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FIFTH AMENDMENT—CUSTODIAL INTERROGATION

Doyle v. Ohio, 96 S.Ct. 2240 (1976)

Michigan v. Mosley, 423 U.S. 96 (1975)

Since 1966, when the Supreme Court held in *Miranda v. Arizona*¹ that specific warnings must be given to subjects of police interrogation in order to preserve the rights guaranteed under the fifth amendment, the Court has devoted much effort to the task of applying the principles of *Miranda* to factual situations ranging from those closely resembling *Miranda* to those only tangentially related. This task has again arisen in two recent cases. The Court has considered the consequences that a subject of custodial interrogation may suffer as a result of asserting his right to remain silent. In *Doyle v. Ohio*,² where the defendants had not offered to police at the time of their arrest the exculpatory explanation they later gave at trial, the Court held that the due process clause of the fourteenth amendment prohibits prosecution use of the post-arrest silence for impeachment purposes. In *Michigan v. Mosley*,³ where an accused had exercised his right to remain silent during an initial interrogation by one police officer but had made inculpatory statements during later questioning by a second officer regarding an unrelated crime, the Court held the later statements were admissible at trial.

In *Doyle v. Ohio*,⁴ the two defendants were arrested for the attempted sale of ten pounds of marijuana to an informant for a local narcotics investigation unit. The informant had arranged a meeting at which the defendants allegedly passed the

marijuana to him. When the defendants were taken into custody by the police, it was discovered that they possessed \$1,320, which the informant claimed to have paid to them. Subsequent to the custodial search, full *Miranda* warnings were given to the defendants.

At trial, the defendants testified that the informant had in fact arranged to sell the marijuana to them, and that he had left with them the \$1,320 in an attempt to frame them by making it appear that they were the sellers. This explanation, which Justice Powell, speaking for the majority, described as "not entirely implausible,"⁵ was not contradicted with evidence by the State.

The prosecutor on cross-examination was allowed to question each of the defendants as to why he had not offered this explanation to the authorities at the time of arrest. To this inquiry, the defendants replied with a "jumble of responses"⁶ and were subsequently convicted. Their convictions were affirmed by the court of appeals, the Supreme Court of Ohio denying review.⁷

In argument before the United States Supreme Court, the State contended that the prosecutor's cross-examination of the defendants was necessary due to the discrepancy between the defendants' exculpatory statements at trial and their silence at the time of the arrest. Such discrepancy gave rise to an inference that the exculpatory story had been fabricated. The defendants' silence, in other words, was tantamount to a prior inconsistent statement. It was therefore proper, the State argued, for the prosecutor to comment upon this inconsistency for the limited purpose of impeachment. In support of its proposition, the State cited *Harris v. New York*⁸ and *Oregon v. Hass*,⁹ two cases in which the Court had

⁵*Id.* at 2242.

⁶*Id.* at 2246 (Stevens, J., dissenting). The responses given included such replies as: "I didn't know what [the police officer] was talking about," "Because I wanted to get my hands on [the informant] because I suspected he was trying [to frame me]." "I didn't like someone putting me in a spot like that." *Id.* at 2246-47 n.4.

⁷*Id.* at 2246-47.

⁸401 U.S. 222 (1971).

⁹420 U.S. 714 (1975).

¹384 U.S. 436 (1966). In *Miranda*, a landmark decision in the development of the rights of the accused, the Court enunciated the principle that police custodial interrogation creates an atmosphere that is inherently psychologically coercive such that any statement elicited from the accused in such an atmosphere could not truly be considered a product of his free will. Therefore, the Court held that certain procedural safeguards had to be observed in order to legitimate custodial interrogation. The subject must be advised that he has a right to remain silent, that anything he says can be used against him at trial, that he has a right to have an attorney with him during questioning, and that if he cannot afford an attorney, one will be appointed. If these safeguards are not met, no evidence obtained as a result of the questioning can be used against the defendant.

²96 S.Ct. 2240 (1976).

³423 U.S. 96 (1975).

⁴96 S.Ct. 2240 (1976).

permitted the use of post-arrest inconsistent statements for impeachment purposes, even though these statements were clearly inadmissible as evidence of guilt because of *Miranda* violations.

In *Harris*, the Court held that although incriminating statements which were obtained by the police before the defendant had been given the *Miranda* warnings were not admissible as evidence of the defendant's guilt, they nonetheless could be used by the prosecution to impeach the defendant's credibility as a witness in his own behalf. The Court reasoned that:

Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. . . . Having voluntarily taken the stand, [the defendant] was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. . . . The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.¹⁰

In *Hass*, the defendant upon arrest was advised of his rights in accordance with *Miranda*. While still in the patrol car he was questioned concerning the alleged crime and he responded that he wanted an attorney. The officer told him that he could phone an attorney when they arrived at the police station. The defendant then made incriminating statements in response to further questions. The Court held that these incriminating statements, though inadmissible at trial as evidence of guilt, were admissible for the limited purposes of impeachment of the defendant's trial testimony. The Court relied upon the rationale employed in *Harris* in concluding that the valuable aid that this evidence would provide for the jury in assessing the defendant's credibility far outweighed any "speculative possibility"¹¹ that police misconduct would thereby be encouraged.

In the instant case, the Court,¹² while recognizing the importance of the impeachment process in the criminal justice system, nonetheless rejected the State's argument on two grounds. First, the Court rejected the contention that silence at the time of arrest is inconsistent with exculpatory statements at

trial. The Court reasoned that silence in the wake of *Miranda* warnings could have been caused by the defendants' desire to exercise those rights of which they had just been advised. Silence at the time of arrest is therefore "insolubly ambiguous because of what the State is required to advise the person arrested."¹³ Because of this insoluble ambiguity, the defendants' silence at the time of arrest is of "dubious probative value."¹⁴ Consequently, prosecutorial use of this silence for impeachment purposes was deemed improper.

Furthermore, the Court went beyond this evidentiary rationale and based its decision upon constitutional grounds, holding that the use of the defendants' silence for impeachment purposes violated the due process clause of the fourteenth amendment. The Court reasoned that although the *Miranda* warnings carry no express assurance that the subject's exercise of his right to remain silent will entail no penalty, such assurance is implicit in the giving of the warnings. When the police inform a suspect in custody that he has a right to remain silent, this information carries with it an implied guarantee that the suspect may exercise that right without fear that its exercise will later be used against him. Therefore, concluded the Court, to allow the accused's assertion of his right to be employed against him even for the limited purpose of impeaching his testimony at trial would be fundamentally unfair and a deprivation of due process of law.¹⁵

The dissenting Justices¹⁶ argued that the defendants' silence at the time of arrest was "graphically inconsistent"¹⁷ with their later exculpatory testimony at trial. If the defendants had really been framed by the police informant, as they claimed at trial, then their failure to mention this at the time of arrest was "almost inexplicable."¹⁸ Their silence, the dissent concludes, is therefore tantamount to a prior inconsistent statement and admissible for impeachment purposes.¹⁹

¹³96 S.Ct. at 2244.

¹⁴*Id.* at 2245 n.8. The Court here was reiterating its holding in *United States v. Hale*, 422 U.S. 171 (1975). See text accompanying notes 34-37 *infra*.

¹⁵96 S.Ct. at 2245.

¹⁶Justices Stevens, Blackmun, and Rehnquist.

¹⁷96 S.Ct. at 2246.

¹⁸*Id.*

¹⁹Prior inconsistent statements of any witness are admissible to impeach his testimony at trial, the theory being that because the two sets of statements cannot both be true, their contradictory nature is indicative of the lack of credibility of the witness. See 3A J. WIGMORE, EVIDENCE

¹⁰401 U.S. 225-26.

¹¹420 U.S. at 723.

¹²Justice Powell delivered the opinion of the Court, in which Chief Justice Burger and Justices Brennan, Stewart, White, and Marshall joined.

Furthermore, the dissent finds the majority's due process rationale erroneous as applied to the facts of the case at hand. The dissent contends that the defendants' silence at the time of arrest was not the result of reliance upon the right to remain silent, or they would have so stated at trial in response to the prosecutor's questions. Instead, they gave a "jumble of responses,"²⁰ which negates the majority's presumption that the defendants' silence was induced by reliance on *Miranda*. Without this basic presumption, the dissent argues, the majority's due process argument falls. Without reliance upon the *Miranda* warnings, the situation is no different than if no such warnings had not been given at all. Nothing in the majority's opinion, states the dissent, suggests that there would be any unfairness or denial of due process in the prosecutor's use of a defendant's prior silence for impeachment purposes where no *Miranda* warnings were given.²¹

The effect of *Doyle* on prior law is that it constitutionalizes the right of an accused not to have his silence in reliance upon the *Miranda* warnings later used to impeach his trial testimony. Prior to *Doyle*, the right was purely evidentiary. In *Raffel v. United States*²² the Court held that the fifth amendment did not prohibit use of the defendant's prior assertion of his right to remain silent to impeach his exculpatory trial testimony. The defendant in *Raffel* had declined to take the stand at his first trial²³ to rebut a government agent's incriminating testimony. At the second trial the government agent gave similar testimony and this time the defendant did take the stand to rebut that testimony. The court then asked questions which required him to disclose that he had declined to testify at the first trial in exercise of his right to remain silent. The Supreme Court reasoned that this did not violate the defendant's fifth amendment privilege against self-incrimination because the immunity which the fifth amendment affords an accused is waived by him when he takes the stand at trial:

When [the defendant] takes the stand in his own behalf, he does so as any other witness, and within the

limits of the appropriate rules he may be cross-examined . . . for the purpose of impeaching his credibility.²⁴

In *Grunewald v. United States*,²⁵ where the defendant's assertion of the privilege before the grand jury was used to impeach his exculpatory trial testimony,²⁶ the Court held that under established principles of evidence a defendant's prior silence could be used to impeach his trial testimony if, but only if, his prior assertion of his right to remain silent was inconsistent with his subsequent exculpatory trial testimony.²⁷ The Court pointed out three factors bearing on the conclusion that the defendant's assertion of his fifth amendment privilege before the grand jury was not inconsistent with his exculpatory testimony at trial. First, the defendant repeatedly

²⁴271 U.S. at 497.

²⁵353 U.S. 391 (1957).

²⁶The facts in *Grunewald* were these: Two New York business firms which were under investigation for tax fraud established contact with the defendant Halperin, a New York attorney. Halperin, for a large fee, conducted negotiations on behalf of these firms with an influential friend in Washington who was accused of bribing an I.R.S. official to drop criminal prosecution. Halperin was called before a grand jury investigating corruption in the Bureau of Internal Revenue and was asked questions regarding his connection with the scheme. Halperin refused to answer these questions, claiming his fifth amendment privilege and repeatedly asserting his innocence. At trial, Halperin was asked some of these same questions and he answered them in a way consistent with his innocence. The government was then allowed to bring out in cross-examination that the defendant had pleaded the fifth amendment privilege before the grand jury.

²⁷That is, if his prior silence was inconsistent with his innocence. See 3A J. WIGMORE, EVIDENCE §§ 1017, 1040, 1042, 1071: prior statements of a defendant are admissible for impeachment purposes if there exists a "real inconsistency" between those statements and the defendant's trial testimony. "The purpose is to induce the tribunal to discard the one statement because the [defendant] has also made another statement which cannot at the same time be true" (§ 1040). Inconsistent prior silence is likewise admissible for impeachment purposes because 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" (§ 1042) [emphasis supplied]. In other words, when a defendant's prior silence is inconsistent with his innocence (that is, with his exculpatory trial testimony) this silence is admissible to impeach his testimony because it amounts to a prior inconsistent statement.

See also Note, 112 U. PA. L. REV. 210 (1963) for a discussion of the theory that failure to deny an accusation is evidence of the truth of that accusation. The author concludes that because of the meagre probative value of silence in the face of accusation and the prejudicial nature of use of that silence at trial, strict standards of admissibility ought to be employed.

§§ 1017, 1040 (J. Chadbourne rev. 1970). See also note 27 *infra* and accompanying text.

²⁰96 S.Ct. at 2246. See note 6 *supra*.

²¹*Id.* at 2248.

²²271 U.S. 494 (1926). There is doubt as to whether *Raffel* is good law today in light of more recent Supreme Court rulings concerning the fifth amendment privilege against self-incrimination. See notes 49 & 50 *infra* and accompanying text.

²³The first trial resulted in a hung jury.

asserted his innocence at the grand jury inquest and had insisted that he pleaded the fifth amendment only on the advice of his attorney. Second, the secretive nature of the grand jury proceedings bore heavily upon what inferences could legitimately be drawn from the assertion of the privilege before that body.²⁸ Finally, when the accused had asserted his privilege before the grand jury, he was "quite evidently already considered a potential defendant [and it was therefore] quite natural for him to fear that he was being asked questions for the very purpose of providing evidence against himself."²⁹

Again, the constitutional permissibility of prosecutorial use of an accused's silence during police interrogation to impeach his subsequent trial testimony was left unsettled by the Court in *Miranda v. Arizona*.³⁰ There, after holding that a defendant must be advised that he has a right to remain silent in the face of police interrogation, the Court noted:

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.³¹

Prosecutors argued, as did the prosecutor in *Doyle*, that what the Court in *Miranda* meant to proscribe by this language was only the use of a defendant's prior silence as evidence of guilt and not as evidence for impeachment purposes.³² This argu-

ment was given support when the Court held in *Harris v. New York*³³ that a confession which was inadmissible to prove the guilt of a defendant because of *Miranda* violations was nonetheless admissible to impeach the defendant's exculpatory trial testimony.

The Court was again faced with the issue of the permissibility of a prosecutor's use of a defendant's prior silence to impeach his trial testimony in *United States v. Hale*,³⁴ where the prosecutor confronted the defendant on cross-examination with the fact that he had stood mute at the time of arrest in the face of accusations.³⁵ The Court in *Hale* purposely avoided reaching the question of whether or not prosecutorial use for impeachment purposes of a defendant's prior silence was constitutionally proscribed and specifically limited its holding to evidentiary grounds. The Court reaffirmed the principle enunciated in *Grunewald v. United States*³⁶ that a defendant's prior assertion of his right to remain silent cannot be used to impeach his exculpatory trial testimony if his prior silence is consistent with that trial testimony. The Court went beyond a mere reiteration of *Grunewald*, however, by holding that a defendant's silence in the face of police custodial interrogation is *never* inconsistent with exculpatory statements at trial. A variety of reasons, said the *Hale* Court, may have influenced the arrestee's decision to remain silent: (1) he had no duty to speak; (2) his silence may have been in reliance on his right to remain silent under *Miranda*; or (3) the intimidating atmosphere of arrest may have led him to stand mute. Consequently, the defendant's silence at the time of arrest is of little

²⁸"[The defendant] was a compelled, and not a voluntary, witness; . . . he was not represented by counsel; . . . he could summon no witness; . . . [and] he had no opportunity to cross-examine witnesses testifying against him. . . . Innocent men are more likely to plead the privilege in secret proceedings, where they testify without advice of counsel and without opportunity for cross-examination, than in open court proceedings where cross-examination and judicially supervised procedure provide safeguards for the establishing of the whole, as against the possibility of merely partial, truth." 353 U.S. at 422-23.

²⁹353 U.S. at 423.

³⁰384 U.S. 436 (1966).

³¹*Id.* at 468 n.37.

³²On the basis of this language and the tone of the *Miranda* decision in general, the majority of federal and state courts that dealt with the issue of the constitutional permissibility for prosecutorial use for impeachment purposes of the defendant's silence during custodial interrogation prior to *Harris v. New York*, 401 U.S. 222 (1971), held that such silence was inadmissible for impeachment purposes as well as for proving guilt. See Note, 32 LA. L. REV. 650, 652 n.11 (1972) for a collection of the cases so holding.

³³401 U.S. 222 (1971). See discussion of *Harris* at note 10 *supra* and accompanying text.

³⁴422 U.S. 171 (1975).

³⁵In *Hale* the defendant was pointed out on the street and identified to police as one of the participants in a recent robbery. When police approached the defendant, he attempted to flee but was apprehended, placed under arrest, and advised of his rights under *Miranda*. Upon being searched he was found in possession of \$158 in cash. In response to police questioning, the defendant stood mute. At his trial, however, he took the stand and testified (1) that he was in a narcotics treatment center at the time of the crime; (2) that after leaving the center he was in the company of a friend who subsequently purchased narcotics; (3) that he fled when approached by police because he feared being found in the presence of a person carrying narcotics; and (4) that the money he had with him had come from his wife who had given him about \$150 from her welfare check to purchase some money orders for her. In an effort to impeach the defendant's testimony, the prosecutor caused the defendant to admit, on cross-examination, that he had not offered that exculpatory information to the police at the time of arrest.

³⁶353 U.S. 391 (1957).

probative value in determining the credibility of testimony at trial. Therefore, the government's interest in having the defendant's prior silence made known is minimal, whereas the potential for prejudice to the defendant is great, since the jury is likely to accord much more weight to the defendant's prior invocation of his privilege against self-incrimination than is warranted.³⁷

Doyle takes *Hale's* evidentiary holding a step further by giving it a constitutional basis in the due process clause of the fourteenth amendment. An individual is now assured that if he decides, after having received the *Miranda* warnings, that he wishes to invoke his right to remain silent, the State cannot use his silence against him at trial because to do so would constitute a deprivation of due process.

However, this constitutional basis is a narrow one, one which applies only to situations where the police do in fact give an arrestee his *Miranda* warnings before beginning custodial interrogation. As the dissent points out in *Doyle*, if no *Miranda* warnings are given and the suspect chooses to remain silent, the prosecutor would not, under the rationale of the majority in *Doyle*, be constitutionally prohibited from using this silence to impeach the suspect's exculpatory trial testimony.

Doyle's holding may supply an incentive to police to neglect to give the *Miranda* warnings. If the police have just arrested a suspect who they are relatively sure will not confess, it may be to their advantage to avoid giving the *Miranda* warnings. This would be advantageous because the suspect's silence could then be used against him at trial to impeach any exculpatory testimony, whereas if they gave the *Miranda* warnings, use of his silence at trial for impeachment purposes would be prohibited by *Doyle*. It is conceivable, therefore, that the holding in *Doyle* might under certain circumstances result in a deliberate circumvention of the dictates of the *Miranda* decision.

This unsavory result could have been avoided had the Court based its holding in *Doyle* on a fifth amendment right on the part of a defendant not to have his assertion of his right against self-incrimination used to impeach his trial testimony. As was stated in *Malloy v. Hogan*,³⁸ what the fifth amend-

ment was designed to guarantee is "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."³⁹

In *Griffin v. California*,⁴⁰ where the trial court allowed comment upon the defendant's refusal to testify in his own defense as tending to prove his guilt, the Court held that to allow this would impose an unconstitutional penalty upon the defendant's exercise of his constitutional privilege against self-incrimination. "It [would infringe upon] the privilege by making its assertion costly."⁴¹ While it is true that in *Griffin* the prosecutor was prohibited from using the defendant's invocation of his right to remain silent as evidence of guilt as opposed to mere use for impeachment purposes,⁴² the rationale of the case is applicable to the issue at hand. Allowing the prosecutor to use the defendant's prior silence to impeach his exculpatory trial testimony is as much an imposition of a penalty upon the defendant's assertion of his fifth amendment privilege as is allowing the prosecutor to use that silence as evidence of guilt.⁴³ Moreover, in *Spevack v. Klein*,⁴⁴ where an

amendment and the County Court adjudged him in contempt of court and had him placed in prison until he was ready to answer. Petitioner then applied for a writ of habeas corpus. The Supreme Court held that the fifth amendment privilege against self-incrimination was incorporated into the fourteenth amendment and that, consequently, the state's action against the petitioner, constituting an unconstitutional abridgement of that privilege, was impermissible.

³⁹*Id.* at 8.

⁴⁰380 U.S. 609 (1965).

⁴¹*Id.* at 614.

⁴²Another distinction could be made. In *Griffin* the defendant asserted his right to remain silent at the time of trial as opposed to the time of arrest and police interrogation. However, this distinction is irrelevant. As was stated in *Gillison v. United States*, 399 F.2d 586, 587 (D.C. Cir. 1968):

In *Griffin v. State of California* the Supreme Court held that the Fifth Amendment forbids prosecutor and court from commenting on an accused's failure to testify on his own behalf. The distance between that issue and the prosecutor's comments . . . about the accused's failure to make an exculpatory statement upon arrest is infinitesimal. Indeed in *Miranda v. State of Arizona*, the . . . Court recognized the applicability of *Griffin* to this [very] situation. . . . (emphasis added).

⁴³Circuit courts dealing with the issue have reached conflicting results. Some have found violations of the fifth amendment privilege in a prosecutor's use of a defendant's silence to impeach his trial testimony in that such use constituted an impermissible inference drawn from the defendant's refusal to speak: *United States v. Anderson*,

³⁷422 U.S. at 176-77.

³⁸378 U.S. 1 (1964). In *Malloy*, the petitioner was arrested and pleaded guilty to a gambling offense. About 16 months later, he was ordered to testify before a referee appointed to conduct an investigation of alleged gambling activities in the county. When asked certain questions concerning his arrest and conviction, he pleaded the fifth

attorney was disbarred for asserting his privilege against self-incrimination before a judicial disciplinary proceeding, it was held that the "imposition of any sanction which makes the assertion of the Fifth Amendment privilege 'costly'"⁴⁵ would amount to an impermissible penalty upon the exercise of that privilege. Certainly, prosecutorial use of a defendant's silence to impeach his exculpatory trial testimony would constitute an imposition of a sanction which would make the defendant's exercise of his privilege against self-incrimination costly.⁴⁶

Had the Court in *Doyle* adopted the fifth amendment rationale instead of using the due process theory, it would have avoided giving police an incentive to circumvent the dictates of *Miranda*. Perhaps the reason that the majority in *Doyle* declined to use this fifth amendment rationale is that it was faced with the fact that *Raffel v. United*

*States*⁴⁷ had held that the fifth amendment did not prohibit use of a defendant's prior assertion of his right to remain silent to impeach his exculpatory trial testimony.⁴⁸ This seeming difficulty posed by *Raffel*, however, could have been overcome by the majority had it desired to base its holding upon fifth amendment grounds. It is doubtful that *Raffel* and the rationale supporting it could withstand judicial scrutiny today in light of the Court's holdings in *Griffin* and *Spevack*.⁴⁹ If by taking the stand in his own defense the defendant not only waives the privilege at that time but also opens himself up to comment and questions by the prosecution about his prior silence, this would certainly constitute the "imposition of [a] sanction which makes assertion of the privilege 'costly'"⁵⁰ within the meaning of *Griffin* and *Spevack*.

*Michigan v. Mosley*⁵¹ concerns a defendant who was arrested in connection with several robberies and was fully advised of his rights in accordance with *Miranda v. Arizona*.⁵² When questioned about the robberies at the police station, he asserted his right to remain silent and the detective halted the interrogation. Two hours later, however, another detective took the defendant to another part of the building, again advised him of his rights under *Miranda*, interrogated him concerning a murder, and eventually elicited a confession from him. The defendant was subsequently tried and convicted of murder. The conviction, however, was reversed on appeal,⁵³ the Michigan appellate court finding a per se violation of the *Miranda* dictate that once the subject of police custodial interrogation indicates that he wishes to remain silent, the interrogation must cease. The action of the police in resuming the interrogation was viewed by the court as an attempt to circumvent the *Miranda* dictate "by the simple expedient of shuttling a person from one police officer to another for purposes of questioning and thus [attempting to justify] subsequent interrogation after an election to remain silent."⁵⁴ The police, said the court, had con-

498 F.2d 1038 (D.C. Cir. 1974), *aff'd on other grounds sub nom.* United States v. Hale, 422 U.S. 171 (1975); Johnson v. Patterson, 475 F.2d 1066 (10th Cir. 1973), *cert. denied*, 414 U.S. 878 (1973); United States v. Semensohn, 421 F.2d 1206 (2nd Cir. 1970); United States v. Brinson, 411 F.2d 1057 (6th Cir. 1969); Fowle v. United States, 410 F.2d 48 (9th Cir. 1969). However, other circuit courts have declined to invalidate prosecutorial use of a defendant's prior silence to impeach his trial testimony on fifth amendment grounds and have instead employed the type of analysis used in *Grunewald v. United States*, 353 U.S. 391 (1957) (*see* text accompanying notes 25-29 *supra*): United States v. Ramirez, 441 F.2d 950 (5th Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); United States *ex rel.* Burt v. New Jersey, 475 F.2d 234 (3d Cir.), *cert. denied*, 414 U.S. 938 (1973).

See Justice Black's concurring opinion in *Grunewald*, in which he argues that the prosecutor's use, for impeachment purposes of the defendant's prior silence in that case constituted an impermissible penalty imposed upon the defendant's assertion of his privilege against self-incrimination, stating:

I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them.

353 U.S. at 425.

⁴⁴385 U.S. 511 (1967).

⁴⁵*Id.* at 515 (emphasis added).

⁴⁶Such was the rationale employed in *Fowle* and the like cases noted at note 43 *supra*. *See also* United States *ex rel.* Macon v. Yeager, 476 F.2d 613, 616 (3d Cir.), *cert. denied*, 414 U.S. 855 (1973), where the court stated:

Griffin holds broadly that . . . the relevant question is whether the particular defendant had been harmed by the state's use of the fact that he engaged in constitutionally protected conduct.

Certainly, impeachment of the defendant's exculpatory testimony at trial harms the defendant.

⁴⁷271 U.S. 494 (1926).

⁴⁸*See* notes 22-24 *supra* and accompanying text.

⁴⁹Indeed, Justice Black in his concurring opinion in *Grunewald v. United States*, 353 U.S. 391 (1957), expresses doubt that *Raffel* has any vitality today. He concludes, moreover, that to the extent that it does, it should be expressly overruled.

⁵⁰*Spevack v. Klein*, 385 U.S. 511, 515 (1967).

⁵¹423 U.S. 96 (1975).

⁵²384 U.S. 436 (1966).

⁵³*People v. Mosley*, 51 Mich. App. 105, 214 N.W. 2d 564 (1974), *leave to appeal denied*, 392 Mich. 764 (1974).

⁵⁴*Id.* at 108, 214 N.W. 2d at 566.

tinued to interrogate the defendant after he had indicated that he wished to remain silent, thus violating *Miranda*.

The Supreme Court in *Miranda* examined this possible violation of a defendant's rights:

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he had shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome his free choice in producing a statement after the privilege has been once invoked.⁵⁵

The *Mosley* majority found that this passage from *Miranda* was susceptible of numerous interpretations. First, the passage could be interpreted to mean that a suspect could never again be questioned by any police officer at any time or place, on any subject, once the right to remain silent had been asserted. Second, it could mean that any statement obtained from the subject after he had once invoked his right to remain silent, even if volunteered by him without any further police interrogation whatsoever, must be considered a product of compulsion and therefore inadmissible in evidence at trial. Third, the *Miranda* passage could be read as requiring only the immediate cessation of questioning and allowing resumption after a mere momentary pause.⁵⁶ The Court characterized all of these literal interpretations as capable of leading to "absurd and unintended results,"⁵⁷ and concluded that at some point in time, resumption of questioning must be permissible.⁵⁸

⁵⁵384 U.S. at 436.

⁵⁶423 U.S. at 101-02.

⁵⁷*Id.* at 102.

⁵⁸The majority of federal and state courts, as the majority in *Mosley* points out, 423 U.S. at 103 n.9, have held that *Miranda* does not per se prohibit all subsequent interrogation after the suspect has once asserted his Fifth Amendment privilege. The state courts so holding have stressed (1) the voluntariness of the subsequent confessions obtained, *People v. Pittman*, 55 Ill. 2d 39, 302 N.E.2d 7 (1973); *State v. McClelland*, 164 N.W. 2d 189 (1969); *State v. Law*, 214 Kan. 643, 522 P.2d 320 (1974); *Conway v. State*, 7 Md. App. 400, 256 A.2d 178 (1969); *State v. Godfrey*, 182 Neb. 451, 155 N.W.2d 438 (1968); *Commonwealth v. Grandison*, 449 Pa. 231, 296 A.2d 730 (1972); *State v. Robinson*, 87 S.D. 375, 209 N.W.2d 374 (1973); *Hill v. State*, 429 S.W.2d 481 (Tex. Crim. App. 1968); (2) the fact that the renewed questioning did not

The Court then went on to formulate a standard by which to determine the point in time when questioning could be resumed. Because the purpose behind the *Miranda* decision was to "adopt fully effective means . . . [of notifying] the person of his right of silence and [of assuring] that the exercise of the right will be scrupulously honored,"⁵⁹ the Court concluded that the admissibility of statements obtained from a subject of police interrogation after that subject had once asserted his right to remain silent depended upon whether his "right to cut off questioning [had been] scrupulously honored."⁶⁰ Applying this formula to the case at hand, the Court found that the defendant's prior decision to cut off questioning had been scrupulously honored by the police based on the fact that questioning of the defendant was not resumed until more than two hours had elapsed, that the second interrogation which led to the voluntary confession was conducted by a different officer, at another location, about an unrelated crime, and that the second officer had again read the defendant his rights under the *Miranda* doctrine.⁶¹

amount to incessant harassment by the police for the purpose of breaking down the will of the suspect, in other words, that *Miranda* interdicted only those situations where the police refuse to take no for an answer and continue questioning after the suspect has asserted his right to remain silent. *People v. Naranjo*, 181 Colo. 273, 509 P.2d 1235 (1973); *State v. Bishop*, 272 N.C. 283, 158 S.E.2d 511 (1968); or (3) the fact that the defendant must have known that he had indicated a desire to remain silent, this request would have been honored because it had been so when he previously asserted the right, *State v. O'Neil*, 299 Minn. 60, 216 N.W.2d 822 (1974); *State v. Estrada*, 63 Wis. 2d 476, 217 N.W.2d 359 (1974).

⁵⁹384 U.S. at 479. In *Miranda* the Court, in holding that procedural safeguards were necessary to ensure that the suspect's free exercise of his fifth amendment privilege would be unfettered, reasoned that the atmosphere of police custodial interrogation was such that this free exercise of the privilege was imperiled:

Even without employing brutality [or] the "third degree" . . . the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals. . . .

In each of the cases [now before us], the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent.

Id. at 455, 457-58 (citations omitted).

⁶⁰423 U.S. at 104.

⁶¹The Court also distinguished *Westover v. United States*, 384 U.S. 436 (1966), a companion case to *Miranda*, which the Michigan Court of Appeals had found dispositive. In *Westover* the defendant was arrested and questioned by local police from 9:45 p.m. until noon the next day. Three F.B.I. agents then took over, gave advisory

Justices Brennan and Marshall, in dissent, took issue with the majority's presentation of the facts. The majority found that the second interrogation had concerned "an unrelated holdup murder."⁶² However, the dissent pointed out that the officer who arrested the defendant had done so on the basis of an anonymous tip which embraced not only the robberies that were the subject of the first interrogation but also the robbery-murder that was the subject of the second interrogation. The defendant was suspected of all these crimes. Therefore, the second interrogation did not concern an unrelated crime.

Moreover, the majority's characterization of the second interrogation as having taken place "at another location"⁶³ was criticized by the dissent as misleading. The second interrogation was conducted merely on a different floor of the same building. In light of these facts, the dissent argued that even under the standard formulated by the majority, the inculpatory statements obtained during the course of the second interrogation must be held inadmissible because the defendant's decision to cut off questioning had not been scrupulously honored. Rather, the second interrogation was a deliberate attempt on the part of the police to circumvent the dictates of *Miranda*. It was a ploy to elicit a confession from the accused.

Although the dissenters agreed that *Miranda* was not to be read as imposing an absolute ban on the resumption of questioning after the suspect in custody has once invoked his right to remain silent, they nonetheless felt that resumed questioning must be conditioned upon procedural safeguards for which the majority's formula did not provide.⁶⁴ *Miranda*

warnings to the defendant, proceeded to question him about different crimes, and eventually obtained his confession. The Court held the confession inadmissible because:

Although the two law enforcement authorities are legally distinct and the crimes for which they interrogated Westover were different, the impact on him was that of a continuous period of questioning. . . . Despite the fact that the F.B.I. agents gave warnings at the outset of their interview, from Westover's point of view the warnings came at the end of the interrogation process. In these circumstances an intelligent waiver of constitutional rights cannot be assumed.

Id. at 496. In contradistinction to *Westover*, the Court noted, the police gave Mosley full *Miranda* warnings at the outset of each interrogation, "subjected him to only a brief period of initial questioning, and suspended questioning entirely for a significant period before beginning the interrogation that led to his incriminating statement." 423 U.S. at 106-07.

⁶²423 U.S. at 118.

⁶³*Id.* at 119.

⁶⁴*Id.* at 115.

requires that the procedures approved be sufficient to assure with reasonable certainty that a confession is not obtained under the compulsion inherent in custodial interrogation and detention.⁶⁵ The teaching of *Miranda* is that "renewed questioning is itself part of the process which invariably operates to overcome the will of a suspect."⁶⁶ Therefore, statements obtained as the result of renewed questioning are presumptively coerced. In response to renewed interrogation, the suspect must be able freely to exercise his right to remain silent. But because the renewed questioning is itself inherently coercive, it acts to overbear the individual's free will in the exercise of his right to remain silent.⁶⁷

The dissent suggested that the proper rule to establish, one that would more adequately safeguard the suspect's free exercise of his right to remain silent in response to renewed questioning, would be to demand that once the suspect has invoked his right to remain silent, interrogation should not resume until the appointment and arrival of counsel. This, the dissent pointed out, would be the precise safeguard that *Miranda* had deemed adequate for the protection of the suspect's fifth amendment privilege against self-incrimination during custodial interrogation.⁶⁸

Michigan v. Mosley purports to clear up a question which *Miranda* had failed to settle conclusively; namely, under what circumstances, if any, may the police resume questioning of a suspect in custody who has previously invoked his right to

⁶⁵See note 9 *supra*.

⁶⁶423 U.S. at 114.

⁶⁷Indeed it was this deficiency that led the dissent to conclude:

[T]he process of eroding *Miranda* rights, begun with *Harris* . . . continues with today's holding that police may renew the questioning of a suspect who has once exercised his right to remain silent, provided the suspect's right to cut off questioning has been "scrupulously honored." Today's distortion of *Miranda's* constitutional principles can be viewed only as yet another step toward the erosion and, I suppose, ultimate overruling of *Miranda's* enforcement of the privilege against self-incrimination.

Id. at 112.

⁶⁸The Court in *Miranda* had reasoned that the presence of an attorney would be an adequate safeguard for a suspect's fifth amendment privilege during police custodial interrogation because his presence would "dispel the compelling atmosphere of the interrogation," 384 U.S. at 465, thereby assuring that statements obtained were not the product of compulsion. Presence of an attorney would equalize the psychologically intimidating atmosphere of police custodial situations. The suspect would no longer stand alone against the overwhelming forces of the government.

remain silent in response to prior interrogation? *Miranda* had stated that if the subject of a police custodial interrogation indicated that he wished to remain silent, then the interrogation must cease. What the Court in *Miranda* did not say, however, was whether or not it would be permissible to resume the interrogation at some later time.

After *Miranda*, circuit courts employed differing standards to factual situations involving subsequent interrogations. In *United States v. Crisp*,⁶⁹ the Seventh Circuit established a strict standard, holding that once the individual has asserted his right to remain silent, the interrogation must cease until such time as the suspect "voluntarily and spontaneously invite[s] further discussion."⁷⁰ Once the privilege has been invoked, said the court, "an interrogator must not be allowed to seek its retraction."⁷¹ Consequently, police initiation of renewed questioning is impermissible. Interrogation can be resumed only upon the initiation of the accused.⁷²

⁶⁹435 F.2d 354 (7th Cir. 1970), *cert. denied*, 402 U.S. 947 (1971). In *Crisp* the defendant was convicted of armed robbery. During F.B.I. interrogation, he had asserted his fifth amendment privilege in regard to any question concerning "any bank robbery." *Id.* at 357. The F.B.I. agent conducting the interrogation continued questioning him on other matters but eventually returned to the matter of the bank robbery of which the defendant was suspected, thereby constituting a resumption of questioning on a subject upon which the defendant had already asserted his right to remain silent. At this time the agent was able to elicit incriminating statements from the defendant and he was ultimately convicted.

⁷⁰*Id.* at 357.

⁷¹*Id.*

⁷²*Accord*, *United States ex rel. Doss v. Bensinger*, 463 F.2d 576 (7th Cir.), *cert. denied*, 409 U.S. 932 (1972); *People v. Fioritto*, 68 Cal. 2d 714, 441 P.2d 625, 68 Cal. Rptr. 817 (1968). In *Bensinger* the defendant had asserted his right to remain silent and the police had ceased questioning. However, several hours later, the police obtained a confession from the defendant by confronting him with the confession of his accomplice. The court held that the "police-initiated" resumption of interrogation was impermissible. 463 F.2d at 579. The court reiterated the *Miranda* dictate that once a suspect has asserted his right to remain silent, the interrogation must cease, and quoted its earlier holding in *Crisp* to the effect that this dictate, like all the other dictates of *Miranda*, must be meticulously honored by the police.

In *Fioritto* the defendant was arrested for burglary and, in response to police interrogation, invoked his right to remain silent after receiving the *Miranda* warnings. The police then confronted him with two accomplices who had confessed and implicated him in the burglary. Shortly thereafter, the police again advised the defendant of his *Miranda* rights and renewed the questioning, asking him if he would like to confess. The defendant then signed a waiver of his rights and confessed. The court held that this confession

In *Jennings v. United States*,⁷³ the Fifth Circuit employed a much less restrictive standard for determining the permissibility of renewed interrogation. There the court held that *Miranda* had intended to interdict only those situations where an accused asserts his right to remain silent but the police disregard his claim and continue to interrogate him. The court concluded that renewed questioning would be permissible so long as the police do not relentlessly harrass the suspect with questions; that is, so long as the police halt interrogation each time the accused asserts his right to remain silent. Similarly, the

was inadmissible because it violated the *Miranda* dictate that once a suspect has asserted his right to remain silent the interrogation must cease. Once the suspect has invoked the privilege against self-incrimination, said the court, interrogation can be resumed only upon the voluntary initiation of the suspect.

A similar standard was employed in *United States v. Jackson*, 436 F.2d 39 (9th Cir. 1970), *cert. denied*, 403 U.S. 906 (1971), where the defendant, after having been arrested and advised of his rights in accordance with *Miranda*, indicated that "he had some things to say but would like to talk to his lawyer [first and] preferred to wait a little while." *Id.* at 41. Four days later, the police again advised the defendant of his rights and asked him if he had changed his mind and was now willing to talk. The defendant then signed a waiver and made incriminating statements. In holding that these statements were admissible at trial, the Court said:

We find nothing... in *Miranda*... to preclude officers from again seeing a suspect in custody *who has indicated a potential willingness to talk*, after a reasonable interval, provided that their questioning is for the limited purpose of finding out whether the suspect has changed his mind.

Id. (emphasis added). *But see* *United States v. Barnes*, 432 F.2d 89 (9th Cir. 1970), where two defendants were arrested on charges of smuggling marijuana and asserted their right to remain silent in response to police interrogation. They were confronted with an accomplice who had also been arrested and had confessed. This accomplice repeated her confession in the defendants' presence and the police then resumed interrogation of the defendants, in response to which they admitted their participation in the smuggling scheme. The court held this a violation on the *Miranda* dictate that once a suspect has expressed his desire to remain silent, the interrogation must cease.

⁷³391 F. 2d 512 (5th Cir.), *cert denied*, 393 U.S. 868 (1968). In *Jennings* the defendant was arrested on suspicion of transporting a stolen car across state lines. At the police station, a local police officer fully advised the defendant of his *Miranda* rights and began interrogation but ceased when the defendant announced that he would answer no further questions. Approximately one hour later, an F.B.I. agent arrived and, not knowing of the prior interrogation or of the defendant's assertion of his right to remain silent, began questioning the defendant after first reading him his rights. The defendant then signed a waiver and confessed.

Second Circuit held in *United States v. Collins*⁷⁴ that a suspect's assertion of his right to remain silent does not foreclose the police from later urging him to reconsider his refusal to answer questions so long as there is a lapse in time between the accused's assertion of his privilege and the request for reconsideration of this assertion. The *Miranda* warnings must again be given to the suspect in a way that will assure him that his exercise of his right to remain silent will be honored, and the reconsideration should be urged by the police "in a careful, noncoercive manner at not too great length."⁷⁵ When the accused has once asserted his right to remain silent in response to police interrogation, questioning may not be resumed "until new and adequate warnings have been given and there is a reasonable basis for inferring that the suspect has voluntarily changed his mind."⁷⁶

In resolving the split among the circuits, *Mosley* has chosen the less restrictive standard. So long as the suspect's decision to cut off questioning is scrupulously honored, questioning may be resumed at a

later time. It is not clear, however, how much time must elapse.

At this point, it must be asked whether this formula fulfills the purpose and rationale of *Miranda*. The underlying rationale of *Miranda*⁷⁷ is that police custodial interrogation is so inherently coercive that procedural safeguards are necessary to protect an arrestee's basic fifth amendment rights. The resumption of the interrogational process is also assumed to be inherently coercive. Procedural safeguards are needed, then, not only at the inception of the original questioning but also at the resumption of interrogation. As the dissent points out, to scrupulously honor the suspect's prior decision to remain silent does not guarantee that the suspect will feel free to assert his right to remain silent in response to renewed questioning. Resumption of interrogation is itself a part of the process that works to weaken the suspect's will. It therefore becomes questionable whether resumption of interrogation can ever be consistent with scrupulously honoring the defendant's fifth amendment privilege when resumption of questioning acts to dissolve the free exercise of that privilege.⁷⁸

The standard suggested by the dissent more adequately comports with the purpose and rationale of *Miranda*, while still fulfilling any practical need for the resumption of questioning. The presence of an attorney at the renewed interrogation would provide a "equale assurance that the second interrogation is not coercive. In *Miranda* the Court stated:

If an individual indicates his desire to remain silent, but has an attorney present, there may be some circumstances in which further questioning would be permissible. In the absence of evidence of overbearing, statements then made in the presence of counsel might be free of the compelling influence of the interrogation process and might fairly be construed as a waiver of the privilege for the purposes of these statements.⁷⁹

Moreover, the "presence of an attorney" standard would have the advantage of providing lower federal courts with a simple viable test by which to determine the permissibility of renewed questioning in particular cases. The diverse formulae previously employed by federal courts would be replaced by a uniform workable standard, as opposed to the nebulous yardstick enunciated by the majority in *Mosley*.

⁷⁴462 F.2d 792 (2d Cir.), cert. denied, 409 U.S. 988 (1972). In *Collins* the defendant was arrested by F.B.I. agents and New York City detectives for armed robbery. Immediately after arrest, he was advised of his rights under *Miranda*, taken to the police station, and asked whether he had any connection with the robbery. When he replied in the negative and asserted that he would answer no more questions, the interrogation ceased. Approximately five hours later, after being transferred to F.B.I. headquarters, he was again given the *Miranda* warnings and questioned. Again he asserted his innocence and the questioning ceased. The next morning, while the defendant was being transferred to the U.S. Attorney General's office, the F.B.I. agents, after reading the defendant his rights, again attempted to elicit answers from him regarding the robbery, and again the defendant refused to answer. Upon meeting with the Attorney General, the defendant was again advised of his rights and asked if he wanted to make a statement. At this time he confessed.

⁷⁵*Id.* at 797. *Accord*, *State v. O'Neil*, 299 Minn. 60, 71, 216 N.W.2d 822, 829 (1974); *State v. Estrada*, 63 Wis. 2d 476, 217 N.W.2d 359 (1974).

⁷⁶462 F.2d at 802. *Accord*, *Hill v. Whealon*, 490 F.2d 629 (6th Cir. 1974), the defendant was arrested for murder by local police and informed of his *Miranda* rights. When asked if he wished to waive these rights, the defendant responded unequivocally in the negative. An hour and a half later, another officer, knowing of the defendant's previous exercise of his right to remain silent, truthfully informed him that an accomplice had confessed and asked the defendant if he would like to talk. The defendant agreed and the officer then again gave him his *Miranda* warnings before he signed a waiver and confessed. The Court held this confession admissible, citing *Collins*.

⁷⁷See note 9 *supra*.

⁷⁸See note 17 *supra*.

⁷⁹*Miranda v. Arizona*, 384 U.S. at 474 n.44.

CONCLUSION

Both *Doyle v. Ohio* and *Michigan v. Mosley* respond to questions arising from the assertion by an accused of his right to remain silent in response to police custodial interrogation. The *Miranda* Court had required that police advise a suspect in custody that he has a right to remain silent and also mandated that the defendant must not be penalized for asserting the privilege. *Doyle v. Ohio* is an expansion of *Miranda*, as it makes clear that this

proscription extends to prosecutorial use for impeachment purposes of the defendant's silence during interrogation. *Michigan v. Mosley*, permitting police initiation of renewed questioning, must be viewed as a constriction of the *Miranda* dictate that once an individual asserts his right to remain silent, the interrogation must cease. This mandate has been altered to read: once an individual asserts his right to remain silent, the interrogation must cease *for a while*.