STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
R.A. Griffin, P.J., J.T. Neff, H.N. White, JJ.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

vs

No. 119818

JONATHAN JOE JONES
Defendant-Appellee

Lower Court No: 98-016374-FC-3
COA NO. 221264

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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Table of Contents

Page

Index of Authorities . . . . . -ii-

Statement of the Question . . . . . -1-

Statement of Facts . . . . . -1-

Argument . . . . . -2-

I. The doctrine of "fair response" is a sibling of that of "invited error," and both are branches of the principle of issue waiver. Defendant brought out that a witness had taken a polygraph. Once that fact was revealed, it was fair response for the prosecutor to reveal the result of the polygraph. . . -2-

I. Introduction . . . . . -2-

II. Discussion . . . . . -3-

A. Invited Error . . . . . -4-
B. Fair Response . . . . . -8-

III. Conclusion and Application . . . . . -9-

Relief . . . . . -11-

Appendix

TABLE OF AUTHORITIES

FEDERAL CASES

Fields v Bagley,
275 F.3d 478 (CA 6, 2001) 5

Harvis v Roadway Express, Inc,
923 F.2d 59 (CA 6, 1991) 5

United States v Balter,
91 F.3d 427 (CA 3, 1996) 8

United States v Franklin,
250 F.3d 653 (CA 8, 2001) 9

United States v Griffin,
84 F.3d 912 (CA 7, 1996) 8

United States v Hardwell,
80 F.3d 1471 (CA 10, 1996) 8

United States v Mitchell, 9
85 F.3d 800 (CA 1, 1996) 8

United States v Olano,
507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) 4, 5, 6

United States v Perez,
116 F.3d 840 (CA 9, 1997) 6

United States v Robinson,
485 U.S. 25, 108 S. Ct. 864, 99 L. Ed. 2d 23 (1988) 8, 9, 10

United States v Ross,
77 F.3d 1524 (CA 7, 1996) 8

United States v Tandon,
111 F.3d 482 (CA 6, 1997) 8

United States v Tocco,
135 F.3d 116 (CA 6, 1998) 9

United States v Young,
470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1984) 9

STATE CASES

Hogsett v Ellis,
17 Mich. 351 (1868) 4

People v Alsteens,
49 M:ich App 467 (1973) 4

People v Amison,
70 Mich. App. 70 (1976) 5

People v Boyd,
49 Mich. App. 388 (1973) 5

People v Carter,
462 Mich. 206 (2000) 3, 4

People v Foster,
77 Mich. App. 704 (1977) 9

People v Jolly,
51 Mich. App. 163 (1974) 9

People v McCray,
210 Mich. App. 9 (1995) 5

People v Murray,
52 Mich. 288 (1883) 4

People v Pomranky,
62 Mich. App. 304 (1975) 9

People v Potra,
191 Mich. App. 503 (1991) 9

People v Redfern,
71 Mich. App. 452 (1976) 9

People v Riley,
465 Mich. 442 (2001) 4

People v Stanaway,
446 Mich. 643 (1994) 2

People v Watson,
245 Mich. App. 572 (2001) 9

Roberts v Consolidation Coal Company,
539 Se2d 4789 (W Va, 2000) 5

State v Longe,
743 A.2d 569 (Vermont, 1999) 5

Statement of the Question

I.

The doctrine of "fair response" is a sibling of that of "invited error," and both are branches of the principle of issue waiver. Defendant brought out that a witness had taken a polygraph. Once that fact was revealed, was it fair response for the prosecutor to reveal the result of the polygraph?

Amicus answers: "YES"

Statement of Facts

Amicus joins in the Statement of Facts of the People of the State of Michigan as appellant.

Argument

I.

The doctrine of "fair response" is a sibling of that of "invited error," and both are branches of the principle of issue waiver. Defendant brought out that a witness had taken a polygraph. Once that fact was revealed, it was fair response for the prosecutor to reveal the result of the polygraph.

I. Introduction

Concurring in *People v Stanaway*,[1] Justice Riley observed that the then extant harmless error rules in Michigan did not "provide any meaningful help to appellate courts in reviewing nonconstitutional error," and expressed the need for a "full and decisive explanation" of the question. The State's jurisprudence has come far since those remarks; settled now are:

- principles of harmless error review for both constitutional and nonconstitutional error;
- principles of issue forfeiture; and
- principles of issue waiver.[2]

This Court has now asked that the parties and interested amici address how the invited-error doctrine fits into the State's jurisprudence on forfeiture and waiver. Amicus answers that invited error is a branch of the doctrine of waiver, and that "fair response" is its sibling. An

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[1] *People v Stanaway*, 446 Mich 643, 698, 700 (1994).

[2] See Chart at Appendix A.

error that is invited, then, is waived for appellate review because the error is extinguished; a response that would have been error but for having been provoked by the opposing party is, if a fair response, also waived for appellate review because the response is not error at all.

II. Discussion

This court, following the lead of the United States Supreme Court, distinguished issue waiver from issue forfeiture in *People v Carter*.[3] In that case, the Court considered a violation of MCR 6.414(H), which provides that on a request by the jury for a review of certain testimony, the trial court, in exercising its discretion, may order the jury to deliberate further "without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed." The trial judge responded to a request from the jury in a manner suggesting that no reading of testimony was possible at any time; defense counsel expressed satisfaction with this instruction. This Court distinguished forfeiture of an issue, which occurs from a failure to object or to make an appropriate motion, and does not extinguish the error, allowing review for plain error, from waiver, which occurs not from a failure to act, but from the taking of some affirmative action, such as by agreeing with an instruction given by the trial judge, and extinguishes any error.

> One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error....."Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly

[3] *People v Carter*, 462 Mich 206 (2000).

> informed or voluntary, all depend on the right at stake."...It is presumed that waiver is available in "a broad array of constitutional and statutory provisions...."....While the defendant must personally make an informed waiver for certain fundamental rights such as the right to counsel or the right to plead not guilty, for other rights, waiver may be effected by action of counsel.[4]

Agreement to the instruction proposed by the court in *Carter*, then, extinguished any claim of error. Surely if agreement to a course of action results in the waiver of any claim of error in that course of action, the *proposal* of a course of action, which is then taken, also waives any claim of error, by extinguishing the error.

A. Invited Error

The principle that error invited by a party cannot be raised as error on appeal has a well-established historical pedigree. Going on a century and a half ago this Court, in an opinion by Justice Christiancy, applied the doctrine to bar a claim of error.[5] And in 1883 the principle was applied in a criminal case, the Court holding that a defendant who stipulated to the admission of deposition testimony could not be heard to complain on appeal of a denial of the right of confrontation.[6] More modern cases are to the same effect. See *People v Alsteens*[7] (defendant who stipulated to the admission of certain testimony could not claim

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[4] *Carter*, at 215-210, quoting from *United States v Olano*, 507 US 725, 113 S Ct 1770, 123 L Ed 2d 508 (1993). See also *People v Riley*, 465 Mich 442 (2001).

[5] *Hogsett v Ellis*, 17 Mich 351 (1868).

[6] *People v Murray*, 52 Mich 288 (1883) (Cooley, J).

[7] *People v Alsteens*, 49 M:ich App 467 (1973).

error regarding its admission); *People v Boyd*[8] (defendant waived objection to trial judge at bench trial hearing *Walker* hearing when the hearing was requested in the middle of trial); *People v Amison*[9] (defendant could not object to answer of witness that was responsive to question asked on cross-examination); *People v McCray*[10] ("a party cannot request a certain action of the trial court and then argue on appeal that the action was error").

Is an invited error extinguished under the doctrine of issue waiver, or is it reviewable for plain error under the doctrine of issue forfeiture? Invited error is a "cardinal rule of appellate review," and is understood to be a "branch of the doctrine of waiver by which courts prevent a party from inducing an erroneous ruling and later seeking to profit from the legal consequences of having the ruling set aside. It is based on reliance interests similar to those that support the doctrines of equitable and promissory estoppel."[11] Invited error thus extinguishes the claim of error, rather than forfeiting it and subjecting it to plain-error review.

One federal circuit has considered invited error in light of the United States Supreme Court's *Olano* decision. An en banc panel of the Ninth Circuit split 6-5 (five judges concurring in the result in the case) on the effect of *Olano* on the invited-error doctrine. The

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[8] *People v Boyd*, 49 Mich App 388 (1973).

[9] *People v Amison*, 70 Mich App 70 (1976).

[10] *People v McCray*, 210 Mich App 9 (1995).

[11] *Harvis v Roadway Express, Inc*, 923 F2d 59, 60-61 (CA 6, 1991). See also *Fields v Bagley*, 275 F3d 478 (CA 6, 2001); *State v Longe*, 743 A2d 569 (Vermont, 1999); *Roberts v Consolidation Coal Company*, 539 Se2d 4789 (W Va, 2000).

case involved an allegedly faulty jury instruction that the defendants had proposed. Focusing on *Olano's* discussion of waiver as the intentional relinquishment or abandonment of a known right, the majority believed that the case modified invited-error doctrine to require not simply a focus on whether the defendant "induced or caused the error," but also whether the defendant "considered the controlling law...and, in spite of being aware of the applicable law, proposed or accepted a flawed instruction" (though the majority also said that it did not mean to say that an instruction suggested by the defendant would be reviewed for plain error simply because defendant claimed "he did not know the instructions were flawed").[12]

The concurring opinion has the better of the argument, and amicus urges that it be followed by this court. The concurring opinion observed that historically where defense counsel requested the instruction given, the "invited error doctrine would make the error unreviewable whether it was prejudicial or not, and whether defense counsel was aware of it or not,"[13] calling the majority opinion "aberrant." To infer modification of the historically-grounded invited-error doctrine from *Olano*, which mentions invited error not at all, is mistaken–the doctrine "has been around for too long to suppose that the Supreme Court would have tossed it away without even mentioning it"–and, continued the concurring

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[12] *United States v Perez*, 116 F3d 840, 845 (CA 9, 1997).

[13] *Perez*, at 849, 850 (concurring opinion of Judge Kleinfeld).

opinion, the majority's modification is "mischievous in its likely consequences."[14] The majority erred in its fundamental premise, for the waiver which occurs when error is invited is the right to claim error on appeal as to the course of action taken. As well-put by the concurrence, "[t]he majority decision confuses knowledge that one is waiving a particular right with knowledge that one is waiving the right to appeal error, known or unknown." [15] The majority modification is also bad policy:

- Traditional invited error doctrine lets trial judges give defense counsel leeway to manage their cases as they and their clients think best. In response to many defense requests before and during trial, the judge says to himself, "I'm not sure defense counsel is right, but I should let the defense run the defense." Judges freely allow defense counsel to run their cases, because there has traditionally been no risk of reversal for invited error.

* * * * *

- "Judicial scrutiny of counsel's performance must be highly deferential"....But it cannot be deferential, if on appeal we are going to look for evidence that the defense knew of the right being waived, and then waived it intentionally.

* * * * *

- The moral principle of estoppel is at the heart of invited error doctrine....It is wrong for the defense to ask a trial judge to do something, and then ask an appellate court to reverse because the trial judge did what was requested....Defendants should be bound by their lawyers' acts on their behalf, because judges properly rely on defense counsel's superior knowledge of the defense's best interests and duty to pursue them....

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[14] *Perez*, at 849.

[15] *Perez*, at 851.

- There is no moral justification for imposing on society the risk of unpunished or repeated crime, inevitable in some percentage of reversed convictions, because of errors which defendants invited trial judges to make.[16]

This Court should follow the view expressed by the concurring judges, which finds support in other circuits.[17] An error that is invited is extinguished, and cannot be urged on appeal.

B. Fair Response

The doctrine of "fair response" is a form of invited error–indeed, the stronger sibling of the two doctrines–as it does not merely extinguish error that may have occurred, but, if the response is truly fair, renders that which would have been error but for the provocation of the opposing party no error at all. As the United States Supreme Court has made clear, even that which otherwise would have been *constitutional* error may be no error at all if a fair response to action by opposing counsel. In *United States v Robinson*[18] defense counsel argued that defendant had never been given the opportunity to tell his side of the story. The prosecutor responded in rebuttal that defendant "could have taken the stand and explained it to you, anything he wanted to. The United States of America has given him, throughout, the opportunity to explain." Importantly, the Supreme Court held that it was not necessary

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[16] *Perez*, at 853.

[17] See *United States v Griffin*, 84 F3d 912 (CA 7, 1996); *nited States v Ross*, 77 F3d 1524 (CA 7, 1996); *United States v Mitchell,* 985 F3d 800 (CA 1, 1996); *United States v Balter*, 91 F3d 427 (CA 3, 1996); *United States v Tandon*, 111 F3d 482 (CA 6, 1997); *United States v Hardwell*, 80 F3d 1471 (CA 10, 1996).

[18] *United States v Robinson*, 485 US 25, 108 S Ct 864, 99 L Ed 2d 23 (1988).

to address whether plain error had occurred, because "there was no constitutional error at all." And this was because "...where as in this case the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel, we think there is no violation of the privilege."[19] Thus, fair response is a form of invited error, resulting in a finding of no error at all. The doctrine is well-established, supported by Supreme Court authority in addition to *Robinson*, [20] by federal cases,[21] and by a long history in Michigan jurisprudence.[22]

III. Conclusion and Application

Invited error and fair response are siblings, fair response being the stronger of the two, as invited error extinguishes any claim of error, where with fair response no error even occurs. Both are branches of the doctrine of waiver, not issue forfeiture. In the present case, the branch of waiver of fair response requires affirmance of the conviction.

Defense counsel improperly brought out that a prosecution witness had taken a polygraph examination. The prosecutor objected, but to leave the matter at that could well

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[19] 108 S Ct at 869.

[20] See *United States v Young*, 470 US 1, 105 S Ct 1038, 84 L Ed 2d 1 (1984)(allowing the prosecutor to state his personal belief in the guilt of the accused as fair response to defense argument that even the prosecutor didn't believe the defendant was guilty).

[21] See e.g. *United States v Franklin*, 250 F3d 653 (CA 8, 2001); *United States v Tocco,* 135 F3d 116 (CA 6, 1998).

[22] See *People v Watson*, 245 Mich App 572 (2001); *People v Potra*, 191 Mich App 503 (1991); *People v Foster*, 77 Mich App 704 (1977); *People v Redfern*, 71 Mich App 452 (1976); *People v Pomranky*, 62 Mich App 304 (1975); *People v Jolly*, 51 Mich App 163 (1974).

have left the idea in the mind of the jurors that the witness failed the examination (else why would the prosecution keep the results from them?). To respond to this impropriety of defense counsel by revealing the results is a fair response, just as the prosecutor's argument in *Robinson* that defendant could have taken the stand was a fair response to counsel's argument that defendant had not been allowed to tell his side of the story. Because the prosecutor's response in the present case was invited, and was a fair response, the proper inquiry is not issue forfeiture, but waiver under the branch of waiver of fair response. The response being fair there is no error, and the conviction should be affirmed.

Relief

Wherefore, amicus requests that the conviction of the defendant be affirmed.

Respectfully submitted,

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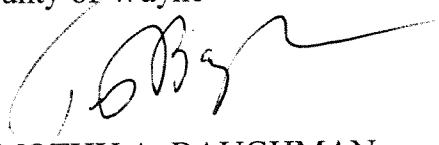

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ERROR REVIEW CHART: DIRECT REVIEW

Claim of error

Waiver

Agreement[1]

Invited Error/Fair Response[2]

No error to review[3]

Forfeiture

Failure to object

Defendant must show plain error (same test for constitutional and nonconstitutional error claims)[4]

Defendant must show that there was

- Error,
- that was plain or obvious,
- that affected his/her substantial rights,
- to a degree that a miscarriage of justice resulted

  –an innocent person was likely convicted, or

  --the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Preservation

Proper objection/motion

Constitutional

Prosecution must show harmless beyond a reasonable doubt[5]

–error is presumed to be trial error[6]

–"structural" error requires no showing of prejudice[8]

Nonconstitutional

Defendant must show by preponderance that error had a substantial and injurious effect on outcome of trial[7]

1. *People v. Carter,* 462 Mich 206 (2000).

2. *People v Pearson*, 123 Mich App 462 (1983); *People v* Riley, 465 Mich 442 (2001); *People v Amison*, 70 Mich App 70 (1976); *Harvis v Roadway Express*, 923 F2d 59 (CA 6, 1991); *United States v Perez*, 116 F3d 840 (CA 9, 1997); *Fields v Bagley*, 275 F3d 478 (CA 6, 2001); *State v Longe*, 743 A2d 569 (Vt, 1999); *Roberts v Consolidation Coal*, 539 SE2d 478 (Va, 2000); *United States v Young*, 470 US1, 105 S Ct 1038, 84 L Ed 2d 1 (1985); *People v Fields*, 450 Mich 94 (1995).

3. *People v Carter,* 462 Mich 206 (2000); *United States v Olano,* 507 US 725, 113 S Ct 1770, 123 L Ed 2d 508 (1993).

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

5. *People v Robinson*, 386 Mich 551 (1972).

6. *Arizona v Fulminante*, 499 US 279, 111 S Ct 1246, 113 L Ed 2d 302 (1991); *People v Solomon*, 220 Mich App 527 (1996).

7. *People v Lukity*, 460 Mich 84 (1999); *People v Toma*, 462 Mich 281 (2000); *People v Snyder*, 462 Mich 38 (2000).

8. *Fulminante*; *People v Duncan*, 462 Mich 47 (2000).