USE OF POST-ARREST, PRE-WARNING SILENCE IS PERMISSIBLE TO IMPEACH DEFENDANT'S EXCULPATORY TRIAL TESTIMONY

Fletcher v. Weir, 455 U.S. 603 (1982)

In *Fletcher v. Weir*[1] the United States Supreme Court limited the procedural protection afforded a criminal defendant,[2] holding that when no *Miranda* warnings[3] are given, the admission of a defendant's post-arrest silence to impeach[4] his exculpatory trial testimony[5] does not violate the due process clause of the fourteenth amendment.[6]

The defendant fatally stabbed his adversary during a fight and was arrested seventeen hours later.[7] Although the record provided no clear indication whether the arresting officer informed the defendant of his right to remain silent, as required by *Miranda v. Arizona*,[8] the record

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1. 455 U.S. 603 (1982) (per curiam).

2. *See infra* text accompanying notes 80-85.

3. *See infra* note 8 and accompanying text.

4. Courts generally prohibit the state's use of post-arrest silence to prove the merits of the case. *See infra* note 32 and accompanying text.

5. The question is particularly important where prosecutors must rebut the defendant's alibi defense. When the defendant advances an alibi for the first time at trial, rebuttal is often difficult. As a result, many jurisdictions require defendants to notify the prosecutor of any alibi prior to trial. *See, e.g.*, FED. R. CRIM. P. 12.1; IND. CODE ANN. tit. 35 § 36-4-1 (Burns 1982); KAN. CODE OF CRIM. PROC. § 22.3218; MICH. COMP. LAWS §§ 768.20, 768.21 (1970); NEV. REV. STAT. § 174.087 (1969); N.Y. CRIM. PROC. LAW § 250.20 (McKinney 1971); OKLA. STAT. tit. 22, § 585 (1969); WIS. STAT. ANN. § 971.23(8) (West 1974); ARIZ. R. CRIM. P. 15.2(B); COLO. R. CRIM. P. 12.1; D.C. COURT RULES-CRIMINAL DIVISION 61-1; FLA. R. CRIM. P. 3.200; ME. R. CRIM. P. 16(B); MINN. R. CRIM. P. 9.02 subd. 1(3)(a); MO. R. CRIM. P. 25.34(A)(5); MONT. CODE CRIM. P. 95-1803(d); N.M.R. CRIM. P. 32; N.D.R. CRIM. P. 12.1; OHIO R. CRIM. P. 12.1; PA. R. CRIM. P. 312; VT. R. CRIM. P. 12.1; WASH. SUPER. CT. CRIM. R. 4.7(B)(2)(ii).

In Williams v. Florida, 399 U.S. 78 (1969), the Supreme Court rejected fifth amendment due process and self-incrimination challenges to the Florida notice-of-alibi law. The decision laid to rest constitutional concerns about this type of statute. *See generally* Epstein, *Advance Notice of Alibi*, 55 J. CRIM L.C. & P.S. 29 (1964); Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228 (1964); Note, *The Right of the Prosecutor to Advance Notice of the Defendant's Alibi Defense*, 2 PEPPERDINE L. REV. 417 (1975); Note, *Criminal Discovery: California's Treatment of Pretrial Notice of Alibi*, 7 SW. U.L. REV. 338 (1975); Note, *Constitutional Implications of Notice-of-Alibi Provisions*, 21 WAYNE L. REV. 1415 (1975).

6. U.S. CONST. amend. XIV, § 1. The fourteenth amendment states in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ." *Id.*

7. Weir v. Fletcher, 658 F.2d 1126, 1127 (6th Cir. 1981), *rev'd*, 455 U.S. 603 (1982) (per curiam).

8. 384 U.S. 436 (1966). *Miranda* requires that police warn arrestees of their right to remain silent before interrogation. *Id.* at 444. Courts define "interrogation" for *Miranda* purposes as direct questioning or the functional equivalent. *See* Rhode Island v. Innis, 446 U.S. 291, 298-302

clearly showed that the defendant did remain silent after his arrest.[9] At his trial for intentional murder, the defendant took the stand voluntarily. On direct examination, he advanced for the first time an exculpatory version of the incident.[10] During cross-examination, the prosecutor questioned the defendant about his failure to present the exculpatory explanation before or after his arrest.[11]

The trial court found the defendant guilty of manslaughter[12] and the Kentucky Supreme Court affirmed.[13] The federal district court for the Western District of Kentucky subsequently granted a writ of habeas corpus[14] and the Sixth Circuit affirmed.[15] On certiorari, the United States Supreme Court reversed and *held*: Absent *Miranda* warnings, prosecutorial use of post-arrest silence as prior inconsistent conduct to impeach a defendant's testimony does not violate due process because no state action has assured a defendant that his silence will not be used against him.[16]

(1980). *See also* Grane, Rhode Island v. Innis: *A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions,* 17 AM. CRIM. L. REV. 1 (1979); Kamisar, Brewer v. Williams, Massiah, *and* Miranda: *What is Interrogation? When Does it Matter?,* 67 GEO. L.J. 1 (1978); Comment, Doyle v. Ohio: *Use of a Defendant's Silence for Impeachment at Trial,* 8 LOY. U. CHI. L.J. 438 (1977) [hereinafter cited as Comment, *Use of Defendant's Silence*].

9. 455 U.S. at 603-04.

10. *Id.* The defendant testified that he accidentally stabbed the victim and that he acted in self-defense.

11. *Id.* Evidence of pre-arrest silence is admissible for impeachment purposes. *See infra* note 34. During cross-examination of the defendant the following exchange took place concerning his post-arrest silence:

> Q. Why didn't you tell [the State Police] at the time that he accidentally fell down on your knife?
> A. Well, I didn't—
> Mr. Osborne [Defense Attorney]: Judge, again, I am going to object. He had no reason to tell them anything at the time.
> By Mr. Bryant [Prosecuting Attorney]:
> Q. Go ahead and tell us.
> A. I didn't feel I ought to tell them anything.
> Q. Okay. That's after your knife disappeared and after you fled all over Ballard county, Barlow and Wickliffe; and 17 hours later your were picked up. You don't want to tell us about anything? Of course, you don't have to.
> Mr. Osborne: Again, I'm going to object and move this court to discharge this Jury in this case because of the conduct on cross-examination.
> The Court: Overruled.

Weir v. Fletcher, 658 F.2d 1126, 1128-29 (6th Cir. 1981).

12. Weir v. Fletcher, No. 77-225 (McCracken Cir. Ct. Mar. 8, 1978).

13. Weir v. Fletcher, No. 78-SC-430-MR (Ky. Feb. 27, 1979).

14. Weir v. Fletcher, No. C79-0149-P (GJ) (W.D. Ky. Dec. 7, 1979).

15. Weir v. Fletcher, 658 F.2d 1126 (6th Cir. 1981), *rev'd,* 455 U.S. 603 (1982).

16. Fletcher v. Weir, 455 U.S. 603, 607 (1982).

At common law, a criminal defendant's silence in the face of accusations that a reasonable, innocent person would rebut was admissible[17] under the "tacit admission" exception to the hearsay rule[18] as substantive proof of the state's case and as evidence to impeach the defendant's exculpatory testimony.[19] Contemporary courts frequently displace the common law rule, disallowing the use of a defendant's silence as substantive evidence. These courts offer one or more of three possible rationales. First, some courts employ the self-incrimination provision of the fifth amendment to exclude silence.[20] Second, other courts disallow

17. Before any evidence is admitted, it must be both logically and legally relevant. Logical relevance exists when evidence is material and has probative value. *See* FED. R. EVID. 401.

Under the doctrine of legal relevance, the trial judge may exclude logically relevant evidence when its probative danger outweighs its probative value. See Federal Rule of Evidence 403, which states that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

See generally C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE §§ 184-85 (E. Cleary 2d ed. 1972).

18. As Wigmore defines the "tacit admission rule," "[a] failure to assert a fact, when it would have been natural to assert it amounts in effect to an assertion of the non-existence of the fact." 3 A. WIGMORE, EVIDENCE § 1042 (Chadbourn rev. ed. 1973). *See* United States v. Moore, 552 F.2d 1068 (9th Cir. 1975); United States v. Coppola, 526 F.2d 764 (10th Cir. 1975); Fowle v. United States, 410 F.2d 48 (9th Cir. 1969). *See also* C. MCCORMICK, *supra* note 17, § 270. *See generally* Brody, *Admission Implied from Silence, Evasion, and Equivocation in Massachusetts Criminal Cases,* 42 B.U.L. REV. 46 (1962); Schiller, *On the Jurisprudence of the Fifth Amendment Right to Silence,* 16 AM. CRIM. L. REV. 197 (1974); Comment, *Use of Defendant's Silence, supra* note 8, at 443.

Two limitations on the common law rule are particularly notable. First, recognizing that silence is inherently ambiguous, the framers of the Federal Rules of Evidence defined "statement" as: "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is *intended* by him as an assertion." FED. R. EVID. 801(a) (emphasis added). *See* Note, *Impeaching a Defendant's Testimony by Proof of Post-Arrest Silence:* Doyle v. Ohio, 25 CLEV. ST. L. REV. 261, 270-71 (1976). Second, Wigmore suggests that the tacit admission rule is seriously affected by *Miranda*: "Certain situations in particular may furnish a positive motive for silence without regard to the truth or falsity of the statement. Whether the fact that the party was at the time *under arrest* creates such a situation has been the subject of opposing opinions. . . ." 4 A. WIGMORE, *supra*, § 1072(4) (emphasis in original).

19. Until the late 19th century, courts considered participants in criminal trials incompetent to testify. Thus, courts have only recently become concerned with the use of a defendant's silence to impeach. *See* J. GEORGE, JR., CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 233 (1973). For a list of the first state court decisions recognizing the defendant's right to testify, see Ferguson v. Georgia, 365 U.S. 570, 577 n.6 (1960).

20. *See* Michigan v. Tucker, 417 U.S. 433, 441 (1974) (discussion of *Miranda*); Miranda v. Arizona, 384 U.S. 436, 444 (1966) (fifth amendment rationale for right to remain silent); Griffin v. California, 380 U.S. 609, 612 (1965) (prosecutor's comment to jury about defendant's failure to testify at former trial impermissibly penalizes exercise of fifth amendment right to remain silent);

the use of silence by presuming that it lacks probative value.[21] Finally, when state action either explicitly or implicitly assures the defendant that his silence is not usable for any purpose at trial, some courts hold that use of that silence against the defendant is fundamentally unfair and violates due process.[22]

In 1926, in *Raffel v. United States*,[23] the United States Supreme Court limited the protection provided by the fifth amendment's self-incrimination provision, holding that the provision only precludes the state's use of a defendant's silence if the defendant chooses not to testify.[24] In *Raffel*, the defendant, accused of conspiring to violate the National Prohibition Act, chose not to testify at his first trial but presented an alibi defense at his second trial.[25] The Supreme Court held that by choosing to take the stand the defendant waived his right to remain silent. Accordingly, he was subject to the same questions under cross-examination as any other witness,[26] including questions

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Stewart v. United States, 366 U.S. 1, 6 (1961) (failure to testify at two former trials inadmissible to impeach the defendant in cross-examination); Johnson v. United States, 318 U.S. 189, 196-97 (1943) (prosecutor may not comment on defendant's silence after court erroneously told defendant he could rely on immunity). *See also* C. MCCORMICK, *supra* note 17, § 270.

The fifth amendment to the United States Constitution provides in pertinent part: "[No person] shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V. The Supreme Court first applied the fifth amendment to the states in Malloy v. Hogan, 378 U.S. 1 (1964). For a discussion of the origins of the privilege against self-incrimination, see C. MCCORMICK, *supra* note 17, § 114.

For criticism of the expansion of the fifth amendment, see L. MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? (1959); Cross, *The Right of Silence and the Presumption of Innocence—Sacred Cows or Safeguards of Liberty?*, 11 J. SOC'Y PUB. TCHRS. L. 55 (1966-71); Givens, *Reconciling the Fifth Amendment with the Need for More Effective Law Enforcement*, 52 A.B.A.J. 443 (1966); Hoffman, *The Distortion of the Fifth Amendment*, 43 N.Y. ST. B.J. 330 (1971); Inban, *Should We Abolish the Constitutional Privilege Against Self-Incrimination?*, 2 CRIM. L. REV. 28 (1955).

On the other hand, some commentators argue that courts too severely restrict the fifth amendment. *See, e.g.*, Berger, *The Unprivileged Status of the Fifth Amendment: Fox Hunters, Old Women, Hermits, and the Burger Court*, 54 NOTRE DAME LAW. 26 (1978).

21. *See supra* note 17 & *infra* notes 36-42 and accompanying text.

22. *See infra* notes 43-44 and accompanying text.

23. 271 U.S. 494 (1926).

24. *Id.* at 497. *See supra* note 20.

25. *Id.* at 495 (1926). At the first trial a government agent testified that the defendant had made an incriminating statement before trial. The district court ordered retrial after the first jury deadlocked. At the second trial the defendant testified. On cross-examination the prosecutor questioned him about the reason for his prior silence. The Supreme Court upheld the prosecutor's right to ask such questions.

26. *Id.* at 499. During cross-examination, the defendant must answer all questions relevant to the scope of his testimony during direct examination. *See* FED. R. EVID. 611(b); C. MCCORMICK, *supra* note 17, § 21.

about his former silence.[27]

Forty years later, in *Miranda v. Arizona*,[28] the Supreme Court held that the self-incrimination provision of the fifth amendment requires police officers to advise suspects of their constitutional rights to remain silent and obtain representation of counsel prior to custodial interrogation.[29] Failure to provide these warnings renders any subsequent exculpatory or inculpatory statement by the defendant while in custody inadmissible as substantive evidence.[30] Such statements, however, are admissible to impeach a defendant's inconsistent trial testimony.[31]

27. Raffel v. United States, 271 U.S. 494, 499 (1926). The Court held that the defendant's silence was admissible both to impeach and to convict. Courts no longer permit the latter use. *See infra* note 32 and accompanying text.

State courts questioned the continuing authority of *Raffel* in light of subsequent Supreme Court decisions. *See, e.g.,* Raithel v. State, 40 Md. App. 107, 117, 388 A.2d 161, 167 (1978); State v. Carmody, 253 N.W.2d 415, 417 (N.D. 1977). *See also infra* notes 28-44 and accompanying text. Nevertheless, the Supreme Court reaffirmed *Raffel* more than fifty years later, in Jenkins v. Anderson, 447 U.S. 231, 236-37 (1980). The *Jenkins* Court argued that no case following *Raffel* had undercut its reasoning. *Id.* at 237 n.4. Justice Stevens argued in a concurring opinion that post-*Raffel* cases have eroded its significance in federal courts. *Id.* at 241-42 (1980) (Stevens, J., concurring). For further discussion of *Jenkins*, see *infra* notes 48-50 and accompanying text. *See also* Doyle v. United States, 426 U.S. 610, 623 (1976) (Stevens, J., dissenting).

Commentators have criticized the Supreme Court's revival of *Raffel*. *See, e.g.,* Note, *Impeachment Use of Prearrest Silence Violates Neither Self-Incrimination Clause of the Fifth Amendment Nor Due Process Component of the Fourteenth Amendment:* Jenkins v. Anderson, 54 TEMP. L.Q. 331, 349 (1981); Comment, Jenkins v. Anderson: *The Fifth Amendment Fails to Protect Prearrest Silence,* 59 DEN. L.J. 145, 154 (1981); Comment, *Impeachment Use of Prearrest Silence Violates Neither the Privilege Against Compulsory Self-Incrimination Nor the Fundamental Fairness Guarantee of the Due Process Clause,* 58 U. DET. J. URB. L. 307, 315-16 (1981).

28. 384 U.S. 436 (1966).

29. *Id.* at 444. *Miranda* provides a system for the practical enforcement of the right to remain silent, which the Court held is grounded in the self-incrimination provision of the fifth amendment. Prior to *Miranda*, the Court used the due process clause of the fifth and fourteenth amendments to provide some measure of protection against involuntary confessions that were the product of unfair or unreasonable interrogations. *See* Michigan v. Tucker, 417 U.S. 433, 441-43 (1974).

30. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

31. *See* Harris v. New York, 401 U.S. 222 (1971) (statement made following arrest but before *Miranda* warnings issued admissible to impeach defendant's inconsistent statement at trial). *Harris* contradicted the unanimous position of the federal circuit courts. *See id.* at 229-31. After *Harris*, twenty-one of the twenty-seven state supreme courts to consider the issue adopted the *Harris* holding. *See* Campbell v. State, 341 So. 2d 742 (Ala. 1976); State v. Jorgenson, 108 Ariz. 476, 502 P.2d 158 (1972); Rooks v. State, 250 Ark. 561, 466 S.W.2d 478 (1971); Jorgensen v. People, 174 Colo. 144, 482 P.2d 962 (1971); Hill v. State, 316 A.2d 557 (Del. 1974); State v. Retherford, 270 So. 2d 363 (Fla.), *cert. denied,* 412 U.S. 953 (1973); McHan v. State, 232 Ga. 470, 207 S.E.2d 457 (1974); People v. Byers, 50 Ill. 2d 210, 278 N.E.2d 65 (1972); Davis v. State, 256 Ind. 58, 271 N.E.2d 893 (1971); State v. Greene, 214 Kan. 78, 519 P.2d 651 (1974); State v. Marin, 352 A.2d 746 (Me. 1976); Commonwealth v. Harris, 364 Mass. 236, 303 N.E.2d 115 (1973); People

Moreover, if the defendant chooses to remain silent, either before or after arrest, the state may not subsequently use this silence as substantive proof of guilt.[32]

The propriety of using the defendant's silence solely for impeachment purposes, on the other hand, poses a more difficult problem.[33] After *Miranda*, lower courts disagreed about whether to allow the use of post-arrest silence[34] to impeach a defendant's testimony.[35] The

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v. Brown, 399 Mich. 350, 249 N.W.2d 693 (1976); Booker v. State, 325 So. 2d 791 (Miss. 1976); State v. Bazis, 190 Neb. 586, 210 N.W.2d 919 (1973); Johnson v. State, 92 Nev. 405, 551 P.2d 241 (1976); State v. Bryant, 280 N.C. 551, 187 S.E.2d 111 (1972); State v. Kassow, 28 Ohio St. 2d 141, 227 N.E.2d 435 (1971); Langdell v. State, 556 P.2d 1076 (Okla. Crim. App. 1976); Riddell v. Rhay, 79 Wash. 2d 248, 484 P.2d 907 (1971); Ameen v. State, 51 Wis. 2d 175, 186 N.W.2d 206 (1971). *See generally* Gruhl, *State Supreme Courts and the United States Supreme Court's Post-Miranda Rulings,* 72 J. CRIM. L. & CRIMINOLOGY 886, 894-96 (1981) (discussion of post-*Harris* state cases).

32. Even prior to *Miranda*, many courts disallowed the state's use of silence to prove its case. *See generally* 4 W. WIGMORE, *supra* note 18, § 1072.

Since *Miranda*, federal courts have uniformly held that silence is inadmissible to prove the defendant's guilt. *See, e.g.,* United States v. Ghiz, 491 F.2d 599 (4th Cir. 1974); United States v. Faulkenberry, 472 F.2d 879 (9th Cir.), *cert. denied,* 411 U.S. 970 (1973); United States v. Kroslack, 426 F.2d 1129 (7th Cir. 1970); United States *ex rel.* Smith v. Brierly, 384 F.2d 992 (3d Cir. 1967); United States v. McKinney, 379 F.2d 259 (6th Cir. 1967); United States v. Mullings, 364 F.2d 173 (2d Cir. 1966).

33. *Miranda* contained broad dictum: "The prosecutor may not . . . use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation." Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966). Harris v. New York, 401 U.S. 222 (1971), substantially narrowed the *Miranda* dictum, but did not address post-arrest silence.

In People v. Conyers, 49 N.Y.2d 174, 178, 400 N.E.2d 342, 347, 424 N.Y.S.2d 402, 407 (1980), *vacated and remanded,* 101 S. Ct. 56 (1981), in which the defendant was impeached by his post-arrest silence, the New York Court of Appeals explained that "[t]he State's interest in preventing perjury is a great one, and the use of a defendant's silence for impeachment purposes imposes less of a toll upon the exercise of the privilege than does the use of that silence as proof of guilt." Nevertheless, the *Conyers* court disallowed the use of the defendant's silence. For a discussion of *Conyers*, see *infra* notes 55 & 57-59 and accompanying text.

34. Pre-arrest silence is now admissible for impeachment purposes. *See* Jenkins v. United States, 447 U.S. 231, 234 (1980) (evidence that defendant waited two weeks before reporting stabbing to the police or surrendering admissible to impeach defendant's claim of self-defense). For a discussion of *Jenkins*, see *infra* notes 48-50 and accompanying text.

35. The District of Columbia, Second, Sixth, Ninth and Tenth Circuits held that post-arrest silence was inadmissible to impeach the defendant's testimony. *See* United States v. Anderson, 498 F.2d 1038 (D.C. Cir. 1974), Deats v. Rodriguez; 477 F.2d 1023 (10th Cir. 1973); Johnson v. Patterson, 475 F.2d 1066 (10th Cir.), *cert. denied,* 414 U.S. 878 (1973); United States v. Semensohn, 421 F.2d 1206 (2d Cir. 1970); United States v. Nolan, 416 F.2d 588 (10th Cir. 1969); Gillison v. United States, 399 F.2d 586 (D.C. Cir. 1968); United States v. McKinney, 379 F.2d 259 (6th Cir. 1967).

The Third and Fifth Circuits, on the other hand, upheld the admissibility of post-arrest silence for impeachment purposes. *See* United States *ex rel.* Burt v. New Jersey, 475 F.2d 234 (3d Cir.),

Supreme Court resolved this dispute in *United States v. Hale*[36] when it created a rebuttable presumption against the use of post-arrest silence for impeachment. The Court held that silence following the administration of *Miranda* warnings is characteristically ambiguous.[37] Thus,

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cert. denied, 414 U.S. 938 (1973); United States v. Ramirez, 441 F.2d 950 (5th Cir.), *cert. denied,* 404 U.S. 869 (1971).

Even before *Miranda*, some circuit courts refused to allow use of defendant's post-arrest silence to impeach his trial testimony. *See, e.g.,* Ivey v. United States, 344 F.2d 770 (5th Cir. 1965); Fagundes v. United States, 340 F.2d 673 (1st Cir. 1965).

For a general history of the use of post-arrest silence in the federal courts, see Note, *supra* note 18, at 261; Comment, *Accused's Silence During Custodial Interrogation May Not Be Used to Impeach Credibility,* 30 U. MIAMI L. REV. 773, 774-75 (1976) [hereinafter cited as Comment, *Accused's Silence*]; Comment, *Impeaching a Defendant's Trial Testimony by Proof of Post-Arrest Silence,* 123 U. PA. L. REV. 940, 945 (1975); Comment, *Privilege Against Self-Incrimination, the Use During Trial of a Defendant's Silence at the Time of Arrest,* 10 WASHBURN L.J. 105, 105-12 (1970).

Ten of fifteen state supreme courts to consider the question between 1966 and 1975 prohibited the use of the defendant's post-arrest silence for impeachment purposes. *See, e.g.,* People v. Burress, 183 Colo. 146, 515 P.2d 460 (1973); State v. Haggard, 94 Idaho 249, 486 P.2d 260 (1971); Cessna v. Commonwealth, 465 S.W.2d 283 (Ky. 1971); People v. Bobo, 390 Mich. 355, 212 N.W.2d 190 (1973); Miles v. State, 525 P.2d 1249 (Okla. Crim. App. 1974); Commonwealth v. Woods, 455 Pa. 1, 312 A.2d 357 (1973), *cert. denied,* 419 U.S. 880 (1974); Reid v. Commonwealth, 213 Va. 790, 195 S.E.2d 866 (1973); State v. Dean, 67 Wis. 2d 513, 227 N.W.2d 712 (1975), *cert. denied,* 423 U.S. 1074 (1976); Gabrielson v. State, 510 P.2d 534 (Wyo. 1973).

For state supreme court cases upholding the use of post-arrest silence for impeachment purposes, see Davis v. State, 501 P.2d 1026 (Alaska, 1972); State v. Bly, 215 Kan. 168, 523 P.2d 397 (1974); People v. Rothschild, 35 N.Y.2d 355, 320 N.E.2d 639, 361 N.Y.S.2d 901 (1974); State v. Young, 27 Ohio St. 2d 310, 272 N.E.2d 353 (1971). *See generally* Gruhl, *supra* note 31, at 896-97 (discussing state cases addressing impeachment use of post-arrest silence).

36. 422 U.S. 171 (1975). For a discussion of *Hale*, see Note, *supra* note 18, at 261-78; Comment, *Impeachment of a Criminal Defendant by Evidence of Post-Arrest Silence: A Conflict Partially Resolved,* 61 IOWA L. REV. 641 (1975); Comment, *Use of a Defendant's Silence, supra* note 8, at 445-52; Comment, *Accused's Silence, supra* note 35, at 773; 4 HOFSTRA L. REV. 115 (1975).

37. 422 U.S. at 177. Following a robbery, police approached the defendant who fled and was subsequently captured. The police discovered cash in excess of the stolen amount in his possession. The police arrested the defendant for the robbery and informed him of his right to remain silent. The robbery victim later identified the defendant, who gave no explanation for his flight or possession of the money. During his trial testimony, the defendant asserted for the first time that he had been on his way to purchase narcotics when he was arrested. *Id. See also* Doyle v. Ohio, 426 U.S. 610, 617-18 (1976).

The *Hale* Court discussed several factors that could induce a suspect to remain silent after arrest: (1) the suspect's exercise of his right to remain silent under *Miranda;* (2) his natural fear and confusion following arrest; and (3) his fear of incriminating another. United States v. Hale, 422 U.S. 171, 176-77 (1975). *See also* People v. Conyers, 5 N.Y.2d 454, 420 N.E.2d 933, 458 N.Y.S.2d 741 (1981) (silence may result from defendant's natural distrust of police and belief that alibi would do no good). *See generally* Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial,* 33 U. CHI. L. REV. 657 (1966); Note, *Tacit Criminal Admissions,* 112 U. PA. L. REV. 210 (1963).

In determining the probative value of silence, the Supreme Court in *Hale* applied the same test

the Court concluded that trial courts should exclude evidence of post-arrest silence because the probative danger of using such evidence[38] for trial impeachment outweighs its probative value in the truth-seeking[39] process.[40] Because the Supreme Court decided *Hale* on evidentiary rather than constitutional grounds,[41] however, the decision did not bind state courts.[42]

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it had used in the landmark evidence case of Grunewald v. United States, 353 U.S. 391, 422-23 (1957). This test employs three factors to determine if silence is inconsistent with subsequent testimony:

1. repeated assertions of innocence before the grand jury;
2. the secretive nature of the tribunal in which the initial questioning occurred; and,
3. the focus on petitioner as potential defendant at the time of the arrest, making it natural for him to fear that he was being asked for the very purpose of providing evidence against himself.

United States v. Hale, 442 U.S. 171, 178 (1975).

Hale created a rebuttable evidentiary presumption against the use of post-arrest silence for impeachment purposes at trial. If the defendant's silence had met the *Grunewald* test of probativeness, however, it would have been logically relevant. Because *Hale* did not establish an irrebuttable presumption against the prosecutorial use of a defendant's post-arrest silence for impeachment purposes, the Court was able to distinguish *Raffel* without overturning it.

38. The Court argued that cross-examination of defendants regarding post-arrest silence and prosecutorial comment on that silence during closing arguments have an "intolerably prejudicial" effect on the jury. United States v. Hale, 422 U.S. 171, 180 (1975). *See generally* Comment, 123 U. PA. L. REV. 940, *supra* note 35, at 973-74 (jury will construe post-arrest silence as evidence of guilt).

39. The Court has often emphasized the importance of its truth-seeking function when deciding on the admissibility of a defendant's silence. *See, e.g.,* Jenkins v. Anderson, 447 U.S. 231, 238 (1980); Doyle v. Ohio, 426 U.S. 610, 616-17 (1976).

40. United States v. Hale, 422 U.S. 171, 173, 180 (1975). When the probative danger outweighs the probative value of evidence in this manner, the evidence is deprived of legal relevance. *See supra* note 17. For cases in which the Court has held that the need for the truth outweighs the threat of danger to the defendant, see, *e.g.,* Oregon v. Hass, 420 U.S. 714, 721-22 (1975) (post-warning statement made prior to presence of attorney usable to impeach defendant's inconsistent trial testimony); Harris v. New York, 401 U.S. 222, 226 (1971) (statement obtained without *Miranda* warnings usable to impeach defendant's trial testimony); Walder v. United States, 347 U.S. 62, 66 (1954) (fruits of illegal search usable to impeach defendant's trial testimony); Fitzpatrick v. United States, 178 U.S. 304, 305 (1900) (to insure complete information, a defendant who testifies is subject to cross-examination). *See generally* Doyle v. Ohio, 426 U.S. 610, 628-30 (1976).

41. United States v. Hale, 422 U.S. 171, 173 (1975).

42. *See* Fletcher v. Weir, 455 U.S. 603, 605 (1982). *See generally* Cupp v. Naughton, 414 U.S. 141, 146 (1973) (states may disregard non-constitutionally based Supreme Court decisions); McNabb v.United States, 318 U.S. 332, 340-41 (1943) (Court has power to establish rules to govern federal courts which do not bind the states because they lack a constitutional basis).

Of the five state supreme courts to confront the issue between *Hale* and *Doyle v. Ohio*, only Tennessee declined to adopt the *Hale* evidentiary presumption. *See* Niemeyer v. Commonwealth, 533 S.W.2d 218 (Ky. 1976); Vipperman v. State, 92 Nev. 213, 457 P.2d 682 (1976); State v. Deatore, 70 N.J. 100, 358 A.2d 163 (1970); Braden v. State, 534 S.W.2d 657 (Tenn. 1976). *See also* Gruhl, *supra* note 31, at 897-98 (discussion of post-*Hale* state cases).

The following year, the Supreme Court extended the *Hale* rule to the states through the due process clause of the fourteenth amendment in *Doyle v. Ohio*.[43] The Court held that because the administration of *Miranda* warnings implicitly assures a defendant that his subsequent silence will carry no penalty and because such silence is "insoluably ambiguous," the use of such silence for impeachment purposes violates the fundamental fairness requirement of the due process clause.[44]

Doyle, however, only partially resolved the controversy over the state's use of a defendant's post-arrest silence to impeach his testimony at trial.[45] The decision identified both the arrest and the administration

43. 426 U.S. 610, 611, 619 (1976). The defendant in *Doyle* was arrested for selling marijuana. He made no statement until his trial, at which time he testified that he had only attempted to buy the marijuana. *Id.* at 613-14. For a discussion of *Doyle*, see Note, *supra* note 18, at 261; Comment, *Use of Defendant's Silence, supra* note 8, at 443; Comment, *Constitutional Prohibition Against Use of Post-Arrest Silence for Impeachment Purposes,* 81 DICK. L. REV. 649 (1977) [hereinafter cited as *Constitutional Prohibition*]; Comment, *Post-Arrest Silence: Use for Impeachment Purposes Prohibited,* 22 LOY. L. REV. 1073 (1976) [hereinafter cited as *Post-Arrest Silence*].

The *Doyle* Court also made the *Hale* evidentiary presumption irrebuttable by banning the use of post-arrest silence as "insoluably ambiguous." *Id.* at 617-18. *See* Note, *supra* note 18, at 261.

44. Doyle v. Ohio, 426 U.S. 610, 618-19 (1976). The Court in *Doyle* stated that:

> [W]hile 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.

Id. at 618.

A similar issue arose in Johnson v. United States, 318 U.S. 189 (1943). The prosecutor in *Johnson* commented on the defendant's silence during cross-examination. The Supreme Court reversed the defendant's conviction, noting that even though the trial judge erred in allowing the defendant to remain silent, the defendant had relied on the judge's ruling. To allow the use of the ensuing silence to impeach the defendant would violate due process. *Id.* at 196-97. The *Johnson* Court also held that the authorities must inform the defendant if silence is admissible against him so that he may make an informed decision whether to exercise his privilege against self-incrimination. *Id.* at 198-99. *See also* Raley v. Ohio, 360 U.S. 423, 425 (1959) (defendants relied on decision of chairman of state investigating committee that they could invoke the fifth amendment privilege). *See generally Constitutional Prohibition, supra* note 43, at 651-52 (discussion of *Doyle's* applicability to *Johnson* and *Raley*).

45. By basing its decision on the due process clause and evidentiary grounds, *see supra* notes 43-44, the *Doyle* Court succeeded in avoiding the self-incrimination questions raised by the case. Circuit courts that addressed the problem of post-arrest silence after *Miranda*, on the other hand, frequently based their holdings on the fifth amendment's self-incrimination provision. *See supra* note 35. These courts read broadly Griffin v. California, 380 U.S. 609 (1965), in which the Supreme Court held that the fifth amendment prohibits the state's use as evidence of a defendant's exercise of the privilege against self-incrimination. They add to this broadening of *Griffin* the dictum in *Miranda* which purports to prohibit the prosecutor's use at trial of a defendant's silence or claimed privilege against self-incrimination. *See supra* note 33.

The circuit courts advanced two arguments in support of their refusal to permit the use of post-

of *Miranda* warnings as silence-inducing state action.[46] The Court did not expressly answer the question whether arrest alone, absent *Miranda* warnings, provides sufficient inducement of silence to prohibit its use on due process grounds.

The Supreme Court indirectly addressed this issue in the dicta of two post-*Doyle* cases.[47] In *Jenkins v. Anderson*,[48] the Court sustained the prosecutor's use of the defendant's pre-arrest silence for impeachment purposes.[49] Distinguishing *Doyle*, the *Jenkins* Court suggested that the defendant's ability to prevent the impeachment use of his silence on due process grounds depends on the state's administration of *Miranda* warnings.[50] In *Roberts v. United States*,[51] the Court affirmed the use of

arrest silence. First, admitting evidence of silence penalizes the defendant's exercise of his fifth amendment privilege. Second, jurors often cannot distinguish between evidence introduced for impeachment purposes and evidence used to establish guilt. *See* Note, *supra* note 18, at 288-90.

Ten of the thirteen state supreme courts to evaluate the impeachment use of post-arrest silence after 1976 followed *Doyle* without dissent. *See* Stork v. State, 559 P.2d 99 (Alaska 1977); State v. White, 97 Idaho 708, 551 P.2d 1344 (1976); Jones v. State, 265 Ind. 447, 355 N.E.2d 402 (1976); State v. Mims, 220 Kan. 726, 556 P.2d 387 (1976); State v. Smith, 336 So. 2d 867 (La. 1976); State v. Lyle, 73 N.J. 403, 375 A.2d 629 (1977); State v. Foddrell, 291 N.C. 546, 231 S.E.2d 618 (1977); State v. Carmody, 253 N.W.2d 413 (N.D. 1977); State v. Boyd, 233 N.E.2d 710 (W. Va. 1977); Irvin v. State, 560 P.2d 372 (Wyo. 1977). Three state supreme courts distinguished *Doyle*. *See* State v. Alo, 57 Hawaii 418, 558 P.2d 1012 (1976); State v. Osborne, 50 Ohio St. 2d 211, 364 N.E.2d 216 (1977); State v. Thompson, 88 Wash. 2d 518, 564 P.2d 315 (1977). *See also* Gruhl, *supra* note 31, at 898 (discussion of post-*Doyle* state cases).

46. Justice Powell, writing for the majority in *Doyle* stated: "We hold that the use for impeachment purposes of petitioner's silence, at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment." Doyle v. Ohio, 426 U.S. 610, 619 (1975).

While the use of the conjunctive form suggests that both arrest *and Miranda* warnings are necessary to raise due process concerns, lower courts have not interpreted *Doyle* in this manner. *See infra* notes 55-65 and accompanying text.

47. *See* Jenkins v. Anderson, 447 U.S. 231 (1980); Roberts v. United States, 445 U.S. 552 (1980). Because neither case concerned post-arrest, pre-warning silence, they are useful only as persuasive authority.

48. 447 U.S. 231 (1980).

49. *Id.* at 234. The Court reasoned that first, because *Raffel* is still good law, impeachment based on prior silence is permissible unless such silence was induced by governmental action thereby making it inherently ambiguous or fundamentally unfair; second, the probative value of pre-arrest silence is a state evidentiary question and therefore is not within the Supreme Court's jurisdiction; and third, pre-arrest silence is not induced by any governmental action. *Id.* at 239-40. Justice Marshall, in a strong dissent, argued that first, *Raffel* is bad law; second, the probativeness of prearrest silence requires testing to determine if the silence is inconsistent with the defendant's trial testimony; and third, the defendant's exercise of his fifth amendment right to remain silent is impermissibly burdened by the prosecutorial use of silence. *Id.* at 246-54 (Marshall, J. dissenting).

50. The Court stated that "[i]n this case, no governmental action induced petitioner to remain silent before arrest. The failure to speak occurred before the petitioner was taken into custody and

a defendant's post-conviction silence for sentencing purposes[52] and again distinguished *Doyle*,[53] suggesting that *Miranda* warnings were essential to the due process rationale employed in *Doyle*.[54]

Two state courts, however, directly confronted the question of the use of post-arrest, pre-warning silence and concluded that due process demanded its exclusion. In *People v. Conyers*[55] and *Michigan v. Hurd*,[56] appellate courts of New York and Michigan respectively, reversed the defendants' convictions because of prosecutorial references during trial to post-arrest, pre-warning silence.[57] The court in *Conyers* based its decision on both self-incrimination and due process grounds,[58] while the *Hurd* court relied on self-incrimination alone.[59]

Several circuit courts have also argued for the application of the

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given *Miranda* warnings. Consequently, the fundamental unfairness of *Doyle* is not present in this case." Jenkins v. Anderson, 447 U.S. 231, 240 (1980). For an analysis of *Jenkins*, see Ayer, *The Fifth Amendment and the Inference of Guilt from Silence:* Griffin v. California *After Fifteen Years,* 78 MICH. L. REV. 841 (1980); Jenkins v. Anderson: *Self-Incrimination—Prearrest Silence,* 66 A.B.A.J. 1288 (1980). *See also supra* note 27.

51. 445 U.S. 552 (1980).

52. *Id.* at 561.

53. *Id.* at 552. The *Roberts* Court stated that, "[h]is conduct bears no resemblance to the insoluably ambiguous post-arrest silence that may be induced by the assurances contained in *Miranda* warnings." *Id.* at 561.

54. *Id.* at 552. *See also* Anderson v. Charles, 447 U.S. 404 (1980). In *Anderson*, the Supreme Court held that the prosecution may impeach a defendant's trial testimony with evidence of a prior inconsistent statement. The Court distinguished *Doyle* in a way that suggested the necessity of *Miranda* warnings to the *Doyle* defense:

> *Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances. But *Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent.

Id. at 408.

55. 49 N.Y.2d 174, 400 N.E.2d 342, 424 N.Y.S.2d 402, *vacated and remanded,* 449 U.S. 809 (1980).

56. 102 Mich. App. 424, 301 N.W.2d 881 (1980), *vacated and remanded,* 454 U.S. 807 (1981), *cert. denied,* 455 U.S. 976 (1982).

57. *Id.* at 429-30, 301 N.W.2d at 883-84; People v. Conyers, 49 N.Y.2d 174, 176-77, 400 N.E.2d 342, 344, 424 N.Y.S.2d 402, 404, *vacated and remanded,* 449 U.S. 809 (1980).

58. 49 N.Y.2d at 179, 400 N.E.2d at 346, 424 N.Y.S.2d at 406, *vacated and remanded,* 449 U.S. 809 (1980). The New York Court of Appeals observed:

> [T]he implied promise, contained in the *Miranda* warnings, that one's silence will not be used against one, is not derived from the words of the *Miranda* warnings, but from the actual constitutional guarantees which they express. Thus, regardless of whether that promise is repeated by the police in the form of *Miranda* warnings, each and every citizen has already been made just such a promise by the State. . . . Having made that promise, the State may not, consistent with any concept of fairness and due process, subsequently renege on that promise by utilizing a defendant's silence against him.

Doyle rule to cases involving the use of post-arrest, pre-warning silence for trial impeachment.[60] In *Weir v. Fletcher*,[61] for example, the Sixth

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Id.

The dissent vigorously disagreed, asserting that in the absence of *Miranda* warnings, the state does not violate the defendant's right to due process by using silence to impeach his trial testimony because there is "no 'state action' upon which to predicate a due process claim." *Id.* at 185, 400 N.E.2d at 350, 427 N.Y.S.2d at 410 (Meyer, J., dissenting). As for the self-incrimination issue, the dissent argued for application of the *Raffel* standard, allowing evidence of the defendant's silence if it is "inconsistent" with his trial testimony. *Id.* at 190, 400 N.E.2d at 352, 427 N.Y.S.2d at 413 (Meyer, J., dissenting).

59. Michigan v. Hurd, 102 Mich. App. 424, 430, 301 N.W.2d 881, 883 (1980), *vacated and remanded,* 454 U.S. 807 (1981), *cert. denied,* 455 U.S. 976 (1982). The Michigan Court of Appeals stated that, "[i]f the [tacit admission] rule were applied in criminal cases [in Michigan], it would violate the Fifth Amendment right against self-incrimination." *Id.*

The United States Supreme Court vacated and remanded both decisions for reconsideration in light of *Jenkins*. Michigan v. Hurd, 454 U.S. 807 (1981); People v. Conyers, 449 U.S. 809 (1980). On remand, the *Conyers* court held, as a matter of state evidence law, that the slight probative value and the highly prejudicial effect of post-arrest, pre-warning silence precludes its use at trial to impeach a defendant's testimony. People v. Conyers, 52 N.Y.2d 454, 457, 420 N.E.2d 933, 935-36, 438 N.Y.S. 2d 741, 743-44 (1981). The court's reliance on an independent state ground exempted the case from Supreme Court review. The rehearing of *Hurd* went unreported, and the Supreme Court denied certiorari. Michigan v. Hurd, 102 Mich. App. 424, 301 N.W.2d 881, *vacated and remanded,* 454 U.S. 807 (1981), *cert. denied,* 455 U.S. 976 (1982).

60. *See* Weir v. Fletcher, 658 F.2d 1126, 1131-32 (6th Cir. 1981) (review of post-*Doyle* cases), *rev'd,* 455 U.S. 603 (1982); Brief for Respondent at 8, Fletcher v. Weir, 102 S. Ct. 1309 (1981) (discussion of post-*Doyle* conflict among circuits).

In two cases decided after *Jenkins*, the record failed to disclose whether the defendant had received *Miranda* warnings. United States v. Curtis, 644 F.2d 263, 270-72 (3d Cir. 1981); United States v. Harrington, 636 F.2d 1182, 1186-87 (9th Cir. 1980). For discussion of *Jenkins*, see *supra* notes 48-50 and accompanying text. In another case, also decided after *Jenkins*, the police issued warnings but this fact did not affect the outcome. Al v. Olim, 639 F.2d 466 (9th Cir. 1980). The remaining post-*Doyle* cases support the exclusion of post-arrest, pre-warning silence in dicta. *See* United States v. Nunez-Rios, 622 F.2d 1093, 1099-1101 (2d Cir. 1980) (use of post-arrest, pre-warning silence to impeach held improper because silence ambiguous; right to remain silent exists independently of *Miranda* warnings; police misconduct must be deterred); Bradford v. Stone, 594 F.2d 1294, 1295-96 (9th Cir. 1979) (impeachment use of post-arrest silence impermissible regardless of whether *Miranda* warnings given); United States *ex rel.* Allen v. Rowe, 591 F.2d 391, 399 (7th Cir. 1979) (no reason to distinguish between silence before and after *Miranda* warnings); Douglas v. Cupp, 578 F.2d 266, 267 (9th Cir. 1978) (use of post-arrest, pre-warning silence in state's case-in-chief impermissible), *cert. denied,* 439 U.S. 1081 (1979); United States v. Brinson, 411 F.2d 1057, 1060 (6th Cir. 1969) (pre-warning silence not usable as a "tacit admission" to prove state's case-in-chief). *Cf.* Minor v. Black, 527 F.2d 1, 4 (6th Cir. 1975) (impeachment use of post-arrest, pre-warning silence impermissible when silence based on advice of attorney), *cert. denied,* 427 U.S. 904 (1976).

In *Minor* and *Douglas*, the Supreme Court declined to review decisions prohibiting the use of pre-warning silence. For a detailed discussion of *Minor*, see Steinberg, Minor v. Black: *The Use of Defendant's Pre-Trial Silence for Impeachment Purposes,* 6 MEM. ST. U.L. REV. 421 (1976); Comment, *Silence of Accused Relying Upon His Privilege Against Self-Incrimination Was in This Instance not a Prior Inconsistent Act—Evidence Error of Constitutional Magnitude:* Minor v.

Circuit interpreted *Doyle* expansively. The court held that allowing cross-examination concerning post-arrest silence is "inherently unfair" even if no *Miranda* warnings are issued.[62] The court based its holding on evidentiary,[63] due process,[64] and policy grounds.[65]

Black, 3 N. KY. L. REV. 267 (1975). *But see* Williams v. Zahradnick, 632 F.2d 353, 360 (4th Cir. 1980) (*Doyle* holding applies *after* warnings issued).

61. 658 F 2d 1126 (6th Cir. 1981), *rev'd,* 455 U.S. 603 (1982).

62 *Id.* at 1127, 1130. For cases citing the Sixth Circuit's opinion, see People v. Lucas, 88 Ill. 2d 245, 253, 430 N.E.2d 1091, 1095 (1981) (Clark, J., concurring) (comment on defendant's post-arrest, pre-warning statement impermissible); Richter v. State, 642 P.2d 1269, 1274 (Wyo. 1982) (*Doyle* per se rule only applies if error not harmless).

In addition to holding that use of post-arrest, pre-warning silence is impermissible, the Sixth Circuit decided that the use of silence in this case did not constitute "harmless error." This two-step process adopted by the court is typical of cases dealing with *Doyle*-type error. Of the twenty-six states considering the question, twenty-four apply a harmless error test to *Doyle*-type evidence errors. *See* Wilkinson v. State, 361 So. 2d 400 (Ala. Crim. App. 1978); State v. Davis, 119 Ariz. 529, 582 P.2d 175 (1978); People v. Schindler, 114 Cal. App. 3d 178, 170 Cal. Rptr. 461 (1980); People v. Ortega, 40 Colo. App. 449, 580 P.2d 813 (1978); State v. Zeko, 177 Conn. 545, 418 A.2d 917 (1979); Smith v. State, 244 Ga. 814, 262 S.E.2d 116 (1979); People v. Green, 74 Ill. 2d 444, 386 N.E.2d 272 (1979); Jones v. State, 265 Ind. 447, 355 N.E.2d 402 (1976); State v. Satterfield, 3 Kan. App. 2d 212, 592 P.2d 135 (1979); Darnell v. Commonwealth, 558 S.W.2d 590 (Ky. 1977); Robeson v. State, 285 Md. 498, 403 A.2d 1221 (1979); Commonwealth v. Grieco, 5 Mass. App. 350, 362 N.E.2d 1204 (1977); People v. Sain, 407 Mich. 412, 285 N.W.2d 772 (1979); State v. Callahan, 310 N.W.2d 550 (Minn. 1981); Cooley v. State, 391 So. 2d 614 (Miss. 1980); State v. Walker, 617 S.W.2d 94 (Mo. App. 1981); State v. Callaway, 92 N.M. 80, 582 P.2d 1293 (1978); People v. Savage, 67 A.D.2d 562, 415 N.Y.S.2d 845 (1979); State v. Carmody, 253 N.W.2d 415 (N.D. 1977); Maxville v. State, 629 P.2d 1279 (Okl. Crim. App. 1981); Schrum v. Commonwealth, 219 Va. 204, 246 S.E.2d 893 (1978); State v. Evans, 96 Wash. 2d 1, 633 P.2d 83 (1981); State v. Boyd, 233 S.E.2d 710 (W. Va.1977); Rudolph v. State, 78 Wis. 2d 435, 254 N.W.2d 471 (1977), *cert. denied,* 435 U.S. 944 (1978).

Pennsylvania wavers in its application of the harmless error standard. *See* Commonwealth v. Easley, 245 Pa. Super. 41, 369 A.2d 283 (1976), *rev'd,* 483 Pa. 337, 396 A.2d 1198 (1979); Commonwealth v. Flynn, 248 Pa. Super. 374 A.2d 1317 (1977).

All of the United States Circuit Courts of Appeals that have confronted *Doyle*-type cases require prejudicial error. *See* United States *ex rel.* Allen v. Franzen, 659 F.2d 745 (7th Cir. 1981); Weir v. Fletcher, 658 F.2d 1126 (6th Cir. 1981), *rev'd,* 455 U.S. 603 (1982); United States v. Ylda, 643 F.2d 348 (5th Cir. 1981); Williams v. Zahradnick, 634 F.2d 353 (4th Cir. 1980); United States v. Nunez-Rios, 622 F.2d 1093 (2d Cir. 1980); Quigg v. Crist, 616 F.2d 1107 (9th Cir.), *cert. denied,* 449 U.S. 922 (1980); Morgan v. Hall, 569 F.2d 1161 (1st Cir. 1978), *cert. denied,* 437 U.S. 910 (1978); United States v. Williams, 556 F.2d 65 (D.C. Cir. 1977), *cert. denied,* 431 U.S. 972 (1977). For an explanation of the "harmless error" test, see Weir v. Fletcher, 658 F.2d 1126, 1132-33 (6th Cir. 1981), *rev'd,* 455 U.S. 603 (1982). *See also* Note, Miranda *Warnings and the Harmless Error Doctrine: Comment on the Indiana Approach,* 47 IND. L.J. 331 (1972); Note, *Application of the Harmless Error Doctrine to Violations of* Miranda: *The California Experience,* 69 MICH. L. REV. 941 (1971); Comment, *Harmless Constitutional Error—Post-Arrest Silence of Accused Used by Prosecutor for Impeachment Purposes:* Darnell v. Commonwealth, 5 N. KY. L. REV. 287 (1978).

63. Weir v. Fletcher, 658 F.2d 1126, 1130-31 (6th Cir. 1981), *rev'd,* 455 U.S. 603 (1982). The court stated that post-arrest silence may result from fear and anxiety created by arrest and independent knowledge of the right to remain silent. The court argued that these factors do not

The Supreme Court in *Fletcher v. Weir*[66] declined to read *Doyle v. Ohio*[67] as preventing prosecutorial use of post-arrest, pre-warning silence to impeach a defendant's trial testimony.[68] After reaffirming *Hale*[69] and *Doyle*,[70] the Court held that absent *Miranda* warnings, the state has not provided the arrestee with any assurance[71] that his silence will not be used against him.[72] On that assumption, the prosecution's use of post-arrest, pre-warning silence for impeachment purposes does

necessarily indicate the defendant's guilt or innocence. *Id.* For other factors capable of inducing silence, see *supra* note 37.

The dissent argued that post-arrest, pre-warning silence may have some probative value, stating that "[i]t is indeed difficult to discern why as a practical matter, the precise moment of arrest must automatically make any silence lose all probity of the truth of a defendant's exculpatory story." *Id.* at 1136 (Engel, J., dissenting).

64. *Id.* at 1131. The court declined to apply the *Jenkins* dictum which declared *Miranda* warnings essential to *Doyle*. Instead, the court applied *Doyle* liberally by declaring arrest alone sufficient governmental action upon which to base a due process claim. The court said, "[w]e think that an arrest, by itself, is governmental action which implicitly induces a defendant to remain silent." *Id.*

The dissent found nothing unfair about using the defendant's silence to impeach his alibi. It reasoned that no governmental action gave the defendant cause to think that his silence was unusable, and neither the arrest itself nor the cross-examination were fundamentally unfair. *Id.* at 1134-35 (Engel, J., dissenting).

65. *Id.* at 1132. The Sixth Circuit offered two policy arguments to bolster its decision. First, the court asserted that admitting post-arrest, pre-warning silence for impeachment purposes penalizes those defendants who are already aware of their right to remain silent. *Id.* The dissent responded that the defendant could eliminate any unfairness at trial because he "may still explain that his silence was premised on the exercise of the right." *Id.* at 1136 (Engel, J., dissenting).

Second, the court argued that allowing such impeachment would discourage police officers from issuing *Miranda* warnings, at least until after sufficient time elapses to provide prosecutors with material for impeachment use. *Id.* at 1132. The dissent argued that withholding warnings is contrary to the interests of the police because any confession obtained prior to warning the defendant is inadmissible to prove the state's case-in-chief. *See supra* note 30 and accompanying text. Further, the prosecution can only use silence if the defendant chooses to testify. *Id.* at 1136 (Engel, J., dissenting). For further discussion of this second policy objection, see *infra* notes 80-82 and accompanying text.

66. 455 U.S. 603 (1982) (per curiam).

67. 426 U.S. 610 (1976). *See supra* notes 43-46.

68. *Id.* at 605-06.

69. United States v. Hale, 422 U.S. 171 (1975). *See* Fletcher v. Weir, 455 U.S. 603, 604-05 (1982). *See also supra* notes 36-42 and accompanying text.

70. Doyle v. Ohio, 426 U.S. 610 (1976). *See* Fletcher v. Weir, 455 U.S. 603, 605 (1982). *See also supra* notes 43-46 and accompanying text.

71. The Court quoted *Doyle* for the proposition that *Miranda* warnings provide the defendant with an implicit assurance that his silence will not be used against him at trial. *See supra* note 44.

72. 455 U.S. 603, 606 (1982).

not violate due process of law.[73] The Court, therefore, made explicit that the issuance of *Miranda* warnings is essential to invoke *Doyle's* protection against impeachment with post-arrest silence.[74]

The Supreme Court's refusal in *Fletcher v. Weir*[75] to apply *Doyle's* due process holding to cases involving pre-warning silence is theoretically sound. The Court correctly declined to hold that the act of arrest alone constitutes an assurance by the state that it will not subsequently use the arrestee's silence against him. As such, prosecutorial use of a defendant's pre-warning silence for impeachment purposes is not fundamentally unfair.

Courts should not interpret the *Fletcher* decision as a blanket approval of prosecutorial use of post-arrest, pre-warning silence for impeachment purposes. While the use of such silence does not violate due process, it may not satisfy evidentiary standards.[76] Because the act of arrest may *in fact* induce silence,[77] post-arrest silence will frequently lack probative value.[78] Such a showing would require the exclusion of

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73. *Id.* at 607. In addition, the Court pointed out that "[a] State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which post-arrest silence may be deemed to impeach a criminal defendant's own testimony." *Id.* This suggests that the evidentiary approach of *Hale* is applicable to post-arrest, pre-warning silence. *See supra* notes 36-42; *infra* notes 76-79.

74. *Id.* at 605-07. In reaching its holding the Supreme Court concluded that the Sixth Circuit's decision was inconsistent with post-*Doyle* Court decisions. *Id.* at 606. The Court argued that its decisions in *Jenkins*, *Anderson*, and *Roberts* indicated that the assurances provided by *Miranda* warnings were crucial to *Doyle's* due process holding. *Id.* (citing Jenkins v. Anderson, 447 U.S. 231 (1980); Anderson v. Charles, 447 U.S. 404 (1980); Roberts v. United States, 445 U.S. 552 (1980)). For discussion of these cases, see *supra* notes 48-54.

Commenting on its *Jenkins* holding, the *Fletcher* Court stated that, "[i]n *Jenkins* we noted that the failure to speak involved in that case occurred before the defendant was taken into custody and was given his *Miranda* warnings, commenting that no governmental action induced the defendant to remain silent before his arrest." 455 U.S. 603, 606 (1982). With regard to its decision in *Roberts*, the Court noted, "we observed that the post-conviction, presentencing silence of the defendant did not resemble 'postarrest silence that may be induced by the assurances contained in *Miranda* warnings.'" *Id.* (quoting Roberts v. United States, 445 U.S. 552, 561 (1980)). Finally, the Court cited language from its opinion in *Anderson*: "*Miranda* warnings inform a person of his right to remain silent and assure him, at least implicitly, that his silence would not be used against him. . . . *Doyle* bars the use against a criminal defendant of silence maintained after the receipt of governmental assurances." *Id.* (quoting Anderson v. Charles, 447 U.S. 408, 404, 407-08 (1980)).

75. 455 U.S. 603 (1982) (per curiam).

76. *See supra* note 73.

77. *See supra* notes 17 & 37 and accompanying text. The *Fletcher* Court emphasized the state's assurance of protection rather than its inducement of silence. 445 U.S. 603, 604-07 (1982).

78. The prosecution must demonstrate the probative value of silence in each case. *See supra* note 17 and accompanying text.

pre-warning silence on evidentiary rather than constitutional grounds.[79]

Moreover, the *Fletcher* decision will probably have an undesirable effect in practice. *Miranda* requires the state to issue warnings to safeguard the accused's right against self-incrimination.[80] *Fletcher*, by declining to protect defendants who have not received *Miranda* warnings, encourages police to delay the administration of warnings to create silence for later impeachment use.[81] This result is contrary to the spirit of *Miranda* and marks another retreat by the Supreme Court from the protection offered by the exclusionary rule.[82]

The Court's refusal to extend *Doyle's* due process holding to pre-*Miranda*-warning silence in the face of unanimous lower court decisions[83] urging the extension exemplifies the relative weight the current Supreme Court gives to the often conflicting goals of protecting defendants' procedural rights and promoting the institutional truth-seeking

79. Courts' approaches to the use of defendants' silence have developed hierarchically. *See supra* text accompanying note 20-22. The due process holding of *Doyle* provides the highest degree of protection to defendants. In declining to apply this standard to pre-warning silence, the Court in *Fletcher* left the other historical rationales unaffected. In the absence of the due process rationale, therefore, federal courts will now apply the next most protective standard to pre-warning silence, the rebuttable presumption of logical irrelevance espoused in *Hale*. *See supra* notes 36-42 and accompanying text. If this standard applies after *Fletcher,* a case-by-case evaluation of probativeness and prejudice will replace *Doyle's* irrebuttable bar to the use of post-arrest, pre-warning silence. Even though the *Hale* rule does not bind the states, state courts will probably follow the lead of the federal courts as they did between *Hale* and *Doyle*. *See supra* note 43 and accompanying text.

80. The Sixth Circuit majority made this argument. Weir v. Fletcher, 658 F.2d 1126, 1132 (6th Cir. 1981), *rev'd,* 455 U.S. 603 (1982). *See supra* notes 27-30 and accompanying text.

81. See *supra* note 65 for a discussion of this danger by the Sixth Circuit in Weir v. Fletcher, 658 F.2d 1126 (6th Cir. 1981), *rev'd,* 455 U.S. 603 (1982). The dissent based its response to this argument on police concern for obtaining a confession. *Id.* at 1136 (Engel, J., dissenting). Given the many ways in which arrest alone may induce silence, however, *see* notes 37 & 65, the likelihood of a confession is not very great. When police sense that an arrestee will not confess, the *Fletcher* decision removes all incentive to comply with the requirements of *Miranda*.

An analogous limitation of defendants' rights which has had deleterious effects is the restriction of the right to counsel at police lineups to lineups occurring after the defendant is formally charged or indicted. *See* Kirby v. Illinois, 406 U.S. 682 (1972); United States v. Wade, 388 U.S. 218 (1967). The failure to extend the right to counsel in this area encourages police to delay charging arrestees until after the police have held lineups. *See* Note, *The Pretrial Right to Counsel,* 26 STAN. L. REV. 399 (1974).

82. See *supra* note 31 for cases restricting the exclusionary rule in the area of defendant testimony.

83. See *supra* note 60 for post-*Doyle* cases urging the extension of *Doyle's* protection to pre-warning silence.

concerns of the state.[84] *Fletcher v. Weir*[85] heightens the tension between these two goals.

K.D.G.

84. See *supra* note 39 for a discussion of the saliency of the Court's concern with the truth seeking process.

85. 455 U.S. 603 (1982).