

We have carefully considered all aspects of the case in our effort to determine whether or not there was harmless error. FED. R. CRIM. P. 52(a) reads: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." But it is beyond doubt that an accused is afforded a "substantial right" in deciding whether or not to take the stand.⁸ We find ourselves unable to say with fair assurance and in the total setting here presented, that there was no prejudice.⁹

Reversed.

the stand, *no comment or argument about his failure to testify is permitted.*" (Emphasis added.) And see *Turner v. District of Columbia*, 98 A.2d 786 (D.C. Mun. App. 1953) ; *Brooks v. District of Columbia*, 48 A.2d 339, 341 (D.C. Mun. App. 1946).

⁸ *Bruno v. United States*, 308 U.S. 287, 292 (1939). Indeed, if the accused decides *not* to testify, it is fatal to refuse an instruction that his failure to take the stand shall not tell against him. *Ibid.*; cf. *Langford v. United States*, 178 F.2d 48, 55 (9 Cir. 1949).

⁹ *Kotteakos v. United States*, 328 U.S. 750, 764-765 (1946) ; *Starr v. United States*, 105 U.S.App.D.C. 91, 94-96, 264 F.2d 377, 380-382 (1958), *cert. denied*, 359 U.S. 936 (1959). In any event, it does not "affirmatively" appear from the whole record that there was no prejudice. *Bihn v. United States*, 328 U.S. 633, 638 (1946). Cf. *Campbell v. United States*, 85 U.S.App.D.C. 133, 176 F.2d 45 (1949).