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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY *DM*
DEPUTY

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

40962-3 II

IN re the Personal
Restraint Petition of:
ADRIAN CONTRERAS-REBOLLAR,

Petitioner.

PRP SUPPLEMENTED GROUNDS

ADRIAN CONTRERAS-REBOLLAR
Appearing Pro Se

Stafford Creek Corr. Center
191 Constantine Way
Aberdeen, WA. 98520

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II. ASSIGNMENTS OF ERRORS

A. Assignments of Error

1. The trial court erred when it allowed insolubly ambiguous statements under a misrepresentation of decisive law.
2. The prosecutor used Contreras' right to silence as substantive evidence of guilt as well as to infer guilt thereof.
3. Petitioner's counsel rendered ineffective assistance when it failed to propose a jury instruction which Petitioner had a right to as mandated by CrR 3.5(d)(4).
4. Petitioner was denied his right to a fair trial when his credibility and technical defense were greatly undermined and prejudiced by prosecutorial misconduct.

B. Issues Pertaining to the Assignments of Error

1. When a trial judge wrongly applies influential case-law should this Court uphold such a wrong ruling?
(Assignment of Error 1)

2. Did the prosecution use evidence from Petitioner's right to remain silent as substantive evidence of guilt? (Assignments of Errors 1 & 2)
3. Were defense counsel raised the issue of involuntariness but failed to propose the Jury instruction mandated by CrR 3.5(d)(4) constitute ineffective assistance of counsel? (Assignments of Error 3).
4. Was it prosecutorial misconduct to propose to the jury, that Petitioner's self-defense claim was but a fabrication after having heard the evidence, and having been confronted with the witnesses against him? (Assignment of Error 4)
5. Also, was it prosecutor misconduct when the prosecutor vouched for and injected his personal belief that the state witnesses were the ones telling the truth? (Assignment of Error 4)
6. Did all these errors cumulatively compound to deny Petitioner of his right to a fair trial? (Assignments of Errors 1, 2, 3, & 4).

II. ARGUMENT & AUTHORITIES

- A. The state violated Petitioner's Due Process Clause of the 14th Amendment when it purposefully elicited, commented, and exploited his Constitutional right to remain silent.

Petitioner wishes to prove to this Honorable Court, that his restraint is indeed unlawful for it "was imposed or entered in violation of the Constitution of the United States and the Constitution or laws of the State of Washington." RAP 16.4(c)(2) And, this being a newly raised issue, Petitioner affirms "Material facts exist which have not been previously presented and heard," RAP 16.4(c)(3), which in respects of the interest of Justice require vacation of the convictions by which Petitioner was convicted by the State.

The Court grants relief by PRP when a person is being restraint unlawfully. RAP 16.4(a). Petitioner is under "restraint" due to "limited freedom because of a court decision in a criminal proceeding," and being imprisoned at a State DOC Facility serving

a term of confinement pursuant to a court order in the criminal proceeding. RAP 16.4(b).

A Petitioner may obtain relief by demonstrating a Constitutional violation; *In re Cashaw*, 123 Wn.2d 138, 148, 866 P.2d 8 (1994). Petitioner also relies on *In re Hews*, 99 Wn.2d 80, 87, 660 P.2d 263 (1983), in presenting this newly raised issue for the 1st time on appeal in which the Supreme Court of WA. held "the failure to raise a Constitutional issue for the first time on appeal is no longer a reason for the automatic rejection of a PRP. *In re Hews*, at 87.

Petitioner will now show he incurred actual prejudice stemming from a Constitutional error incurred at trial. Both the Fifth Amendment and art. 1, §. 9 of the Washington Constitution provide that no person can be compelled in any criminal case to be a witness or give evidence against himself.

Here, Contreras' 5th Amend. U.S. Fed. CONST. right to silence applied via the 14th Amend. Constitutional Due Process Clause, was violated when the trial Judge misapplied the rendering decision of *Miranda v. Arizona*,

and inadvertently allowed the prosecution to elicit comments of Contreras' pre-arrest silence. (RP7 890; Appendix-A) To which the prosecution took full advantage of, then commented and exploited Contreras' right to remain silent.

Contreras asserts this right is liberally construed. *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996); (citing *Hoffman v. U.S.*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951)).

The trial court allowed what the prosecutor deemed ■ "spontaneous statement" to be elicited by testimony of the arresting officer. (RP7 893; Appendix-A) These statements were made by the Petitioner while under custody as deemed by the trial judge. (RP7 892-93; Appendix-A)

However, Petitioner contends the statements of "what's this all about? what's going on?" were not spontaneous in nature, if at all, but were the product of coercion made under psychological duress while being apprehended by an undercover officer.

(Affidavit, Appendix-B; RP6 700-04; RP7 ■ 916-17, 927-28)

Clearly the trial Judge misapplied the rendering decisions mandated in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966)., by which these "spontaneous statements" were allowed. (RP7 890, 892-93; Appendix-A) "there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Miranda*, at 467. (Appendix-C, all cited *Miranda*) "The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner;" it does not distinguish degrees of incrimination. *Miranda*, at 476.

Here, the trial Judge should have derived that Contreras' was indeed in custody when these statements were made, but further, that Contreras' right extends beyond the expressed *Miranda* warnings to the setting in which his freedom and actions were curtailed when he was being detained by undercover agents. And thereby should not have been allowed.

But also, the distinction made by the prosecutor that the statements were spontaneous should not have been accepted, for Petitioner's privilege against self-incrimination protects him from being compelled to incriminate himself in any manner. Thus, to make a distinction or to distinguish to what degree incrimination occurred, simply does not matter, so long as there has been no expressed relinquishment of those rights. *Miranda*, at 475-76 (Appendix-C)

Further, the *Miranda* Court was clear that "wherever a question [REDACTED] arises" whether a confession was not voluntary, the issue is controlled by the Fifth amendment commanding that no person 'shall be compelled in any criminal case to be a witness against himself.' And, it must and may only be sufficient to establish that a statement was voluntary that the accused was not involuntarily impelled to make a statement when but for the improper influences he would have remained silent. *Miranda*, at 461. (Appendix-C)

Certainly, there was a question, as to the voluntariness of these statements by the trial court

(RP 7 893 at 15-18; Appendix-A), thus voluntariness was a concern, but instead of applying the clearly stated aforementioned law, *Miranda* at 461, the trial Judge however was more focused on the "insolubly ambiguous" impact these statements might have with the Jury.

(RP 7 893)

Not only was Petitioner arrested by undercover agents, but had said governmental agent confront him with the barrel of a gun pointed directly at him at a distance of 60 feet away and from a 2nd story elevated platform rise, thus he was compelled to make these certain certain statements as to invoke his rights, instead, per the court's ruling, he lost ██████ those rights.

This ruling by the trial court was an error, as the WA. Supreme Court in *Easter*, 130 W.2d rightly concluded: "In fact, an accused's silence in the face of police questioning is quite expressive as to the person's intent to invoke the right regardless of whether it is pre-arrest or post-arrest. If silence after arrest is "insolubly ambiguous" according to the *Doyle* Court, it is equally so before an arrest." (citing *Doyle v. Ohio*, 426

U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); Appendix-D)).

The trial Judge ruled that because I had not yet been interrogated my rights under Miranda did not apply. However, the reading of Miranda by the WA. Supreme Court did not indulge in such a narrow reading of Miranda.

"The Fifth Amendment applies before the defendant is in custody or is the subject of suspicion or investigation. The right can be asserted in any investigatory or adjudicatory proceeding." (Easter, in Appendix-D; citing *Kastigar, v. U.S.*, 406 U.S. 441, 444, 92 S.Ct. 1653, 1656, 32 L.Ed.2d 212 (1972)). Also, "Miranda indicates the right to silence exist prior to the time the government must advise the person of such right when taking the person into custody..." *Miranda*, 384 U.S. at 444, 86 S.Ct. 1612.

Because the trial Judge missapplied these rendering decisions, Contreras' rights against self-incrimination were violated.

Petitioner asserts, the trial court erred when it failed to recognize that, even do, the allowed statements were not exactly made freely nor voluntarily, were nonetheless admitted as "the state must show that the Miranda warnings were complied with." (RP 7 893; Appendix-A)

This is wrong, and contradictory to the righteous examination made in Easter. No special set of words is necessary to invoke the right. (no "magic language" or "ritualistic formula".) (citing *Quinn v. U.S.*, 349 U.S. 155, 162, 75 S.Ct. 668, 673, 99 L.Ed. 964 (1955)).

1. The prosecutor purposefully elicited, commented, and exploited on Contreras' Constitutional right to remain silent.

"When the state may later comment an accused did not speak up prior to an arrest, the accused effectively has lost the right to silence." (Easter, 130 Wn.2d in Appendix-D; citing *State v. Trichel*, 16 Wash.App. 18, 30, 553 P.2d 139 (1976)).

Prosecutor's first question posed to Mr. Contreras was not "What's this all about? What's going on?" but was instead questioned "You never called the police?"

(RP 7 913; Appendix-A) [REDACTED] Petitioner points out this was the very first question posed by the prosecution concerning the 'spontaneous statements' and was not a question in response to answer previously given and had nothing to do with "what's this all about? what's going on?"

Petitioner asserts it is evident that the prosecutions intent was when posing this question: to infer guilt thereof, and from Petitioner's right to silence concerning his not having have called the police. As well as infringe upon Petitioner's right against self-incrimination.

Because the state did not allow the statements in question for impeachment, but instead used them as rebuttal before Petitioner even took the stand, Petitioner contends the prosecution thus injected these statements as and for its case-in-chief.

(RP 7 832; Appendix-A) Petitioner thus asserts, his pre-arrest silence was also used against him in violation of the 5th Amendment.

The majority of Federal Courts considering the issue

have ruled pre-arrest silence cannot be used in the state's case in chief. (Easter in Appendix-D, cit in U.S. v. Burson, 952 F.2d 1196, 1200-01 (10th Cir. 1991), cert. denied, 503 U.S. 997, 112 S.Ct. 1702, 118 L.Ed.2d 411 (1992)).

The prosecution further violated and infringe upon Petitioner's Fifth Amendment right against self-incrimination when it used Contreras' post-arrest, pre-Miranda silence both as substantive evidence guilt per State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996), as well as to diminish his exculpatory story given at trial per Doyle v. Ohio, 426 U.S. 610, 618-19, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

The state secondly addressed Petitioner concerning these "What's this all about? What's going on?" in various indirect manners in (RP7 916-17) and even after Petitioner answered directly and in the affirmative to these statements (RP7 916 at 21; Appendix-A), prosecution continued to indirectly ask and induct other irrelevant issues. [REDACTED] Thereby, the prosecutor exploited Petitioner's right to remain silent. See State v. Fricks, 91 Wn.2d 391, 395-96, 588 P.2d 1328 (1979).

The prosecutor then commented on these otherwise "insolubly ambiguous" statements during closing arguments to imply guilt thereof. (RP 8 1023; Appendix-A) As well as used Petitioner's pre-arrest silence both as substantive evidence of guilt during its case in chief, (RP 7 913) and to infer guilt from said pre-arrest silence during its closing argument. (RP 8 1025; Appendix-A)

- a. The trial court failed to enter its written findings when allowing these statements pursuant to CrR 3.5(c).

The trial court failed to meet its rightful obligation pursuant to CrR 3.5(c):

(c) Duty of Court to Make a Record.

After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

In *State v. Miller*, 92 Wn.App. 693, 703, 964 P.2d 1196 (1998), the Court of Appeals ruled that written findings are to be fulfilled due to a trial court's oral findings falling short of being concise and conclusive

as to why such statements are allowed.

Petitioner contends such was the case here.

The trial court must also determine whether the evidence is relevant to prove an essential element of the crime charged. See *State v. Smith*, 106 Wash.2d 772, 776, 725 P.2d 951 (1986). If the court finds the information relevant it must then weigh on the record the probative value of the evidence against its prejudicial effect. See *State v. Jackson*, 102 Wash.2d 689, 694, 689 P.2d 76 (1984). And, "As we have stated before: when the risk of confusion is so great as to upset the balance, the evidence goes out." See *State v. Davis*, 38 Wash.App. 600, █████ 603, 686 P.2d 1143 (1984); ER 402; ER 403.

The trial court failed to enter into, or rule upon any of these findings and state court's trial set parameters. (RP 7 893-94; Appendix-A)

Mr. Contreras was prejudiced by these compounded errors as the evidence against him was not overwhelming and because the jury verdict relied heavily on his technical defense and credibility, these otherwise "insolubly ambiguous" deemed "spontaneous

statements" by the trial court were allowed in violation of Contreras' Fifth Amendment right against self-incrimination. The prosecutor then exploited Contreras' pre-arrest silence of not having notified law enforcement as well as his compelled ■ and coerced post-arrest silence. For these reasons and pursuant to *Doyle v. Ohio*, supra, Petitioner asks this Honorable Court to hold that his rights to due process under the Fourteenth Amendment were violated when he was cross-examined regarding his failure to claim he had acted in self-defense.

- B. Defense counsel rendered ineffective when it failed to propose a jury instruction after raising the issue of involuntariness per CrR 3.5, thereby depriving defendant of a fair trial.

Every criminal defendant is entitled to effective assistance of counsel. U.S. CONST. amd. VI; WASH. CONST. art. 1, §. 22 (ame■nd. X); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Pursuant to CrR 3.5(d)(4), concerning the rights of defendants when confession statements are ruled admissible,

when the defense raises the issue of voluntariness, the jury shall be instructed that they may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit.

Petitioner asserts voluntariness was an issue (RP 7 893 at 15-18; Appendix-A) and defense certainly raised the issue. (RP 7 832-33, 892 at 16; Appendix-A) Adopting the 2 prong test of Strickland at 688. First, Petitioner contends his counsel fell below an objective standard of reasonableness and thereby deprived Petitioner of his 6th Amend. right to a fair trial and right to effective assistance of counsel applied via the 14th Amed. of the Fed. U.S. CONST.

Reasonable attorney conduct includes a duty to investigate the relevant law. Strickland, 466 U.S. at 690-91. Here, Petitioner's counsel was under a moral obligation to propose a jury instruction which, more likely than not, would have been given by the trial court pursuant to its own criminal court rules, to wit CrR 3.5(d)(4).

Although the substantive facts differ from Petitioner's case the legal premise does not, therefore,

Petitioner relies on *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987) (Appendix-E). There, the WA Supreme Court ruled defense counsel's failure to propose an instruction that is warranted by the evidence, that gives a complete and correct statement of the law, and that would be helpful to the defense may well be deficient performance. *Thomas*, at 228.

Petitioner contends, that what is more than in the *Thomas* case here, is Petitioner's counsel was under a moral obligation and duty to propose the Jury instruction pursuant to CrR 3.5(d)(4).

The 2nd prong of the Strickland test requires the showing that counsel's deficient performance prejudiced the defense. *Strickland* at 687. Here, Petitioner's defense counsel's errors were serious enough that it denied Contreras of a fair trial.

Petitioner asserts the failed propose Jury instruction greatly undermined Contreras' technical defense as the trial Judge himself did not know what weight Petitioner's statements would have on the Jury, and because Petitioner's credibility went to the heart of his defense, it was seriously undermined when the prosecution was allowed to re-open its case to rebutt Petitioner's testimony given at trial.

- c. The prosecutor posed comments which constitute prosecutorial misconduct, denying the defendant of his right to a fair trial when he attempted to have the Jury draw adverse inferences from Petitioner's exercise of his constitutional rights, as well as vouching for the credibility of his own witnesses.

Petitioner may raise this issue, a manifest error affecting a constitutional right, for the first time on review by demonstrating a Constitutional violation. In re Cashaw, 123 Wn.2d 138, 148, 866 P.2d 8 (1994); In re News, 99 Wn.2d 80, 87, 660 P.2d 263 (1983); RAP 2.5(a)(3); RAP 16.4(c)(2); RAP 16.4(c)(3).

Every criminal defendant is entitled to a fair trial by an impartial Jury. U.S. CONST. amends. 6, 14; WASH. CONST. art 1, §. 3, 21, 22. Washington courts have not

differentiated between the 2 provisions. Also, the U.S. CONST. 6th amend. via the 14th amend. provides "in all criminal prosecutions, the accused shall enjoy the right to... to be confronted with the witnesses against him."

The prosecution attorney should avoid comment, in the presence of the jury, on the defendant's assertion of the right to confrontation. Such comment is improper because it invites the jury to draw a negative inference from the exercise of a constitutional right. *State v. Jones*, 71 Wn.App. 798, 863 P.2d 85 (1993). Because this case purports that WA. State has not focused much (i.e., the WA. Supreme Court) on this issue it cites *Dyson v. U.S.*, 418 A.2d 127 (DC. Fed. Cir. 1980) a DC. Fed. Court cir. case which Petitioner relies on for this issue. (Appendix-F)

Petitioner contends and argues the prosecuting attorney's conduct was both improper and prejudicial. This misconduct was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury."

State v. Gentry, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995).

Petitioner argues, yet in another way to undermine his technical defense of self-defense, the prosecution posed distinct flagrant and ill-intentioned questions to Petitioner during its cross-examination. (RP7 922-23; Appendix-G)

Petitioner's case is legally on par with Dyson. Here, the prosecutor commented not 2 but 3 times concerning Contreras' assertion of his Constitutional right to confront the State's witnesses against him, and have the Jury draw adverse inferences therefrom, but went further and used these ill-intentioned comments, flagrantly during closing arguments as well. (RP8 977, 988 at 10-19, 993 at 17, 1012 at 18-22, [REDACTED] 1014 at 23; all at Appendix-G)

Petitioner received undue prejudice by these comments because they suggested to the Jury Petitioner's self-defense claim was nothing more than a mere fabrication due to his exercising of an otherwise, Fed. U.S. CONST. right to be confronted with the witnesses against him.

Petitioner's next assertion of prosecutor misconduct occurred when the state attorney vouched and expressed personal belief about the credibility of several state witnesses.

The WA. state Supreme Court has held, it is misconduct for a prosecutor to express a personal belief about the credibility of a witness. See *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). This is true when credibility determinations are to be made "solely" by the jury. See *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

A first instance of this occurs when the prosecutor keys Jose Rosas as "the most important witness to this situation" and "the most important factor from the beginning" (RPs 982; Appendix-H). Then goes on to vouch for this state witness stating "what motivation does Jose (or this witness) have to tell you anything but the truth" (RPs 983; Appendix-H) A state witness who had to be arrested in order for prosecution to have even secured his testimony. (Appendix-H) And had refused to answer various subpoenas. (Appendix-H) To which the prosecutor then mentioned that in order for the jury to have believed

me they would have to politely say Jose Rosas is 'mistaken' or lying. (RP8 983 at 11) Concerning the same witness, prosecution further misdeliberately misrepresented the facts of the case concerning Jose Rosas' contact with Petitioner, which was that he had had no contact with Petitioner at all. (RP4 536-37, 575; Appendix-H)

Further vouching can be found in (RP8 986; Appendix-H) concerning Ahria Kelley, a victim in the case. "But Ahria has no motive to say anything other than what happened." Even do this witness had to be granted immunity, due to his otherwise unwillingness to talk/cooperate. (see bench warrant for arrest Appendix-H) And "he did" concerning the prosecutor's personal belief of this witness having told the truth. (RP8 986; Appendix-H)

Further occasions of prosecution, both vouching for his own witnesses, as well as expressing his personal belief concerning their credibility may be found in the underlined portions of the Report of Proceedings in (Appendix-H)

Finally, Petitioner argues that these errors, as well as those of his PRP opening brief are cumulative errors which warrant reversal on review and of his convictions per *State v. Johnson*, 90 Wn.App. 54 (1998). In the VersusLaw research engine cite, Petitioner cites *Johnson*, at [101] as it is a lengthy case, concerning the adverse prejudicial impact he received on all his PRP cumulated cumulative errors. And, relies on the substantive and procedural history/facts of his PRP opening brief.

III. CONCLUSION

The trial court misapplied the rendering decisions of *Miranda v. Arizona* to which the prosecutor then exploited upon Petitioner's right to remain silent and commented on both his pre-arrest silence when he questioned Petitioner concerning his failure to alert authorities and then used that evidence as substantive evidence of guilt. And also used his post-arrest silence to imply guilt thereof.

Petitioner's counsel rendered ineffectively when he failed to propose a jury instruction mandated by CrR 3.5(d)(4) which would have been granted as a

matter of right pursuant to CrR 3.5(d)(4) and which would have better enabled the defendant to argue to the Jury that the confessional statements allowed were involuntarily made and that they, the [REDACTED] Jurors, were to give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit.

The prosecutor posed several ill-intentioned and flagrant remarks concerning Petitioner's exercise of his Constitutional right to be confronted with the witnesses against him, and used these remarks flagrantly during its closing arguments to imply Contreras' technical defense was both composed and fabricated by having heard the evidence and witnesses against him. Furthermore, the prosecutor vouched and injected his personal beliefs concerning the credibility of its own state witnesses over Petitioner's. Because credibility determinations are to be made solely by the Jury and the case relied heavily on the credibility determinations [REDACTED] by the Jurors, this prosecutor's misconduct was so flagrant and ill-intentioned it [REDACTED] denied Contreras his right to a fair trial.

Finally, Petitioner asserts that this Honorable Court should rule that these PRP compounded errors amounted to cumulative errors that inadvertently further denied Petitioner his right to a fair trial. For these reasons, the Court should reverse and remand Petitioner for a new trial.

DATED: November 17, 2011



Adrian Contreras-Rebollar
Pro se, Petitioner

Certificate of Service

I, Adrian Contreras-Rebollar, certify that on this day I delivered via U.S. Mail a true and correct copies of this brief both to the Court of Appeals, Div. 2 and prosecutor Jason Ruyf of/in Tacoma, WA. This statement is certified to be both true and correct under penalty of perjury of the laws of the state of WA.



Signature

11/17/11

Date

APPENDIX A

1 Q And did you have a gun drawn?

2 A Not at that point.

3 Q When you ordered her down, was it a loud "police", that
4 kind of thing?

5 A Yeah. Again, we were probably, at least, 60 feet away
6 and I wanted to make it clear to her what I wanted her
7 to do, so it was a clear warning.

8 Q Did she comply?

9 A Yes, she did.

10 Q How was she dressed, if you recall?

11 A I don't recall.

12 Q What happened then with her?

13 A As she was moving westward on the elevated north
14 sidewalk, a second individual who appeared to be the
15 suspect in this investigation appeared from the same
16 location she had appeared from.

17 Q Would you recognize that person, the second person, if
18 you saw him again?

19 A Yes, I would.

20 Q Do you see him in the courtroom?

21 A He's seated in the black suit at defense table.

22 MR. GREER: For the record, the witness has
23 identified the defendant.

24 Q Now, can you describe, then, what happened next?

25 A This individual, the defendant, was carrying something

1 with him, and at that time I was trying to focus on
2 Ms. Hernandez as well as him. I was looking at both,
3 and they were separated. He had something concealed
4 against his body, and upon him recognizing or seeing me
5 or, at least, appeared what caused his behavior, he
6 immediately turned around and went right back towards
7 the hotel room.

8 Q Can you describe what you saw him holding?

9 A I couldn't see what it was. It was concealed. It
10 didn't appear to be a hard object like a box or a
11 suitcase but something in cloth or something.

12 Q Could you tell what he was holding? What part of what
13 he was holding could you see, if anything?

14 A It was concealed under, as I recall, some sort of
15 clothing or towel. I could not see what the object
16 was.

17 Q So what happened next?

18 A Well, the other detectives became aware of the
19 circumstances while it was unfolding. He, again, went
20 back towards Unit 212. I ordered her to continue in
21 the direction I had originally ordered her to go, and
22 as she was doing that, the defendant reappeared from
23 the same location. ~~_____~~

24 Q And did he still have that item in his arms or hands?

25 A No, he did not.

1 Q What happened next?

2 A We ordered him in the same direction I had ordered
3 Ms. Hernandez to go, and he complied.

4 Q He did comply?

5 A Yes.

6 Q And did you take either of these two individuals into
7 custody shortly after that?

8 A The defendant, when he came down the stairs at my
9 direction, was taken into custody, yes.

10 Q And do you recall how he was dressed?

11 A Not specifically, no.

12 Q Ultimately in dealing with him did you take his
13 clothing, the clothing that he was actually wearing,
14 into evidence?

15 A Yes, all of it at the booking desk.

16 Q And I want to show you some items. I guess I'll do
17 this two at a time. I think there's a total of eight
18 or nine, so the first thing I'll do is hand you
19 Plaintiffs 30 and 31.

20 MR. GREER: Defense counsel, do you want to
21 see this before I hand it to him?

22 MR. SCHOENBERGER: Just a moment, Counsel.
23 Thank you.

24 Q (By Mr. Greer) Do you recognize those two exhibits?

25 A Yes. They both have the tags from our electronic

1 no 3.5 hearing, and because the State did not intend on
2 offering the statement in its case in chief -- he
★ 3 walked out and kept asking: What's this all about?
4 What's going on? That's the statement.

★ 5 So that, I believe, is subject to inquiry by the
6 State. He was then arrested, and before his Miranda
7 warnings, which he invoked, but before that he walks
8 out. The police are approaching, saying, Come here,
9 and he's saying: What's this all about? What's going
10 on?

11 THE DEFENDANT: Your Honor?

12 THE COURT: Well, let Mr. Schoenberger
13 respond.

14 Mr. Schoenberger, any response? The State's
15 apparently going to ask him about that statement.

16 MR. SCHOENBERGER: Well, I understand what
17 counsel is saying, that the defendant made statements
18 before he was Mirandized, which he intends to bring out
19 in cross-examination, and I think that that's not
20 proper without the Court's ruling on whether those
21 statements were voluntary, whether he was in custody,
22 whether there was a custodial arrest. I think a 3.5
23 hearing on those statements is required before counsel
24 can bring them out.

25 THE COURT: Mr. Greer, any response?

1 MR. GREER: Well, I'll have Detective Vold in
2 here for that limited purpose.

3 THE COURT: Is he available today?

4 MR. GREER: I'm sure he is. I can call him.
5 I told him that this was a possibility.

6 THE COURT: How long do you anticipate your
7 client, Mr. Schoenberger?

8 MR. SCHOENBERGER: Probably into the
9 afternoon, Your Honor.

10 THE COURT: So why don't you ask Vold to be
11 here about 1:30?

12 (Pause in the proceedings.)

13 MR. GREER: Thank you, Your Honor.

14 THE COURT: Why don't we have
15 Mr. Contreras-Rebollar step over to the stand now.

16 MR. SCHOENBERGER: Judge, the defendant has
17 requested a bathroom break before we begin his
18 testimony. As long as the jury is out, can we do that?

19 THE COURT: Try to make it quick. We have
20 had about five minutes of testimony this morning.
21 We'll take a short recess.

22 MR. SCHOENBERGER: Thank you, Your Honor

23 (Recess.)

24 (Jury not present.)

25 THE COURT: Are we ready for the jury now?

1 THE WITNESS: Brian Vold. The spelling of
2 the last name is V-O-L-D.

3 BRIAN VOLD,
4 having been called as a witness by the plaintiff, being
5 first duly sworn, was examined and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. GREER:

8 Q Detective Vold, do you recall your testimony the other
9 day regarding the issues in the defendant's arrest?

10 A Yes, I do.

11 Q And the surrounding circumstances?

12 A Yes.

★ 13 Q I would like to get right to the time period where you
14 actually called to him, as I understand it, and he
15 voluntarily came and was cooperative.

seized

★ 16 A Yes. He came down the stairs at my request.

17 Q At any point did the defendant make any statements to
18 you?

19 A As he was being placed on the ground and handcuffed, he
20 made several general comments to me.

21 Q Were they in response to any of your questions?

22 A No, they were not.

23 Q Or any other officer's?

24 A No.

25 Q What statements did he make?

★1 A He was repeatedly asking us in various ways what we
2 were doing and why we were doing it. He repeated it:

3 What's going on? Why is this happening? Things to
★4 that effect. And then he made a comment about his
5 family had an attorney. And I said: Not a problem,
6 you're being detained, and I'll respect your wishes.

★7 Q Did you Mirandize him at any point before he made those
8 statements?

★9 A I did not have the opportunity, no.

10 Q After he, as I understand, was lying on the ground
11 being cuffed; is that correct?

12 A Not at that point. I just advised him, Don't speak
13 anymore, and I didn't ask him any questions.

*He tried to tell
the judge no.*

★14 Q I just want to clarify. He comes down and you have him
15 at gunpoint?

★16 A That's correct.

★17 Q Is he ordered to go down to the ground?

18 A Yes.

19 Q And he complied?

20 A Yes.

★21 Q He's being cuffed in the time period where he made the
22 statements that you testified?

23 A Yes.

24 Q At what point did you Mirandize him?

★25 A Prior to the arrival of Officer John Yuhasz he was

1 placed in the patrol car, and at that point he was
2 Mirandized.

3 Q Did he make any statements while he was on the ground
4 other than the ones you mentioned?

5 A Nothing that I can recall, no.

6 Q Did he make all those statements while he was on the
7 ground?

8 A On the ground or being held on the ground while we
9 waited for a patrol car to come up to our location and
10 take custody.

11 Q And how long after he was initially on the ground was
12 it that this other patrol officer got there?

13 A I would say under two minutes, maybe a minute.

14 Q During that period of time what was happening?

15 A Well, there was concern with Room 212 and with the
16 female that was being detained, and we were just
17 controlling him, but due to his request I was avoiding
18 interacting with him.

19 Q Where was the request on the continuum if you start
20 with when he's on the ground to the point two minutes
21 later put in the officer's car?

22 A The request?

23 Q Well, the mention, I guess, that he has a family
24 attorney.

25 A He was still on the ground, and I said I respect that,

*According to
Miranda he's
supposed to
advise me immediately
why would he wait
this long.*

1 THE WITNESS: Yes.

2 THE COURT: When he came out, did you have
3 your gun up at him?

4 THE WITNESS: Well, actually, as I recall, I
5 was watching both of them because I did not know her
6 level of involvement in the situation, but when he
7 disappeared and came back out, my focus became on him.

8 THE COURT: Nothing else from me. Anything
9 else?

10 MR. GREER: No.

11 THE COURT: Thank you very much. You can
12 step down.

13 Mr. Greer, what statement do you want to elicit in
14 cross-examination or you want to inquire about?

15 MR. GREER: Everything up to the point --
16 and, Detective, if you can stay so you can hear the
17 Court's ruling. But everything up to the point where
18 the defendant starts referring to a family attorney.
19 Nothing in that area the State will be offering, just
20 "what's this all about, why are you doing this," is all
21 the State's looking for.

22 THE COURT: Are you going to offer that
23 through Detective Vold as rebuttal?

24 MR. GREER: Correct.

25 THE COURT: You're going to inquire on

1 trial, which you've already waived, I guess.

2 Mr. Schoenberger, do you wish to call any
3 witnesses as part of the 3.5 hearing?

4 MR. SCHOENBERGER: May I have a moment, Your
5 Honor?

6 THE COURT: Yes.

7 (Mr. Schoenberger confers with the
8 defendant.)

9 MR. SCHOENBERGER: No, I'm not going to call
10 anybody.

11 THE COURT: So the State is going to offer
12 his statements, What's going on, what's this about,
13 words to that effect?

14 MR. GREER: Spontaneous statements.

15 THE COURT: Mr. Schoenberger?

16 MR. SCHOENBERGER: Your Honor, if there was
17 ever a custodial arrest situation, this is it. This
18 man is 60 feet away from the officer.

19 THE COURT: He's in custody, I agree with
20 that.

21 MR. SCHOENBERGER: It's a custodial
22 situation, and I think anything and everything he said
23 in a custodial situation before he's Mirandized is
24 improper and should not be allowed.

25 THE COURT: Mr. Greer?

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MR. GREER: Just very simply, that's not correct. Any custodial interrogation, Miranda must precede, and this was not custodial interrogation. It was, as I said, a spontaneous statement made by the defendant before the officer actually had the opportunity to Mirandize him, and it is admissible.

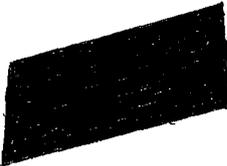
THE COURT: My understanding of Miranda, and I'm pretty sure I understand it, is before the State can offer any responses before interrogation, they must show that the Miranda warnings were complied with. In this case I find that Mr. Contreras was in custody. The officer was clearly placing him under arrest, but he had not been interrogated, he was not asked any questions.

It's not particularly surprising he would say, What's this about, or words to that effect. If you've got an officer pointing a gun at you, you're maybe going to ask why or maybe not say anything. What weight, if any, the jury might give to these is another issue. I'm not sure they'll think it all that significant, but they might, so I do not find any violation of Miranda application, of Miranda, since this was not custodial interrogation, I believe.

However, it was custodial. The State may dispute that.

Anything you want to add about that, Mr. Greer?

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MR. GREER: No. I would point out, obviously, if the defendant agrees that he made that statement and qualifies it in any way, then, of course, there's no rebuttal.

THE COURT: We'll see what he says, if anything.

MR. GREER: But I am going to have the detective stand by because I don't think I'll be that long on cross.

THE COURT: So are we ready to bring in the jury on cross?

MR. SCHOENBERGER: Yes.

MR. GREER: The State's ready.

THE COURT: Why don't we have Mr. Contreras and the officer step forward and then we'll bring in the jury.

(Jury present.)

THE COURT: Good afternoon, ladies and gentlemen. You can all be seated as you find your seats. We'll continue now with cross-examination of Mr. Contreras-Rebollar, who's already under oath by Mr. Greer.

MR. GREER: Thank you, Your Honor.

1 Q And his car rolled slowly and landed a short distance
2 from where he was shot?

3 A I guess that's what ended up happening.

4 Q And I won't go over all the other evidence of where his
5 gun was found and where the gun of his had gone or
6 gotten in his hands, in his lap, but my question is:
7 You never called the police?

8 A As you're saying that the shells were, like, too close
9 to the thing, the police have already testified that
10 they were driving in and out of that driveway and they
11 didn't even go all the way through that -- all their
12 cars were parked right there, so they testified that it
13 could have been real easy -- I mean, that as the cars
14 were driving, they ran over some of the evidence.

15 And that house right there that you're saying that
16 I couldn't see, actually, you could see it. That house
17 was real close to the alley like that. I mean, it
18 wasn't real close to the end of the driveway where you
19 can't see as you're turning into the street, you know,
20 see the car that was ahead of me.

21 Q My question is: You never called the police?

22 A No.

23 Q You also said that all night long you're trying to take
24 Regina home, a woman you never met before, and she's in
25 the car where you?

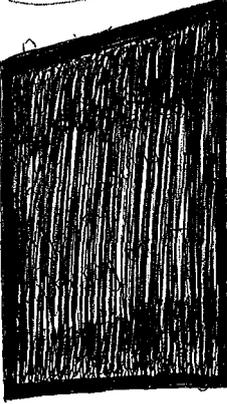
He's saying
the police?

1 mom's or drive them all the way --

2 A No, I was just doing that out of the generosity of my
3 heart, sir. Ahria was a person I had just met a couple
4 of months before and we were just establishing a
5 relationship, so out of the generosity of my heart I
6 just wanted to give them a ride because I know these
7 people are mostly homeless and don't got cars, and I
8 wanted to do it out of the generosity of my heart. I
9 never intended to the effect that you're trying to make
10 it. No, that's not right; that's not true.

5th Amendment

11 Q When the police arrived and arrested you, when they
12 called you down, what you said to them was not, Hey, I
13 was almost killed. What you said to them was: What's
14 this all about; why are you doing this, why am I being
15 arrested, correct?



16 A No, that's incorrect. *If I woulda said yes to this Q, I would of*
course be compelling myself. *the state*
me,

17 Q What did you say?

18 A When I saw -- I was up in the second story, I saw an
19 unmarked car, just like a red --

20 Q What did you say to them, is my question.

21 A I told them, What are you guys doing? I asked them
22 what are they doing, because they never told me who
23 they were or anything. They never identified
24 themselves. The guy was dressed in regular clothes,
25 and, I guess, like he said, he had a rain jacket and he

1 said it had "police" on his back, but I never was able
2 to see his back. To me, it was just a regular guy
3 hopping out of his car with regular clothes and a
4 jacket on, so after when I was down there, I was just
5 asking them what are they doing, who are they.

6 Q And they didn't say "this is the police," anything to
7 that effect?

8 A When I was finally down there, yes. When I was on the
9 ground, they told me they were the police and that I'm
10 a suspect or whatever.

11 Q Isn't it true that when you came out of the room they
12 said: The police. Put your hands to where I can see
13 you. Walk toward me. Come down here. Get on your
14 stomach, hands behind your back?

15 A They got me down the stairs. They never said they were
16 the police.

17 Q I'm haven't asked my question yet. On your stomach
18 with your hands behind your back. After all that did
19 you say, What's this all about?

20 A No. I was getting down on my knees and they were
21 telling me: Get down; get down on your knees. And
22 that's when I was telling them, like, what are they
23 doing, who are they, because they never identified
24 themselves as police; they never said they were police
25 officers.

1 raid jacket. There was a section that flips down here
2 that shows a police standard shield, badge. There's a
3 section that flips down here that says "police", and
4 then in the back in much larger letters it says
5 "police", and by the time I engaged him, I had drawn my
6 duty weapon and announced my presence and the other
7 officers' presence.

8 Q And I need to know specifically what you said to
9 announce your presence.

10 A Specifically, I can't quote myself, but I would imagine
11 it would be something along the lines of: Tacoma
12 police. I need you to follow my directions, et cetera
13 et cetera.

14 Q How far away was the suspect when you first identified
15 yourself?

16 A I would estimate about 60 feet.

17 Q And where was he in relation to where you were?

18 A I was northwest of the Motel Six, the most
19 northwesterly corner. He was to my southeast on an
20 elevated sidewalk to the second floor rooms.

21 Q Both of you on foot?

22 A Yes.

23 Q And when you made the announcement, I guess, did you
24 have eye contact with him?

25 A Yes. He clearly saw me. I positioned myself enough so

1 that he could, in fact, see me.

2 Q How loudly did you make this announcement?

3 A Loud enough to make sure that he no doubt heard what I
4 had to say.

5 Q And were you pointing the gun at him or did you have it
6 ready in case you needed it?

7 A Well, there were the two contacts. When he first
8 exited --

9 Q I'm talking when you made the announcement and drew his
10 attention to you.

11 A Pointed it at him, but at 60 feet away, at him is a
12 relative statement.

13 Q And did he comply with all your directives after that
14 point?

15 A Yes, he did.

16 Q You've testified, I believe, that he came down the
17 stairs and you arrested him. I want you to go in more
18 detail about the actual physical arrest procedure.
19 Once he got down the stairs, what happened?

20 A I was at the base of the stairs, as was Detective Wade,
21 and at gunpoint we directed him to the ground. As I
22 recall, there's a garden area there, and we placed him
23 face down on the ground, which is standard procedure,
24 and I handcuffed him behind his back.

25 Q Did he make any statements during that procedure?

1 A He made multiple statements, questioning what we were
2 doing and why we were doing it.

3 MR. GREER: Thank you. Nothing further.

4 THE COURT: Mr. Schoenberger, any
5 cross-examination?

6 MR. SCHOENBERGER: No further questions.
7 Thank you.

8 THE COURT: Thank you very much, Detective.
9 You can step down.

10 Mr. Greer, any further rebuttal witnesses?

11 MR. GREER: No. The State rests.

12 THE COURT: Any surrebuttal,
13 Mr. Schoenberger?

14 MR. SCHOENBERGER: None, Your Honor.

- 15 THE COURT: Ladies and gentlemen, you've now
16 heard all the testimony in the trial. The next stage
17 of the trial is jury instructions. The attorneys and I
18 are going to spend a little time getting those
19 prepared, so I think the best thing is to let you go
20 home early and then we'll get those all prepared and
21 the first thing tomorrow we'll have the jury
22 instructions presented to you and then closing
23 arguments. So you get out early today and maybe we'll
24 -- no, you won't have to come in early tomorrow, but
25 again, please do not discuss the case among yourselves

1 same thing could happen to you, Regina.

2 Laying on the ground being cuffed: What's this
3 all about? What's this all about? All of those things
4 give you a clear picture, an accurate picture of the
5 defendant's mindset, which is to kill or cause the
6 significant, permanent harm to Mr. Solis, what he
7 actually did, ruthless.

8 Now, beyond a reasonable doubt standard, your
9 instruction says, among other things, that after fully
10 and fairly and carefully considering the evidence, if
11 you have an abiding belief in the truth of the charge,
12 then you're convinced beyond a reasonable doubt.

13 Now, I said -- this would be about the third time
14 I've said this. The first thing I said when I began
15 questioning you in this case is, how important would it
16 be for you to render a verdict that represents the
17 truth about what happened. Everybody agreed that
18 that's important, but the significance at this point
19 is, you don't have to decide the truth of every single
20 thing that happened, the minutia in this case, the
21 conflicting stories of certain events.

22 What you have to decide, what you have been
23 empaneled to decide, is has the State met its burden in
24 proving to you the truth of the elements of the charge.
25 The elements of assault in the first degree are that

1 The defense says reasonable in his eyes and everything;
2 who knows? Other things he knows is himself. He knows
3 what he's about. He knows what he's doing out on those
4 streets.

5 And when you use your common sense, when you
6 analyze the minutia of this case, please step back and
7 look at the big picture. Don't convict because you
8 believe that he's in a gang, that kind of thing.
9 That's not at all what I'm saying, but what I am saying
10 is that these people are not acting reasonably and the
11 defendant doesn't do what most people would do if
12 somebody put a gun at them and called the police, get
13 away, protect their family and themselves in reasonable
14 ways. He goes after him, and that's what he did.

15 When you came in the door, I think it's been a
16 week or so, you knew nothing about this case, a clean
17 slate, and now a totally different story. You're about
18 to get the case and about to discuss it and decide it,
19 and that slate is full of evidence.

20 Use your common sense. Understand that the
21 feelings, the emotions, the analytical part of this is
22 all important, and it's going to settle on you at some
23 point. It could be as soon as you walk in there. It
24 could be whenever. But when you can say with all the
25 doubts, with all the issues you've discussed, that

APPENDIX B

1 pointed weapons at people and had not or needed to
2 arrest them.

3 Q But in this case you knew what you were doing, that you
4 were going to arrest him, and you ordered him at
5 gunpoint to do certain things?

6 A Well, I knew that he was a suspect in a shooting, but I
7 wasn't familiar with the details of it or what level,
8 probable cause, et cetera. I was there to assist in
9 locating and detaining him.

10 MR. SCHOENBERGER: Thank you. I have no
11 further questions.

12 THE COURT: Anything else, Mr. Greer?

13 MR. GREER: No.

14 THE COURT: Just so if I can recall the prior
15 testimony, you were, if I recall right, looking over
16 the car that was there, saw Ms. Hernandez, kind of
17 motioned for her to come down, Mr. Contreras came out
18 of the room, went back in, and then he came out a
19 second time?

20 THE WITNESS: That's correct, Your Honor.

21 THE COURT: How far were you from him?

22 THE WITNESS: I would guess about 60 feet,
23 and he was elevated one story up.

24 THE COURT: He was on the second story
25 walkway?

*He had a gun
he was only
looking 4 him,*

1 Q Did he have anything with him?

2 A Yes.

3 Q What did he have?

4 A He had his gun.

5 Q How was he carrying it?

6 A Like a baby.

7 Q Did he have anything covering it?

8 A Yeah, his coat.

9 Q What coat?

10 A Excuse me?

11 Q What coat?

12 A His coat that he had on.

13 Q What color was his coat?

14 A I don't remember.

15 Q So he went back into the room or did he make it that
16 far?

17 A I don't know, sir. I was already with the police.

18 Q So explain again. You walked out of the room and
19 somehow the police let themselves be known or else you
20 saw them. What happened?

21 A I saw them.

22 Q And what happened?

23 A They took me into custody in the car and I just stayed
24 in the car. It wasn't quiet.

25 Q Did they yell at you?

★1 A They said, "Are you hit?" And they lifted up my
2 clothes. They were like: ~~There's blood on your~~
3 friend's doorstep. Everybody is worried about you,
4 your mom and friend's, people I didn't even know that
5 cared about me that were worried about me. I was fine.
6 And then he came down and they had him in handcuffs and
- 7 they were looking at him too, making sure he wasn't
8 shot. They said they couldn't find no gun, and then
★9 probably about four or five minutes later they said, We
10 found a gun.

11 Q Where were you placed after you were placed under
12 arrest?

13 A I went into an interview room.

14 Q Did you go into a patrol car first?

15 A Yes, sir.

16 Q Was the defendant put in the same patrol car?

17 A No, sir.

18 Q When you were put in the patrol car, did you start
19 talking about what happened?

20 A No, sir. I don't remember.

21 Q Where were you taken?

22 A A police station that used to be Costco.

23 Q Their newest headquarters?

24 A Yeah.

25 Q And once you got there to an interview room, did you

1 that just from your memory?

2 A I remember Sgt. Davidson and Lindsey Wade, Detective

hnd to his 1st
where it was
Miller 4 sure.

3 Wade, and myself. I'll not sure about Miller or

4 Graham, but one or the other, I believe, was there.

5 Q And were there patrol officers also involved in the
6 initial response to that location?

7 A They, I think, were in the area but were not directly
8 with us.

9 Q Is it common for detectives to actually go make contact
10 with witnesses that may be involved in a case like this
11 versus patrol officers?

12 A Yes. We wanted to try to attempt to locate the vehicle
13 that was related to the investigation and without
14 showing that the vehicle had been identified using
15 unmarked cars, that sort of thing.

16 Q So when you're working like this, are you in uniform or
17 the other detectives or sergeant?

18 A No, but on this day I had a jacket on with a flap
19 pulled down identifying myself as the police.

20 Q And the vehicles you're driving are unmarked; is that
21 correct?

22 A Yes.

23 Q So when you got there, were you successful, you and the
24 other officers, in finding a vehicle that matched the
25 description?

1 A Very similar description, yes, parked on the north side
2 of Motel Six.

3 Q What happened next?

★ 4 A I got out of the vehicle, and I was moving around a
5 hedge in an attempt to get the license number of the
#6 vehicle to verify the identity and the registered
7 owner, and as I did so, Ms. Hernandez, later identified
8 as Ms. Hernandez, a female, exited an upper unit near
9 212 and was walking across an elevated sidewalk.

10 Q So did you have a physical description of her before
11 you got there?

★ 12 A A basic one. I didn't know if this, in fact, was
13 Ms. Hernandez, but she was similar in appearance, and
14 she took notice of me immediately.

15 Q What do you mean by that?

16 A She looked down. I was probably 60 feet away, and she
17 just focused in on me, and it did say "police" on the
18 front of my coat, and she kind of had a startled look
19 on her face.

20 Q What did she do next?

21 A I ordered her to continue walking around the elevated
22 sidewalk to the left side of the complex.

23 Q Did you notice whether she closed the door to 212 or
24 not at that time?

25 A I don't recall. I was more focused on her.

APPENDIX C

Cite as 86 S.Ct. 1602 (1966)

defendant's Fifth Amendment privilege where federal interrogation was conducted immediately following state interrogation in same police station and in same compelling circumstances, after state interrogation in which no warnings were given, so that federal agents were beneficiaries of pressure applied by local in-custody interrogation; however, law enforcement authorities are not necessarily precluded from questioning any individual who has been held for period of time by other authorities and interrogated by them without appropriate warning.

80. Courts \Leftrightarrow 393

California Supreme Court decision directing that state defendant be retried was final judgment, from which state could appeal to federal Supreme Court, since in event defendant were successful in obtaining acquittal on retrial state would have no appeal. 28 U.S.C.A. § 1257(3).

81. Criminal Law \Leftrightarrow 1144(12)

In dealing with custodial interrogation, court will not presume that defendant has been effectively apprised of rights and that his privilege against self-incrimination has been adequately safeguarded on record that does not show that any warnings have been given or that any effective alternative has been employed, nor can knowing and intelligent waiver of those rights be assumed on silent record. U.S.C.A.Const. Amend. 5.

82. Constitutional Law \Leftrightarrow 266

Criminal Law \Leftrightarrow 412.1(4), 412.2(3)

State defendant's inculpatory statement obtained in incommunicado interrogation was inadmissible as obtained in violation of Fifth Amendment privilege where record did not specifically disclose whether defendant had been advised of his rights, he was interrogated on nine separate occasions over five days' detention, and record was silent as to waiver. U.S.C.A.Const. Amend. 5.

No. 759:

438

John J. Flynn, Phoenix, Ariz., for petitioner.

Gary K. Nelson, Phoenix, Ariz., for respondent.

Telford Taylor, New York City, for State of New York, as amicus curiæ, by special leave of Court. (Also in Nos. 584, 760, 761 and 762)

439

Duane R. Nedrud, for National District Attorneys Ass'n, as amicus curiæ, by special leave of Court. (Also in Nos. 760, 762 and 584)

No. 760:

Victor M. Earle, III, New York City, for petitioner.

William I. Siegel, Brooklyn, for respondent.

No. 761:

F. Conger Fawcett, San Francisco, Cal., for petitioner.

Sol. Gen. Thurgood Marshall, for respondent.

No. 584:

Gordon Ringer, Los Angeles, Cal., for petitioner.

William A. Norris, Los Angeles, Cal., for respondent.

Mr. Chief Justice WARREN delivered the opinion of the Court.

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.

440

We dealt with certain phases of this problem recently in *Escobedo v. State of*

★
68. Criminal Law ⇨3.7(1)

Fifth Amendment provision that individual cannot be compelled to be witness against himself cannot be abridged. U.S.C.A.Const. Amend. 5.

had full knowledge of his legal rights. U.S.C.A.Const. Amends. 5, 6.

69. Criminal Law ⇨641.1

In fulfilling responsibility to protect rights of client, attorney plays vital role in administration of criminal justice. U.S.C.A.Const. Amend. 6.

75. Criminal Law ⇨412.2(5)

Mere fact that interrogated defendant signed statement which contained typed in clause stating that he had full knowledge of his legal rights did not approach knowing and intelligent waiver required to relinquish constitutional rights to counsel and privilege against self-incrimination.

70. Criminal Law ⇨641.4(1)

Interviewing agent must exercise his judgment in determining whether individual waives right to counsel, but standard for waiver is high and ultimate responsibility for resolving constitutional question lies with courts.

76. Constitutional Law ⇨266

Criminal Law ⇨518(2)

State defendant's oral confession obtained during incommunicado interrogation was inadmissible where he had not been warned of any of his rights before questioning, and thus was not effectively apprised of Fifth Amendment privilege or right to have counsel present. U.S.C.A.Const. Amends. 5, 6.

71. Criminal Law ⇨412.1(4)

Constitution does not require any specific code of procedures for protecting privilege against self-incrimination during custodial interrogation, and Congress and states are free to develop their own safeguards for privilege, so long as they are fully as effective as those required by court. U.S.C.A.Const. Amend. 5.

77. Criminal Law ⇨518(3), 519(9)

Confessions obtained by federal agents in incommunicado interrogation were not admissible in federal prosecution, although federal agents gave warning of defendant's right to counsel and to remain silent, where defendant had been arrested by state authorities who detained and interrogated him for lengthy period, both at night and the following morning, without giving warning, and confessions were obtained after some two hours of questioning by federal agents in same police station. U.S.C.A.Const. Amends. 5, 6.

72. Constitutional Law ⇨46(1)

Issues of admissibility of statements taken during custodial interrogation were of constitutional dimension and must be determined by courts.

73. Constitutional Law ⇨38

Where rights secured by Constitution are involved, there can be no rule making or legislation which would abrogate them.

74. Constitutional Law ⇨266

Criminal Law ⇨412.1(4), 412.2(3)

Statements taken by police in incommunicado interrogation were inadmissible in state prosecution, where defendant had not been in any way apprised of his right to consult with attorney or to have one present during interrogation, and his Fifth Amendment right not to be compelled to incriminate himself was not effectively protected in any other manner, even though he signed statement which contained typed in clause that he

78. Criminal Law ⇨1036(1)

Defendant's failure to object to introduction of his confession at trial was not a waiver of claim of constitutional inadmissibility, and did not preclude Supreme Court's consideration of issue, where trial was held prior to decision in Escobedo v. Illinois.

79. Criminal Law ⇨412.2(3)

Federal agents' giving of warning alone was not sufficient to protect de-

384 U.S. 436

Ernesto A. MIRANDA, Petitioner,

v.

STATE OF ARIZONA.

Michael VIGNERA, Petitioner,

v.

STATE OF NEW YORK.

Carl Calvin WESTOVER, Petitioner,

v.

UNITED STATES.

STATE OF CALIFORNIA, Petitioner,

v.

Roy Allen STEWART.

Nos. 759-761, 584.

Argued Feb. 28, March 1 and 2, 1966.

Decided June 13, 1966.

Rehearing Denied No. 584

Oct. 10, 1966.

See 87 S.Ct. 11.

Criminal prosecutions. The Superior Court, Maricopa County, Arizona, rendered judgment, and the Supreme Court of Arizona, 98 Ariz. 18, 401 P.2d 721, affirmed. The Supreme Court, Kings County, New York, rendered judgment, and the Supreme Court, Appellate Division, Second Department, 21 A.D.2d 752, 252 N.Y.S.2d 19, affirmed, as did the Court of Appeals of the State of New York at 15 N.Y.2d 970, 259 N.Y.S.2d 857, 207 N.E.2d 527. The United States District Court for the Northern District of California, Northern Division, rendered judgment, and the United States Court of Appeals for the Ninth Circuit, 342 F.2d 684, affirmed. The Superior Court, Los Angeles County, California, rendered judgment and the Supreme Court of California, 62 Cal.2d 571, 43 Cal. Rptr. 201, 400 P.2d 97, reversed. In the first three cases, defendants obtained certiorari, and the State of California obtained certiorari in the fourth case. The Supreme Court, Mr. Chief Justice Warren, held that statements obtained from defendants during incommunicado interrogation in police-dominated atmosphere, without full warning of constitu-

tional rights, were inadmissible as having been obtained in violation of Fifth Amendment privilege against self-incrimination.

Judgments in first three cases reversed and judgment in fourth case affirmed.

Mr. Justice Harlan, Mr. Justice Stewart, and Mr. Justice White dissented; Mr. Justice Clark dissented in part.

1. Courts ⇨397½

Certiorari was granted in cases involving admissibility of defendants' statements to police to explore some facets of problems of applying privilege against self-incrimination to in-custody interrogation and to give concrete constitutional guidelines for law enforcement agencies and courts to follow.

2. Criminal Law ⇨398(1), 641.1

Constitutional rights to assistance of counsel and protection against self-incrimination were secured for ages to come and designed to approach immortality as nearly as human institutions can approach it. U.S.C.A.Const. Amends. 5, 6.

3. Criminal Law ⇨412.1(4)

Prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of defendant unless it demonstrates use of procedural safeguards effective to secure privilege against self-incrimination. U.S.C.A.Const. Amend. 5.

4. Criminal Law ⇨412.1(4)

"Custodial interrogation", within rule limiting admissibility of statements stemming from such interrogation, means questioning initiated by law enforcement officers after person has been taken into custody or otherwise deprived of his freedom of action in any significant way. U.S.C.A.Const. Amend. 5.

See publication Words and Phrases for other judicial constructions and definitions.

1602-1664

5. Criminal Law ⇨412.2(3)

Unless other fully effective means are devised to inform accused person of the right to silence and to assure continuous opportunity to exercise it, person must, before any questioning, be warned that he has right to remain silent, that any statement he does make may be used as evidence against him, and that he has right to presence of attorney, retained or appointed. U.S.C.A.Const. Amend. 5.

6. Criminal Law ⇨641.4(1)

Defendant may waive effectuation of right to counsel and to remain silent, provided that waiver is made voluntarily, knowingly and intelligently. U.S.C.A. Const. Amends. 5, 6.

7. Criminal Law ⇨412.2(1)

There can be no questioning if defendant indicates in any manner and at any stage of interrogation process that he wishes to consult with attorney before speaking. U.S.C.A.Const. Amend. 6.

8. Criminal Law ⇨412.1(4)

Police may not question individual if he is alone and indicates in any manner that he does not wish to be interrogated.

9. Criminal Law ⇨412.2(1)

⌘ Mere fact that accused may have answered some questions or volunteered some statements on his own does not deprive him of right to refrain from answering any further inquiries until he has consulted with attorney and thereafter consents to be questioned. U.S.C.A. Const. Amends. 5, 6.

10. Criminal Law ⇨412.1(1)

⌘ Coercion can be mental as well as physical and blood of accused is not the only hallmark of unconstitutional inquisition. U.S.C.A.Const. Amend. 5.

11. Criminal Law ⇨412.1(4)

Incommunicado interrogation of individuals in police-dominated atmosphere, while not physical intimidation, is equally destructive of human dignity, and current practice is at odds with principle that individual may not be compelled to

incriminate himself. U.S.C.A.Const. Amend. 5.

12. Criminal Law ⇨393(1)

Privilege against self-incrimination is in part individual's substantive right to private enclave where he may lead private life. U.S.C.A.Const. Amend. 5.

13. Criminal Law ⇨393(1)

Constitutional foundation underlying privilege against self-incrimination is the respect a government, state or federal, must accord to dignity and integrity of its citizens.

14. Criminal Law ⇨393(1)

Government seeking to punish individual must produce evidence against him by its own independent labors, rather than by cruel, simple expedient of compelling it from his own mouth. U.S.C.A. Const. Amend. 5.

15. Criminal Law ⇨393(1)

Privilege against self-incrimination is fulfilled only when person is guaranteed right to remain silent unless he chooses to speak in unfettered exercise of his own will. U.S.C.A.Const. Amend. 5.

16. Criminal Law ⇨393(1)

Individual swept from familiar surroundings into police custody, surrounded by antagonistic forces and subjected to techniques of persuasion employed by police, cannot be otherwise than under compulsion to speak. U.S.C.A.Const. Amend. 5.

17. Arrest ⇨68

When federal officials arrest individuals they must always comply with dictates of congressional legislation and cases thereunder. Fed.Rules Crim.Proc. rule 5(a), 18 U.S.C.A.

18. Criminal Law ⇨517.1(1)

Defendant's constitutional rights have been violated if his conviction is based, in whole or in part, on involuntary confession, regardless of its truth or falsity, even if there is ample evidence aside from confession to support conviction.

pealed during his trial gained popular acceptance in England.²⁸ These sentiments worked their way over to the Colonies and were implanted after great struggle into the Bill of Rights.²⁹ Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that "illegitimate and unconstitutional practices get their first footing * * * by silent approaches and slight deviations from legal modes of procedure." *Boyd v. United States*, 116 U. S. 616, 635, 6 S.Ct. 524, 535, 29 L.Ed. 746 (1886). The privilege was elevated to constitutional status and has always been "as broad as the mischief

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against which it seeks to guard." *Counselman v. Hitchcock*, 142 U.S. 547, 562, 12 S.Ct. 195, 198, 35 L.Ed. 1110 (1892). We cannot depart from this noble heritage.

[12-15] Thus we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. As a "noble principle often transcends its origins," the privilege has come rightfully to be recognized in part as an individual's substantive right, a "right to a private enclave where he may lead a private life. That right is the hallmark of our democracy." *United States v. Grunewald*, 238 F.2d 556, 579, 581-582 (Frank, J., dissenting), rev'd, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957). We have recently noted that the privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values, *Murphy v. Waterfront Comm. of New York Harbor*, 378 U.S. 52, 55-57, n. 5, 84 S.Ct. 1594, 1596-1597, 12 L.Ed.2d 678 (1964); *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 414-415, n. 12, 86 S.Ct. 459, 464,

28. See Morgan, *The Privilege Against Self-Incrimination*, 34 *Minn.L.Rev.* 1, 9-11 (1949); 8 Wigmore, *Evidence* 285-295 (McNaughton rev. 1961). See also Lowell, *The Judicial Use of Torture*, Parts I and II, 11 *Harv.L.Rev.* 220, 290 (1897).

15 L.Ed.2d 453 (1966). All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," 8 Wigmore, *Evidence* 317 (McNaughton rev. 1961), to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. *Chambers v. State of Florida*, 309 U.S. 227, 235-238, 60 S.Ct. 472, 476-477, 84 L.Ed. 716 (1940). In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy v. Hogan*, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653 (1964).

[16] The question in these cases is whether the privilege is fully applicable during a period of custodial interrogation.

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In this Court, the privilege has consistently been accorded a liberal construction. *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 81, 86 S.Ct. 194, 200, 15 L.Ed.2d 165 (1965); *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed.2d 1118 (1951); *Arnstein v. McCarthy*, 254 U.S. 71, 72-73, 41 S.Ct. 26, 65 L.Ed. 138 (1920); *Counselman v. Hitchcock*, 142 U.S. 547, 562, 12 S.Ct. 195, 197, 35 L.Ed. 1110 (1892). We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by

29. See Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 *Va.L.Rev.* 763 (1935); *Ullmann v. United States*, 350 U.S. 422, 445-449, 76 S.Ct. 497, 510-512, 100 L.Ed. 511 (1956) (Douglas, J., dissenting).

statements are taken from an individual during interrogation obviously enhances the integrity of the fact-finding processes in court. The presence of an attorney, and the warnings delivered to the individual, enable the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process. Without the protections flowing from adequate warning and the rights of counsel, "all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police." *Mapp v. Ohio*, 367 U.S. 643, 685, 81 S.Ct. 1684, 1707, 6 L.Ed.2d 1081 (1961) (Harlan, J., dissenting). Cf. *Pointer v. State of Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

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III.

[23, 24] Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his

Yale L.J. 1000, 1048-1051 (1964); Comment, 31 U.Chi.L.Rev. 313, 320 (1964) and authorities cited.

rights and the exercise of those rights must be fully honored.

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional strait-jacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.

[25-28] At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and

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unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury.³⁷ Fur-

37. See p. 1617, supra. Lord Devlin has commented:

"It is probable that even today, when there is much less ignorance about these

Cite as 86 S.Ct. 1602 (1966)

[55-57] Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege. Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.

[58-60] The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant. No distinction can be drawn between statements which are direct confessions and statements which amount to "admissions" of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly,

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for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory." If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testi-

mony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement. In *Escobedo* itself, the defendant fully intended his accusation of another as the slayer to be exculpatory as to himself.

The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station ~~or otherwise deprived of his freedom of action in any significant way.~~ *arrested* It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries. Under the system of warnings we delineate today or under any other system which may be devised and found effective, the safeguards to be erected about the privilege must come into play at this point.

[61, 62] Our decision is not intended to hamper the traditional function of police officers in investigating crime. See *Escobedo v. State of Illinois*, 378 U.S. 478, 492, 84 S.Ct. 1758, 1765. When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of

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responsible citizenship for individuals to give whatever information they may have to aid in

to answer others, that decision has no application to the interrogation situation we deal with today. No legislative or judicial fact-finding authority is involved here, nor is there a possibility that

the individual might make self-serving statements of which he could make use at trial while refusing to answer incriminating statements.

367 U.S. 568, 635, 81 S.Ct. 1860, 1896, 6 L.Ed.2d 1037 (concurring opinion of The Chief Justice), flexible in its ability to respond to the endless mutations of fact presented, and ever more familiar to the lower courts.

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Of course, strict certainty is not obtained in this developing process, but this is often so with constitutional principles, and disagreement is usually confined to that borderland of close cases where it matters least.

The second point is that in practice and from time to time in principle, the Court has given ample recognition to society's interest in suspect questioning as an instrument of law enforcement. Cases countenancing quite significant pressures can be cited without difficulty,⁵ and the lower courts may often have been yet more tolerant. Of course the limitations imposed today were rejected by necessary implication in case after case, the right to warnings having been explicitly rebuffed in this Court many years ago. *Powers v. United States*, 223 U.S. 303, 32 S.Ct. 281, 56 L.Ed. 448; *Wilson v. United States*, 162 U.S. 613, 16 S.Ct. 895, 40 L.Ed. 1090. As recently as *Haynes v. State of Washington*, 373 U.S. 503, 515, 83 S.Ct. 1336, 1344, the Court openly acknowledged that questioning of witnesses and suspects "is undoubtedly an essential tool in effective law enforcement." *Accord, Crooker v. State of California*, 357 U.S. 433, 441, 78 S.Ct. 1287, 1292.

Finally, the cases disclose that the language in many of the opinions overstates the actual course of decision. It has been said, for example, that an admissible confession must be made by the suspect "in the unfettered exercise of his own will," *Malloy v. Hogan*, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653, and that "a prisoner is not 'to be made the de-

5. See the cases synopsised in *Herman*, supra, n. 4, at 456, nn. 36-39. One not too distant example is *Stroble v. State of California*, 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872, in which the suspect was kick-

luded instrument of his own conviction,' " *Culombe v. Connecticut*, 367 U.S. 568, 581, 81 S.Ct. 1860, 1867, 6 L.Ed.2d 1037 (Frankfurter, J., announcing the Court's judgment and an opinion). Though often repeated, such principles are rarely observed in full measure. Even the word "voluntary" may be deemed somewhat

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misleading, especially when one considers many of the confessions that have been brought under its umbrella. See, e. g., supra, n. 5. The tendency to overstate may be laid in part to the flagrant facts often before the Court; but in any event one must recognize how it has tempered attitudes and lent some color of authority to the approach now taken by the Court.

I turn now to the Court's asserted reliance on the Fifth Amendment, an approach which I frankly regard as a *trompe l'oeil*. The Court's opinion in my view reveals no adequate basis for extending the Fifth Amendment's privilege against self-incrimination to the police station. Far more important, it fails to show that the Court's new rules are well supported, let alone compelled, by Fifth Amendment precedents. Instead, the new rules actually derive from quotation and analogy drawn from precedents under the Sixth Amendment, which should properly have no bearing on police interrogation.

The Court's opening contention, that the Fifth Amendment governs police station confessions, is perhaps not an impermissible extension of the law but it has little to commend itself in the present circumstances. Historically, the privilege against self-incrimination did not bear at all on the use of extra-legal confessions, for which distinct standards evolved; indeed, "the *history* of the two principles is wide apart, differing by one hundred years in origin, and derived through sep-

ed and threatened after his arrest, questioned a little later for two hours, and isolated from a lawyer trying to see him; the resulting confession was held admissible.

APPENDIX

D

426 U.S. 610, 48 L.Ed.2d 91
Jefferson DOYLE, Petitioner,

v.

State of OHIO.

Richard WOOD, Petitioner,

v.

State of OHIO.

Nos. 75-5014, 75-5015.

Argued Feb. 23, 1976.

Decided June 17, 1976.

Defendants were convicted before the Common Pleas Court of Tuscarawas County, Ohio, of selling marihuana, and they appealed. The Court of Appeals of Tuscarawas County, affirmed, and certiorari was granted. The Supreme Court, Mr. Justice Powell, held that although the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings, that where defendants, who were given the Miranda warnings on arrest, did not complain to arresting officer that they had been framed but gave their exculpatory story for first time at trial, prosecutor's cross-examining defendants as to why they had not told the frame-up story on arrest violated due process and that cross-examination as to defendants' postarrest silence was not justified on grounds of necessity, i. e., that discrepancy gave rise to inference that story was fabricated and that such cross-examination was necessary in order to present to the jury all information relevant to the truth of such story.

Reversed and remanded.

Mr. Justice Stevens filed dissenting opinion in which Mr. Justice Blackmun and Mr. Justice Rehnquist joined.

1. Constitutional Law ⇌ 266(1)

Witnesses ⇌ 347

A state prosecutor may not seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-ex-

amining the defendant about his failure to have told the story after receiving Miranda warnings at time of his arrest; use of a defendant's postarrest silence in such manner violates due process. U.S.C.A.Const. Amends. 5, 14.

2. Witnesses ⇌ 330(1)

Prosecutors are allowed wide leeway in the scope of impeachment cross-examination.

3. Constitutional Law ⇌ 266(1)

Witnesses ⇌ 347

Where at time of arrest defendants were given the Miranda warnings, i. e., warnings of right to counsel and to remain silent, but it was not until they took the stand that defendants contended that they had been framed, prosecutor's impeaching defendant's trial testimony by cross-examining them as to why they had not told the frame-up story to the police at time of the arrest violated due process; asserted need to present to the jury all information relevant to truth of the exculpatory story did not justify the prosecutor's action. U.S.C.A.Const. Amends. 5, 14.

4. Criminal Law ⇌ 412.2(3)

The Miranda rule, which is a prophylactic means of safeguarding Fifth Amendment rights, requires that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him and that he has a right to retained or appointed counsel before submitting to interrogation. U.S.C.A.Const. Amend. 5.

5. Witnesses ⇌ 347

Silence in wake of Miranda warnings, i. e., right to counsel and to remain silent, may be nothing more than the arrestee's exercise of his rights; thus, every postarrest silence is insolubly ambiguous because of what the state is required to advise the person arrested and, hence, an arrestee's silence does not give rise to a permissible inference that a subsequent exculpatory story has been fabricated and does not permit impeachment of such story by use of his

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| 52 | 96 | 2831 | 397 | 96 | 3141 | 902 | 96 | 3204 | 904 | 96 | 3212 | 908 | 96 | 3219 | 910 | 96 | 3225 | 910 | 96 | 3225 | | | |
| 106 | 96 | 2868 | 433 | 96 | 3021 | 903 | 96 | 3204 | 905 | 96 | 3213 | 909 | 96 | 3220 | 911 | 96 | 3225 | 911 | 96 | 3225 | | | |
| 132 | 96 | 2857 | 465 | 96 | 3037 | 903 | 96 | 3205 | 906 | 96 | 3214 | 909 | 96 | 3221 | 911 | 96 | 3226 | 911 | 96 | 3226 | | | |
| 153 | 96 | 2909 | 543 | 96 | 3074 | 903 | 96 | 3206 | 906 | 96 | 3215 | 910 | 96 | 3220 | 911 | 96 | 3227 | 911 | 96 | 3227 | | | |
| 242 | 96 | 2960 | 579 | 96 | 3110 | 903 | 96 | 3207 | 907 | 96 | 3215 | 910 | 96 | 3221 | 912 | 96 | 3227 | 912 | 96 | 3227 | | | |
| 262 | 96 | 2950 | 901 | 96 | 3201 | 903 | 96 | 3208 | 907 | 96 | 3216 | 910 | 96 | 3222 | 913 | 96 | 3228 | 913 | 96 | 3228 | | | |
| 280 | 96 | 2978 | 901 | 96 | 3202 | 904 | 96 | 3209 | 907 | 96 | 3217 | 910 | 96 | 3223 | 923 | 96 | 3234 | 923 | 96 | 3234 | | | |
| 325 | 96 | 3001 | 902 | 96 | 3202 | 904 | 96 | 3210 | 907 | 96 | 3218 | | | | | | | | | | | | |



██████████ recommended I look into these cases while we were at class:

- 1.) Unconstitutional to comment on Defendant's Guilt
State v. Farr-Lenzini, 93 Wh.App. 453 (1999)
- 2.) State v. Olmedo, 112 Wh.App. 525 (2002)

Cite as 96 S.Ct. 2240 (1976)

silence at time of arrest. U.S.C.A.Const. Amend. 5.

6. Constitutional Law ⇌ 266(1)

Witnesses ⇌ 347

— Although the Miranda warnings, i. e., warnings of right to counsel and right to remain silent, contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings and, hence, it would be fundamentally unfair and a deprivation of due process to allow a defendant's silence at time of arrest to be used to impeach an exculpatory story proffered for the first time at trial, regardless of whether reliance on the Miranda warnings is offered as a justification in objecting to such cross-examination. U.S.C.A.Const. Amends. 5, 14.

7. Witnesses ⇌ 398(1)

Fact of postarrest silence in face of Miranda warnings, i. e., warnings of right to counsel and to remain silent, can be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version on arrest; in such situation the fact of earlier silence is not impermissibly being used to impeach the exculpatory story, but, rather, to challenge the defendant's testimony as to his behavior following arrest. U.S.C.A.Const. Amends. 5, 14.

Syllabus *

During the course of their state criminal trials petitioners, who after arrest were given warnings in line with *Miranda v. Arizona*, 384 U.S. 436, 467-473, 86 S.Ct. 1602, 1624-1627, 16 L.Ed.2d 694, took the stand and gave an exculpatory story that they had not previously told to the police or the prosecutor. Over their counsel's objection, they were cross-examined as to why they had not given the arresting officer the ex-

culpatory explanations. Petitioners were convicted, and their convictions were upheld on appeal. *Held*: The use for impeachment purposes of petitioners' silence, at the time of arrest and after they received *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment. Post-arrest silence following such warnings is insolubly ambiguous; moreover, it would be fundamentally unfair to allow an arrestee's silence to be used to impeach an explanation subsequently given at trial after he had been impliedly assured, by the *Miranda* warnings, that silence would carry no penalty. Pp. 2244-2246.

Reversed and remanded.

James R. Willis, Cleveland, Ohio, for petitioners.

Ronald L. Collins, New Philadelphia, Ohio, for the respondent, pro hac vice, by special leave of Court.

Mr. Justice POWELL delivered the opinion of the Court.

[1] The question in these consolidated cases is whether a state prosecutor may seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda* warnings¹ at the time of his arrest. We conclude that use of the defendant's post-arrest silence in this manner violates due process, and therefore reverse the convictions of both petitioners.

I

Petitioners Doyle and Wood were arrested together and charged with selling 10 pounds of marihuana to a local narcotics bureau informant. They were convicted in the Common Pleas Court of Tuscarawas

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1. *Miranda v. Arizona*, 384 U.S. 436, 467-473, 86 S.Ct. 1602, 1624-1627, 16 L.Ed.2d 694 (1966).

County, Ohio, in separate trials held about one week apart. The evidence at their trials was identical in all material respects.

The State's witnesses sketched a picture of a routine marihuana transaction. William Bonnell, a well-known "street person" with a long criminal record, offered to assist the local narcotics investigation unit in setting up drug "pushers" in return for support in his efforts to receive lenient treatment in his latest legal problems. The narcotics agents agreed. A short time later, Bonnell advised the unit that he had arranged a "buy" of 10 pounds of marihuana and needed \$1,750 to pay for it. Since the banks were closed and time was short, the agents were able to collect only \$1,320. Bonnell took this money and left for the rendezvous, under surveillance by four narcotics agents in two cars. As planned, he met petitioners in a bar in Dover, Ohio. From there, he and petitioner Wood drove ¹⁶¹² in Bonnell's pickup truck to the nearby town of New Philadelphia, Ohio, while petitioner Doyle drove off to obtain the marihuana and then meet them at a prearranged location in New Philadelphia. The narcotics agents followed the Bonnell truck. When Doyle arrived at Bonnell's waiting truck in New Philadelphia, the two vehicles proceeded to a parking lot where the transaction took place. Bonnell left in his truck, and Doyle and Wood departed in Doyle's car. They quickly discovered that they had been paid \$430 less than the agreed-upon price, and began circling the neighborhood looking for Bonnell. They were stopped within minutes by New Philadelphia police acting on radioed instructions from the narcotics agents. One of those agents, Kenneth Beamer, arrived on the scene promptly, arrested petitioners, and gave them *Mi-*

2. Defense counsel's efforts were not totally successful. One of the four narcotics agents testified at both trials that he had seen the package passed through the window of Doyle's car to Bonnell. In an effort to impeach that testimony, defense counsel played a tape of the preliminary hearing at which the same agent had testified only to seeing the package under

randa warnings. A search of the car, authorized by warrant, uncovered the \$1,320.

At both trials, defense counsel's cross-examination of the participating narcotics agents was aimed primarily at establishing that due to a limited view of the parking lot, none of them had seen the actual transaction but had seen only Bonnell standing next to Doyle's car with a package under his arm, presumably after the transaction.² Each petitioner took the stand at his trial and admitted practically everything about the State's case except the most crucial point: who was selling marihuana to ¹⁶¹³ whom. According to petitioners, Bonnell had framed them. The arrangement had been for Bonnell to sell Doyle 10 pounds of marihuana. Doyle had left the Dover bar for the purpose of borrowing the necessary money, but while driving by himself had decided that he only wanted one or two pounds instead of the agreed-upon 10 pounds. When Bonnell reached Doyle's car in the New Philadelphia parking lot, with the marihuana under his arm, Doyle tried to explain his change of mind. Bonnell grew angry, threw the \$1,320 into Doyle's car, and took all 10 pounds of the marihuana back to his truck. The ensuing chase was the effort of Wood and Doyle to catch Bonnell to find out what the \$1,320 was all about.

Petitioners' explanation of the events presented some difficulty for the prosecution, as it was not entirely implausible and there was little if any direct evidence to contradict it.³ As part of a wide-ranging cross-examination for impeachment purposes, and in an effort to undercut the explanation, the prosecutor asked each petitioner at his respective trial why he had not told the frameup story to Agent Beamer when he arrested petitioners. In the first

Bonnell's arm. The agent did not retract his trial testimony, and both he and the prosecutor explained the apparent inconsistency by noting that the examination at the preliminary hearing had not focused upon whether anyone had seen the package pass to Bonnell.

3. See n. 2, *supra*.

trial, that of petitioner Wood, the following colloquy occurred:⁴

"Q. [By the prosecutor.] Mr. Beamer did arrive on the scene?

"A. [By Wood.] Yes, he did.

"Q. And I assume you told him all about what happened to you?

"A. No.

1614 "Q. You didn't tell Mr. Beamer?

"A. No.

"Q. You didn't tell Mr. Beamer this guy put \$1,300 in your car?

"A. No, sir.

"Q. And we can't understand any reason why anyone would put money in your car and you were chasing him around town and trying to give it back?

"A. I didn't understand that.

"Q. You mean you didn't tell him that?

"A. Tell him what?

4. Trial transcript in *Ohio v. Wood*, No. 10657, Common Pleas Court, Tuscarawas County, Ohio (hereafter Wood Tr.), 465-470.

5. Trial transcript in *Ohio v. Doyle*, No. 10656, Common Pleas Court, Tuscarawas County, Ohio (hereafter Doyle Tr.), 504-507:

"Q. [By the prosecutor.] . . . You are innocent?

"A. [By Doyle.] I am innocent. Yes Sir.

"Q. That's why you told the police department and Kenneth Beamer when they arrived—

"(Continuing.)—about your innocence?

"A. . . . I didn't tell them about my innocence. No.

"Q. You said nothing at all about how you had been set up?

"Q. Did Mr. Wood?

"A. Not that I recall, Sir.

"Q. Mr. Wood, if that is all you had to do with this and you are innocent, when Mr. Beamer arrived on the scene why didn't you tell him?

"Q. But in any event you didn't bother to tell Mr. Beamer anything about this?

"A. No, sir."

Defense counsel's timely objections to the above questions of the prosecutor were overruled. The cross-examination of petitioner Doyle at his trial contained a similar exchange, and again defense counsel's timely objections were overruled.⁵

1615 Each petitioner appealed to the Court of Appeals, Fifth District, Tuscarawas County, alleging, *inter alia*, that the trial court erred in allowing the prosecutor to cross-examine the petitioner at his trial about his post-arrest silence. The Court of Appeals affirmed the convictions, stating as to the contentions about the post-arrest silence:

"This was not evidence offered by the state in its case in chief as confession by silence or as substantive evidence of guilt but rather cross examination 1616 of a witness as to why he had not told the same story earlier at his first opportunity.

"Q. As a matter of fact, if I recall your testimony correctly, you said instead of protesting your innocence, as you do today, you said in response to a question of Mr. Beamer,— 'I don't know what you are talking about.'

"A. I believe what I said,—'What's this all about?' If I remember, that's the only thing I said.

"A. I was questioning, you know, what it was about. That's what I didn't know. I knew that I was trying to buy, which was wrong, but I didn't know what was going on. I didn't know that Bill Bonnell was trying to frame me, or what-have-you.

"Q. All right,—But you didn't protest your innocence at that time?

"A. Not until I knew what was going on."

In addition, the court in both trials permitted the prosecutor, over more objections, to argue petitioners' post-arrest silence to the jury. Closing Argument of Prosecutor 13-14, supplementing Wood Tr.; Doyle Tr. 515, 526.

"We find no error in this. It goes to credibility of the witness."

The Supreme Court of Ohio denied further review. We granted certiorari to decide whether impeachment use of a defendant's post-arrest silence violates any provision of the Constitution,⁶ a question left open last Term in *United States v. Hale*, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975), and on which the Federal Courts of Appeals are in conflict. See *id.*, at 173 n. 2, 95 S.Ct., at 2135.

II

The State pleads necessity as justification for the prosecutor's action in these cases. It argues that the discrepancy between an exculpatory story at trial and silence at time of arrest gives rise to an inference that the story was fabricated somewhere along the way, perhaps to fit within the seams of the State's case as it was developed at pretrial hearings. Noting that the prosecution usually has little else with which to counter such an exculpatory story, the State seeks only the right to cross-examine a defendant as to post-arrest silence for the limited purpose of impeachment. In support of its position the State emphasizes the importance of cross-examination in general, see *Brown v. United States*, 356 U.S. 148, 154-155, 78 S.Ct. 622, 626-627, 2 L.Ed.2d 589 (1958), and relies upon those cases in which this Court has permitted use for impeachment purposes of post-arrest statements that were inadmissible as evi-

6. Petitioners also claim constitutional error because each of them was cross-examined by the prosecutor as to why he had not told the exculpatory story at the preliminary hearing or any other time prior to the trials. In addition, error of constitutional dimension is asserted because each petitioner was cross-examined as to post-arrest, preliminary hearing, and general pretrial silence when he testified as a *defense witness* at the other petitioner's trial. These averments of error present different considerations from those implicated by cross-examining petitioners as defendants as to their silence after receiving *Miranda* warnings at the time of arrest. In view of our disposition of this case we find it unnecessary to reach these additional issues.

7. We recognize, of course, that unless prosecutors are allowed wide leeway in the scope of

dence of guilt because of an officer's failure to follow *Miranda's* dictates. *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971); *Oregon v. Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975); see also *Walder v. United States*, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954). Thus, although the State does not suggest petitioners' silence could be used as evidence of guilt, it contends that the need to present to the jury all information relevant to the truth of petitioners' exculpatory story fully justifies the cross-examination that is at issue.

[2-6] Despite the importance of cross-examination,⁷ we have concluded that the *Miranda* decision compels rejection of the State's position. The warnings mandated by that case, as a prophylactic means of safeguarding Fifth Amendment rights, see *Michigan v. Tucker*, 417 U.S. 433, 443-444, 94 S.Ct. 2357, 2363-2364, 41 L.Ed.2d 182 (1974), require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested.⁸ See *United States v.*

impeachment cross-examination some defendants would be able to frustrate the truth-seeking function of a trial by presenting tailored defenses insulated from effective challenge. See generally *Fitzpatrick v. United States*, 178 U.S. 304, 315, 20 S.Ct. 944, 948, 44 L.Ed. 1078 (1900).

8. The dissent by Mr. Justice STEVENS expresses the view that the giving of *Miranda* warnings does not lessen the "probative value of [a defendant's] silence . . ." *Post*, at 2246. But in *United States v. Hale*, 422 U.S. 171, 177, 95 S.Ct. 2133, 2137, 45 L.Ed.2d 99 (1975), we noted that silence at the time of arrest may be inherently ambiguous even apart from the effect of *Miranda* warnings, for in a given case there may be several explanations

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¹⁶¹⁸ *Hale, supra*, 422 U.S., at 177, 95 S.Ct., at 2137. Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.⁹ Mr. Justice White, concurring in the judgment in *United States v. Hale, supra*, at 182-183, 95 S.Ct., at 2139, put it very well:

"[W]hen a person under arrest is informed, as *Miranda* requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during

for the silence that are consistent with the existence of an exculpatory explanation. In *Hale* we exercised our supervisory powers over federal courts. The instant cases, unlike *Hale*, come to us from a state court and thus provide no occasion for the exercise of our supervisory powers. Nor is it necessary, in view of our holding above, to express an opinion on the probative value for impeachment purposes of petitioners' silence. We note only that the *Hale* court considered silence at the time of arrest likely to be ambiguous and thus of dubious probative value.

9. A somewhat analogous situation was presented in *Johnson v. United States*, 318 U.S. 139, 63 S.Ct. 549, 87 L.Ed. 704 (1943). A defendant who testified at his trial was permitted by the trial judge to invoke the Fifth Amendment privilege against self-incrimination in response to certain questions on cross-examination. This Court assumed that it would not have been error for the trial court to have denied the privilege in the circumstances, see *id.*, at 196, 63 S.Ct., at 553, in which case a failure to answer would have been a proper basis for adverse inferences and a proper subject for prosecutorial comment. But because the privilege had been granted, even if erroneously, "the requirements of fair trial" made it error for the trial court to permit comment upon the defendant's silence. *Ibid.*

"An accused having the assurance of the court that his claim of privilege would be granted might well be entrapped if his assertion of the privilege could then be used against him. His real choice might then be quite different from his apparent one. . . . Elementary fair-

the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony. . . . Surely *Hale* was not informed here that his silence, as well as his words, could be used against him at trial. Indeed, anyone would reasonably conclude from *Miranda* warnings that this would not be the case."¹⁰

[7] We hold that the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment.¹¹ The State has not claimed that such use in the circumstances of this case might have been harmless error. Accordingly, petitioners'

ness requires that an accused should not be misled on that score." *Id.*, at 197, 63 S.Ct., at 553.

Johnson was decided under this Court's supervisory powers over the federal courts. But the necessity for elementary fairness is not unique to the federal criminal system. Cf. *Raley v. Ohio*, 360 U.S. 423, 437-440, 79 S.Ct. 1257, 1265-1267, 3 L.Ed.2d 1344 (1959).

10. The dissenting opinion relies on the fact that petitioners in this case, when cross-examined about their silence, did not offer reliance on *Miranda* warnings as a justification. But the error we perceive lies in the cross-examination on this question, thereby implying an inconsistency that the jury might construe as evidence of guilt. After an arrested person is formally advised by an officer of the law that he has a right to remain silent, the unfairness occurs when the prosecution, in the presence of the jury, is allowed to undertake impeachment on the basis of what may be the exercise of that right.

11. It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest. Cf. *United States v. Fairchild*, 505 F.2d 1378, 1383 (CA5 1975).

convictions are reversed and their causes remanded to the state courts for further proceedings not inconsistent with this opinion.

So ordered.

Mr. Justice STEVENS, with whom Mr. Justice BLACKMUN and Mr. Justice REHNQUIST join, dissenting.

Petitioners assert that the prosecutor's cross-examination about their failure to mention the purported "frame" until they testified at trial violated their constitutional right to due process and also their constitutional privilege against self-incrimination. I am not persuaded by the first argument; though there is merit in a portion of the second, I do not believe it warrants reversal of these state convictions.

I

The Court's due process rationale has some of the characteristics of an estoppel theory. If (a) the defendant is advised that he may remain silent, and (b) he does remain silent, then we (c) presume that his decision was made in reliance on the advice, and (d) conclude that it is unfair in certain cases, though not others,¹ to use his silence to impeach his trial testimony. The key to the Court's analysis is apparently a concern that the *Miranda* warning, which is intended to increase the probability that a person's response to police questioning will be

1. As the Court acknowledges, the "fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest." *Ante*, at 2245 and n. 11.

2. At Wood's trial, the arresting officer described the warning he gave petitioners:

"I told Mr. Wood and Mr. Doyle of the *Miranda* warning rights—they had the right to remain silent, anything they said could and would be used against them in a court of law, and they had the right to an attorney and didn't have to say anything without an attorney being present and if they couldn't afford one, the court would appoint them one at the proper time." Trial transcript in *Ohio v. Wood*, No. 10657, Common Pleas Court, Tuscarawas County, Ohio (hereafter *Wood Tr.*), 126.

intelligent and voluntary, will actually be deceptive unless we require the State to honor an unstated promise not to use the accused's silence against him.

In my judgment there is nothing deceptive or prejudicial to the defendant in the *Miranda* warning.² Nor do I believe that the fact that such advice was given to the defendant lessens the probative value of his silence, or makes the prosecutor's cross-examination about his silence any more unfair than if he had received no such warning.

This is a case in which the defendants' silence at the time of their arrest was graphically inconsistent with their trial testimony that they were the unwitting victims of a "frameup" in which the police did not participate. If defendants had been framed, their failure to mention that fact at the time of their arrest is almost inexplicable; for that reason, under accepted rules of evidence, their silence is tantamount to a prior inconsistent statement and admissible for purposes of impeachment.³

Indeed, there is irony in the fact that the *Miranda* warning provides the only plausible explanation for their silence. If it were the true explanation, I should think that they would have responded to the questions on cross-examination about why they had remained silent by stating that they relied on their understanding of the advice given by the arresting officers. Instead, how-

At the Doyle trial, he testified that he "gave them their rights" and gave them a "Miranda Warning." Trial transcript in *Ohio v. Doyle*, No. 10656, Common Pleas Court, Tuscarawas County, Ohio (hereafter *Doyle Tr.*), 269. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, requires the following warning:

"[The suspect] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.*, at 479, 86 S.Ct., at 1630.

3. 3A J. Wigmore, Evidence § 1042 (Chadbourn rev. 1970).

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ever, they gave quite a different jumble of responses.⁴ Those responses negate the Court's presumption that their silence was induced by reliance on deceptive advice.

4. Petitioner Doyle gave the following testimony on direct and cross-examination at his trial:

"Q. [By defense counsel.] And you were placed under arrest at that time?

"A. [By Doyle.] Yes. I asked what for and he said,—'For the sale of marijuana.' I told him,—I didn't know what he was talking about.

"Q. [By the prosecutor.] As a matter of fact, if I recall your testimony correctly, you said instead of protesting your innocence, as you do today, you said in response to a question of Mr. Beamer,—'I don't know what you are talking about.'

"A. [By Doyle.] I believe what I said,—'What's this all about?' If I remember, that's the only thing I said.

"Q. You testified on direct.

"A. If I did, then I didn't understand.

" . . . I was questioning, you know, what it was about. That's what I didn't know. I knew that I was trying to buy, which was wrong, but I didn't know what was going on. I didn't know that Bill Bonnell was trying to frame me, or what-have-you.

"Q. All right,—But you didn't protest your innocence at that time?

"A. Not until I knew what was going on." Doyle Tr. 479, 506–507.

At Wood's trial, Doyle gave a somewhat different explanation of his silence at the time of arrest:

"Q. [By the prosecutor.] Why didn't [Wood] tell [the police officers] about Mr. Bonnell?

"A. [By Doyle.] Because we didn't know what was going on and wanted to find out.

"Q. So he hid the money under the mat?

"A. The police officers said they stopped us for a red light. I wanted to get my hands on Bill Bonnell.

"Q. It wasn't because you were guilty, was it?

"A. Because I wanted to get my hands on Bill Bonnell because I suspected he was trying

"Q. Why didn't you tell the police that Bill Bonnell just set you up?

"A. Because I would rather have my own hands on him.

"Q. When Mr. Beamer arrived?

"A. . . . [W]hen Mr. Beamer got there I said to Mr. Beamer what the hell is all this about and he said you are under arrest for the suspicion of selling marijuana and I said you got to be crazy. I was pretty upset.

"Q. So on the night of April 29 you felt that you were being framed like you are being framed today?

"A. I was so confused that night, the night of the arrest.

"Q. How about Mr. Wood?

"A. Mr. Wood didn't know what was going on.

"Q. . . . Are you as mad and upset today as you were that night?

"A. I can't answer that question.

"Q. Did you feel the same way about what happened to you?

"A. That night I felt like I couldn't believe what was happening.

"Q. You didn't like being framed?

"A. That is right. I didn't like some one putting me in a spot like that.

"Q. Didn't it occur to you to try to protect yourself?

"A. Yes, at this time I felt like I wasn't talking to nobody but John James who was the attorney at that time.

"Q. But you felt . . .

"A. The man walked up and didn't ask me anything.

"Q. You didn't talk to a soul about how rotten it was because you were framed?

"A. I will answer the question, sir, the best I can. I didn't know what to say. I was stunned about what was going on and I was asked questions and I answered the questions as simply as I could because I didn't have nobody there to help me answer the questions.

"Q. Wouldn't that have been a marvelous time to protest your innocence?

"A. I don't know if it would or not.

"Q. Do you remember having a conversation with Kenneth Beamer?

"A. Yes, sir.

"Q. What was said?

"A. Kenneth Beamer said I want to know where you stash—where your hide out is, where you are keeping the dope and I said I don't know what you are talking about. I believe the question was asked in front of you.

"Q. Where did this conversation take place?

"A. Took place during the search.

"Q. So any way you didn't tell anyone how angry you were that night?

"A. I was very angry.

"Q. But you didn't tell anyone?

"A. That is right. If I started I don't know where I would have stopped. I was upset." Wood Tr. 424–430.

Petitioner Wood testified on cross-examination at his trial as follows:

Since the record requires us to put to one side the Court's presumption that the defendants' silence was the product of reliance on the *Miranda* warning, the Court's entire due process rationale collapses. For without reliance on the waiver, the case is no different than if no warning had been given, and nothing in the Court's opinion suggests that there would be any unfairness in using petitioners' prior inconsistent silence for impeachment purposes in such a case.

Indeed, as a general proposition, if we assume the defendant's silence would be admissible for impeachment purposes if no *Miranda* warning had been given, I should think that the warning would have a tendency to salvage the defendant's credibility as a witness. If the defendant is a truthful witness, and if his silence is the consequence of his understanding of the *Miranda* warning, he may explain that fact when he is on the stand. Even if he is untruthful, the availability of that explanation puts him in a better position than if he had received no warning. In my judgment, the risk that a truthful defendant will be deceived by the *Miranda* warning and also will be unable to explain his honest misunderstanding is so much less than the risk that exclusion of the evidence will merely provide a shield for perjury that I cannot accept the Court's due process rationale.

"Q. [By the prosecutor.] Jefferson Doyle said he was confused, angry and upset [at the time of the arrest]. Were you confused, angry and upset?

"A. [By Wood.] Upset and confused.

"Q. Why were you upset?

"A. Because I didn't know what was going on most of the time.

"Q. Why would you be upset? Because you found \$1300 in your back seat?

"A. Mainly because the person that was in the car Jeff [Doyle] was upset confused and angry and

"Q. What has that to do with you?

"A. I am in the car. That is what it has to do with me.

"Q. You are innocent?

"A. Yes.

"Q. Of anything?

Accordingly, if we assume that the use of a defendant's silence for impeachment purposes would be otherwise unobjectionable, I find no merit in the notion that he is denied due process of law because he received a *Miranda* warning.

II

Petitioners argue that the State violated their Fifth Amendment privilege against self-incrimination by asking the jury to draw an inference of guilt from their constitutionally protected silence. They challenge both the prosecutor's cross-examination and his closing argument.

A

Petitioners claim that the cross-examination was improper because it referred to their silence at the time of their arrest, to their failure to testify at the preliminary hearing, and to their failure to reveal the "frame" prior to trial. Their claim applies to the testimony of each defendant at his own trial, and also to the testimony each gave as a witness at the trial of the other. Since I think it quite clear that a defendant may not object to the violation of another

"A. I don't know about anything.

"Q. This particular incident, you were placed under arrest, weren't you?

"A. Yes, innocent of this incident.

"Q. Innocent of the entire transaction?

"A. Yes, sir.

"Q. Or even any knowledge of the entire transaction?

"A. Up to a point, sir.

"Q. Mr. Wood, if that is all you had to do with this and you are innocent, when Mr. Beamer arrived on the scene why didn't you tell him?

"A. Mr. Cunningham, in the last eight months to a year there has been so many implications, etc. in the paper and law enforcement that are setting people up and busting them for narcotics and stuff." Wood Tr. 467-469.

Cite as 96 S.Ct. 2240 (1976)

person's privilege,⁵ I shall only discuss the argument that a defendant may not be cross-examined about his own prior inconsistent silence.

In support of their objections to the cross-examination about their silence at the time of arrest, petitioners primarily rely on the statement in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, that the prosecution may not use at trial the fact that the defendant stood mute or claimed the privilege in the face of accusations during custodial interrogation.⁶ There are two reasons why that statement does not adequately support petitioners' argument.

First, it is not accurate to say that the petitioners "stood mute or claimed the privilege in the face of accusations." Neither ¹⁶²⁹petitioner claimed the privilege and petitioner Doyle did not even remain silent.⁷ The case is not one in which a description of the actual conversation between the defendants and the police would give rise to any inference of guilt if it were not so flagrantly inconsistent with their trial testimony. Rather than a claim of privilege, we simply have a failure to advise the police of a "frame" at a time when it most surely would have been mentioned if petitioners' trial testimony were true. That failure gave rise to an inference of guilt only because it belied their trial testimony.

Second, the dictum in the footnote in *Miranda* relies primarily upon *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, which held that the Fifth

5. See *Massiah v. United States*, 377 U.S. 201, 206-207, 84 S.Ct. 1199, 1203-1204, 12 L.Ed.2d 246; 8 J. Wigmore, *Evidence* § 2270, pp. 416-417 (McNaughton rev. 1961); cf. *Alderman v. United States*, 394 U.S. 165, 174, 89 S.Ct. 961, 967, 22 L.Ed.2d 176. Cross-examination and comment upon a witness' prior silence does not raise any inference prejudicial to the defendant, and, indeed, does not even raise any inference that the defendant remained silent.

6. "In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. Cf. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106

Amendment, as incorporated in the Fourteenth, prohibited the prosecution's use of the defendant's silence in its case in chief. But as long ago as *Raffel v. United States*, 271 U.S. 494, 46 S.Ct. 566, 70 L.Ed. 1054, this Court recognized the distinction between the prosecution's affirmative use of the defendant's prior silence and the use of prior silence for impeachment purposes. *Raffel* expressly held that the defendant's silence at a prior trial was admissible for purposes of impeachment despite the application in federal prosecutions of the prohibition that *Griffin* found in the Fifth Amendment. *Raffel, supra*, at 496-497, 46 S.Ct., at 567-568.

Moreover, Mr. Chief Justice Warren, the author of the Court's opinion in *Miranda*, joined the opinion in *Walder v. United States*, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503, which squarely held that a valid constitutional objection to the admissibility of evidence as part of the Government's case in chief did not bar the use of that evidence to impeach the defendant's trial testimony. The availability of an objection to the affirmative use of improper evidence does not provide the defendant "with a shield against contradiction of his untruths." *Id.*, at 65, 74 S.Ct., at 356. The need to ensure the integrity ¹⁶²⁹of the truth-determining function of the adversary trial process has provided the predicate for an unbroken line of decisions so holding.⁸

¹⁶³⁰Although I have no doubt concerning the propriety of the cross-examination about petitioners' failure to mention the purport-

(1965); *Malloy v. Hogan*, 378 U.S. 1, 8, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); Comment, 31 U.Chi.L.Rev. 556 (1964); *Developments in the Law—Confessions*, 79 Harv.L.Rev. 935, 1041-1044 (1966). See also *Bram v. United States*, 168 U.S. 532, 562, 18 S.Ct. 183, 194, 42 L.Ed. 568 (1897)." 384 U.S., at 468 n. 37, 86 S.Ct., at 1625.

7. See n. 4, *supra*.

8. As the Court recently recognized in a most carefully considered opinion, an adversary system can maintain neither the reality nor the appearance of efficacy without the assurance that its judgments rest upon a complete illumination of a case rather than upon "a partial or speculative presentation of the facts." *United*

ed "frame" at the time of their arrest, a more difficult question is presented by their objection to the questioning about their

failure to testify at the preliminary hearing and their failure generally to mention the "frame" before trial.⁹ Unlike the failure to

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States v. Nixon, 418 U.S. 683, 709, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039. The necessity of insuring a complete presentation of all relevant evidence has led to the rule that a criminal defendant who voluntarily foregoes his privilege not to testify, and presents exculpatory or mitigating evidence, thereby subjects himself to relevant cross-examination without the right to reclaim Fifth Amendment protection on a selective basis. *Fitzpatrick v. United States*, 178 U.S. 304, 315, 20 S.Ct. 944, 948, 44 L.Ed. 1078.

"If he takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination. '[H]e has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts.'" *Brown v. United States*, 356 U.S. 148, 154-155, 78 S.Ct. 622, 626, 2 L.Ed.2d 589 (citation omitted).

One need not impute perjury to an entire class to acknowledge that a testifying defendant has more to gain and less to lose than an ordinary witness from fabrications upon the witness stand. Cf. *Reagan v. United States*, 157 U.S. 301, 304-311, 15 S.Ct. 610, 611-613, 39 L.Ed. 709; *Taylor v. United States*, 390 F.2d 278, 284-285 (CA8 1968) (Blackmun, J.). As the Court notes today: "Unless prosecutors are allowed wide leeway in the scope of impeachment cross-examination some defendants would be able to frustrate the truth-seeking function of a trial by presenting tailored defenses insulated from effective challenge." *Ante*, at 2244 n. 7. In recognition of this fact, this Court has allowed evidence to be used for impeachment purposes that would be inadmissible as evidence of guilt. In *Walder v. United States*, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503, evidence of narcotics unlawfully seized in connection with an aborted earlier case against a defendant was held admissible for the limited purpose of impeaching the defendant's testimony that he never had been associated with narcotics, although such evidence clearly was inadmissible for any purpose in the prosecution's case in chief. In *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1, the Court held admissible for the purpose of impeaching a defendant's testimony certain partially inconsistent post-arrest statements which, although voluntary, were unavailable for the prosecution's case because they had been given by the defendant without benefit of *Miranda* warnings. And last Term, in a decision closely anal-

ogous to *Harris*, the Court held admissible for impeachment purposes post-arrest statements of a defendant made after he had received *Miranda* warnings and exercised his right to request a lawyer, but before he had been furnished with counsel as *Miranda* requires in such circumstances. *Oregon v. Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570.

In each of these cases involving impeachment cross-examination, the need to insure the integrity of the trial by the "traditional truth-testing devices of the adversary process," *Harris v. New York supra*, 401 U.S., at 225, 91 S.Ct., at 645, was deemed to outweigh the policies underlying the relevant exclusionary rules.

9. Petitioner Doyle was cross-examined as follows at his trial:

"Q. [By the prosecutor.] All right. Do you remember the Preliminary Hearing in this case?"

"A. [By Doyle.] Yes Sir. I remember it.

"Q. And that was prior to your indictment for this offense, was it not?"

"A. Yes sir. I believe,—Yes Sir, it was before I was indicted.

"Q. Arraignment. Is that what you mean?"

"A. Yes. The next day after the arrest.

"Q. Yes, when evidence was presented and you had the opportunity to hear the testimony of the witnesses against you. Remember that?"

"A. Yes Sir.

"Q. Mr. Bonnell testified; Captain Griffin testified; Deputy-Chief Deputy White testified?"

"A. Yes Sir.

"Q. Kenneth Beamer testified?"

"A. Yes Sir.

"Q. You were there, weren't you?"

"A. Yes Sir.

"Q. And your lawyer was there,—Mr. James?"

"A. Yes Sir.

"Q. Tape recording was made of the transcript?"

"A. Yes Sir.

"Q. Did you protest your innocence at that proceeding?"

"A. I didn't—everything that was done with that was done with my attorney. My attorney did it.

"Q. All right. The first time that you gave this version of the fact was in the trial of Richard Wood,—was it not?"

"A. Yes Sir. It was the first time I was asked.

"Q. All the time, you being innocent?"

make the kind of spontaneous comment that discovery of a "frame" would be expected to prompt, there is no significant inconsistency between petitioners' trial testimony and their adherence to counsel's advice not to take the stand at the preliminary hearing; moreover, the decision not to

"A. Yes Sir." Doyle Tr. 507-508.

Petitioner Wood was subjected to similar cross-examination at his trial:

"Q. [By the prosecutor.] As a matter of fact you never told anyone that you had been set up until today?

"A. [By Wood.] Yes, I believe I did, sir.

"Q. I assume you discussed it with your lawyer?

"A. Yes, I discussed it with my lawyer.

"Q. And you heard the testimony and witnesses against you?

"A. Yes, sir.

"Q. And were you aware Mr. James was able to obtain a tape transcript of the proceedings?

"A. Yes.

"Q. And you no doubt listed to those?

"A. Parts and portions of them—some of it.

"Q. But you never communicated your innocence?

"A. I believe I did one time to Mr. Beamer.

"Q. When might that have been?

"A. When in the jail house.

"Q. So you protested your innocence?

"A. In a little room. I believe he asked us how do you let people get away with people setting up friends like this. He said Bill Bonnell is not your friend and I said no, but I figured he was a good enough acquaintance he would do that.

"Q. Where was that?

"A. Little room there.

"Q. Every been there before?

"A. Yes, sir.

"Q. When?

"Q. Did you see me there?

"A. I didn't know who you were at the time. I believe you were in and out of there.

"Q. You didn't say anything to me, did you?

"A. No, I didn't know who you were then." Wood Tr. 470-472.

10. Under Ohio law, the preliminary hearing determines only whether the defendant should be held for trial. The prosecution need establish, at most, that a crime has been committed and that there is "probable and reasonable cause" to hold the defendant for trial, and the court need only find "substantial credible evidence" of the charge against the defendant. Ohio Rev. Code Ann. §§ 2937.12, 2937.13 (Supp.1973). Indeed, if a defendant has been indicted, no hearing need be held. *State v. Morris*, 42 Ohio

divulge their defense prior to trial is probably attributable to counsel rather than to petitioners.¹⁰ Nevertheless, unless and until this Court overrules *Raffel v. United States*, 271 U.S. 494, 46 S.Ct. 566, 70 L.Ed.

1054,¹¹ I think a state court is free to regard the defendant's decision to take the

St.2d 307, 326, 329 N.E.2d 85, 97 (1975). Defense counsel thus will have no incentive to divulge the defendant's case at the preliminary hearing if the prosecution has presented substantial evidence of guilt. Since that was the case here, no significant impeaching inference may be drawn from petitioners' silence at that proceeding.

Petitioners' failure to refer to the "frame" at any time between arrest and trial is somewhat more probative; for if the "frame" story were true, one would have expected counsel to try to persuade the prosecution to dismiss the charges in advance of trial.

11. *Raffel* was the last decision of this Court to address the constitutionality of admitting evidence of a defendant's prior silence to impeach his testimony upon direct examination. *Raffel* had been charged with conspiracy to violate the National Prohibition Act. An agent testified at his first trial that he had admitted ownership of a drinking place; *Raffel* did not take the stand. The trial ended in a hung jury, and upon retrial, the agent testified as before. *Raffel* elected to testify and denied making the statement, but he was cross-examined on his failure to testify in the first trial. This Court held that the evidence was admissible because *Raffel* had completely waived the privilege against self-incrimination by deciding to testify. 271 U.S., at 499, 46 S.Ct., at 568.

Subsequent cases, decided in the exercise of this Court's supervisory powers, have diminished the force of *Raffel* in the federal courts. *United States v. Hale*, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99; *Stewart v. United States*, 366 U.S. 1, 81 S.Ct. 941, 6 L.Ed.2d 84; *Grunewald v. United States*, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931. All three of these cases held that the defendant's prior silence or prior claim of the privilege was inadmissible for purposes of impeachment; all three distinguished *Raffel* on the ground that the Court there assumed that the defendant's prior silence was significantly inconsistent with his testimony on direct examination. *Hale*, *supra*, 422 U.S., at 175-176, 95 S.Ct., at 2136-2137; *Stewart*, *supra*, 366 U.S., at 5-7, 81 S.Ct., at 943-944; *Grunewald*, *supra*, 353 U.S., at 418-424, 77 S.Ct., at 981-984. Two of the three cases relied upon the need to protect the defendant's exercise of the privilege against self-incrimination from unwarranted inferences of guilt, a rationale that is not easily reconciled with the

stand as a waiver of his objection to the use of his failure to testify at an earlier proceeding or his failure to offer his version of the events prior to trial.

B

In my judgment portions of the prosecutor's argument to the jury overstepped per-

reasoning in *Raffel* that the decision to testify constitutes a complete waiver of the protection afforded by the privilege. Compare *Hale, supra*, 422 U.S., t 180, 95 S.Ct., at 2138 and n. 7, and *Grunewald, supra*, 353 U.S., at 423-424, 77 S.Ct., at 983-984, with *Raffel*, 271 U.S., at 499, 46 S.Ct., at 568.

12. At Doyle's trial, the prosecutor made the following arguments to the jury:

"Diffuse what the true facts are; obscure the facts and prosecute the prosecution.

"A typical and classic defense, but keep in mind, when you are considering the testimony of the law enforcement officers involved, that not until, Ladies and Gentlemen, not until the trial of this case and prior to this case, the trial of Richard Wood's case, that anybody connected with the prosecution in this case had any idea what stories would be told by Jefferson Doyle and Richard Wood. Not the foggiest idea. Both of them told you on the witness stand that neither one of them said a word to the law enforcement officials on the scene—

"(continuing) on the scene at the point of their arrest, at the Preliminary Hearing before Indictment in this case. Not a word that they were innocent; that this was their position; that somehow, they had been 'set-up.'

"So, when you evaluate the testimony of the Law Enforcement Officials, consider—

"(continuing)—what they had to deal with on the night in question and the months subsequent to that.

"Then they decide that they have been 'had' somehow. They have been framed.

"Now, remember, this fits with the facts as observed by the law enforcement officers except the basic, crucial facts. Somehow, they have been framed. So, if you believe this, Ladies and Gentlemen, they take off, chase Bill Bonnell around to give his money back to him or ask him what he did to them, yet they don't bother to tell the Law Enforcement Officers.

"It is unbelievable. I think, when you go to the Jury Room, Ladies and Gentlemen, you are going to decide what really happened.

"We have the Fifth Amendment. I agree with it. It is fundamental to our sense and system of fairness, but if you are innocent—

missible bounds. In each trial, he commented upon the defendant's silence not only as inconsistent with his testimony that he had been "framed," but also as inconsistent with the defendant's innocence.¹² Comment on the lack of credibility of the defendant is plainly proper; it is not proper, however, for the prosecutor to ask the

"(continuing)—if you are innocent, Ladies and Gentlemen, if you have been framed, if you have been set-on, etc. etc. etc., as we heard in Court these last days, you don't say, when the law enforcement officer says,—'You are under arrest,'—you don't say,—'I don't know what you are talking about.' You tell the truth. You tell them what happened and you go from there. You don't say,—'I don't know what you are talking about.'—and demand to see your lawyer and refuse to permit a search of your vehicle, forcing the law enforcement agents to get a search warrant.

"If you're innocent, you just don't do it." Doyle Tr. 515-516, 519, 526.

At Wood's trial, he made similar arguments:

"The defense in this case was very careful to make no statements at all until they had the benefit of hearing all the evidence against them and had time to ascertain what they would admit and what they would deny and how they could fit their version of the story with the state's case. During none of this time did we ever hear any business about a set up or frame or anything else. All right.

"Yes, it is the law of our land, and rightfully so, ladies and gentlemen, that nobody must be compelled to incriminate themselves. It is the 5th Amendment. No one can be forced to give testimony against themselves where criminal action charges are pending. It is a very fundamental right and I am glad we have it.

"The idea was nobody can convict himself out of his own mouth and it grew out of the days when they used to whip and beat and extract statements from the defendants and get them to convict themselves out of their own mouth, and I am glad we have that right.

"But ladies and gentlemen, there is one statement I am going to make. If you are innocent, if you are innocent, if you have been framed, if you have been set up as claimed in this case, when do you tell it? When do you tell the policemen that?

"Think about it. After months—after various proceedings and for the first time? I am not going to say any more about that but I want you to think about it." Closing Argument of the Prosecutor 12-14, supplementing Wood Tr.

APPENDIX

E

sideration of the length of Green's exceptional sentence.

PEARSON, C.J., and UTTER, BRACHTENBACH, DOLLIVER,
DORE, ANDERSEN, CALLOW, and GOODLOE, JJ., concur.

Reconsideration denied March 7, 1988.

[No. 53550-7. En Banc. October 8, 1987.]

THE STATE OF WASHINGTON, Respondent, v. KERRY
S. THOMAS, Petitioner.

- [1] **Automobiles — Eluding Police Vehicle — Elements — Wanton Disregard — Voluntary Intoxication.** The wanton and willful disregard necessary to the crime of attempting to elude a police vehicle is a subjective standard. Voluntary intoxication which prevents the formation of that subjective mental state is relevant to rebut the inferences from objective evidence of the defendant's manner of driving.
- [2] **Criminal Law — Right to Counsel — Effective Assistance of Counsel — Test — Prejudice.** A deficient performance of defense counsel constitutes reversible error if there is a reasonable probability that it affected the result of the trial, *i.e.*, if the deficiency undermines the reviewing court's confidence in the outcome.
- [3] **Criminal Law — Right to Counsel — Effective Assistance of Counsel — Qualifications of Expert Witness.** A defense counsel's failure to discover the lack of qualifications of a crucial expert witness constitutes ineffective assistance of counsel.

DOLLIVER, ANDERSEN, CALLOW, and DURHAM, JJ., dissent by separate opinion.

Nature of Action: Prosecution for attempting to elude a police vehicle.

Superior Court: The Superior Court for Kitsap County, No. 84-1-00421-3, Leonard W. Kruse, J., entered a judgment on March 4, 1985, on a verdict of guilty.

Court of Appeals: Holding at 46 Wn. App. 723 that the defendant was not denied effective assistance of counsel,

the court *affirmed* the judgment.

Supreme Court: Holding that defense counsel's representation was deficient and that it prejudiced the defendant, the court *reverses* the Court of Appeals and the judgment.

Christine Wyatt, for petitioner.

C. Danny Clem, Prosecuting Attorney, and *Reinhold P. Schuetz*, Deputy, for respondent.

GOODLOE, J.—This case involves an allegation of ineffective assistance of counsel. Petitioner Kerry Thomas alleges that her assigned trial counsel failed to competently present a diminished capacity defense based on voluntary intoxication to a charge of attempting to elude a police vehicle. We agree and remand for a new trial.

On October 15, 1984, defendant Thomas imbibed numerous alcoholic drinks at the Blue Goose Tavern, in Kitsap County. The barmaid, Hurleen Fridline, remembers serving Thomas about five glasses of wine. Around 11 p.m., Fridline cut Thomas off because she felt Thomas had consumed too much. Soon thereafter, Thomas started getting rowdy and Fridline asked her to leave. After leaving the Blue Goose, Thomas remembers going to the Port Orchard Tavern. At approximately 2 a.m., Thomas returned to the Blue Goose in her car. Because of her drunken behavior and erratic driving Fridline called the police. Deputy Wayne Gulla of the Kitsap County Sheriff's Office responded. Meanwhile, Thomas had driven away.

Gulla pursued Thomas in the direction her yellow car had last been seen. Shortly after beginning pursuit, he observed fresh skid marks that passed through a cyclone fence. After briefly stopping he proceeded onward. At a grocery store he contacted Deputy John Sandberg, who had also responded to that location. While talking, Gulla noticed the headlights of a car up the road which "made a bounce as if the vehicle was run into the ditch or was pulling out of the ditch." Report of Proceedings, at 91. Gulla

headed in the direction in which the headlights were observed. He testified that as he approached the car, which was yellow, it was necessary to take evasive action to avoid a head-on collision. In so doing, Gulla took a right turn. The yellow car followed and began closely tailgating Gulla's patrol car. His patrol car was equipped with shields, spotlight, push bars, "wigwag" headlights, siren, and strobe lights in the grill, but did not have markings on it indicating that it was a police vehicle.

To evade the car that was tailgating him, Gulla made an abrupt right turn. He then made a U-turn and pulled out behind it. At this point Deputy Sandberg came up behind him in a fully marked Kitsap County Sheriff deputy car. Gulla and Sandberg proceeded to pursue the yellow car. Gulla stated that he was no more than two car lengths behind the pursued car. He activated the patrol car's "wigwag" headlights, red and blue strobe lights, and siren. He testified that the car being chased responded by accelerating and that it weaved all over the road.

The chase continued through a series of curves, following which the yellow car made a left-hand turn. Gulla testified:

At that point I angled my patrol vehicle right into the driver's door of the fleeing vehicle, blasting the siren right in the window. The driver of the vehicle, which I observed at that time to be a female, looked toward my patrol vehicle, and throughout the course of the events had been watching my actions in her rear-view mirror.

Report of Proceedings, at 98. Gulla testified that coming out of the left-hand turn, the pursued car again accelerated. During all of this, Sandberg had all of his emergency lights and his siren on.

Finally, the chased car turned down a dead-end street. After the car reached the end the driver made a U-turn. The driver headed toward Sandberg's marked vehicle which he had positioned to block the road. However, she then stopped. Thereafter, Thomas was taken into custody. Gulla concluded that she was very intoxicated. Sandberg testified that he pursued Thomas for a mile to a mile and a half.

Thomas testified that she does not remember returning to the Blue Goose Tavern. She stated:

I had a blackout. I have had blackouts before, and a lot of times I'll come in and out of it. If something really terrible happens, I have been known to black it all out so that I don't have to deal with it.

Report of Proceedings, at 167-68. She testified that she does not recall driving through the cyclone fence. Thomas also testified that she stopped as soon as she realized a police vehicle was following her. She stated that she does not recall hearing any sirens. Thomas said that she only remembers seeing bright white lights, but did not think it was the police because their lights are blue and red. She testified that she was "blitzed" and incoherent.

The Kitsap County Prosecutor charged Thomas with attempting to elude a pursuing police vehicle in violation of RCW 46.61.024 and driving while under influence of intoxicating liquor or drug in violation of RCW 46.61.502. Thomas pleaded guilty to the DWI charge. The attempting to elude charge went to trial. A jury found Thomas guilty. The Court of Appeals affirmed. *State v. Thomas*, 46 Wn. App. 723, 732 P.2d 171 (1987). This court accepted discretionary review.

Thomas' assignments of error involve an allegation of ineffective assistance of counsel. The purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial. *See, e.g., State v. Osborne*, 108 Wn.2d 87, 99, 684 P.2d 683 (1984); *State v. Ermert*, 9 Wn.2d 839, 849, 621 P.2d 121 (1980). To that end Justice O'Connor articulated the following 2-prong test in *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984):

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as

to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

See also *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, cert. denied, 93 L. Ed. 2d 301 (1986); *State v. Sardinia*, 42 Wn. App. 533, 713 P.2d 122 (1986).

The *Strickland* test requires a showing that counsel's representation fell below an objective standard of reasonableness based on consideration of all of the circumstances. *Strickland*, at 688. Regarding the first prong, scrutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness. See *Strickland*, at 689. To meet the requirement of the second prong defendant has the burden to show that

there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *A reasonable probability is a probability sufficient to undermine confidence in the outcome.*

(Italics ours.) *Strickland*, at 694. Defendant, however, "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, at 693.

In the present case, the claim of ineffective assistance of counsel relates to defense counsel's alleged failure to properly present a diminished capacity defense based on voluntary intoxication. Thomas' first allegation of ineffective assistance of counsel involves her trial counsel's failure to offer an instruction based on our construal of the felony flight statute, RCW 46.61.024, in *State v. Sherman*, 98 Wn.2d 53, 653 P.2d 612 (1982).

RCW 46.61.024 defines felony flight in the following terms:

Any driver of a motor vehicle who wilfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a manner indicating a wanton or wilful disregard for the lives or property of others while attempting to elude a pursuing police vehicle, after being

given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony.

In *Sherman*, we held that RCW 46.61.024 requires that the defendant both subjectively and objectively act with wanton and wilful disregard of others. We concluded that juries should be instructed that the circumstantial evidence of defendant's manner of driving only creates a rebuttable inference of "wanton and wilful disregard for the lives or property of others . . ." *Sherman*, at 59. Therefore, *Sherman* indicates that objective conduct by the defendant indicating disregard is only circumstantial evidence and may be rebutted by subjective evidence pertaining to defendant's mental state.

[1] The defense theory of the case was that Thomas was too intoxicated to have formulated the required wanton or wilful disregard. Therefore, she argues that a *Sherman* instruction was crucial because she presented evidence, her intoxication, to rebut the inference of wanton and wilful disregard created by her driving. Thomas asserts that a *Sherman* instruction would have better enabled her counsel to argue the defense's theory of the case. The Court of Appeals disagreed and held that the failure to offer a *Sherman* instruction was not prejudicial because no evidence existed to rebut the inference. *Thomas*, at 727. The court reasoned that a *Sherman* instruction is necessary only if defendant presents an affirmative showing of a noncriminal or innocent mental state, e.g., stuck throttle, rather than having "no mental state at all." *Thomas*, at 728. Thomas responds that voluntary intoxication is a defense encompassed by the reasoning of *Sherman* and that an attorney of reasonable competence would not have failed to offer the instruction mandated by *Sherman*. We agree with Thomas.

State v. Coates, 107 Wn.2d 882, 889, 735 P.2d 64 (1987) provides: "[E]vidence of voluntary intoxication is relevant to the trier of fact in determining in the first instance whether the defendant acted with a particular degree of mental culpability." Furthermore, in *State v. Parker*, 102 Wn.2d 161, 683 P.2d 189 (1984), the defendant was also

charged with eluding a police vehicle in violation of RCW 46.61.024. The issue in *Parker* involved the necessity of giving an instruction on the lesser included offense of reckless driving. The court stated:

The evidence in the case supports an inference that the lesser crime was committed. There was substantial evidence that the defendant was intoxicated at the time of the alleged offense and the trial court so instructed. At the time of arrest and at trial, defendant was unable to remember the chase through the streets of Seattle. The jury could have found that the defendant was not so intoxicated as to act without "wilful and wanton disregard", but intoxicated to a degree preventing knowledge that he was eluding a pursuing police vehicle.

Parker, at 165-66. The clear import of *Coates* and *Parker*, together with *Sherman*, is that voluntary intoxication can be an exculpatory factor to a charge of violating RCW 46.61.024.

Defendant is entitled to a correct statement of the law and should not have to convince the jury what the law is. *State v. Acosta*, 101 Wn.2d 612, 621-22, 683 P.2d 1069 (1984). Here, defendant's proposed "to convict" instruction did not indicate that there is a subjective component to RCW 46.61.024, nor did any other instruction offered by the defense. Furthermore, the record does not contain a proposed defense instruction on the relevance of intoxication as to the mental element of the crime charged. The lack of a *Sherman* instruction allowed the prosecutor to argue that Thomas' drunkenness caused her mental state. In contrast, defense counsel argued that Thomas' drunkenness negated any guilty mental state. Therefore, in closing argument, opposing counsel argued conflicting rules of law to the jury. *See Acosta*, at 621-22. Accordingly, we conclude that in failing to offer a *Sherman* instruction, defense counsel's performance was deficient.

We must still ascertain whether the deficient performance was so serious as to deprive Thomas of a fair trial. *Strickland*, at 687. Trial counsel does not guarantee a successful verdict, *State v. Adams*, 91 Wn.2d 86, 91, 586 P.2d

1168 (1978), and competency is not measured by the result. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Nevertheless, it must be remembered that the right to effective assistance of counsel constitutionally guaranteed by the Sixth Amendment and Const. art. 1, § 22 (amend. 10) extends to *all* defendants.

[2] In the present case, whether trial counsel's deficient performance prejudiced Thomas is a close issue. On the one hand, her driving objectively indicated the required wanton or willful disregard. On the other hand, the record indicates that Thomas was extremely intoxicated. Given a *Sherman* instruction, the jury may have determined that her extreme intoxication negated the required wantonness or willfulness. Without the *Sherman* instruction the jury may well have thought that the objective indication of wanton or willful disregard created by her driving established Thomas' guilt and, therefore, the jury may never have considered the subjective component of RCW 46.61.024. Thus, we believe a proper instruction on the subjective component of RCW 46.61.024 was crucial. Accordingly, our confidence in the outcome is undermined such that we cannot say Thomas received effective assistance of counsel. *See Strickland*, at 694. A reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an instruction based on pertinent cases. *See generally Kemp v. Leggett*, 635 F.2d 453, 454 (5th Cir. 1981). We hold that counsel's deficient performance deprived Thomas of a fair trial. Our conclusion is further supported by Thomas' second argument.

Thomas' second allegation of error involves her counsel's failure to ascertain that Pamela Hammond, called on to testify by defense counsel as an "expert" witness, was only an alcohol counselor trainee. Because of Hammond's lack of qualifications the trial court refused to allow her to testify as an expert. No other expert was called. Thomas asserts that her counsel's failure to ascertain Hammond's lack of qualifications cannot be dismissed as a trial tactic upon which attorneys frequently differ or disagree. *See Adams*,

at 90. She argues that once defense counsel determined that an expert was needed, any reasonably competent counsel would have ascertained the proposed expert's qualifications or lack thereof. Thomas further argues that expert testimony on blackouts would have been helpful and, therefore, she alleges she was prejudiced by her counsel's ineffective assistance.

The Court of Appeals rejected this argument, holding that the "collective experience of a jury is sufficient to apprise the jurors of the effects of drunkenness." *Thomas*, 727. The court reasoned defendant neither showed that there was any available expert whose testimony could have helped nor that any expert testimony would have helped. *Thomas*, at 727. We disagree.

[3] Generally, the decision to call a witness will not support a claim of ineffective assistance of counsel. *State v. Wilson*, 29 Wn. App. 895, 903 (1981); *State v. Thomas*, 71 Wn.2d 470, 472, 429 P.2d 231 (1967). However, the presumption of counsel's competence can be overcome by a showing, among other things, that counsel failed to conduct appropriate investigations. *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978). In the present case, in failing to discover the alcohol counselor trainee's total lack of qualifications, trial counsel's performance was deficient. Had he conducted any investigation into Hammond's qualifications he would have discovered she was only a trainee with minimal experience. Our conclusion is demonstrated by defense counsel's questioning of the expert he called during voir dire, wherein defense counsel elicited the following:]

THE COURT: Do you have any further questions of the witness on this subject? [DEFENSE COUNSEL]: Yes, Your Honor. THE COURT: Qualifications? [DEFENSE COUNSEL]: Yes, Your Honor. Q (By Defense Counsel) Have you, on your own, read any treatises or books on the chemical effect of alcoholism on the brain? A No. Q And have you taken any classes last semester relating to the effect of alcohol on the assimilation of information? A Well, yes. But that wasn't the main topic of the class. But that was also included. Q That was included in the class? A

Assimilation of information. Q And at what institution was that? A That was at Fort Steilacoom Community College. Q And you have been counseling. Strike that. To do your present position need you know what the effect of alcohol is in the brain and the assimilation of knowledge? A To be in my present position I need to be gaining in this information. In other words, I am required to be getting credits, formal credits, in the field that I can become a qualified alcohol counselor. However, that is a process that you go through when you begin. And another thing you need to get to become a qualified alcohol counselor is hours counseling, directly counseling in the field. So it's kind of a process. Q It's a combination? A It's a combination. You have to be working in the field in order to become qualified. So that's what I'm in the process of doing. [DEFENSE COUNSEL]: I have no further questions. [PROSECUTOR]: I have one other question, if I could, Your Honor. Q [By Prosecutor]: From what you have just said, do I take then you are not presently a— quote—qualified alcohol counselor, unquote? A By state criteria of qualified alcohol counselor, no, I'm an alcohol counselor trainee.

Report of Proceedings, at 163-64.

[The foregoing demonstrates that defense counsel was unaware of his "expert's" lack of qualifications. We do not hold that every time the trial court determines an expert witness is not qualified that counsel's performance is thereby deficient. Indeed, such a trial court ruling generally provides no basis for an allegation of ineffective assistance of counsel. However, some minimal investigation into qualifications is required. *See Jury*, at 263. Here, the record reflects that no investigation was made and, therefore, defense counsel's performance was deficient.]

Nonetheless, we still must determine whether Thomas was prejudiced by defense counsel's deficient performance. *State v. Jones*, 95 Wn.2d 616, 622-23, 628 P.2d 472 (1981) indicates that expert testimony is not absolutely necessary in order for a court to give an intoxication instruction. In *Jones*, defendant's testimony that he drank "nine or eleven" beers and eyewitness testimony describing defendant's intoxicated condition sufficed for the trial court to

give an intoxication instruction. *Jones*, at 622-23. However, *Jones* is not dispositive of the present case. Here, Thomas offered substantial lay testimony regarding her intoxicated condition and blackouts. Her testimony regarding blackouts was very damaging to her credibility because it suggested that there is a conscious component to her blackouts. The prosecutor attempted to capitalize on this testimony. Therefore, expert testimony explaining blackouts may have proved crucial to her defense. To hold as the Court of Appeals that "there simply is no showing that there was an expert who could have offered testimony helpful to Thomas" begs the question. *Thomas*, at 727. Arguably, many alcohol counselors could have testified, as defense counsel proposed, as to alcohol's effect on the brain and could have assisted the jury in explaining blackouts. See ER 702. Accordingly, we cannot say that trial counsel's deficiency in failing to discover his expert's lack of qualifications to explain blackouts and their effects did not prejudice Thomas. This reaffirms that our confidence in the outcome of Thomas' trial is undermined.

Based on all of the circumstances, we hold that defense counsel's representation fell below an objective standard of reasonableness. See *Strickland*, at 688. To hold otherwise would render the constitutional guaranty of effective assistance of counsel mere verbiage. We reverse and remand for a new trial.]

PEARSON, C.J., and UTTER, BRACHTENBACH, and DORE, JJ., concur.

DOLLIVER, J. (dissenting)—The opinion of the Court of Appeals fully answers the majority in this case. Thus, rather than rewrite this excellent analysis, I simply quote from the relevant portion:

To prevail on a claim of ineffective assistance of counsel, a defendant must show, first, that counsel's performance was deficient and, second, that defendant was prejudiced by the deficiency. *State v. Sardinia*. 42 Wn. App. 533, 713 P.2d 122, review denied, 105 Wn.2d 1013

(1986). The first element is met by a showing that counsel's performance fell below an objective standard of reasonableness; the second, by a showing that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". *Sardinia*, 42 Wn. App. at 539. Thomas fails to meet these requirements.

As to the expert witness, we will assume arguendo that a lawyer who calls an expert witness is deficient in neglecting to ascertain the witness' qualifications: thus we assume that the first *Sardinia* element has been satisfied here. There is, however, no showing that it made any difference. First, there simply is no showing that there was an expert who could have offered testimony helpful to Thomas. We will not infer the existence of such a person from a silent record. Second, there is no showing that any expert testimony would have helped. The fact is that Thomas was drunk. Surely the collective experience of a jury is sufficient to apprise the jurors of the effects of drunkenness.

We also conclude that the trial court would have committed no prejudicial error in refusing a [*State v.*] *Sherman* [98 Wn.2d 53, 653 P.2d 612 (1982)] instruction had it been offered. Therefore, counsel's failure to offer it did not prejudice Thomas.

Under RCW 46.61.024, the State is required to prove that the defendant drove in a manner "indicating a wanton or wilful disregard for the lives of property of others . . ." (Italics ours.) *Sherman* acknowledged that this mental state element can be inferred from circumstantial evidence. It noted, however, that the inference was rebuttable because the statutory language contemplated proof that the requisite mental state was both objectively manifested and subjectively held. It held that the jury must be instructed that the inference was rebuttable, but that the failure to give such an instruction was harmless if the defendant offered no evidence to rebut the inference. *Sherman*, 98 Wn.2d at 59-60. Thomas offered no such evidence in this case; therefore, the absence of such instruction did not prejudice her. It follows that she has not satisfied the second *Sardinia* element with reference to trial counsel's failure to request the instruction.

Our reading of *Sherman* convinces us that the rebuttal evidence requiring the instruction must consist of an

affirmative showing that the defendant had a noncriminal mental state (e.g., her throttle stuck; she thought the police were robbers, etc.). Thomas offered no evidence to show that she had an innocent mental state. Instead, she employed a diminished capacity defense, not in an attempt to show that she had an innocent mental state, but that she had no mental state at all.

State v. Thomas, 46 Wn. App. 723, 726-28, 732 P.2d 171 (1987).

Neither *State v. Coates*, 107 Wn.2d 882, 735 P.2d 64 (1987) nor *State v. Parker*, 102 Wn.2d 161, 683 P.2d 189 (1984) requires a *Sherman* instruction where, as here, Thomas could present no evidence to rebut the inference from circumstantial evidence that she drove with wanton and willful disregard since she had already stated during her trial she could not remember the events at issue. This being the case it, of course, is impossible for the defendant to present rebuttal testimony as to the subjective element of the crime.

While I do not quarrel with the observation of the majority that the performance of trial counsel was deficient, defendant has not shown the errors of counsel were of such a nature as to deprive her of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

I dissent.

ANDERSEN, CALLOW, and DURHAM, JJ., concur with DELIVER, J.

Reconsideration denied November 24, 1987.

[No. 53061-1. En Banc. October 15, 1987.]

ALBERT LOCKWOOD, ET AL, *Respondents*, v. A C & S, INC.,
ET AL, *Defendants*, RAYMARK INDUSTRIES, INC.,
Petitioner.

- [1] **Trial — Taking Case From Jury — Sufficiency of Evidence — Test.** There is sufficient evidence to sustain a verdict in favor of a nonmoving party unless reasonable minds, accepting the truth of the nonmoving party's evidence and all reasonable inferences therefrom, could not reach such a verdict.
- [2] **Products Liability — Product Identification — Necessity — Asbestos.** A plaintiff injured by asbestos need not identify from personal knowledge the particular manufacturer of the asbestos product to which he was exposed. It is sufficient that he proves that asbestos manufactured by the defendant was present at his workplace.
- [3] **Products Liability — Causation — Asbestos — Sufficiency of Evidence — Factors.** The existence of proximate cause in an action for injuries resulting from exposure to asbestos depends on the particular circumstances of each case. The sufficiency of evidence of causation in such a case depends on the plaintiff's proximity to the asbestos product, the duration of his exposure to it, the expanse of the work site where the asbestos fibers were released, the nature of the asbestos product involved, the manner in which it was handled and used, and medical evidence of causation including possible alternative causes of the injuries.
- [4] **Products Liability — Warnings — Knowledge of Danger — Manufacturer.** A manufacturer's actual or constructive knowledge of dangers incident to reasonably foreseeable uses of its product is relevant to its negligence in failing to give adequate warnings.
- [5] **Appeal — Review — Issues Not Raised in Trial Court — Objection to Evidence — Request for Limiting Instruction.** A party aggrieved by the admission of evidence for a single purpose must request a limiting instruction in order to preserve the issue for appeal.
- [6] **Evidence — Relevance and Prejudice — Unfair Prejudice — What Constitutes.** For purposes of ER 403, which permits the exclusion of evidence when its danger of unfair prejudice substantially outweighs its probative value, "unfair prejudice" means an undue tendency to suggest that the trier of fact make its decision on an improper, frequently emotional, basis.

APPENDIX

F

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418 A.2d 127 (1980)

**Phillip P. DYSON, Appellant,
v.
UNITED STATES, Appellee.**

No. 79-766.

District of Columbia Court of Appeals.Argued April 2, 1980.
Decided July 14, 1980.

128 *128 John C. Hayes, Jr., Washington, D. C., appointed by the court, for appellant.

Martin J. Linkskey, Asst. U. S. Atty., Washington, D. C., with whom Charles F. C. Ruff, U. S. Atty., John A. Terry and Peter E. George, Asst. U. S. Attys., Washington, D. C., were on the brief, for appellee.

129 *129 Before NEWMAN, Chief Judge, and KELLY and MACK, Associate Judges.

MACK, Associate Judge:

After a jury trial, appellant was convicted of second-degree burglary (D.C.Code 1973, § 22-1801) and destruction of private property (D.C.Code 1973, § 22-403). On appeal, he raises one principal issue: whether comments by the prosecutor during rebuttal argument constituted such prejudicial misconduct as to require a new trial.^[1] We find such comments to be improper. Since we are unable to say that the prosecutor's conduct did not substantially sway the judgment of the jury, we reverse.

The government's evidence showed that on the night of August 18, 1978, at approximately 12:30 a. m., a Metropolitan police officer was dispatched to the Washington Wholesale Drug Exchange because its silent burglar alarm had been activated. Upon arrival, the officer directed his spotlight on the outer entrance to the warehouse. There he saw a youth (H.)^[2] standing partially inside the doorway. The officer testified that the youth began running, peeled off a pair of gloves he was wearing and tossed them behind a dumpster. Next appellant exited the doorway. The officer testified that he too began running. Both parties were arrested and appellant identified himself as one "James Russell." The officer retrieved the gloves from behind the dumpster and seized a sledge hammer which was lying approximately ten feet from the entrance. A police fingerprint analyst arrived on the scene but was unable to find any prints in the doorway area.

The president of the drug corporation testified that the silent alarm could be triggered either

by opening or severely jarring the door. He stated that the lower panel of the door had been damaged. None of the warehouse inventory had been stolen.

Appellant and H. testified for the defense. Both acknowledged being at the warehouse but explained that they had seen the door standing open and became curious. The officer arrived just as they began peering into the doorway. Both witnesses denied fleeing when the police arrived. They also denied any prior relationship; in fact, H. stated that he only recognized appellant by sight. H. testified that he was standing on a street corner near the warehouse when appellant approached him, apparently having noticed the open door, and they walked over to the warehouse. Appellant testified that he was en route home but he stopped in the warehouse area at a car wash to "relieve" himself. At that time, he saw the open door and the youth standing on the corner.^[3] He identified himself as "Russell" because that was a name he used at his job. The remainder of appellant's testimony corroborated H.'s testimony.

At the close of the evidence both sides addressed the jury in closing arguments. It is at this point in the trial, appellant contends, that reversible error occurred. He argues that certain comments made by the prosecutor during rebuttal argument constituted misconduct and substantially prejudiced the jury, thereby infecting the verdict.^[4] We agree. We think the fact that the case rested entirely on the credibility of witnesses, coupled with the magnitude of the numerous instances of prosecutorial impropriety, constitute grounds for reversal.

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It is beyond dispute that the government may prosecute vigorously and zealously. Yet all attorneys are presumed to know the rules of the court and they are expected to abide by them. We remind that a prosecuting attorney plays a special role in our judicial system.

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. [*Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935).]

Appellant points to four instances where the prosecutor indulged in transgressions constituting grounds for reversal.

First, some of the challenged remarks express the personal opinion of the prosecutor as to the veracity of the witnesses. The prosecutor stated (with respect to both defense witnesses):

He lied to you, ladies and gentlemen. Why did he do that? Why did he make that story up?

So why is he lying to you? It's just like Johnny lying about not delivering the newspapers. Johnny would lie, and that's because he took the snow shovel and tried to put it off on to somebody else.

When the defense put on its case, it was filled with falsehood, not a grain of truth in this defense, ladies and gentlemen.

We are not basing our argument simply on the fact that he was there, as Mr. Lieber said, but he was there and he lies about where he was

We have admonished lawyers to eschew personal opinions in the course of arguments to juries because this can divert jurors from their role.^[6] See, e. g., *Bates v. United States*, D.C.App., 403 A.2d 1159 (1979); *Jenkins v. United States*, D.C.App., 374 A.2d 581, cert. denied, 434 U.S. 894, 98 S.Ct. 274, 54 L.Ed.2d 182 (1977); *Villacres v. United States*, D.C.App., 357 A.2d 423 (1976); *Hyman v. United States*, D.C.App., 342 A.2d 43 (1975). It is for the jury to decide whether a witness is truthful and an attorney may not inject personal evaluations and opinions as to a witness' veracity. Adherence to this restriction is vitally important when, as here, the veracity of the defense witnesses determines the ultimate issue of guilt or innocence. Thus here testimony by the defense witnesses conflicted with the government's theory that they damaged the door and broke into the drug warehouse. Appellant's testimony is a "lie" only if the jury accepts the government's version of the incident based upon an evaluation of the evidence before it. The prosecutor's comments provided imbalance.

In like vein, the prosecutor attacked the youth's version as incredible and he sought to guide the jury through an evaluation of the youth's demeanor while he was on the witness stand, stating:

[The youth's] testimony is pretty incredible when you think of it.

Why did it take him so long to answer? — because he was making the testimony up while he was sitting here.

Characterizing testimony as incredible is an accepted and proper form of comment on contradictory testimony. But, the prosecutor exceeded the bounds of permissible comment by invading the province of the jury's responsibility to assess the demeanor of witnesses when he characterized the witness' pause as an opportunity to fabricate.

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*131 Even more troubling was the prosecutor's suggestion, over objection, that appellant's presence during the trial facilitated his ability to fabricate his testimony. He stated:

And, you must remember, Mr. Dyson heard all the testimony, as he was the last one to testify

He listened to what everyone said and then he gets up and tells his story.

★ We have construed such an argument as an apparent attempt by the prosecutor to have the jury draw adverse inferences from appellant's exercise of his constitutional right to confront witnesses. We have repeatedly expressed disapproval of such tactics. *Jenkins v. United States*, *supra* at 584; *Villacres v. United States*, *supra* at 426 n. 4; *Hyman v. United States*, *supra* at 45. See also *United States v. Wright*, 160 U.S.App.D.C. 57, 489 F.2d 1181 (1973).

Finally, most troubling was the prosecutor's comment on the failure of appellant to call certain witnesses.

He said he was at the fire with three friends that he knew and still knows them

and knows where they are. Did you hear from those three friends? You did not. Why weren't they here to say, "Yeah, I was at the fire with him." Where are those friends? He could have called those witnesses to corroborate his story, but you didn't hear from any of those people, did you? They are silent.

As to missing witnesses, the rule is well established that "if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." Conyers v. United States, D.C.App., 309 A.2d 309, 312 (1973), citing Graves v. United States, 150 U.S. 118, 121, 14 S.Ct. 40, 41, 37 L.Ed. 1021 (1893). However, absent a finding by the court as to the conditions creating a foundation for the presumption, comment by counsel (or instruction by the court) as to a missing witness is inappropriate and prohibited. Dent v. United States, D.C.App., 404 A.2d 165 (1979); Shelton v. United States, D.C.App., 388 A.2d 859 (1978).^[6]

In the instant case, the conditions are lacking. There is nothing in the record to indicate that the three witnesses were unavailable to the prosecutor, thereby being peculiarly within the power of appellant to produce. No presumption arises from the failure of one party to call a witness if that witness is equally available to both parties. Moreover, appellant's testimony was that he was with these friends earlier on the night of the incident observing a fire some one to two blocks from the warehouse. At most, their testimony could only have corroborated his testimony that he was with them at that time. It would have shed no light on whether appellant did or did not break into the warehouse later that evening. Thus, the prosecutor's comments were improper as they permitted the jury to draw the erroneous inference that the missing witnesses' testimony would elucidate the transaction. Finally, the prosecutor failed to obtain an advance ruling from the trial court on this issue. We have held that counsel must seek and obtain an affirmative ruling before arguing to the jury that it may draw inference from the absence of a witness. Givens v. United States, D.C.App., 385 A.2d 24, 27 (1978), citing Gass v. United States, 135 U.S.App. D.C. 11, 416 F.2d 767 (1969). See Cooper v. United States, D.C.App., 415 A.2d 528 (1980); Dent v. United States, *supra*.

We conclude that the challenged comments were highly improper and representative of the kind of prosecutorial misconduct our cases condemn.^[7]

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*132 II

When we are asked to review instances of prosecutorial misconduct, the alleged errors must rise to the level of "substantial prejudice" in order to justify reversal. Dent v. United States, *supra* at 172; Garris v. United States, D.C.App., 295 A.2d 510 (1972). The applicable test to determine whether such misconduct caused substantial prejudice is "whether we can say, 'with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.' The decisive factors are the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effects of the error." Gaither v. United States, 134 U.S.App.D.C. 154, 172, 413 F.2d 1061, 1079 (1969) (footnotes omitted), quoting Kotteakos v. United States, 328 U.S. 750, 765, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557 (1946). See also Cooper v. United States, *supra*; Bennett v. United States, D.C.App., 375 A.2d 499, 504 (1977).

Here the government's case consisted entirely of circumstantial evidence. The relative strength of the evidence on the critical element of intent was weak. Appellant's fingerprints were not found at the scene; there were no eyewitnesses; he did not have in his possession either fruits of the crime, or implements of the crime such as the sledge hammer or the gloves. The matter for jury consideration consisted entirely of deciding whether to believe the police officer or the defense witnesses. The jury's assessment of the believability of either version was dispositive of its finding of guilt or innocence. Against this backdrop and at the risk of distortion, the challenged prosecutorial comments were directed again and again at the veracity of the defense witnesses.

It is true that the trial judge in its general instructions told the jury that the arguments of counsel were not evidence and repeatedly reminded that the jurors were sole judges of the believability of the witnesses.^[8] Even if such general instructions, however, were sufficient to mitigate the prejudice stemming from the prosecutor's characterizations of the defense witnesses as liars, the defense was still faced with the dangers inherent in the impermissible suggestions that the jury might draw adverse inferences from the absence of evidence and the presence of the defendant.

We are concerned by the frequency with which violations of standards of permissible argument occur. On numerous occasions we have been asked to review instances of such misconduct. In most instances we have held that while the conduct of the prosecutor was improper, we were unable to say, in view of the weight of the evidence against the defendant, that the conduct swayed the judgment of the jury. This case (like that of *Dent, supra*) is different. The evidence against appellant was not particularly strong; the quantum and nature of prosecutorial impropriety was such as to prevent us from saying, with any conviction, that the jury was not prejudiced. Appellant is entitled to a new trial. Accordingly, the judgment is reversed and the cause remanded.

So ordered.

[1] In addition, appellant alleges he was denied his Sixth Amendment right to a speedy trial. This claim is frivolous. We find nothing in the record which approaches the spectre of a speedy trial violation. More than a showing of mere delay is necessary to support such a claim. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); *Bowman v. United States*, D.C.App., 385 A.2d 28 (1978).

[2] H. was tried in a juvenile proceeding.

[3] On rebuttal the arresting officer testified that he saw a truck parked near the entrance which obstructed the view of the door from appellant's vantage point.

[4] Appellant's motion for a mistrial following the argument was denied.

[5] Canon 7 of the Code on Professional Responsibility, as amended by this court, (DR 7-106(C)(4)) provides that: [A] lawyer shall not . . . assert his personal opinion as to the justness of a cause, as to the credibility of a witness, . . . or as to the guilt or innocence of an accused. . . ."

[6] See also *Conyers v. United States*, D.C.App., 237 A.2d 838 (1968); *Wynn v. United States*, 130 U.S.App.D.C. 60, 397 F.2d 621 (1967).

[7] See, e. g., *Bates v. United States, supra*; *Reed v. United States*, D.C.App., 403 A.2d 725 (1979); *Sellers v. United States*, D.C.App., 401 A.2d 974 (1979); *Middleton v. United States*, D.C.App., 401 A.2d 109 (1979); *Williams v. United States*, D.C.App., 379 A.2d 698 (1977); *Fernandez v. United States*, D.C.App., 375 A.2d 484 (1977); *Miles v. United States*, D.C.App., 374 A.2d 278 (1977); *Jenkins v. United States, supra*; *Davis v. United States*, D.C.App., 367 A.2d 1254 (1976); *Villacres v. United States, supra*; *Hyman v. United States, supra*; *Medina v. United States*, D.C.App., 315 A.2d 169 (1974); *Garris v. United States*, D.C.App., 295 A.2d 510 (1972). See also *United States v. Wright, supra*; *United States v. Jones*, 157 U.S.App.D.C. 158, 482 F.2d 747 (1973); *Gaither v. United States, supra*; *Gibson v. United States*, 131 U.S.App.D.C. 163, 403 F.2d 569 (1968); *Harris v. United States*, 131 U.S.App. D.C. 105, 402 F.2d 656 (1968).

[8] The trial court's instruction included: "Now, the statements and arguments of the attorneys in their closing arguments to you are not evidence in the case. Rather, they are attempts by the attorneys to marshal what they think the evidence has shown and put their contentions before you. It is not relevant what an attorney thinks or believes. What is relevant is what you find has actually been proven in this case."

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APPENDIX

G

1 A When?

2 Q When you saw it in the car.

3 A When I saw it in the car, I just saw the barrel go up.

4 I just seen the barrel of a gun go up to the windshield

5 wipers, and I looked, and it just really scared me. It

6 just dropped my heart to my stomach.

7 Q Your testimony is, which hand was he holding it in when

8 you saw it go up?

9 A I didn't see a hand.

10 Q Which part of the car?

11 A It was in the middle of the car, in the middle of the

12 windshield at the point it was brought up, and I saw

13 the barrel of the gun and I saw, like, the shadow of

14 the outline of a rifle.

X 15 Q You're not having your testimony just conform to the

16 evidence, are you?

17 A What do you mean?

X 18 Q You didn't just listen to this case and understand that

19 Smiley had his fingers of his left hand blown off?

20 A No.

21 Q Which would mean that there would be blood somewhere,

22 probably, if it was touching the gun, correct?

23 A I guess.

X 24 Q You know where the gun was found, with the stock in the

25 back seat, the barrel to the front, and he was leaning

1 on it with his hands in his lap, correct?

2 A Yes.

3 Q And my question is: Aren't you just trying to use the
4 testimony, use the evidence, and create a story?

5 A No, sir.

6 MR. SCHOENBERGER: Objection, Your Honor.

7 THE COURT: Sustained. It does seem a bit
8 argumentative.

9 MR. GREER: No other questions, Your Honor.

10 THE COURT: Anything else, Mr. Schoenberger?

11 MR. SCHOENBERGER: Nothing further, Your
12 Honor. Thank you.

13 THE COURT: I'm going to ask the jury to step
14 out for just a second and we'll get you back in here in
15 a couple of minutes, probably.

16 (After the jury left the courtroom,
17 the following proceedings were
18 had:)

19 THE COURT: You can step down.

20 And the defense has nobody else, is that correct,
21 to call?

22 MR. SCHOENBERGER: No, we don't. And, Your
23 Honor, I would like to state for the record that if the
24 Court wanted an offer of proof, and I know we discussed
25 this on the record, but if the Court were to request an

1 I think we're now ready for closing argument from
2 Mr. Greer. Ladies and gentlemen, please direct your
3 attention to Mr. Greer.

4 MR. GREER: Thank you, Your Honor.

5 CLOSING ARGUMENTS

6 BY MR. GREER:

7 This is not a case of self-defense. This was an
8 ambush, and to suggest that this is self-defense is
9 misplaced. Self-defense in this case is nothing more
10 than a creation of the defense after the facts, after
11 understanding what the State's evidence is, and coming
12 up with some explanation in an attempt to sell to you
13 that the defendant acted in self-defense.

14 Now, the other thing that this case is it's a case
15 about these two individuals, at least, Nick Solis and
16 the defendant, involved in gang activity. Neither one
17 will admit it, but there is no doubt about it, that
18 this is a gang case. This case has evidence of drugs,
19 colors, monikers, which are nicknames, a gang name,
20 Sureños 13, blue bandannas, firearms, and two young
21 people driving around aiming guns at each other and
22 shooting each other.

23 Make no doubt about it, this is a gang case. And
24 the rules in this case are not follow the law, defend
25 yourself and get a gun because potentially some

1 injury. He had been shot in the head.

2 And Ahria didn't know what happened until he looks
3 over and sees this. Then he's more concerned about his
4 friend than he is himself and gets out and goes to try
5 to help him out.

6 The physical scene supports everything that was
7 said by Ahria, and Ahria is the only one apparently who
8 remembers. Either that or Nick is not willing to talk
9 about it for whatever reason. But Ahria has no motive
10 to say anything other than what happened. He said in
11 the hospital that he was afraid of what would happen if
12 he told in the 'hood. He was afraid of being a snitch.
13 But in court, and I apologize for using this language,
14 but I think it's expressive; it's how he represented
15 his motive for talking, he just said: Fuck it; I'm
16 just going to tell the truth. And he did. By all
17 accounts, based on the physical scene, it appears that
18 he's telling the truth.

19 The shots themselves, I know that the forensics
20 person or the specialist said that it's got this
21 90-degree opportunity if this is the car and this is
22 that A frame, something like a 90-degree for the
23 direction of the first shot, the one that hits the A
24 frame, but that includes this, and if you take into
25 account the distance of where this other vehicle would

1 Jose's testimony, and again, I point out that in the
2 State's analysis that's probably the most important
3 factor in this case, one of many, but, again, Jose
4 Rosas, he says what he says. Why would he say "I told
5 them to leave and I stood there and watched them go
6 down and turn the corner" if that didn't happen? And
7 went back to bed and then heard gunfire.

8 The same with Yessica. And then what else did
9 Yessica say? And I want to point out something else as
10 well. The defendant's testimony differs from every
11 single other witness, people that were in these cars,
12 Yessica, people that were there. His testimony differs
13 from every other person. And why? Because it's the
14 only way he has a chance of convincing you that it's
15 self-defense. He's trying to create a doubt. That's
16 the desperation that he has, to hope that you'll be
17 naive enough to believe that anything he says has to be
18 believed or creates enough of an issue that you won't
19 be able to convict him.

20 But if you look at Yessica's testimony and you
21 take a look at this case in a common-sense, big-picture
22 analysis, two people come to her home after midnight,
23 unannounced, knocking on the door. Who would do that?
24 Who would go interrupt someone after midnight? These
25 two would. And they go inside her room and try to

1 lying in wait and ambushing, as Mr. Greer has
2 suggested, well, he would have blown the front
3 windshield out by shooting as it as it was coming
4 towards him. It was only when that rifle was raised
5 and he said "oh, my gosh" that he grabbed his gun, and
6 by that time they were nearly at each other where he
7 started firing, and he had to get past Nick's car to
8 get away to safety.

9 I urge you to find that Adrian is not guilty of
10 any assaults on Nick or on Ahria by virtue of
11 self-defense. Thank you very much.

12 THE COURT: Thank you, Mr. Schoenberger. Mr.
13 Greer is entitled to rebuttal argument if he wishes.

14 Mr. Greer?

15 MR. GREER: Thank you, Your Honor.

16 REBUTTAL CLOSING ARGUMENTS

17 BY MR. GREER:

18 With all due respect, reiterating the defendant's
19 crafted self-defense claim, it is nothing more than
20 that. It's just reiterating what the defendant tried
21 to sell you, and you know that the defendant is not
22 credible for several reasons.

23 The last thing the defense said was the
24 windshield, if he saw him coming, he would shoot and
25 you would have a bullet in front of the windshield, and

1 story is not credible include -- and that's what I
2 intend on focusing on in this brief rebuttal -- the
3 issue of Regina. Now, Regina took the stand, of
4 course. In contrast to the defendant's claim that Nick
5 was after Regina because she rejected him -- and
6 remember, that's the defendant's story -- what I'm
7 pointing out to you is that every witness in this case,
8 every witness tells a story different than the
9 defendant.

10 What does Regina say? She says that on the
11 Hilltop Nick came up to her and asked if she was okay,
12 meaning, Are you okay staying with him? She says she's
13 a big girl, she's fine. At no point does she say
14 anything different. And key to this is there are two
15 witnesses to that event, one that testified concerning
16 that event, which is Regina, who was never
17 cross-examined on that. Curiously enough, nobody asked
18 Regina -- the defense never asked Regina, Isn't it true
19 that Nick made advances on you. Never asked. The only
20 time it comes up is when the defendant takes the stand
21 and Regina is no longer available to address the issue.

22 Also, driving with Regina to two friends' homes,
23 remember, this is a long, convoluted story that the
24 defendant gives about where he was and why he was
25 different places. The defendant didn't actually answer

APPENDIX

H

1 A Yes, they were.

2 Q Did anyone have plans that you knew of to leave the
3 house later that evening?

4 A Not that I know of.

5 Q At some point did you become awakened for any reason?

6 A Yes, because I heard that there were like more people
7 around the house.

8 Q And when you say "around the house," do you mean in the
9 house or outside?

10 A Inside the house.

11 Q What did you do when you heard or knew that there were
12 people in the house?

* 13 A I stood up. I went to my daughter's bedroom and I
14 knocked on her door, and I told her that the people who
15 were here, they had to leave because it was very late.
16 And basically I don't like to have anybody in my house.

- 17 Q Did you see the people that you were asking her to make
18 leave?

* 19 A No. I just knocked at her door. I told her that and
20 then I went back to my bedroom.

21 Q Did you ever get up again or wake up and get out of
22 your room again?

23 A Yes, I woke up again because when these people left the
24 house, they wanted my daughter to leave the house with
25 them.

1 Q And how did you know that?

2 A Because I was listening because I hadn't been falling
3 asleep yet.

4 Q Were they talking in Yessica's room or some other part
5 of the house?

6 A No, they were outside already.

7 Q Outside of the house?

8 A Yes.

9 Q Did Yessica go with them?

10 A No.

0 11 Q Did you, when you got up again, actually see the people
12 this time?

0 13 A No, because when I stood up I heard that this was a
14 woman, a young woman, and she was yelling obscenities
15 at my daughter.

16 Q Did you hear any other voices, not including your
17 daughter's, other than this woman?

0 18 A I heard a young man who was telling this young woman
19 not to be that way, that this was not her house and
20 that she had to be respectful of that.

21 Q Did you ever go outside and see these people at any
22 point?

- 23 A No, because when I tried to get out there, they had
24 already got in the car and they were leaving.

25 Q Did you see them get into the car?

1 A Mm-hmm.

2 Q How long do you think they were in your house before
3 they left?

4 A Like ten minutes, like not that long, a couple minutes.

5 Q When the both of them left together, did you go to the
6 door with them, the front door?

7 A I think.

8 Q Did you walk them out?

9 A Yeah, I think.

10 Q Then what happened?

11 A Well, I went back on my bed. I laid on my bed and I
12 was just like laying. Well, I couldn't go back to
13 sleep.

14 Q Did you have your door open or closed?

15 A No, I had my door closed.

16 Q Were your lights off?

17 A Yeah, my lights were off.

18 Q Go ahead. Then what happened?

19 A Then I just heard the gunshots.

20 Q How long after they left did you hear gunshots?

~~21~~ A Right away.

22 Q When you say that, what do you mean?

23 A Like I went to my bed, and as soon as I went to my bed,
24 I was laying there for a few seconds and I heard the
25 gunshots go off.

1 and shoot him down, gun him down. And I'm going to
2 tell you right now that the most important witness to
3 this situation is Jose, and I'll tell you why.

4 I want to also tell you one thing from the outset
5 as well. The only threat, as you recall, that the
6 defendant says made to him is, If you ever show up on
7 the East Side again, I'll kill you.

8 The defendant feels fear, he says, fear that he's
9 going to lose his life, fear that he has to load his
10 gun and be ready and shoot his friend. Where does he
11 go? Does he leave the East Side? Where does he go if
12 he's so afraid? He goes to a common place, a place
13 where he knows Nick will go and a place where he knows
14 he can find Nick and where Nick will find him. He was
15 not afraid of Nick; he was looking for Nick.

16 Now, the next thing I want to do is, again, move
17 to the evidence which supports that this is an ambush.
18 I'm going to put back in front of you one of several
19 keys to this case, and that's this diagram. I have to
20 take my glasses off. I have new lenses and I can't see
21 up or down now. I'm somewhere in between. And, to me,
22 it's more comfortable to take them off, so I'll do
23 that.

24 I'll get right to the most important factor from
25 the beginning, and that is Jose Rosas. What did Jose

1 tell you and what motivation does Jose have to tell you
2 anything but the truth?

3 Jose told you that at one point he got up and told
4 the defendant to leave and Regina to leave. He watched
5 them get up, he watched them go to the car, and he
6 didn't leave the door frame and go back to his bed. He
7 watched them drive down the street until they took a
8 left turn to leave. Then and only then did he go back
9 to his room, get back in his bed, and try to get back
10 to sleep, and it's only then that he hears gunfire.

11 You will have to say either to be polite, he's
12 mistaken, or that he's lying about that in order to
13 believe the defendant. Because what did the defendant
14 say? The defendant said he immediately left and as he
15 was rounding this corner, he saw Smiley, Nick's car,
16 and Regina started screaming. He reached for his gun,
17 rolled his window down, and start shooting.

18 Somebody is not telling the truth. It could not
19 have happened both ways. Other issues that are just as
20 important that support Mr. Rosas's statement about what
21 happened, first of all, the time period in which he
22 gave that statement was right as officers got there he
23 gave a statement to them immediately. So did Yessica.
24 And Yessica also says that she saw her dad make him
25 leave. She went back to her bed and tried to get to

1 Never does the defendant even say he was going to
2 kill us; he was going to shoot me. So she's surprised
3 by it on the stand.

4 What other significant value does that reaction
5 and that statement have? It proves that the defendant
6 is not telling the truth, is not credible on the stand,
7 because what did he say on the stand under oath? That
8 she brought the issue of Smiley to his attention as
9 they were rounding that corner, that she did that.

10 And there's another example right there of a big
11 material contrast between what the other person in the
12 car said happened and what the defendant does. And
13 what does Regina have to lose or gain by telling you
14 anything other than the truth? What does the defendant
15 have to lose or gain by telling you anything other than
16 the truth?

17 The defense says, well, why would he go over to
18 Yessica's house if he didn't know that Nick was going
19 to be there? Remember where they are earlier, if
20 that's where they are, is in Wolfie's alley. Why?
21 Everybody is looking for Wolfie; that's the hangout.
22 Guess who is not there? Wolfie.

23 So Nick is looking for Wolfie, and Wolfie is not
24 there. Who is Wolfie's girlfriend? Yessica. The
25 defendant goes to Yessica's home because, logically,

1 66th.

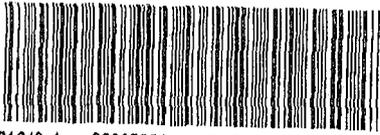
2 Then finally, the defense says time is relative.

3 I mean, come on. Jose and Yessica don't have much to
4 add to this case. It's just a few seconds. Well,
5 first of all, that's not their testimony. It wasn't a
6 few seconds; it was minutes. It was, went back to bed,
7 trying to get to bed. It was Jose watching the car and
8 take the turn, then he went to bed, and then, after a
9 period of time, he heard the gunfire.

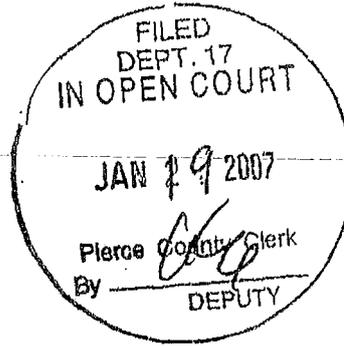
10 It was Yessica saying she watched her dad escort
11 them out and watched her dad till he closed the door
12 and then she went and closed her door, got back in bed
13 and was laying there for a period of time before she
14 heard the gunfire.

15 Now, time is something that in significant events,
16 I'll call them, such as being harmed in a car crash or
17 some major incident that you might be involved in, you
18 may lose track of time. But these two individuals
19 weren't involved in that. These weren't the ones that
20 were shot. These are the people that all they know is:
21 Here's the time frame. Here's what happened here,
22 here, here. I didn't see the shooting. I wasn't a
23 participant in that.

24 It's just as an example of time and how much can
25 be accomplished in a little period of time, but



06-1-01643-4 28907003 ORG 02-02-07



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 06-1-01643-4

vs.

ADRIAN CONTRERAS REBOLLAR,

ORDER GRANTING IMMUNITY

Defendant.

THIS MATTER coming on regularly for hearing in open court on the motion of the plaintiff, supported by the affidavit of GREGORY L GREER, Deputy Prosecuting Attorney for Pierce County, Washington, and it appearing that the ends of justice will best be served by having AHRIA JAMES KELLEY available as a witness against ADRIAN CONTRERAS REBOLLAR, the defendant in the above entitled cause, Now, Therefore, it is hereby

ORDERED that AHRIA JAMES KELLEY, upon pain of contempt in the event that he should refuse to testify in the above entitled cause and pain of perjury should he give false testimony in the above entitled cause, shall testify as a witness when subpoenaed by the State of Washington to give testimony in the above cause.

IT IS FURTHER ORDERED that AHRIA JAMES KELLEY shall be immune from prosecution for or on account of any transaction, matter or fact concerning which he has been ordered to testify.

06-1-01643-4

DONE IN OPEN COURT this 19th day of January, 2007.

[Handwritten Signature]
JUDGE

Presented by:

[Handwritten Signature]
GREGORY L GREER
Deputy Prosecuting Attorney
WSB# 22936

RONALD CULPEPPER

glg *X Order not reviewed by Kelly's attorney,
Korva Campbell*

FILED
DEPT. 17
IN OPEN COURT
JAN 29 2007
Pierce County Clerk
By *[Signature]*
DEPUTY

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06-1-01643-4 26741190 SHRTBW 01-03-07

CLEARED
Date _____

FILED
IN COUNTY CLERK'S OFFICE

A.M. **DEC 11 2006** P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

FILED
IN COUNTY CLERK'S OFFICE

A.M. **JAN 02 2007** P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, COUNTY CLERK
BY _____ DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY.

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 06-1-01643-4

vs.

ADRIAN CONTRERAS REBOLLAR,

Defendant.

BENCH WARRANT - MATERIAL WITNESS JOSE L. ROSAS

WITNESS ADDRESS: 6627 E K St, Tacoma, WA 98404; 6621 E K St, Tacoma, WA 98404

TO ALL PEACE OFFICERS IN THE STATE OF WASHINGTON, GREETINGS:

WHEREAS, an order of court has been entered directing the Clerk of the above entitled court to issue a warrant for the arrest of the above named Material Witness JOSE L. ROSAS

SEX M; RACE W; EYES Brn; WEIGHT 190; HEIGHT 5'11"; DATE OF BIRTH 06/19/1966; POLICE AGENCY TACOMA POLICE DEPARTMENT; DATE OF VIOLATION 04/12/06; POLICE AGENCY CASE NO061020028;

You are hereby commanded to forthwith arrest the said JOSE L. ROSAS, to be held has a material witness as ordered by the court and bring said material witness into court to be dealt with according to law. BAIL IS TO BE SET IN OPEN COURT.

WITNESS THE HONORABLE Lisa Worswick
Judge of the said court and seal thereof affixed

This _____ day of December, 2006.

DEC 11 2006

KEVIN STOCK
Clerk of the Superior Court

By _____ Deputy

This is to certify that I received the within bench warrant on the 11 day of December, 2006 and by virtue thereof on the above day of _____, I arrested the within named witness, _____ and now have said material witness in full custody.

Trishel 12/140 TPD
PEACE OFFICER

Extradition: Shuttle States Only Nationwide Warrant Service Fee \$15/Return Fee \$5/Mileage \$ _____/TOTAL \$ _____
klk

Records Specialist Rydberg

Employee # 145

is signing for and at the direction of the listed officer.

BENCH WARRANT/MATERIAL WITNESS
witmwbw

Date: 12/20/06 Time: 18:58

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

Cite as 86 S.Ct. 1802 (1966)

ily waive privilege to remain silent. U.S. C.A.Const. Amend. 5.

57. Criminal Law ⇨518(1)

Requirement of warnings and waiver of right is fundamental with respect to Fifth Amendment privilege and not simply preliminary ritual to existing methods of interrogation.

58. Criminal Law

⇨406(2), 412.2(3), 412.2(5), 518(1)

Warnings or waiver with respect to Fifth Amendment rights are, in absence of wholly effective equivalent, prerequisites to admissibility of any statement made by a defendant, regardless of whether statements are direct confessions, admissions of part or all of offense, or merely "exculpatory". U.S. C.A.Const. Amend. 5.

59. Criminal Law ⇨393(1)

Privilege against self-incrimination protects individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination.

60. Criminal Law ⇨412.2(3)

Statements merely intended to be exculpatory by defendant, but used to impeach trial testimony or to demonstrate untruth in statements given under interrogation, are incriminating and may not be used without full warnings and effective waiver required for any other statement. U.S.C.A.Const. Amend. 5.

61. Criminal Law ⇨417(1)

When individual is in custody on probable cause, police may seek out evidence in field to be used at trial against him, and may make inquiry of persons not under restraint.

62. Criminal Law ⇨412.2(3), 417(1)

Rules relating to warnings and waiver in connection with statements taken in police interrogation do not govern general on-the-scene questioning as to facts surrounding crime or other general questioning of citizens in fact-finding process. U.S.C.A.Const. Amend. 5.

63. Criminal Law ⇨516

Confessions remain a proper element in law enforcement.

64. Criminal Law ⇨412.1(1)

Any statement given freely and voluntarily without compelling influences is admissible.

65. Criminal Law ⇨412.1(1), 517.1(1)

Volunteered statements of any kind are not barred by Fifth Amendment; there is no requirement that police stop person who enters police station and states that he wishes to confess a crime or a person who calls police to offer confession or any other statements he desires to make. U.S.C.A.Const. Amend. 5.

66. Criminal Law ⇨393(1)

When individual is taken into custody or otherwise deprived of his freedom by authorities in any significant way and is subjected to questioning, privilege against self-incrimination is jeopardized, and procedural safeguards must be employed to protect privilege. U.S.C.A.Const. Amend. 5.

67. Criminal Law ⇨412.2(3), 412.2(5)

Unless other fully effective means are adopted to notify accused in custody or otherwise deprived of freedom of his right of silence and to assure that exercise of right will be scrupulously honored, he must be warned before questioning that he has right to remain silent, that anything he says can be used against him in court, and that he has right to presence of attorney and to have attorney appointed before questioning if he cannot afford one; opportunity to exercise these rights must be afforded to him throughout interrogation; after such warnings have been given and opportunity afforded, accused may knowingly and intelligently waive rights and agree to answer questions or make statements, but unless and until such warnings and waiver are demonstrated by prosecution at trial, no evidence obtained as a result of interrogation can be used against him. U.S. C.A.Const. Amends. 5, 6.

which further questioning would be permissible; in absence of evidence of overbearing, statements then made in presence of counsel might be free of compelling influence of interrogation process and might fairly be construed as waiver of privilege for purposes of these statements. U.S.C.A.Const. Amend. 5.

45. Criminal Law ⇄412.1(1)

Any statement taken after person invokes Fifth Amendment privilege cannot be other than product of compulsion. U.S.C.A.Const. Amend. 5.

46. Criminal Law ⇄412.2(1)

If individual states that he wants attorney, interrogation must cease until attorney is present; at that time, individual must have opportunity to confer with attorney and to have him present during any subsequent questioning. U.S.C.A.Const. Amends. 5, 6.

47. Criminal Law ⇄412.2(3)

While each police station need not have "station house lawyer" present at all times to advise prisoners, if police propose to interrogate person they must make known to him that he is entitled to lawyer and that if he cannot afford one, lawyer will be provided for him prior to any interrogation. U.S.C.A.Const. Amend. 5.

48. Criminal Law ⇄393(1)

If authorities conclude that they will not provide counsel during reasonable period of time in which investigation in field is carried out, they may refrain from doing so without violating person's Fifth Amendment privilege so long as they do not question him during that time. U.S.C.A.Const. Amend. 5.

49. Criminal Law ⇄414

If interrogation continues without presence of attorney and statement is taken, government has heavy burden to demonstrate that defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. U.S.C.A.Const. Amend. 5.

50. Constitutional Law ⇄43(1)

High standards of proof for waiver of constitutional rights apply to in-custody interrogation.

51. Criminal Law ⇄414

State properly has burden to demonstrate knowing and intelligent waiver of privilege against self-incrimination and right to counsel, with respect to incommunicado interrogation, since state is responsible for establishing isolated circumstances under which interrogation takes place and has only means of making available corroborated evidence of warnings given.

52. Criminal Law ⇄517.2(2)

Express statement that defendant is willing to make statement and does not want attorney, followed closely by statement, could constitute waiver, but valid waiver will not be presumed simply from silence of accused after warnings are given or simply from fact that confession was in fact eventually obtained.

53. Criminal Law ⇄641.9

Presuming waiver from silent record is impermissible, and record must show, or there must be allegations and evidence, that accused was offered counsel but intelligently and understandingly rejected offer.

54. Criminal Law ⇄412.1(4)

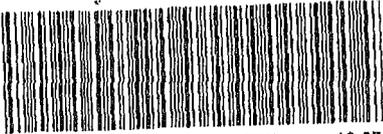
Where in-custody interrogation is involved, there is no room for contention that privilege is waived if individual answers some questions or gives some information on his own before invoking right to remain silent when interrogated. U.S.C.A.Const. Amend. 5.

55. Criminal Law ⇄412.1(3), 412.1(4)

Fact of lengthy interrogation or incommunicado incarceration before statement is made is strong evidence that accused did not validly waive rights. U.S.C.A.Const. Amend. 5.

56. Criminal Law ⇄393(1)

Any evidence that accused was threatened, tricked, or cajoled into waiver will show that he did not voluntar-



06-1-01643-4 26714213 SHRTBW 12-27-06

FILED IN COUNTY CLERK'S OFFICE

AM. DEC 12 2006 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY [Signature] DEPUTY

Records Specialist Shamela
Employee # 111

ORIGINAL
DEC 12 2006
Issued for and at the direction of the listed officer.

Date: 12/30/06 File #: 1255
SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

CLEARED
Date 12/30/06

STATE OF WASHINGTON,

Plaintiff,

vs.

ADRIAN CONTRERAS REBOLLAR,

Defendant.

CAUSE NO. 06-1-01643-4

BENCH WARRANT - MATERIAL WITNESS
AHRIA JAMES KELLEY

FILED IN COUNTY CLERK'S OFFICE
AM. DEC 26 2006 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY [Signature] DEPUTY

WITNESS ADDRESS: 618 E 57th, Tacoma, WA 98404; 247 Tacoma Ave S, Apt 202, Tacoma, WA 98402

TO ALL PEACE OFFICERS IN THE STATE OF WASHINGTON, GREETINGS:

WHEREAS, an order of court has been entered directing the Clerk of the above entitled court to issue a warrant for the arrest of the above named Material Witness AHRIA JAMES KELLEY

SEX M; RACE AMER INDIAN/ALASKAN; EYES BRN; WEIGHT 160; HEIGHT 5'11"; DATE OF BIRTH 08/30/1987; POLICE AGENCY TACOMA POLICE DEPARTMENT; DATE OF VIOLATION 04/12/06; POLICE AGENCY CASE NO061020028;

You are hereby commanded to forthwith arrest the said AHRIA JAMES KELLEY, to be held has a material witness as ordered by the court and bring said material witness into court to be dealt with according to law. BAIL IS TO BE SET IN OPEN COURT.

WITNESS THE HONORABLE Lisa Worswick
Judge of the said court and seal thereof affixed
This 12 day of December, 2006.
DEC 12 2006
KEVIN STOCK
Clerk of the Superior Court

By [Signature]
Deputy

This is to certify that I received the within bench warrant on the 03 day of Dec 2006 and by virtue thereof on the _____ day of _____, I arrested the within named witness, _____ and now have said material witness in full custody.

Scotlick 97043 PC30
PEACE OFFICER

Extradition: Shuttle States Only Nationwide Warrant Service Fee \$15/Return Fee \$5/Mileage \$ _____ /TOTAL \$ _____
klk

ORIGINAL

BENCH WARRANT/ MATERIAL WITNESS - I
witmvbw

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

AFFIDAVIT OF

Adrian Contreras

STATE OF WASHINGTON

County of Grays Harbor

ss.

I Adrian Contreras, declare under penalty of perjury and on oath state the following:

I was walking out the 2nd story motel room, when I saw what appeared to me like an average Joe individual sneaking toward my parked vehicle, with his eyes narrowing, extremely focusing in on my car. He was walking, but was sneaking like half way crouching. This extremely alarmed me to the extend that this guy was either trying to steal my car, or was looking for me. Either way his extremely narrowed eyes and half way crouching alarmed me to that extend, that I felt he was actually looking for me, that is, to see if someone was inside the [my] vehicle. The time was early in the morning somewhere round 10:15-30 A.M. I ran back into the room and heard some barely audible male voice but couldn't make out what it was as I had only stepped 4-5 steps out of the door and was

31. Criminal Law ⇨412.2(1)

Right to have counsel present at interrogation is indispensable to protection of Fifth Amendment privilege. U.S.C.A. Const. Amend. 5.

32. Criminal Law ⇨412.2(1)

Need for counsel to protect Fifth Amendment privilege comprehends not merely right to consult with counsel prior to questioning but also to have counsel present during any questioning if defendant so desires. U.S.C.A. Const. Amends. 5, 6.

33. Criminal Law ⇨412.2(5)

Preinterrogation request for lawyer affirmatively secures accused's right to have one, but his failure to ask for lawyer does not constitute waiver. U.S.C.A. Const. Amend. 5.

34. Criminal Law ⇨412.2(5)

No effective waiver of right to counsel during interrogation can be recognized unless specifically made after warnings as to rights have been given. U.S.C.A. Const. Amend. 5.

35. Criminal Law ⇨412.2(5)

Proposition that right to be furnished counsel does not depend upon request applies with equal force in context of providing counsel to protect accused's Fifth Amendment privilege in face of interrogation. U.S.C.A. Const. Amend. 5.

36. Criminal Law ⇨412.2(3)

Individual held for interrogation must be clearly informed that he has right to consult with lawyer and to have lawyer with him during interrogation, to protect Fifth Amendment privilege. U.S.C.A. Const. Amend. 5.

37. Criminal Law ⇨412.2(3)

Warning as to right to consult lawyer and have lawyer present during interrogation is absolute prerequisite to interrogation, and no amount of circumstantial evidence that person may have been aware of this right will suffice to stand in its stead. U.S.C.A. Const. Amend. 5.

38. Criminal Law ⇨412.2(1)

If individual indicates that he wishes assistance of counsel before interrogation occurs, authorities cannot rationally ignore or deny request on basis that individual does not have or cannot afford retained attorney.

39. Criminal Law ⇨393(1)

Privilege against self-incrimination applies to all individuals. U.S.C.A. Const. Amend. 5.

40. Criminal Law ⇨641.6(3)

With respect to affording assistance of counsel, while authorities are not required to relieve accused of his poverty, they have obligation not to take advantage of indigence in administration of justice. U.S.C.A. Const. Amend. 6.

41. Criminal Law ⇨412.2(3)

In order fully to apprise person interrogated of extent of his rights, it is necessary to warn him not only that he has right to consult with attorney, but also that if he is indigent lawyer will be appointed to represent him. U.S.C.A. Const. Amend. 6.

42. Criminal Law ⇨641.7(1)

Expedient of giving warning as to right to appointed counsel is too simple and rights involved too important to engage in ex post facto inquiries into financial ability when there is any doubt at all on that score, but warning that indigent may have counsel appointed need not be given to person who is known to have attorney or is known to have ample funds to secure one. U.S.C.A. Const. Amend. 6.

43. Criminal Law ⇨412.1(4)

Once warnings have been given, if individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, interrogation must cease. U.S.C.A. Const. Amend. 5.

44. Criminal Law ⇨412.1(4)

If individual indicates desire to remain silent, but has attorney present, there may be some circumstances in

18. Criminal Law ⇨998(6)

Whether conviction was in federal or state court, defendant may secure post-conviction hearing based on alleged involuntary character of his confession, provided that he meets procedural requirements.

20. Criminal Law ⇨412.1(4)

Voluntariness doctrine in state cases encompasses all interrogation practices which are likely to exert such pressure upon individual as to disable him from making free and rational choice. U.S.C.A.Const. Amend. 5.

21. Criminal Law ⇨412.2(4), 641.12(2)

Independent of any other constitutional proscription, preventing attorney from consulting with client is violation of Sixth Amendment right to assistance of counsel and excludes any statement obtained in its wake. U.S.C.A.Const. Amend. 6.

22. Criminal Law ⇨412.2(4)

Presence of counsel in cases presented would have been adequate protective device necessary to make process of police interrogation conform to dictates of privilege; his presence would have insured that statements made in government-established atmosphere were not product of compulsion. U.S.C.A.Const. Amends. 5, 6.

23. Criminal Law ⇨393(1)

Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed from being compelled to incriminate themselves. U.S.C.A.Const. Amend. 5.

24. Criminal Law ⇨393(1), 412.2(3)

To combat pressures in in-custody interrogation and to permit full opportunity to exercise privilege against self-incrimination, accused must be adequately and effectively apprised of his rights and exercise of these rights must be fully honored. U.S.C.A.Const. Amend. 5.

25. Criminal Law ⇨18(2)

If person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has right to remain silent, as threshold requirement for intelligent decision as to its exercise, as absolute prerequisite in overcoming inherent pressures of interrogation atmosphere, and to show that interrogators are prepared to recognize privilege should accused choose to exercise it. U.S.C.A.Const. Amend. 5.

26. Criminal Law ⇨518(1)

Awareness of right to remain silent is threshold requirement for intelligent decision as to its exercise. U.S.C.A. Const. Amend. 5.

27. Criminal Law ⇨393(1)

It is impermissible to penalize individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. U.S.C.A.Const. Amend. 5.

28. Criminal Law ⇨407(1)

Prosecution may not use at trial fact that defendant stood mute or claimed his privilege in face of accusation.

29. Criminal Law ⇨518(2)

Whatever background of person interrogated, warning at time of interrogation as to availability of right to remain silent is indispensable to overcome pressures of in-custody interrogation and to insure that individual knows that he is free to exercise privilege at that point and time. U.S.C.A.Const. Amend. 5.

30. Criminal Law ⇨518(3)

Warning of right to remain silent, as prerequisite to in-custody interrogation, must be accompanied by explanation that anything said can and will be used against individual; warning is needed to make accused aware not only of privilege but of consequences of foregoing it and also serves to make him more acutely aware that he is faced with phase of adversary system. U.S.C.A.Const. Amend. 5.

already back inside the room.

Because Regina did not come back inside, I stepped back out to both see who it was and better assess the situation. I was confronted with the barrel of a gun which was 1st aimed at Regina but it then focused in on me, I was ordered to "obey my directives" and "walk straight until you reach the end of the staircase" did so, then "walk to your left towards the staircase and make your way down the steps and slowly." My hands were elevated. I was then handcuffed.

Because this officer had not mentioned anything, I mean at all. No rights, no mention of any charges, nothing. I became and was certainly concerned certain rights of mine were being violated because I was already on the ground arrested but there was no mention of any charges or anything whatsoever for that matter.

Like any rational individual I knew I had been arrested, I'm not nor never in my trial did I say "I did not know I was being arrested" but what I'm saying is: I was only trying and wanting to invoke my rights.

While being held on the ground, another undercover agent, dressed in civilian clothes, came up to me while I was still on the ground. He stood there a while (few seconds) and then began to pull up my upper torso clothing. Which is, what prompted me to say "what's going?" he didn't respond, at 1st they untucked my shirts as if searching me for weapons, however he began to pull my shirts up higher which is when I more adamantly again asked "what's going on? ~~Why are you do~~ what are you doing?" and "I have a family lawyer" I was picked up, not violently, but picked up from the ground nonetheless, and was asked if I had been shot or had any gunshot wounds, I said no, but as to make sure, or not he lifted up my shirts and jacket, up to my chest.

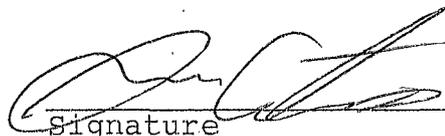
I assert, I have not testified contra anything contradictory at trial to this affidavit, but was simply not asked the main question which is: Why did I ask these questions "What's going on? What are you doing?" which per I wish to answer here.

I hereby state, as is my personal belief, that even if this undercover agent wanted to tell me my charges or read me my rights, he could not, as he himself said (and was trying to say) he did not know the details of the case or what level of probable cause there was [to arrest me] even do he said "etc. etcetera." Please trial proceedings attached to this affidavit pages (RP's) p.g's 294-95; 700; 701; 889.

Affidavit pursuant to 28 U.S.C. § 1746 and DICKINSON V. WAINWRIGHT, 626 F.2d 1184 (1980) sworn as true and correct under penalty of perjury has full force of law and does not have to be verified by notary public.

I, Ad Adrian Contreras, am a U.S. citizen competent to testify and herein attest under penalty of perjury that all statements contained herein is the absolute truth.

Respectfully submitted on this 17th day of November, 2011.


Signature

Adrian Contreras
Print Name

DECLARATION OF SERVICE BY MAIL
GR 3.1

FILED
COURT OF APPEALS
DIVISION II

11 NOV 22 PM 12:49

I, Adrian Contreras, declare and say:

STATE OF WASHINGTON

That on the 17 day of November, 2011, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 41672-7:

" PRP supplemented Grounds " [REDACTED] ;

_____ ;
_____ ;
_____ ;

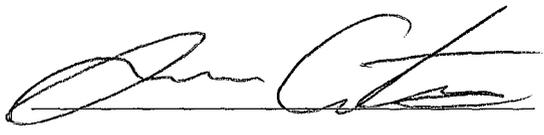
addressed to the following:

David Ponzoha
Court clerk
Court of Appeals, Div. 2
950 Broadway, Suite 300
Tacoma, WA. 98402-4454

Prosecutor
Jason Ruyf
Pierce County Prosecutors Dept.
930 Tacoma Ave. S. Rm. 946
Tacoma, WA. 98402

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 17th day of November, 2011, in the City of Aberdeen, County of Grays Harbor, State of Washington.



Adrian Contreras

DOC 819639 UNIT F
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA 98520