

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals:
Meter, P.J., Talbot and Owens, JJ.
Schuette, P.J., O'Connell and Davis, JJ

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

134967
No. 134976

vs.

MICHAEL J. BORGNE
Defendants-Appellee.

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

No. 135435

vs.

HAROLD EMMETT SHAFIER, III
Defendants-Appellant.

BRIEF OF THE PROSECUTING ATTORNEYS
ASSOCIATION OF MICHIGAN AS AMICUS CURIAE
IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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Statement of the Question

I.

***Doyle v Ohio* prohibits uninvited prosecution reference to an accused's silence after Miranda warnings. Prosecutors in the two cases here introduced evidence of defendant's silence, and referred to it, all without proper objection. Did plain error did occur where 1)the evidence and remarks were arguably responsive to defendants' testimony, 2)in both cases the issue is unpreserved, and 3)in neither case is a miscarriage of justice demonstrated by defendant?**

Amicus answers "NO"

Statement of Facts

Amicus refers the court to the statements of facts in the People's briefs on the merits.

Argument

I.

***Doyle v Ohio*¹ prohibits uninvited prosecution reference to an accused's silence after Miranda warnings. Prosecutors in the two cases here introduced evidence of defendant's silence, and referred to it, all without proper objection. Plain error did not occur in that 1)the evidence and remarks were arguably responsive to defendants' testimony, 2)in both cases the issue is unpreserved, and 3)in neither case is a miscarriage of justice demonstrated by defendant.**

Preservation and Standard of Review

In each case before the court, *Shafier* and *Borgne*, the Court of Appeals correctly found that the *Doyle* issue was unpreserved by proper objection. Review of unpreserved error, whether constitutional in nature² or otherwise, is for plain error.³ The plain-error standard is a rigorous one. To find plain error—error that is reversible despite its forfeiture—“[t]here must be an 'error' that is 'plain' and that 'affect(s) substantial rights.'” And then, correction of the error is permitted only if the error "seriously affects the fairness, integrity or public reputation of judicial proceedings"—unless failure to do so would result in a "miscarriage of justice." This includes the situation where there is a reasonable probability that the defendant is actually innocent.⁴ The defendants bore and bear

¹ *Doyle v Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)

² "No procedural principle is more familiar to this Court than that a constitutional right," or a right of any sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right...." *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508, 517 (1993).

³ *People v Carines*, 460 Mich 750 (1999).

⁴ *Olano*, 125 L Ed 2d 518-521.

the burden of persuasion as to whether this standard has been met.⁵ In *Borgne* the Court of Appeals found the burden met; in *Shafier* it found to the contrary.

A. Introduction: The Underpinnings of *Doyle*

*“Our forefathers, when they wrote this provision into the Fifth Amendment, had in mind a lot of history which has been largely forgotten today.”*⁶

Though of course this court has no authority to overrule a decision of the United States Supreme Court, amicus would nonetheless point out that the constitutional pedigree of the error here is questionable. The protection of the Fifth Amendment is against *compelled* self-incrimination in criminal cases, and a discussion of the permissibility of comments on silence, whether before arrest, after arrest, before Miranda warnings, after Miranda warnings, or during trial, seems odd when one takes account of history. Though it seems almost impossible today that it could be so, at the time of the Founding, and also of the ratification of the Bill of Rights, no state even *permitted*, much less compelled, an accused in a criminal case to testify. It was not until 1864 that Maine became the first state to permit defendants to testify, and Congress did not follow suit until 1878.⁷ But criminal defendants were not actually silent at their trials, they simply were not competent as sworn witnesses. Instead, the defendant was permitted—and often expected—to give an unsworn statement at trial on his own behalf, and was also expected to give a statement *pretrial*. The failure to make a statement

⁵ *Carines*, at 763.

⁶ *Maffie v United States*, 209 F2d 225, 237 (1954)(Judge Calvert Magruder).

⁷ See Ralph Rossum, “‘Self-Incrimination’: The Original Intent,” in Hickok, ed., *The Bill of Rights: Original Meaning and Current Understanding* (University of Virginia Press: 1991), p.276.

to the justice of the peace *would be reported to the jury*.⁸ As Sir James Stephen noted, evidence given against the defendant operated as “so much indirect questioning,” and if the defendant “omitted to answer the questions it suggested he was very likely to be convicted.”⁹ If a defendant was not permitted to be a witness at trial, but was expected to make unsworn statements, the failure to do so to be held against him, why, then, the inclusion of the Fifth Amendment protection against compelled self-incrimination in criminal cases?

Some scholars, Leonard Levy principal among them, take the view that the Founders, and the members of state constitutional conventions which enacted similar protections on which the Fifth Amendment was based, “failed to say what they meant,” for if they meant what they said, then the common-law prohibition on testimony from the accused in criminal cases rendered the Fifth Amendment superfluous.¹⁰ Instead, concluded Levy, what those individuals drafting state Bill of Rights and the Fifth Amendment actually *meant* to do was adopt the common-law right of *nemo tenetur seipsum accusare* (no one is bound to accuse himself), which protected not only against courts in criminal cases, but against all of government, in all kinds of actions, protecting witnesses as well as the accused, and protecting against “threats of criminal liability, civil exposure, and public obloquy.”¹¹ This redrafting of the Fifth Amendment is not tenable.

⁸ Langbein, “The Privilege and Common Law Criminal Procedure,” in *The Privilege Against Self-Incrimination*, quoted by Justice Scalia, dissenting, in *Mitchell v United States*, 526 US 314, 119 S Ct 1307, 143 L Ed 2d 424 (1999).

⁹ J. Stephen, 1 *History of the Criminal Law of England* 440 (1883).

¹⁰ See Levy, *The Origins of the Fifth Amendment (2d Ed)* (MacMillan: 1986).

¹¹ See Rossum, at 276.

Professor Rossum nicely notes that Levy and his followers fail to take account of the very real probability—given the express language of the Fifth Amendment—that the drafters were not writing to “end some current abuse but simply to provide a floor of constitutional protection above which the common law was free to operate but below which it could not go.”¹² Though it seems quaint now, during the 17th century the very giving of an *oath* was held itself to be a coercive act, and the ecclesiastical Court of High Commission engaged in the practice of summoning those with nonconformist opinions and requiring them to take an oath and answer questions. Refusing the oath resulted in contempt and Star Chamber proceedings; lying under oath was perjury; telling the truth under oath could subject one to prosecution for political and religious crimes. The celebrated trial of John Lilburne, a Puritan agitator who refused to take the oath, led to the prohibition of the administration of any oath obliging a person “to confess or accuse himself or herself of any crime.”¹³ Professor Albert Alschuler concludes that the history of the Fifth Amendment is “almost entirely a story of when and for what purposes people would be required to speak under oath.”¹⁴

Requiring an oath of the criminally accused was coercive, and banned for that reason, as being equivalent to torture and the rack. Manuals which instructed justices of the peace on the conduct of their office warned, from the late 16th century through the mid- 19th century, that “The law of England is a Law of Mercy, and does not use the Rack or Torture to compel criminals to accuse themselves....I take it to be for the Same Reason, that it does not call upon the Criminal to answer

¹² Rossum, at 277.

¹³ See Wigmore, “The Privilege Against Self-Incrimination: Its History,” 15 Harv L Rev 610, 621-24 (1902).

¹⁴ Alschuler, “A Peculiar Privilege in Historical Perspective: The Right to Remain Silent,” 94 Mich L Rev 2625, 2638 (1994).

upon Oath. For, this might serve instead of the Rack, to the Consciences of Some Men, although they have been guilty of offenses....”¹⁵ To put the matter finely, then, the purpose of the Fifth Amendment, when understood in its historical context, was “to outlaw torture and improper methods of interrogation,” *including the compelling of testimony under oath*.¹⁶ Put another way, the purpose of the Fifth Amendment was to preclude the obtaining of statements or testimony from the accused in criminal cases by use of coercive governmental conduct.¹⁷

Doyle is built on *Griffin v California*,¹⁸ which bars comment on the defendant’s decision not to testify on the basis that such comments violate the Fifth Amendment. This notion is, as indicated above, contrary to the text and history of the Amendment. To reiterate, pretrial procedure in colonial America was governed by the Marian Committal Statute, which provided:

[S]uch Justices or Justice [of the peace] before whom any person shall be brought for Manslaughter or Felony, or for suspicion thereof, before he or they shall commit or send such Prisoner to Ward, shall take the examination of such Prisoner, and information of those that bring him, of the fact and circumstance thereof, and the same or as much thereof as shall be material to prove the Felony shall put in writing, within two days after the said examination....

The justice of the peace testified at trial as to the content of the defendant's statement; if the defendant refused to speak, *this would also have been reported to the jury*.¹⁹ And Justices of the

¹⁵ See Alschuler, at 2648.

¹⁶ Alschuler, at 2631.

¹⁷ And see the discussion by Justice Scalia dissenting in *Mitchell v. United States*, *supra*).

¹⁸ *Griffin v California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

¹⁹ Langbein, *The Privilege and Common Law Criminal Procedure*, in *The Privilege Against Self-Incrimination* 82, 92 (Helmholz et al. eds.1997).

peace continued pretrial questioning of suspects, whose silence continued to be introduced against them at trial, after the ratification of the Fifth Amendment.²⁰

Doyle's decision to ban reference to an accused's silence after receiving Miranda warnings was not without its dissenters. Justice Stevens objected that "there is nothing deceptive or prejudicial to the defendant in the Miranda warning. Nor do I believe that the fact that such advice was given to the defendant lessens the probative value of his silence, or makes the prosecutor's cross-examination about his silence any more unfair than if he had received no such warning."²¹ And the majority in *Portuondo v Agard*, permitting comment on defendant's presence in the courtroom throughout all the testimony, observed that "Although there might be *reason to reconsider Doyle*, we need not do so here."²² Again, this court cannot undertake that reconsideration itself, but that *Griffin* and its progeny, including *Doyle*, stray so far from text and history counsels that the case be closely cabined, and principles of issue-preservation and harmless-error rigorously applied.

B. No Miscarriage Of Justice Occurred in the Two Cases Here

(1) Borgne

The Court of Appeals majority mistakenly found that the defendant had carried his burden of demonstrating plain-error, including the prejudice component of demonstrating a miscarriage of

²⁰ See See, e.g., Fourth Report of the Commissioners on Practice and Pleadings in New York-Code of Criminal Procedure xxviii (1849); 1 Complete Works of Edward Livingston on Criminal Jurisprudence 356 (1873), referenced by Justice Scalia in *Mitchell*. See also Justice Scalia's further discussion of the illogic of the *Griffin* decision, concluding that *Griffin* was a "wrong turn" in constitutional jurisprudence, and Justice Thomas's call for a "reexamination" of *Griffin* in his opinion in *Mitchell*.

²¹ *Doyle*, at 426 U.S. 610, 621, 96 S.Ct. 2240, 2246 (Stevens, J., dissenting).

²² *Portuondo v. Agard*, 529 U.S. 61, 74, 120 S.Ct. 1119, 1128 (2000) (emphasis added).

justice. But for the reasons stated by the People in their brief, and Judge Talbot in dissent, *Doyle* error did not occur in this case because *Doyle* does not prevent the prosecution from countering a claim by the defendant that he was prevented by the police from “telling his side” to them.²³ Here, once defendant had been captured and identified by the victim as the perpetrator of the crime, he testified that what then occurred was that ““The officer asked me where the purse was and where the gun was. I didn't have any idea what he was talking about. *I tried to describe the shooting to him* and he put me in the back seat of the police car.” That defendant choose to remain silent impeaches his claim that he wished to cooperate with the police and was rebuffed. No *Doyle* error occurred.

But even if error occurred, again for the reasons stated by the People and by Judge Talbot in dissent, the rigorous plain-error prejudice standard is not met here. The prosecution case was strong given the victim’s testimony, and the statement of the Court of Appeals majority that reversal was required because without the *Doyle* error “might have considered defendant’s version of events plausible” and so “might” have had a reasonable doubt is an application of a prejudice standard that is *not* that contained in the plain-error standard of *Olano* and *Carines*, but sounds very much like the “harmless beyond a reasonable doubt” standard for preserved constitutional error, a standard that is inapplicable here.²⁴ The defendant must demonstrate not simply that the error “might” have had some effect on the jury so that the jury thus “might” have had a reasonable doubt (which would be to say that the prosecution must prove the error harmless beyond a reasonable doubt), but must

²³ See e.g. *People v Vanover*, 200 Mich App 498 (1993).

²⁴ An error is harmless beyond a reasonable doubt when “there is no reasonable possibility that the error materially affected the verdict.” *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); *United States v. Bell*, 367 F.3d 452, 472 (CA 5, 2004).

establish that “*the probability of a different result* is sufficient to undermine confidence in the outcome of the proceeding.”²⁵ This is hardly the standard applied by the Court of Appeals majority, and, assuming for the sake of argument that error occurred here, it is not a standard that defendant can meet, for the reasons stated by the People and by Judge Talbot in dissent.

(2) Shafier

Again, defendant must demonstrate the probability of a different result without the error is sufficiently great to undermine confidence in the outcome of the trial. The Court of Appeals majority found that the plain-error standard had not been met. Though, as the majority acknowledged, use of the evidence (without appropriate objection) was perhaps more extensive than in other cases involving *Doyle* error (on the other hand, amicus has noted the questionable underpinnings of *Doyle*), the test remains the same. The People have in their brief well laid out why no miscarriage of justice occurred here given the evidence against the defendant, and the Court of Appeals should thus be affirmed in this case.

C. Conclusion

In conclusion, then, in answer to the questions noted in this court’s orders granting leave to appeal

- *whether the defendant’s constitutional rights under Doyle v Ohio . . . were violated?*

It is at least arguable that the defendants opened the door in these cases; that argument is more compelling in *Borgne*.

- *whether the claim of error under Doyle was properly preserved at trial?*

²⁵ *United States v. Dominguez Benitez*, 542 U.S. 74, 83, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004); *United States v. Bain*, 537 F.3d 876 (CA 8, 2008).

It was not; see the briefs of the People, and MRE 103(a).

- *[what is] the resulting appropriate standard of review on appeal?*

The standard of review is the plain-error standard for unpreserved error, be it constitutional or nonconstitutional error. The prejudice component of that test requires that defendant demonstrate that “*the probability of a different result* is sufficient to undermine confidence in the outcome of the proceeding.” In *Borgne* the majority applied an inappropriate test, one equivalent to the harmless beyond a reasonable doubt test for preserved constitutional error.

- *whether any error was harmless under the applicable standard of review.?*

Under the plain-error standard the defendants have failed to carry their burden of showing that the probability of a different result (acquittal) is sufficiently great as to undermine confidence in the outcome of the trials in each case.

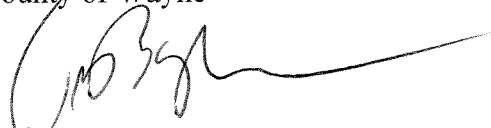
Relief

WHEREFORE, amicus requests that the Court of Appeals be affirmed in *Shafier* and reversed in *Borgne*.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'Timothy A. Baughman', with a long horizontal flourish extending to the right.

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