

the receipt of evidence should be made in the trial court. *Williams v. United States*, — U.S.App.D.C. —, —, 303 F.2d 772, 774, *cert. denied*, 369 U.S. 875 (1962) and cases cited.

Appellant did not take the stand as the trial was resumed. His counsel had filed no requests for special instructions. Government counsel, apparently intending to counter the argument of defense counsel, undertook to caution the jury "in advance" that the jurors always should keep in mind that the arguments of counsel are not evidence. He reminded the jury of the evidence before it, which included, of course, the appellant's admissions. The prosecutor pointed out that the Government's only exhibit was the television set, recovered pursuant to White's directions. Then he stated:

"The Government would also bring to your attention the fact that the defendant failed to take the stand. No inference at all is to be given to you by the fact [sic] that he exercised this right. This is a very important right to the individual; it is an important right in our system of justice.

"It is my job to prove to you—" (Emphasis added.)

Defense counsel interrupted and asked for a bench conference. During that colloquy,⁴ counsel moved for a mistrial because of the prosecutor's comment "on the failure of

⁴ After counsel had expressed his view respecting the Government's "commenting on the defendant's failure to take the stand," the judge said to the prosecutor—but not then to the jury:

"THE COURT: I don't think it is very wise to say that, [Prosecutor]. The Court in its charge to the jury will point out that no inference of guilt whatsoever arises from the defendant's failure to take the stand.

"I do think it is better in these situations to refrain from such comment. It might sound as though you are, by inference, putting some suggestion or connotation on this fact. I recognize that that is not your intention. I would never mention this in the trial of a criminal case."