

ORIGINAL

In the

Supreme Court of the United States

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DENNIS SEAY JENKINS, :
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 Petitioner :
 :
 v. : No. 78-6809
 :
 CHARLES ANDERSON, WARDEN :
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Washington, D. C.
January 8, 1980

Pages 1 thru 26

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Petitioner :

v. :

No. 78-6809

CHARLES ANDERSON, WARDEN :
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Tuesday, January 8, 1980

The above-entitled matter came on for oral argument
at 10:03 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

CARL ZIEMBA, ESQ., 2000 Cadillac Tower, Detroit,
Michigan 48226; Court-appointed Attorney for
Petitioner

ROBERT A. DERENGOSKI, ESQ., Solicitor General of the
State of Michigan, 525 West Ottawa Street, 762 Law
Building, Lansing, Michigan 48913, on behalf of
Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in the Jenkins v. Anderson.

Mr. Ziemba.

ORAL ARGUMENT OF CARL ZIEMBA, ESQ.,
ON BEHALF OF THE PETITIONER

MR. ZIEMBA: Mr. Chief Justice, and may it please the Court:

If there is one major shortcoming in the administration of criminal law in this country it is in the restricted interpretation given to the concept of the presumption of innocence. In my years at the criminal trial bar I have so often heard trial judges instruct the jury the defendant is presumed to be innocent and that the presumption starts at the beginning of the case and continues on until his guilt is proven beyond reasonable doubt. I think that that is a misleading, if not mistaken, notion of the presumption of innocence.

I think that we are all as members of this society presumed to be innocent of the commission of crime.

QUESTION: Wouldn't you say that Bell v. Wolfish last year that the presumption of innocence was something a word of art peculiar to criminal trials?

MR. ZIEMBA: Yes, but I think that that is a restricted concept of it.

QUESTION: You disagree with ---

MR. ZIEMBA: I agree with the Court's declaration so far as the Court went. But I would say that the reason why a police officer has to have probable cause to believe that somebody has committed a felony or to see the person commit a misdemeanor in his presence before he can lay hold of him is because that person is presumed to be innocent of the commission of crime.

I think that the very genius of our system of criminal jurisprudence starts with the presumption of innocence which invests every member of our society and it must follow from that in our system of jurisprudence, criminal jurisprudence that if a person is presumed innocent he cannot be burdened with the duty of proving his innocence. And therefore if the State accuses a person of crime the State has the burden of proving that crime. And then of course they have evolved all of the facets of the principle of the right of nonincrimination investing every individual, which means to say that if the State chooses to charge a person with crime the State has the burden of proving that charge beyond a reasonable doubt without any assistance at all from the defendant. And there is no burden upon the defendant to make an explanation or to make exonerating statements.

QUESTION: Well, the defendant can be called before a grand jury and required to give blood samples, handwriting analysis, and that sort of thing; can he not?

MR. ZIEMBA: That is true, but we have said that that is not testimonial in nature, have we not.

QUESTION: Yes, but I take it the State wouldn't do it if it didn't feel it was helping prove its case.

MR. ZIEMBA: Well, I suppose not. Of course that is not to say that I am in absolute agreement with the concept that giving blood samples and things of this nature is not compelling a person to give evidence against himself. But of course I am in the minority on that point of view.

But we do recognize the fundamental principle that when one is hailed into court and put on trial and all of the State's evidence marshaled against him is presented in court he still has the right to remain silent. And nobody can comment upon that, upon the fact that he did remain silent.

QUESTION: But once he takes the stand in his own behalf the situation undergoes some change, doesn't it?

MR. ZIEMBA: Yes, it does; but we cannot -- we cannot punish a person for exercising a constitutional right simply because he exercises another right, and that is the right to give evidence under the Sixth Amendment. In other words, here we have -- we have the potential of a person reading in the newspaper that the authorities suspect him of the commission of some crime though there is no formal charge made against him but still it is brought about that X has done so and so. Now, X must decide instantaneously then before any charge is formally

filed against him whether he is going to testify in his trial if it should ever come to that, you see. Because if he intends to testify in his trial he had better come out with an explanation in the face of these rumors and the stories in the newspapers now. Otherwise, he is going to be damned on trial by his pre-trial silence in the face of these accusations.

I do not think that supports our basic tenets and principles of fairness and justice.

Now, if it is true that it is true that a person who is stopped on a street by a police officer and is asked questions about the commission of some crime has a perfect right not to answer the police officer, then how can we say that any duty devolves upon that person when he hears that he might be charged with crime or that he is suspected of a commission of crime has a duty to seek out the police, go down to the police station, stop the police officer on the street in a scout car and say: "One moment, please. You have got to go along. I acted in self defense. Or, "It was an accident," or "I wasn't there," or whatever the case might be.

Yes.

QUESTION: Did the lower court hold there was a duty on the part of the defendant to do any of these things?

MR. ZIEMBA: No, but I think it is --

QUESTION: That the failure to do them if brought out on cross-examination may undermine his credibility.

MR. ZIEMBA: It doesn't have to imply that one has the duty.

QUESTION: Not necessarily. I think he could have said and the trial judge could have told the jury he had no duty to go in and talk and you should decide for yourselves whether there is any inconsistency between -- I don't understand why you necessarily say there was a duty.

The question is one of credibility ultimately, isn't it?

MR. ZIEMBA: But isn't it a matter of credibility if a person is subpoenaed before a grand jury and he claims his right under the Fifth?

QUESTION: Well, that is right but he wasn't summoned before the police and didn't assert any such right. He just didn't volunteer to go to the police.

MR. ZIEMBA: I think it is an awfully strange doctrine that says that if a person is hailed before a grand jury he may exercise with impunity his Fifth Amendment right to remain silent. If he is hailed before Congress or any investigatory body and he is propounded questions, he may exercise the Fifth Amendment to remain silent. If he is placed under arrest whether he is given his warnings or not he has the absolute right to refuse to answer questions. If he is stopped on the street he has the absolute right under the Fifth Amendment not to answer any questions. And still we say

that if a person is sitting in his living room and he hears on television that he has been accused of crime, that there is a warrant out for his arrest, before he is arrested he must answer the telephone, go down to the police station and make protestations of innocence.

QUESTION: Do you suggest as a -- well, you certainly don't suggest as a general rule of evidence that silence is irrelevant. Let us assume this is a civil case and in the face of accusations you remain silent. I thought the normal rule of evidence was that silence is a very relevant factor. And the only reason that silence isn't in criminal cases is just to the extent the Fifth Amendment forbids it, wouldn't you say?

MR. ZIEMBA: Yes.

QUESTION: Well, isn't silence in civil cases a perfectly relevant matter to be brought out?

MR. ZIEMBA: In civil cases we are dealing with --

QUESTION: Well, I know but that isn't because there is any duty of anybody to talk, but it is because it is relevant as Justice Stevens suggests.

MR. ZIEMBA: But in civil cases we are dealing with such inconsequential things as money and --

QUESTION: But the only reason it is different in criminal cases is because of the Fifth Amendment, it isn't because it is irrelevant or not meaningful, it is just --

MR. ZIEMBA: Well, that may be Mr. Justice --

QUESTION: But isn't your argument though that the Fifth Amendment forbids this; isn't that the amendment of your argument?

MR. ZIEMBA: Right. And further that the Fifth Amendment extends out into the community in all circumstances.

QUESTION: Well, Mr. Ziemba, to take the last hypothesis that you proposed of someone sitting in his living room and hearing a radio broadcast that there had been a crime committed and perhaps he was a suspect and he was ultimately indicted and tried, took the stand and the prosecutor sought to impeach him because he had failed to rush down to the police station and give his version.

Don't you think the Supreme Court of Michigan would have decided this question on a non-constitutional ground just that it is not relevant it doesn't impeach the man's credibility for him to have failed to rush down to the police station?

MR. ZIEMBA: I think that the Supreme Court of the State of Michigan would probably decide the case on the face -- on the basis of People v. Bobo cited on page 26 of the Petitioner's brief where the court said:

"Whether his (defendant's) silence was prior to or at the time of arrest makes little difference -- the defendant's Fifth Amendment right to remain silent is constant."

"If silence in the face of specific accusation

'may not be used' (against a defendant), it would be a strange doctrine indeed that would permit silence absent such an accusation to be used as evidence of guilt."

QUESTION: Well, why did the -- your client have to go to the Federal courts to get relief here if the Supreme Court of Michigan feels that way?

MR. ZIEMBA: Mr. Justice White, I keep asking that question time and time again. My practice in the State of Michigan is almost exclusively criminal work and I cannot answer these questions, why in a certain case the court will invoke the Constitution of the United States and of the State of Michigan and reverse a conviction; and in other cases -- well, I can't discern any fact the difference the court gives me an unpublished opinion in which they say: "We have examined the record and find no error." I have no explanation for it, for that phenomenon; I am sorry.

But let us imagine two persons engaged in an activity and the police surprise them and one is seized and the other runs and makes good his escape. The one who is seized is immediately told by the police: "Now, you have the right under the Constitution not to say anything." He is given his Miranda rights. And the second culprit has remained at liberty for two weeks, he hasn't come forth with any explanation or he hasn't stopped in a police office, he hasn't gone into any police station. But eventually he is taken into custody

and both placed on trial. The chap who had the misfortune or good fortune to be arrested at the scene and given his Miranda warnings, he can risk complete impunity, take the witness stand and give exculpatory evidence without being damned for exercising his right to silence.

The fellow who was at liberty for two weeks, he gets on the stand and he is impeached, he is shown to be lying on trial because he remained silent in those two weeks he is at liberty --

QUESTION: It is a little more than that, isn't it, counsel; he just didn't remain silent, he fled from the scene of a homicide situation --

MR. ZIEMBA: Yes.

QUESTION: -- a man was stabbed to death.

MR. ZIEMBA: The man remained without communication for two weeks. That kind of silence is a little different from just remaining silent after you have got a Miranda warning, isn't it?

MR. ZIEMBA: I am not sure, Your Honor.

QUESTION: You make so much importance, you have devoted 10 minutes or 12 minutes to. Did trial counsel make an objection at the time this issue arose in the trial court?

MR. ZIEMBA: No, he did not.

QUESTION: Was it raised in the first appeal?

MR. ZIEMBA: In the -- petitioner here had court-

appointed counsel on his appeal as a right to the Michigan Court of Appeals. And the specific issue before the Court today was not raised to the Michigan Court of Appeals in appointed counsel's brief.

You see we have in the State of Michigan a procedural device available to the prosecution wherein the prosecution can file a motion to affirm the conviction on the basis that the issues raised by the appellant are so unsubstantial as not to need any form of submission in argument. And if the court agrees with the prosecutor an order affirming the conviction might enter. And that was done in this case, the Court of Appeals of Michigan entered an order affirming the conviction on the basis of a motion to affirm by the prosecutor. Then the petitioner here being dissatisfied with his appointed counsel's brief, filed a motion for reconsideration -- an application for reconsideration to the Michigan Court of Appeals within the time allotted by the rules. And he raised this specific issue and the application for reconsideration was denied.

The petitioner then proceeded pro se to make application to the Michigan Supreme Court in a discretionary appeal and he presented this issue before the court, among others, to the Michigan Court -- Michigan Supreme Court. And the Michigan Supreme Court denied leave to appeal, stating that they are not persuaded that the questions should be review--

ed by that court.

Now, I might point this out: that the State of Michigan neither in the Court of Appeals nor in the Michigan Supreme Court nor in the Federal District Court on the petition for writ of habeus corpus nor on the appeal to the Circuit Court of Appeals for the Sixth Circuit raised the issue that there was failure to make a contemporaneous objection at trial. In other words, that issue has never been raised in this case until it has come here under petition for certiorari. And I think that if the defendant is chargeable for neglecting to object on the -- on trial, the State of Michigan is chargeable for not raising that objection any place during the appellate procedures and processes until it has come before this Court.

And I might point this out further, Your Honor, that in the State of Michigan we do have a plain error doctrine and it is invoked most frequently when constitutional rights are involved. So the Michigan Court of Appeals and/or the Michigan Supreme Court could have -- could have entertained this question and reversed the conviction even in the absence of an objection by the petitioner at the trial level.

QUESTION: But they didn't.

MR. ZIEMBA: They did not; no.

So I respectfully submit that that should not be considered to be an issue before this Court.

Now, Your Honor, I have never -- I have never killed an individual to my knowledge, but I would guess -- I would guess that any kind of a killing of an individual must be an emotionally disturbing thing. And I know this from my practice in the criminal law in the city of Detroit that a young black person who is involved in a homicide is not going to be terribly anxious to fall into the hands of the police officer. He is going to be frightened. It is a natural reaction for any individual.

QUESTION: Maybe a white person would be?

MR. ZIEMBA: Well, I don't know that that would be the case, Mr. Justice. Here we have a black petitioner. He argued that he was frightened. He was so frightened of the police that before he turned himself in he made arrangements with the black mayor of the city of Detroit to surrender himself through the mayor's office because he was afraid.

QUESTION: Did he have a prior criminal record?

MR. ZIEMBA: I am not sure. He -- he might have had, Your Honor; not a serious one.

QUESTION: Well, there is some --

MR. ZIEMBA: He had no -- no, no, in point of fact I recall, Your Honor, he gave the explanation that he was -- that he was in addition fearful that because he had been placed on probation just recently by one of the judges of the court of the city of Detroit. So, he did have -- he did have a prior

criminal record.

But of course --

QUESTION: He was not wholly unfamiliar with the criminal process.

MR. ZIEMBA: Your Honor, I don't think that when an unschooled individual goes through a criminal proceeding -- a case on time that he is necessarily thoroughly educated, given the -- in the principles and processes of the criminal law. I don't think that that person can then be judged to - to be one who is familiar with the criminal law and the criminal processes. So that the -- the jury in this case in point of fact the petitioner was tried with murder of the first degree. The jury took four and a half days -- four and a half days to come back with a verdict of manslaughter. In the State of Michigan we have murder of the first degree, second degree and then voluntary manslaughter.

Now, it was the defendant's testimony which was crucial to this case. He asserted a defense of self defense. He said that he stabbed in self defense. Now, if his -- his impeachment by the prosecutor in the form that we find in this case seriously undermined his credibility in the eyes of the -- of the lay juries, and that is where the basic unfairness and the violation of the Constitution principle is involved.

Are there any further questions?

QUESTION: I notice from the record that there apparently was no objection to the prosecutor's references to his --

MR. ZIEMBA: There were no objections to the arguments of the prosecutor referring to the exercise by the petitioner of his right to silence; there was not, Your Honor, no.

QUESTION: But you say that this -- at least I got the impression you said this case turned entirely on his testimony. The jury had the choice of believing eye witnesses brought by the prosecution and eye witnesses produced by the defendants and these witnesses were in complete conflict with each other, were they not, as to who had the knife in the first place?

MR. ZIEMBA: Yes, I would say -- I would say that was a fair representation, Mr. Chief Justice.

QUESTION: The jury verdict came down to whether they were going to believe one set of witnesses or believe another set of witnesses?

MR. ZIEMBA: I think -- well, no, I think -- no, my experience is that the jury wants to hear from the defendant, what's his side of the story. And it is very important I think in a criminal case to put the defendant on the stand. If I can possibly put a defendant on the stand I will put him on the stand because the -- the -- the chances of relief without giving the defendant the stand are materially reduced, you see.

Now, the defendant gets on the stand and he swears, you see, that the deceased had the knife and that the deceased was coming at the petitioner because the petitioner had reported that the deceased had committed this crime a few days earlier. And that he wrestled with the petitioner and he turned -- tussled and wrestled with the deceased and turned the knife of the deceased on the deceased and stabbed him with his own knife, you see.

Now, it is my impression -- it is my impression that -- that jurists come to jury service invested with the folk wisdom. For instance, you can stack the jury until the cows come home, that a defendant need not prove his alibi. That is the law in the State of Michigan, that it is sufficient if the evidence on alibi raises a reasonable doubt as to the presence of the defendant of the scene of the crime that is committed. But nonetheless it is a fact of jury trials that if the jury believes that the alibi witnesses are lying, they will say: "Uh, he must be guilty, because they are lying," you see. And so they also come -- they also come to a jury trial with the preconception that if a defendant has nothing to fear, he is not guilty, why doesn't he get up on that witness stand and say so. Why doesn't he get up there and deny his guilt, you see.

And then when the defendant gets on the witness stand and the prosecutor says: "You can't believe him, you

can't believe him because if what he was telling you in court today is true he would have come voluntarily into the police department soon after that onslaught as he possibly as he possibly could get and explain: 'You have got it all wrong, I acted in self defense,' " you see.

QUESTION: May I ask you about the extent of your position in the case.

You don't rely at all, as I listened to your argument, on the Doyle case.

MR. ZIEMBA: I do to this extent, that the Doyle case is correct but the Doyle case seems to say that the police invent constitutional rights when they inform a defendant of his Miranda rights.

QUESTION: Well, Doyle was due process, wasn't it? I thought the Fifth Amendment --

MR. ZIEMBA: Well, I am sure the Fifth Amendment is in there some place. The court said you can't tell the man that he has a right under the Fifth Amendment not to incriminate himself and then on trial damn him because he exercised his right. This is --

QUESTION: It is equal to the Miranda case.

MR. ZIEMBA: Yes, I would say --

QUESTION: Directly relates to the Miranda --

MR. ZIEMBA: Certainly. Miranda didn't --

QUESTION: And this case now before us is not. Is

that difference in there?

MR. ZIEMBA: Yes. But I would say this, that Miranda didn't invent any new constitutional right.

QUESTION: No, no.

MR. ZIEMBA: You see. All Miranda says was --

QUESTION: One can question whether or not it did, but you submit that it didn't.

MR. ZIEMBA: All that Miranda says is, "Look, will you please take a person into custody, inform him of the fact that he has a right to remain silent because otherwise he may not know and he may be frightened into making a statement," you see.

But if a person is taken into custody and he is a constitutional scholar and he remains silent even and is not given his Miranda rights, why do we shore him of his right to remain silent, exercise his Fifth Amendment rights? It doesn't make any sense.

QUESTION: Well, is it your view -- I just want to be sure I understand your theory -- is it your view that anytime a defendant has a constitutional right to remain silent and does so, notwithstanding how relevant that silence may be to the some issue in the case the prosecutor may never bring out the fact of silence because he has a constitutional right to maintain his silence?

MR. ZIEMBA: Precisely, Mr. Justice Stevens. I

respectfully submit that if a person is -- has a right to remain silent, then there is no duty ever imposed upon him to speak. His silence can never be inconsistent with innocence. After all we say that a person --

QUESTION: As long as his speaking might incriminate him.

MR. ZIEMBA: Well, in this case --

QUESTION: It is not right and you would qualify your statement, you are relying on the Fifth Amendment --

MR. ZIEMBA: That is the basic underlying --yes.

QUESTION: Well, that is protection against self-incrimination, that entails self-incrimination.

MR. ZIEMBA: That is true.

If a person is presumed to be innocent and if a person has a right to remain silent, then how can we ever say that he has a duty under any circumstances in the face of rumors or accusations of crime to come forward and give explanations under penalty that if he should be placed on trial for criminal charges and he gets up on the witness stand he will be damned for the exercise of his constitutional right to remain silent?

QUESTION: Not necessarily. He may give quite a good explanation that satisfies the jury as to why he waited two weeks before he moved.

MR. ZIEMBA: Why should he have to do that, Mr. Chief Justice? Anybody -- if he is exercising a constitutional

right why should he have to give anybody an explanation as to why he exercised that constitutional right? What is the result of the constitutional right if he has to go around explaining why --

QUESTION: Nobody is saying he had to do it.

MR. ZIEMBA: Well, the prosecutor certainly was.

QUESTION: All the prosecutor was saying was that the fact that he didn't do it is relevant in an evidentiary sense in deciding whether or not he was telling the truth at the trial.

MR. ZIEMBA: I am sorry, but I cannot see any difference --

QUESTION: Well, I really

MR. ZIEMBA: -- in saying that and saying you had a duty.

QUESTION: I regret my illogic.

MR. ZIEMBA: No, its --

QUESTION: You say it would just be a contradiction in terms if you added to the Miranda warnings, you tell him you have a right to remain silent and the right to a lawyer and so on; but that if you remain silent your silence may be used against you.

Now, let us assume he is warned to that effect. You would say even so, you couldn't use his silence to impeach him at trial.

MR. ZIEMBA: Well, if the case is laying down a rule like that, I would just throw up my hands and say I just don't understand the law -- I just don't understand the law.

QUESTION: Mr. Ziemba, supposing that your defendant, your client got on the witness stand and testified that immediately after the killing he went to the police chief and told him it was self defense and what happened and he in fact had been silent and had not gone to the police chief. Couldn't the police chief get on the stand and say: "This man remained silent."

MR. ZIEMBA: Well, that's -- then he has gotten on the witness stand and told a deliberate falsehood.

QUESTION: Well, but that is what the theory of the State is here, that he got on the stand and told a deliberate falsehood; it is inconsistent with his silence.

MR. ZIEMBA: No.

QUESTION: You disagree with it, but that is their theory.

MR. ZIEMBA: You see the ultimate question for the jury to decide is whether or not the defendant is telling the truth or not, you see. It is not for the prosecutor.

Do I sit down?

MR. CHIEF JUSTICE BURGER: Very well.

MR. ZIEMBA: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.

ORAL ARGUMENT OF ROBERT A. DERENGOSKI, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. DERENGOSKI: Mr. Chief Justice, and may it please the Court:

Bearing in mind that the most basic tenet of the Fifth Amendment right to not incriminate yourself is compulsion, the State of Michigan takes a position that in this cause there is no Fifth Amendment violation. This man was not compelled to testify against himself.

The contention is that by exploring his flight and concealment that his "silence" was infringed upon. I have difficulty in conceiving this voluntary flight and voluntary concealment to be in the category of silence, certainly not in a testimonial sense. A man contends that once he exercises his Sixth Amendment right, takes the stand with counsel at his side and testifies and speaks of his absence, he brought it all on, that we are barred from cross-examining on that issue.

Incidentally, of the 30 or more pages of the testimony given by this man, less than a page I think -- it is less than a page in the appendix concerning the examination by the prosecution on cross-examination of this flight and concealment. I doubt whether it had any serious impact upon the jury at all. In fact keep in mind that this man was charged under Michigan law with first degree murder, conviction of which requires mandatory life sentence. But evidently this

story of an alibi -- or self defense, rather, did have some impact upon the jury. They came in and found him guilty of manslaughter, which is a 10- to 15-year sentence which he did receive.

Now, it is not Doyle case at all. Doyle held that because of the oppressive conditions of the police station and the features thereof that once he was given his Miranda warning and so forth that you couldn't infringe upon that and make mention of that.

But here in this case he brought it up. There was no compulsion, no Fifth Amendment problem involved. This Court way back many years ago I think in Raffel said that once the accused takes the stand the prosecution has full sway in the matter of issues pertinent to the cause and to cross-examine thereon.

I move along a bit to perhaps a knottier problem involved here, and in Doyle was a due process question. The question is whether -- did the probative value of examining him on his escape and concealment, or flight and concealment, did that outweigh the prejudice that was done to him. I would have to say "No," and I think the finding of a lesser -- guilt of a lesser offense definitely proves that.

Was there such a fundamental unfairness in his trial? I think not. Oh, the prosecutor made the rather shall I say tacky remark that perhaps during his flight and concealment he

was lining up witnesses. I think he also referred to that in one sentence in his summation to the jury. But you know that is not all bad, it is a perfectly normal thing for a person. He has explained he was frightened. That is another explanation for his flight and concealment. And perhaps the jury did believe him, that he was frightened and that is the reason why he fled.

Now, it would certainly be a most normal thing -- I would certainly not take exception to the claim that any intelligent person running off like that would sure try and line up some witnesses. That would be the intelligent thing and not necessarily a meretricious act. But to contend that a person may be involved in a felony and then go on, escape for more than two weeks, conceal himself, come back and give a self defense plea when his flight and concealment was certainly inconsistent with such a plea, to permit that I say to the Court would certainly handcuff prosecuting authorities throughout this country in many, many cases.

QUESTION: Well, whether it was inconsistent with his plea or not was a matter for the jury to decide.

MR. DERENGOSKI: Yes, sir, and they made their selection.

QUESTION: And you suggest that they were influenced to the extent that they reduced this by two grades, from first degree murder down to manslaughter.

MR. DERENGOSKI: Yes, sir.

QUESTION: I see.

MR. DERENGOSKI: I say with the acceptance of a theory such as that and making it part of the law of this Nation, I say the handcuffing of prosecuting authorities would certainly occur. I can foresee where all you have to do is skip out, stay concealed, take the stand with some plausible self-defense witnesses and you could not be --

QUESTION: Do you think that a man charged with a crime is obliged to give himself up?

MR. DERENGOSKI: Oh, no, sir, I don't think there is any constitutional duty of that, sir. I do not.

QUESTION: I thought that is what you were saying.

MR. DERENGOSKI: No, sir.

QUESTION: I misunderstood you. I am sorry.

MR. DERENGOSKI: No, I say that we have the right once he takes the stand to attempt to cast doubt upon his self-defense plea and his escape and concealment is certainly an act inconsistent -- and that has been generally held -- with a plea of self defense.

Unless the Court has any questions, I conclude.

MR. CHIEF JUSTICE BURGER: Very well.

Thank you gentlemen, the case is submitted.

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