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## Evidence - Use, in the Federal Courts, of Accused's Silence after Miranda Warnings to Impeach His Trial Testimony - United States v. Hale

Patricia Schick

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**EVIDENCE—Use, in the Federal Courts, of Accused's Silence After Miranda Warnings to Impeach His Trial Testimony. United States v. Hale, \_\_\_\_\_ U.S. \_\_\_\_\_, 95 S.Ct. 2133 (1975).**

William Hale was arrested after being identified by a robbery victim from whom five men had taken ninety-six dollars. Hale was taken to the police station, advised of his right to remain silent, searched, and found to be carrying one hundred and fifty-eight dollars in cash. When an officer asked, "Where did you get the money?" Hale made no response. At trial in the District Court for the District of Columbia, Hale took the stand and presented an exculpatory version of the facts, including testimony that his estranged wife had received her welfare check the day of the robbery and had given him the money to purchase money orders for her, as he had done several times in the past.<sup>1</sup> On cross-examination the prosecutor questioned Hale about his failure to explain his possession of the money to the police after his arrest.<sup>2</sup> The trial court instructed the jury to disregard the testimony, but refused to declare a mistrial, and conviction followed. The Court of Appeals for the District of Columbia reversed,<sup>3</sup> holding that inquiry into defendant's silence impermissibly prejudiced his defense and infringed upon his right to remain silent under *Miranda v. Arizona*.<sup>4</sup> The United States Supreme Court granted certiorari in order to resolve a conflict in the federal courts of appeals on the question of whether the Constitution allows impeachment of a criminal defendant by evidence of his silence under police interrogation.<sup>5</sup> In deciding *Hale*, however, the Court did not reach the constitutional issue but held that, in the circumstances of the case, evidence of Hale's silence was insufficiently probative and was outweighed by the prejudicial impact of its admission.<sup>6</sup>

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1. United States v. Hale, \_\_\_\_\_ U.S. \_\_\_\_\_, 95 S.Ct. 2133, 2135 (1975).
2. *Id.* at 2135-36. The colloquy was as follows:
  - Q. Did you in any way indicate to the police where the money came from?
  - A. No, I didn't.
  - Q. Why not?
  - A. I didn't feel it was necessary at the time.
3. United States v. Anderson, \_\_\_\_\_ D.C. App. \_\_\_\_\_, 498 F.2d 1038 (1974).
4. 384 U.S. 436 (1965).
5. United States v. Hale, *supra* note 1, at 2135.
6. *Id.*

## INTRODUCTION

Although the *Hale* decision appears to be a purely evidentiary determination limited to the circumstances of the case, a close reading suggests that its effect may be more far-reaching than first appears. The Court stressed that because *Hale* was under custodial interrogation and had just been given his *Miranda* warnings, his silence could just as easily be taken to indicate reliance on his right to remain silent as to support an inference of later fabrication, and thus was not probative on the issue of credibility.<sup>7</sup> The fifth amendment privilege and the *Miranda* warnings created the setting which rendered the accused's silence ambiguous. This setting will generally be present in cases of the *Hale* pattern; the accused's silence will generally be ambiguous and thus inadmissible under *Hale*.

## BACKGROUND: THE EVIDENTIARY PERSPECTIVE

Evidence of a prior inconsistent statement is admissible to impeach the credibility of a witness. Such evidence casts doubt on the accuracy or truthfulness of both the prior statement and the trial testimony.<sup>8</sup> Evidence of prior inconsistent conduct, of which silence may be an example, is also admissible to impeach,<sup>9</sup> though subject to the criticism that it is often ambiguous.<sup>10</sup>

Generally, "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."<sup>11</sup> The later assertion of the fact at trial raises an inconsistency. The important language is "when it would have been *natural* to assert it." In a case like *Hale*, the question is: Would it have been natural for the accused, if his testimony at trial is true, to volunteer his account of the facts to the police after being given the *Miranda* warnings? The emphasis, from the evidentiary viewpoint, is on the degree of inconsistency, if any, between his prior silence and his testimony.

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7. *Id.* at 2137.

8. MCCORMICK, EVIDENCE § 34 (2d ed. 1972).

9. *Id.* n.7.

10. *Cf. Id.* § 270, at 652; *Commonwealth v. Dravec*, 424 Pa. 582, 227 A.2d 904 (1967).

11. 3A WIGMORE, EVIDENCE § 1042, at 1056 (Chadbourne rev. 1970).

On the question whether an accused's prior silence is inconsistent with exculpatory testimony at trial, the leading pre-*Miranda* case is *Grunewald v. United States*,<sup>12</sup> which was extensively cited by the *Hale* court. In *Grunewald*, one of the defendants, Halperin, had claimed his fifth amendment privilege before the grand jury; at trial, on cross-examination he answered the same questions asked before the grand jury in a manner consistent with innocence. The prosecutor brought out his former claim of privilege and the court instructed the jury that the defendant's prior silence could be considered for credibility only. The Supreme Court held that, in the circumstances, Halperin's silence before the grand jury was not inconsistent with innocence. The Court identified three factors relevant to determining that the silence was not inconsistent: (1) Halperin's repeated assertions of innocence; (2) the secretive nature of the tribunal before which the questions were asked, and (3) the focus on Halperin as a potential defendant at the time of questioning.<sup>13</sup> The Court thus made it clear that under some circumstances evidence of the prior silence of an accused will be insufficiently probative and may not be used to impeach his testimony. As later in *Hale*, the Court did not reach the question of whether the Constitution permits impeachment of an accused's testimony by evidence of his prior assertion of the right to remain silent.

#### BACKGROUND: THE CONSTITUTIONAL PERSPECTIVE

The Supreme Court held, in *Agnello v. United States*,<sup>14</sup> that evidence obtained in violation of the fourth amendment may not be used for impeachment.<sup>15</sup> In *Walder v. United States*,<sup>16</sup> the Court held that unlawfully obtained evidence might be used to impeach a defendant who had "opened the

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12. 353 U.S. 391 (1957).

13. *Id.* at 422-23.

14. 269 U.S. 20 (1925).

15. *Id.* at 35. "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." Quoting *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). *Agnello* may be read more narrowly as forbidding merely the "bootstrapping in" of impeachment evidence by eliciting the testimony to be impeached for the first time on cross-examination.

16. 347 U.S. 62 (1954).

door” by making affirmative assertions about matters collateral to the issue of guilt or innocence of the crime charged. The *Walder* rationale was that the accused may not use the government’s inability to produce the evidence on direct as a shield for his own perjury.<sup>17</sup> The *Walder* exception, or “collateral use doctrine,” was applied unevenly and with difficulty because of doubts about its meaning and scope.<sup>18</sup> Some courts extended the exception to apply to pre-trial statements obtained in violation of the fifth amendment.<sup>19</sup>

*Miranda v. Arizona*<sup>20</sup> appeared to overrule *Walder* insofar as the *Walder* exception had been applied to fifth amendment questions;<sup>21</sup> however, in *Harris v. New York*<sup>22</sup> the Court made it clear that *Miranda* would not be read as forbidding the use of illegally obtained, non-coerced statements to impeach the testimony of a criminal defendant, so long as the evidence is trustworthy.<sup>23</sup>

Prior to *Harris*, the federal courts generally took the view that, under *Miranda*, the accused’s silence after *Miranda* warnings could not be used to impeach his trial testimony.<sup>24</sup> *Harris* clearly overruled *Miranda*’s prohibition against impeachment use of illegally obtained statements. Did it also overrule *Miranda*’s prohibition against use of the accused’s silence under custodial interrogation?<sup>25</sup> This is the question that has created a division of authority in the federal courts of appeals.

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17. *Id.* at 65.

18. McCORMICK, *supra* note 8, at § 178 n.3.

19. Comment, *The Impeachment Exception to the Constitutional Exclusionary Rules*, 73 COLUM. L. REV. 1476, 1480 (1973).

20. *Miranda v. Arizona*, *supra* note 4.

21. *Id.* at 477.

[S]tatements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word . . .

See also *United States v. Fox*, 403 F.2d 97, 102-03 (2nd Cir. 1968).

22. 401 U.S. 222 (1971).

23. *Id.* at 224.

24. *Fowle v. United States*, 410 F.2d 48 (9th Cir. 1969); *United States v. Brinson*, 411 F.2d 1057 (6th Cir. 1969); *United States v. Semensohn*, 421 F.2d 1206 (2nd Cir. 1970).

25. *Miranda v. Arizona*, *supra* note 4, at 468 n.37.

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.

## THE CONFLICT IN THE COURTS OF APPEALS

The Third and Fifth Circuits have interpreted *Harris* as allowing impeachment of the accused by evidence of his prior silence, while the Tenth and District of Columbia Circuits have held the evidence inadmissible.

The Third Circuit considered the question in *Agnellino v. New Jersey*<sup>26</sup> and held that evidence of the accused's silence was admissible under *Harris*.<sup>27</sup> Agnellino was tried and convicted of receiving stolen goods. On appeal, he argued that his fifth amendment rights had been violated when the trial court allowed the prosecutor to comment on his failure to include, among other information he gave the police after Miranda warnings, the name of the person from whom he had obtained the goods. Agnellino produced the name at trial, and portrayed the sale as a course-of-business transaction.

Judge Hunter, writing for the court, interpreted these facts as an instance of the use of an accused's silence to impeach his credibility. Starting with the proposition that a defendant who takes the stand waives not only his right to remain silent at trial but prior assertions of the right as well,<sup>28</sup> and arguing from *Grunewald*<sup>29</sup> that only where the accused's silence is utterly lacking in probative value is its use constitutional error, Judge Hunter concluded that the evidence is constitutionally inadmissible only where its use amounts to a violation of due process.<sup>30</sup> The fifth amendment protections, so important in *Miranda*, were thus brushed aside.

The other two judges on the *Agnellino* panel, who concurred in the result, did not regard the case as one of silence, but of prior inconsistent statements falling squarely within

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26. 493 F.2d 714 (3rd Cir. 1974).

27. *Id.* at 719. In an earlier case, *United States ex rel. Burt v. New Jersey*, 475 F.2d 234 (3rd Cir. 1973), the same court reached a similar conclusion, but the *Burt* facts do not clearly present the issue.

28. *Id.* Citing *Raffell v. United States*, 271 U.S. 494 (1926), in which the Court said that the fifth amendment privilege is for the protection of defendants who do not take the stand at trial.

29. *Grunewald v. United States*, *supra* note 12.

30. *Agnellino v. New Jersey*, *supra* note 26, at 722.

the *Harris* rule.<sup>31</sup> This division in the court casts some doubt on the finality of *Agnellino* as an expression of the Third Circuit's position.

The Fifth Circuit has held that it is constitutionally permissible, under severely limited circumstances, to use the accused's silence after *Miranda* warnings to impeach his trial testimony. In a trio of cases, *United States v. Ramirez*,<sup>32</sup> *United States v. Quintana-Gomez*,<sup>33</sup> and *United States v. Harp*,<sup>34</sup> the court reasoned that, if the defendants' trial testimony were true, their silence even after *Miranda* warnings was so inherently improbable that it was admissible on the issue of credibility.<sup>35</sup> The court recognized that, as a general rule, prosecutorial comment on the accused's exercise of his right to remain silent violates the Constitution; but the rule has its exception. Where the accused offers a defense at trial which in the light of common sense is totally inconsistent with pre-trial silence, then the evidence is admissible.<sup>36</sup> "[I]t is the rare and exceptional case where comment on silence is permissible. Total inconsistency is the criterion."<sup>37</sup>

The Tenth Circuit, in *Johnson v. Patterson*,<sup>38</sup> rejected the view that the accused's pre-trial silence may be used to impeach his testimony. *Harris*, said the court, dealt with prior inconsistent statements, which clearly bring the accused's credibility into question, whereas silence at the time of arrest is simply "the exercise of a constitutional right that

31. *Id.* at 728-30. Both concurring judges took the view that the tenor of Agnellino's statement to police was inconsistent with the tenor of his testimony at trial. Chief Judge Seiz asserted that comment on *silence*, after *Miranda* warnings, would be constitutionally improper.

32. 441 F.2d 950 (5th Cir. 1971).

33. 488 F.2d 1246 (5th Cir. 1974).

34. 513 F.2d 786 (5th Cir. 1975).

35. In both *Ramirez* and *Quintana-Gomez*, defendants testified that they had been compelled to participate in narcotics transactions by mysterious third parties, under threat of injury or death. Neither defendant mentioned the threats to the police. The facts in *Harp* were more exotic. Nine inmates, charged with attempted escape, offered in defense that they had been forced to accompany a tenth inmate in his escape attempt and had, in effect, been kidnapped. The tenth admitted the "kidnapping" but pleaded insanity. The accused inmates omitted to produce their account of the facts at any time during numerous interviews with officials.

36. *United States v. Harp*, *supra* note 34, at 789-90.

37. *Id.* at 790. In another case, *United States v. Fairchild*, 505 F.2d 1378 (5th Cir. 1975), the court refused to find the evidence admissible, because the silence lacked the requisite degree of improbability in the light of the accused's testimony.

38. 475 F.2d 1066 (10th Cir. 1973).

all persons must enjoy without qualification."<sup>39</sup> The court reasoned that, under *Miranda*, use of the accused's silence to impeach amounted to the imposition of a penalty on the exercise of a constitutional right, and as such was forbidden by *Griffin v. California*.<sup>40</sup>

In *United States v. Anderson*,<sup>41</sup> the District of Columbia Circuit held that evidence of the accused's silence lacked probative value, and that even if it were probative, it would be constitutionally impermissible to use it against the accused in court, even for impeachment. The court found *Harris* inapplicable, since the *Harris* defendant did not assert his right to remain silent under interrogation, but spoke. The accused who remains silent explicitly avails himself of a fundamental right and under *Griffin* the assertion of such a right may not be penalized. "Nothing in *Harris* undercuts this fundamental constitutional principle since *Harris* did not involve assertion of the constitutional right."<sup>42</sup>

In both *Johnson* and *Anderson* the courts relied in part on *Griffin's* prohibition against imposing a penalty on the assertion of a constitutional right. Some doubts<sup>43</sup> about the continuing validity of the *Griffin* principle have been raised by *McGautha v. California*<sup>44</sup> and three guilty plea cases decided in 1970.<sup>45</sup> These cases, however, involve a *waiver* of rights by the accused, and the question presented has to do with what subsequent results of the waiver are constitution-

39. *Id.* at 1068. Since the court in *Hale* did not reach the constitutional argument, the *Johnson* holding remains undisturbed and is mandatory precedent should the question of silence evidence arise in the Federal District Court for the District of Wyoming. The Wyoming Supreme Court has taken a similar view in holding in *Gabrielson v. State*, 510 P.2d 534 (Wyo. 1973), that using the accused's silence against him at trial imposes an impermissible penalty on a fundamental right. See particularly, Judge Guthrie's concurring opinion at 539-40.

40. 380 U.S. 609 (1965). The *Griffin* Court held that prosecutorial comment on the accused's failure to testify was impermissible because it penalized the exercise of a fundamental right by making its assertion costly.

41. *United States v. Anderson*, *supra* note 3. The government's appeal from the appellate court's decision in *Anderson* resulted in the Supreme Court's decision in *United States v. Hale*. The conviction of Hale's co-defendant Anderson was affirmed by the appellate court and he did not appeal.

42. *Id.* at 1044.

43. See Judge Breitenstein's dissent in *Johnson v. Patterson*, *supra* note 38, at 1070; *Agnellino v. New Jersey*, *supra* note 26, at 723.

44. 402 U.S. 183 (1971).

45. *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970).



ally permitted. The silence cases do not involve waiver but rather the direct and unequivocal assertion of the right itself.<sup>46</sup>

#### UNITED STATES V. HALE

The *Hale* facts present the accused's assertion of his right to remain silent in its purest form. Hale was arrested after being pointed out by the robbery victim, was given his *Miranda* rights, and then, when asked to explain his possession of a sum of money, stood mute. At trial he gave an account of his possession of the money which was consistent with innocence.<sup>47</sup>

The Court noted the inherent ambiguity of silence in general and then went on to find *Grunewald* controlling.<sup>48</sup> The court interpreted the *Grunewald* criteria as applying with even more force to Hale than to the *Grunewald* defendant: Hale asserted his innocence, police interrogation is even more secret than a grand jury proceeding, and Hale had been singled out as a potential defendant, having been arrested after an identification by the victim.<sup>49</sup> The factors which suggested that silence was not inconsistent in *Grunewald* served to aid the same determination in *Hale*.

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46. *Simmons v. United States*, 390 U.S. 377 (1968), held that it was constitutionally intolerable to use as substantive evidence the accused's testimony given at a preliminary hearing on an unsuccessful motion to suppress evidence as illegally obtained under the fourth amendment. The Court indicated in *McGautha* that in so far as the *Simmons* rationale was based on avoiding a tension between constitutional rights its validity was open to question. Similar reasoning is seen in the guilty plea cases. It does not follow, however, that in drawing *Simmons'* rationale into doubt these cases also draw into doubt the *Griffin* prohibition against imposing a penalty on the direct assertion of a fifth amendment right. *Simmons, McGautha* and the guilty plea cases all involve a waiver by the accused of his right to remain silent. The cases deal with the consequences which may constitutionally follow upon the accused's waiver. It may be that an unarticulated underlying explanation for these decisions is the impatience and dissatisfaction of the Court with the difficulties of determining whether a particular waiver was voluntary. *McGautha* and the guilty plea cases may perhaps be read as part of an attempt by the Court to set limits on the extent to which a defendant may escape the results of a waiver of rights by asserting a constitutional violation in retrospect.

In *Hale* and similar cases, however, there is no question of waiver. The accused directly and unambiguously asserts a constitutional right, the right to remain silent. It does not follow that *McGautha* and the guilty plea cases, in setting limits on the extent to which an accused may escape the results of a waiver, undermined the *Griffin* prohibition against penalizing the direct assertion of a fifth amendment right.

47. *United States v. Hale*, *supra* note 1, at 2135.

48. *Id.* at 2136.

49. *Id.* at 2138.

The Court's decision in *Hale* rests on the lack of probative value of the accused's silence, and the prejudicial impact of evidence of this type. It is significant that the Court stressed the lack of probative value and gave the question of prejudice little more than passing mention.<sup>50</sup> If the Court had intended to limit its holding narrowly to the unique circumstances of the case, it would have stressed the prejudicial impact of the evidence in the light of the general weakness of the case against *Hale*.<sup>51</sup> Instead, it emphasized the evidentiary inadequacy of the evidence by underlining *Hale*'s position as an accused, in custody, who had just been given the *Miranda* warnings. These are the circumstances of all those whose cases raise the problem discussed herein. The *Hale* holding, in the context of the whole opinion, would appear to mean that the silence of an accused, after *Miranda* warnings, will seldom, if ever, be probative as to his credibility at trial. Thus, though the Court declined to deal with the constitutional issue, its evidentiary holding is broad enough to mandate the exclusion of the silence evidence with a certainty approaching that of a constitutional prohibition.

#### SUMMARY

The Court recognized, in *Hale*, that since it is not "natural" for an accused to reply to police questions after *Miranda* warnings, his answers to the same questions at trial do not raise an inconsistency. By relying on *Grunewald*, a pre-*Miranda* case, the Court avoided dealing with the question whether the Constitution prohibits use of the evidence. *Hale* indicates a reluctance to hasten the undermining of *Miranda* by further extension of the *Harris* doctrine. If it had seen fit to do so, the Court could have applied the reasoning of the Third Circuit in *Agnellino*<sup>52</sup> and found that only where the evidence was *totally* lacking in probative

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50. *Id.*

51. For instance, the Court might have emphasized that *Hale*'s account of his possession of the money was corroborated by his wife and the merchant who had sold him money orders in the past; that he offered an account of his activities which suggested a reason why the victim might have erroneously identified him; that he offered a reasonable explanation for his flight when pointed out by the victim; and that the trial testimony of the victim was contradictory and confused. (For corroboration and victim's testimony, see *United States v. Anderson*, *supra* note 3.)

52. *Agnellino v. New Jersey*, *supra* note 26.

value should it be excluded. *Hale* leaves open the question of what the Court would do with a case like *Harp*<sup>53</sup> in which the accused's silence looks so improbable in the light of his testimony that it strains common sense to exclude it on evidentiary grounds alone. Confronted with such a case, the Court would be forced to reach the constitutional issue.

Finally, Mr. Justice White's concurrence<sup>54</sup> goes to the real, non-technical heart of the issue. The *Miranda* warnings suggest very strongly to the accused that his best course is to remain silent, and so any lawyer would advise him. It offends the fundamental community sense of fair play which underlies due process to turn the accused's reliance on an officially recognized right into the means of discrediting him at trial.

PATRICIA SCHICK

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53. *United States v. Harp*, *supra* note 34.

54. *United States v. Hale*, *supra* note 1, at 2139-40.