a state court what evidence is relevant in a criminal trial?

MR. WHITTEMORE: No, sir, but it was the

function of the Eleventh Circuit to apply Doyle, and the two --

QUESTION: Do you say that Doyle establishes the rule that federal courts decide what evidence is admissible and relevant in a state trial?

MR. WHITTEMORE: No, sir, I do not suggest that at all. What Doyle does tell us is that when a defendant is advised of his rights and thereupon, thereafter remain silent, we don't know whether he is invoking his silence under the constitutional right or whether he simply was afraid, whether he became pararnoid, whether he simply became mute because he was in a hostile environment.

QUESTION: The Court of Appeals went much further than that. It wasn't just talking about silence being relevant. It discussed other actions relied on in the prosecutor's summation, and apparently said they weren't relevant either.

MR. WHITTEMORE: I think the reason the Court did that, Your Honor, and I agree --

QUESTION: Do you defend its doing that?

MR. WHITTEMORE: Pardon me?

QUESTION: Do you defend its doing that?

MR. WHITTEMORE: Yes, sir, I do, because I think it had to draw the distinction between those cases

which have been decided where there is a pre-Miranda silence and the Court has allowed impeachment of the testifying defendant by that silence on the basis that the silence prior to Miranda was so inconsistent with the testimony during trial that it was proper impeachment, and the Eleventh Circuit necessarily had tc address that to explain why in this instance silence is not inconsistent with that defense --

QUESTION: Well, but if you take a look -- perhaps you have the opinion in mind, the long quotation from the prosecutor that the Eleventh Circuit has fairly early in its opinion. It is on A9 to A11 of the petitioner's, the white petitioner's brief on jurisdiction. It strikes me that the first two-thirds of a prosecutor's summary quoted by the Court of Appeals has nothing to do with silence. It is talking about what the fellow did when he was arrested, what he said before he got the Miranda warning, and yet the Eleventh Circuit seems to have relied on all of that.

MR. WHITTEMORE: That is because, Your Honor, the case of Doyle addressed it, and I think the Eleventh Circuit --

QUESTION: Addressed what?

MR. WHITTEMORE: Addressed the probative value of silence after Miranda.

QUESTION: Yes, but my point is that the Eleventh Circuit here relied on numerous things in the prosecutor's summary that refer not to silence at all but to actions or remarks before the Miranda warnings were given. How do you defend that?

MR. WHITTEMORE: Two-fold. One, to show the absence and necessity for using silence because the prosecutor had available to him all of the behavioral aspects of this encounter without treading upon the exercise of a constitutional right. That necessity issue has been advanced by the state throughout these proceedings.

We must have this evidence to rebut insanity. Necessity was rejected in Doyle, and in this case it should be rejected because it simply wasn't necessary to use the man's silence after Miranda.

QUESTION: What I have been trying to get across to you in my questions, and perhaps I am not succeeding in doing, is, as I read the prosecutor's summary, at least the first half of it is not devoted to silence at all. It is devoted to acts that took place before the Miranda warnings were given.

Now, do you defend that part of the Court of Appeals' opinion that says that part of the prosecutor's summary was unconstitutional?

MR. WHITTEMORE: No, sir, I don't. I don't think that is what the Eleventh Circuit was saying. I think the Eleventh Circuit was simply quoting the prosecutor at length, because to take one or two comments out of context may give this case a terribly awkward and perhaps erroneous atmosphere. The prosecutor must be quoted at length, because it shows how he went through the pre-Miranda activity, behavior of the defendant through the victim, through the officer who arrested him, and then the man was Mirandized, and then he invoked his right to silence. And I think the point that the Eleventh Circuit was drawing from that is that not only was it not necessary to go to that extreme, but in this case the insolubly ambiguous nature of silence is evidenced by that argument. We don't know why he remained silent.

If the Court, and I think the Court of Appeals recognized that there may be instances where silence may be probative. This is very clear from their opinion. They simply said in determining probative value of silence we must look at all of the characteristics, and not simply the fact that he remained silent.

The point that we making was --

QUESTION: Why isn't the question of relevance a matter for the state law to determine?

MR. WHITTEMORE: It is, Your Honor. It is not a matter for a federal court sitting in a habeas proceeding to determine.

QUESTION: Mr. Whittemore, when I put that rather bizarre hypothetical to you a while ago, you said that evidence would be admissible. Now, I didn't quite understand why you thought that would be admissible.

Would it be admissible because it was relevant?

MR. WHITTEMORE: Perhaps relevant, but at least it does not tread upon a constitutional right. I am suggesting in my layman's approach I would consider it relevant --

QUESTION: It virtually amounts to a confession, doesn't it?

MR. WHITTEMORE: Well, the silence itself or the behavior?

QUESTION: I am speaking of the -- I will use the adjective bizarre. The bizarre hypothetical I gave you added up to a confession virtually, didn't it? From that a jury could reasonably infer guilt, so it was a very damaging statement, and you thought it was admissible, at least as I understood your response.

MR. WHITTEMORE: Perhaps, Your Honor, I should revisit the scenario you have explained. I understood

it to mean the behavior of the defendant prior to arrest as opposed to his exercise of a right.

QUESTION: Well, what he says is part of his behavior, is it not?

MR. WHITTEMORE: Yes, but he is not exercising a constitutional right. He is in essence -- yes, he is making an admission to the officer. He is telling the officer what he is going to do to fool the psychiatrist and the jury and the judge, and he has waived his Fifth Amendment right.

That is very, very important in this instance. Had Greenfields began talking to the officer instead of remaining silent, he would have waived that right, and everything he said would have been admissible for whatever reason, as an admission or as a confession or as perhaps even impeachment if he testified, but there is a distinction, Your Honor, between pure behavior or demeanor evidence and the invocation of the Fifth Amendment. That is the protected right.

I would suggest here, and I have cited a case, the Kaufman case out of the Eighth Circuit, the observed physical characteristics of a defendant, including comments made after waiving Miranda, are always admissible. Whether they are relevant or not is a matter for the trial judge to determine based on the

nature of the condition, the nature of the psychiatric evidence and expert testimony.

The distinction is pre-Miranda, post-Miranda, and whether the man has remained silent after being Mirandized. That is the fundamental unfairness issue that has been framed by the Eleventh Circuit. It is the Eleventh Circuit holding, consistent with Doyle, that once the defendant, regardless of his defense, is Mirandized, if he remains silent, it is impermissible to comment upon that.

The only exception would be if the defendant testified, testified inconsistent with that silence. For example, if he told the jury, I told all this to the police when I was arrested, and the prosecutor then brought on the police officer to impeach that testimony, I would suggest it is admissible, and Doyle recognized that it would be admissible.

QUESTION: May I ask you one question about Florida law? The appellate court apparently said that when you plead insanity as a defense, you give up your Fifth Amendment privilege. Could he have been put on the stand by the prosecutor if they had elected to in the trial?

MR. WHITTEMORE: No, sir, and I surely don't agree with that statement of the law by the Second D.C.

-- the Second District Court of Appeals.

QUESTION: I see.

MR. WHITTEMORE: I would note that the Greenfield decision before the Florida Appellate Court was specifically disapproved by the Florida Supreme Court approximately three weeks before we argued this case to the Eleventh Circuit. In State versus Berwick, cert denied about a year ago, the Florida Supreme Court exercised conflict certiorari jurisdiction under the Florida constitution, the conflict being between the Greenfield appellate decision and the Berwick case out of another district Court of Appeals.

In the Berwick case, the Florida Supreme Court said very specifically, we disagree with the Second District Court of Appeals, they were wrong, there is no probative value as a matter of state law. It was fundamentally unfair to comment upon this man's silence, and thereupon issued its opinion, which is a very well thought out opinion and addresses Doyle and all of the constitutional ramifications.

So, that is the issue --

QUESTION: So you are saying no matter how we decide this case, as a matter of federal law the result will be the same in Florida anyway? That is interesting.

MR. WHITTEMORE: I believe so. Unfortunately, it came a bit late. That case, Berwick, is very significant for two reasons. One, the Florida Supreme Court disapproved of Greenfield, set the course of Florida law, but secondly and more importantly on the waiver issue, the Sikes issue, if the Florida Supreme Court recognized that the Second District Court of Appeals opinion was precedent setting sufficient to invoke its conflict certiorari jurisdiction, obviously, the Appellate Court reached the merits in a two-page opinion of the issue.

Therefore it is properly preserved, and that is why the magistrate held as it did, that the Appellate Court had addressed the merits, the state court had allowed the procedural default to be tolerated, and I think obviously recognizing that the man had objected to the closing argument of the prosecutor, and I would just quote, if I could, from the Second District Court of Appeals opinion, which was disapproved.

It was neither unfair to introduce it nor improper to comment upon it in summation, the Second District Court of Appeals thereby addressing the merits of this issue. It was preserved for federal habeas review. Wainwright v. Sikes does not apply. The magistrate was correct in ruling that it was preserved.

This Court has never specifically to my knowledge in an opinion announced a rule that if the state court overlooks the procedural default and addresses itself to the merits, Wainwright v. Sikes does not apply. I am asking this Court to rule specifically in this case. It is a good opportunity to reiterate what was said in Sikes, that we deal only with contentions, and I am quoting, "of federal law which were not resolved on the merits in the state proceeding due to the failure to raise it."

QUESTION: What is the general rule about the relative standing of statements made by lawyers in summing up arguments for evidence in a case, which is higher quality?

MR. WHITTEMORE: The general rule is as petitioner has put it in her reply brief. It is fair comment. If the evidence comes in without objection, it is fair comment. Now, the problem I have with that --

QUESTION: That wasn't applied here.

MR. WHITTEMORE: Pardon me?

QUESTION: That wasn't applied here by the Court of Appeals.

MR. WHITTEMORE: It has not been argued until the briefs filed with this Court, and I would suggest --

QUESTION: I am not sure I made my question

clear. When a judge instructs a jury, what does he tell them about the relative standing of evidence given by witnesses as compared with arguments made by lawyers?

MR. WHITTEMORE: The arguments for the lawyers are merely argument. Their recollections are different from the jury. The jury should discount their recollections.

QUESTION: So the jury believed the evidence which they heard from a witness here and disregarded the evidence -- disregarded the arguments of the lawyers as they were instructed. Then what is the relevance of the lawyer's aguments? All he is doing is telling them what the evidence was.

MR. WHITTEMORE: I think he was doing more than that, Judge. I think he was drawing meaning from that silence. He was drawing an inference. Perhaps from a logical sense it appears logical. From an emotional standpoint, we want to think that silence after Miranda is important and meaningful, but what the prosecutor is doing is drawing an inference without an empirical and factual basis, simply suggesting to the jury if he was smart enough to invoke his rights, then he knew what he was doing. The experts tell us that that does not necessarily mean the man was insane at the time of the offense.

The question is, are only sane individuals --

QUESTION: How long had elapsed?

MR. WHITTEMORE: Approximately two hours. The question is, are only sane individuals able to invoke their constitutional rights? I suggest that we can't answer that. You have to presume that all individuals can exercise rights specifically when they are just informed that they have these rights.

They are simply exercising the right which they have just been told they have available to them. I don't think that we can draw distinctions between insanity defenses and self-defense cases, consent cases, all the other cases where affirmative defenses were advanced, and say that in this one instance we will allow you to use a defendant's invocation of his Fifth Amendment right.

QUESTION: The officer administers the Miranda warnings, and he says, do you understand what I have said and what this means? The answer is yes. Do you understand you may have a lawyer before I interrogate ycu? Yes. Do you want me to call a lawyer? Yes.

Now, is that colloquy admissible?

MR. WHITTEMORE: I don't think it is, Judge. A reading of Doyle, if he invokes his right to counsel, if he invokes his right to silence, he is invoking a

right --

QUESTION: He hasn't invoked his right. He has invoked his right to a lawyer.

MR. WHITTEMORE: That is in my mind tantamount to an invocation of the Fifth Amendment. Why else would he want a lawyer but to be with someone who can advise him of his options, someone who is not against him, someone who can advise him of whether to make an intelligent decision? The very basis for the Miranda ruling is to assure an intelligent and knowing decision.

QUESTION: He was never told. If you are talking about Doyle, Doyle didn't say that what you say may not be used against you. It said that -- you say that any answer to a question that he made voluntarily is admissible about the historical facts. He has given his Miranda warnings. He has asked some questions about what happened, and he answers. Admissible, because he has waived.

MR. WHITTEMORE: Admissible for impeachment purposes. Or for admission or confession --

QUESTION: Oh, no, no, no, in chief. You said, and I agree with you, that if he waives his right and answers these questions, and he was never told -- he wasn't told that what he says wouldn't be used -- he was

told that what he says would be used against him, and he is asked, do you want a lawyer, and he says yes.

MR. WHITTEMORE: Your Honor, I would suggest that that is the faulty premise on which Sulie versus Duckworth and the Trujillo decisions were based, and that is merely because a man asks for a lawyer does not suggest that he is sane.

QUESTION: Yes, but that isn't -- if that is your only answer, you must lose your case.

MR. WHITTEMORE: That is not my only answer, Judge.

QUESTION: Well, you have answered that that violates his Fifth Amendment.

MR. WHITTEMORE: That invocation of his right to counsel which he has just been advised of in effect under the Evans case is an invocation of his right to remain silent. They are one and the same. I don't think we can arbitrarily distinguish the Miranda right to counsel, which is the Court granted right, and the Fifth Amendment right.

QUESTION: So the officer says, why do you want a lawyer, and he tells him, and that would be admissible too, I take it.

MR. WHITTEMORE: I think you have to consider that in the context. If the lawyer request is made,

anything derived thereafter if initiated by the officer would be subject to being suppressed under the Edwards case. If the request for a lawyer is made, the interrogation must stop.

QUESTION: Well, he says, do you want a lawyer, and he says no. He says, why don't you.

MR. WHITTEMORE: And if he answers because I am smart enough, I don't need to talk to a lawyer, I think that would be admissible. If he waives that Fifth Amendment right, that privilege, and engages in conversation --

QUESTION: You think it would be admissible for proving sanity?

MR. WHITTEMORE: I think I would have to say it would be, because I think at that point he is engaged in unprotected activity.

QUESTION: But saying no and saying yes, I want a lawyer, wouldn't be admissible to prove sanity?

MR. WHITTEMORE: That is the distinction I made in restating the issue, Your Honor, and that is that there is a distinction between behavior and demeanor evidence that is observed, and the exercise of a constitutional right which has traditionally been protected by this Court and the majority of the lower courts.

There is that artificial distinction, and the reason there is a distinction is because of the Miranda warnings. In Fletcher v. Weir this Court recognized -- up until that point in time all is fair. Everything is admissible. Once the rights are administered, and there is the invocation of silence or the right to counsel thereafter, that is the protected speech. That is the protected exercise of a constitutional right which cannot be used for any purpose unless the defendant, of course, perjures himself on the stand and says that he didn't remain silent, he told the police his defense.

QUESTION: Supposing -- I mean, you say -- can no invocation of a constitutional right ever be used as evidence? Supposing the fellow goes before the committing magistrate or the trial judge for arraignment and says I demand a lawyer, I have got a right to the lawyer under the Sixth Amendment. May no one ever refer to that statement?

MR. WHITTEMORE: I think, Judge, if you are invoking a constitutional right for a prosecutor to thereafter use that assertion, whether it is a request for counsel or I don't want to say anything, Your Honor, of silence, is treading upon protected exercise of a right.

QUESTION: You say just to refer to the fact

that a person asserted a constitutional right somehow impinges on that right.

MR. WHITTEMORE: Yes, sir. It is putting a penalty on the exercise of that right. It is making the exercise costly. It is telling a defendant on the one hand you have these rights, and then two or three months down the road, in the middle of the trial, telling him, we are going to use your exericse of those rights notwithstanding we told you you had them.

That is the penalty which Doyle proscribes. That is the penalty which Miranda proscribes, not to penalize a defendant for the exercise of those rights. That is the fundamental --

QUESTION: Does that evidence -- does that kind of evidence that Justice Rehnquist was probing at go to the issue of guilt?

MR. WHITTEMORE: Oh, I think it does. I think the distinction between sanity and guilt, I think, is artificial. In this case, it was an insanity defense. The burden was on the state to prove sanity by a reasonable doubt, and the sanity of that defendant was an important link in the chain to guilt.

There is a distinction, obviously, between the issue of sanity and the issue of the commission of the physical acts, which was not really in dispute in this

case. There is a distinction, but from the standpoint of is it evidence leading toward guilt, yes, it is. It is a link in the chain toward guilt.

QUESTION: Well, look what happens to a defendant when he decides to testify at trial. He is exercising a constitutional right to testify, but he can certainly -- he can certainly suffer a lot from exercising it.

MR. WHITTEMORE: He surely can, and that is why he must make an intelligent waiver of that right, Judge. That is why the Miranda rights are given.

QUESTION: I know, but so he is penalized in a way for exercising his right.

MR. WHITTEMORE: I guess you could say that, but he has waived the Fifth Amendment right, which is the most significant right that we are dealing with here, and as I said when I started, that is why we are here, because there is the use --

QUESTION: Do you think the right to remain silent is of a higher constitutional order than the right to testify in your own defense?

MR. WHITTEMORE: There is no ranking of rights in my opinion, Judge. It is simply a right which is so cherished in our history and back in the star chambers. The man does not have to speak. He should not be

convicted out of his own mouth, from his own lips.

QUESTION: Well, of course, the courts have never said that in that way. In response to Justice White's question, you say that of course when he once takes the stand he can be impeached completely by what he has said previously even if what he said previously is inadmissible in chief. That is certainly an impairment of an important constitutional right to testify, isn't it?

MR. WHITTEMORE: I don't think it is an impairment at all. If a man takes the stand and waives his right of silence, he is waiving his privilege against self-incrimination, and he is subject to impeachment if he testifies. And that is the common thread in the Harris v. New York case, in the Fletcher case, and in the Jenkins v. Anderson case.

Every one of those defendants testified.

QUESTION: But he is told in his Miranda warnings what you say won't be used against you, or will be used against you, but you have a right to remain silent.

MR. WHITTEMORE: I am not suggesting that he can be impeached by his exercise of the right to silence. I am suggesting the only time that can occur is if he takes the stand and denies having remained

silent. And that is the example used in the footnote in Doyle, that if a man testifies and says, no, I told the police everything that I have just told you, and in fact he did remain silent, I think that is fair game for impeachment, and I don't think the Court addressed it specifically, but it surely suggested that that would be proper impeachment.

Thank you.

QUESTION: Thank you. Do you have anything further, Ms. Paschall?

ORAL ARGUMENT OF ANN GARRISON PASCHALL, ESQ.,
ON BEHALF OF THE PETITIONER

MS. PASCHALL: I think two things. The first thing I have to say is yes, this Court's decision in this case does -- would make a difference, looking at the Florida Supreme Court's Berwick decision, the whole opinion is fraught with analysis of the federal constitutional issues.

There is almost a parenthetical reference at the end. Oh, by the way, it violates the state constitution, too. But the whole analysis --

QUESTION: Is it correct that in that case they construed the federal question the same way the Eleventh Circuit did?

MS. PASCHALL: Yes. I would liken the effect

-- in South Dakota versus Nevill this Court went on and addressed on the merits the issue that had been before the Court about the defendant's refusal, the use of the defendant's refusal to take a blood alcohol test even though the South Dakota Court had also said that it violated the state constitution. This Court in a footnote notes that the bulk of the anlysis again in the state court opinion is federal constitutional analysis, that that is what had been addressed.

That was what was addressed in Berwick. And further, we cannot say that the decision in Berwick would be such a change of law, you know, even if as to necessarily warrant relief at some later date for Mr. Greenfield. For one thing, it might clarify the procedural default question once and for all if the state courts at some point have to determine whether the state constitution separately from the federal constitution was violated.

The other point that I want to make is, we just can't in this case distinguish the evidence that came in of demeanor, of the yes, I want an attorney, no, I don't want to talk to you. We can't say, well, some of this is admissible, it is fine, it is demeanor evidence, but the part which goes to silence is wrong, it shouldn't have been admitted.

I think if one looks at the Eleventh Circuit's opinion that Justice Rehnquist has been talking about today where they set out the quote at Pages A9 and 10 of the appendix to the cert petition, it is a lengthy quote. In that whole section of the prosecutor's argument, the only portions of it that go to silence, there is a good portion of the argument, I do not want to speak to you, and then at the end of the argument, do you want to talk, no.

And again, he talked to the attorney, again he will not speak. In that whole argument, those are the only references to silence. In fact, the whole argument gets to that very point before there is ever any objection raised to the argument in the trial court. The Eleventh Circuit in finding that the error in this case was not harmless said it wasn't harmless because the prosecutor's argument was such a major portion of the argument.

I don't think that one can say if the court had been considering only the very brief references to silence, how that could not have been harmless error in light of the testimony of the officers, Pilifont and Jolly, in light of the thrust of the entire argument. I think it is a reasonable conclusion that that is what the Eleventh Circuit was going to.

They were attacking the whole line of argument that was made.

In short, we would ask this Court to hold that where the only issue is a defendant's criminal responsibility at the time of the defense, that this post-Miranda behavior, including silence, can be used against him. We would ask that you reverse the decision of the Eleventh Circuit.

QUESTION: What would you say if Miranda warnings were never give and he was interrogated and they wanted to use the statements to prove sanity, and the reason they want to use them is, they seem -- anybody would conclude that this is very relevant as to his competence, but he never was given a --

MS. PASCHALL: Your Honor, I am not -- of course, those facts are somewhat different from these. I think then you would get into a difficult question with -- if the purpose of Miranda --

QUESTION: But if disproving the insanity defense is just completely different from guilt or innocence, why would you draw a distinction?

MS. PASCHALL: I am not sure that -- if I would draw a distinction, I would note that we certainly still have an attempt to abide by the Miranda decision, and whatever deterrent effect Miranda has on police

misconduct, and excluding that type of evidence when the police have violated Miranda might or might not be appropriate.

QUESTION: All right. Thank you.

MS. PASCHALL: It is not a distinction I am prepared to make.

Thank you very much.

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

(Whereupon, at 2:01 o'clock p.m., the case in the above-entitled matter was submitted.)

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BY Paul A. Richardson

(REPORTER)