

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

No. 18-8120

FILED

OCT 25 2018

OFFICE OF THE CLERK
SUPREME COURT, U.S.

JERRY LYNN LOFTON

Petitioner

v.

STATE OF MISSISSIPPI

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Whether a prosecutor who this Court has held may not comment to a jury concerning a defendant's failure to testify in a criminal trial may submit his comment to the jury in the form of a jury instruction.

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PARTIES

The petitioner is Jerry Lynn Lofton, a prisoner at Marshall County Correctional Facility, in Holly Springs, Mississippi.

The respondents are the State of Mississippi, Attorney General of Mississippi Jim Hood and Special Assistant Attorney General Laura H. Tedder.

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1. Act of Congress, March 16, 1878, 20 Stat. 30, c.37 8,19

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OTHER AUTHORITIES

1. Wiamore Evidence § 2272, n. 2

(McNaughton rev. ed. 1961 and 1964 Supp.) 18,19

DECISIONS BELOW

The decision of the Circuit Court of Desoto County Mississippi is unreported. A copy of the order is attached as Appendix A. The decision of the Supreme Court of Mississippi is reported at 2018 Miss. LEXIS 183 (affirming the lower court decision). A copy is attached as Appendix B.

The decision of the Supreme Court of Mississippi is reported at 2018 Miss. LEXIS 346 (denying motion for rehearing en banc). A copy is attached as Appendix B. The order of the Supreme Court of Mississippi is unreported and a copy is attached as Appendix C, (denying motion for enlargement of time to file Writ of Certiorari). The order of the Supreme Court of Mississippi is unreported and a copy is attached as Appendix D. (denying Writ of Certiorari).

JURISDICTION

The judgment of the Circuit Court of Desoto County Mississippi was entered on November 29, 2016, and a copy of that order is attached as Appendix A. The judgment of the Supreme Court of Mississippi was entered on April 26, 2018, and a copy of that decision is attached as Appendix B. An order denying a petition for rehearing was entered on August 9, 2018, and a copy is attached as Appendix B. An order denying a request for enlargement of time to file Writ of Certiorari was entered on September 5, 2018 and a copy is attached as Appendix C. An order denying Writ of Certiorari was entered on October 8, 2018, and a copy is attached as Appendix D. Jurisdiction is conferred by 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes are involved in this case:

United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The case underlying this petition is a murder case from Desoto County Mississippi. The petitioner was convicted and sentenced to life in prison in the Mississippi Department of Corrections. At trial, the prosecution made an oral comment to the jury about the failure of the petitioner to testify in his defense. Petitioner did not object because he knew it was reversible error for the prosecution to mention to the jury that he did not testify in his defense.

He was certain he would get a new trial on appeal. Petitioner had a conflict with his court-appointed attorney whom accused petitioner of "setting him up" because petitioner wanted a hybrid representation with his attorney as co-counsel and not an advisor only because with the latter a defendant has no claim to ineffective assistance of counsel.

Petitioner requested new counsel but the court refused to appoint. The court appointed attorney only met with petitioner twice. The first time is when they had the disagreement about "set him up" and the second time was on the evening of

September 8, 2016 a Thursday, with trial scheduled for Monday September 12, 2016. The subpoenas were issued on September 9, 2016, with appearance for September 14, 2016, when the trial ended on September 13, 2016.

Petitioner asked for a continuance the morning of trial but it was denied. He fired his attorney in an attempt to stop the trial but was told they would continue without him.

Petitioner eventually represented himself alone. The judge made the court-appointed attorney stay on as an advisor only.

This was a simple not capital murder case. Petitioner had no witnesses. Petitioner had sought a change of venue because his case was televised and the decedent's mother complained of the fact petitioner was granted bail on television. The blacks in the court-room looked at petitioner with such hostility he he struck all african-americans from the jury.

The reversible error oral comment about the failure to take the witness stand is in the portion of the transcript which states: "same not reported." But over the objection of the petitioner the prosecutor also tendered to the jury an

instruction stating: "Members of the Jury, the Defendant has exercised his constitutional right to remain silent, and you must not draw any unfavorable inferences against the Defendant for his decision not to testify."

REASONS FOR GRANTING THE WRIT

A. Conflicts with Decisions of Courts

The holdings of the Courts of Mississippi are contrary to countless holdings of the Federal and State courts of the United States going back circa civil war times that a prosecutor may not compel a defendant to be a witness against himself by commenting to the jury the fact the defendant failed to testify in his own defense in a criminal trial, e.g. *Wilson v. United States* 149 U.S. 60, 13 S.Ct. 765, 37 L.Ed. 650 (1893); accord, Act of Congress, March 16, 1878, 20 Stat. 30, c. 37. Throughout my trial experience I have found one principle which weans all prosecuting attorneys: the state must make no comment directly or indirectly on the failure of the accused to testify. This principle is so deeply engrafted in the Courts decisions that there is not a prosecuting attorney in the state unaware of this emphatic proscription.

B. Importance of the Question Presented

This case presents a fundamental question of where a prosecutor who commits reversible error by commenting on a defendant's failure to

testify may comment through a jury instruction is of great importance.

C. In Lakeside v. Oregon Justice Stewart wrote "More than 50 years ago, Judge Learned Hand dealt with this question in a single sentence: "It is no doubt better if a defendant requests no charge upon the subject for the trial judge to say nothing about it: but to say that when he does, it is error, carries the doctrine of self-incrimination to an absurdity." Lakeside v. Oregon 435 U.S. 333 341 n.12 (1978)

quoting Becher v. United States 5 F.2d 45 49 (CA2). But fifteen years later Judge Hand stated: "The important thing to bear in mind is the probable futility to the instruction. When an accused does not take the stand, everybody knows that he fears to do so, for a man will not forego anything that may exculpate him. Sometimes no doubt he may merely be afraid that he cannot get out the truth on the stand, but that is very seldom. Ordinarily, it is because he fears the disclosure which will result. Everybody knows, this, and nobody can fail to make the inference, if he thinks about it at all; the accused

only safety is in having his failure kept as much as possible in the background. Hence the real protection, and the only practical protection, is in preventing the prosecution from using it as the basis of an inference of guilt. That is indeed a very real protection, for the prosecution's freedom would be a very deadly weapon; but the advantage derivable from an admonition by the judge that the jury shall make no such inference is wholly illusory; and only serves to put before them what will generally harm the accused, if it does anything at all." United States v. Bruno 105 F.2d 921 (1939).

Justice Stevens dissenting in Lakeside stated "The Constitution therefore gives the defendant and his lawyer the absolute right to decide that the accused shall not become a witness against himself. Even if the judge is convinced that the defendant's testimony would exonerate him and even if he is motivated only by a desire to protect the defendant from the risk of an erroneous conviction, the judge has no power to override counsel's judgment about what is in his client's best interest." Lakeside v. Oregon, 435 U.S. at 343.

The Constitution wisely commits the critical decision of whether the defendant shall take the stand to the defendant and his lawyer, rather than the judge, for at least two reasons. First they have greater access to information bearing on the decision than the judge can normally have.

Second, they are motivated solely by concern for the defendant's interests: the judge inevitably is concerned with society's interest in convicting the guilty as well as protecting the innocent. The choice, therefore to testify or not to testify is for the defendant and his lawyer, not the judge to make. The Constitution commands that the decision be made free of any compulsion by the State. Id.

In *Griffin v. California*, 380 U.S. 609, the Court held that fair and accurate comment by the trial judge on the defendant's failure to take the witness stand was a form of compulsion forbidden by the Constitution. By making silence "costly," the Court ruled, the trial judge's comments had an effect similar in kind, though not in degree, to a contempt ruling or a thumbscrew. Id.

For the judge or prosecutor to call it to the jury's attention has an undeniably adverse effect on the defendant. Id.

When the jurors have in fact overlooked it, telling them to ignore the defendant's silence is like telling them not to think of a white bear. Id.

Griffin was decided over the dissent of Mr. Justice Stewart and Mr. Justice White whom affirmed the conviction in Lakeside.

The Court thinks it would be strange indeed to conclude that this cautionary instruction violates the very constitutional provision it is intended to protect. Ante, at 339. Unless the same words mean different things in different mouths, this holding also applies to statements made by the prosecutor in his closing argument. Id.

So long as Griffin is good law, the State must have a strong reason for ignoring the defendant's request that the instruction not be given. Id. at 347.

Eliminating the instruction on request costs the State nothing, other than the advantage of calling attention to the

defendant's silence. A defendant may waive his Fifth Amendment right to silence, and a judge who thinks his decision unwise may not overrule it. The defendant should also be able to waive, without leave of court, his lesser right to an instruction about his Fifth Amendment right to silence. Many state courts have accepted this conclusion by ruling that no self-incrimination instruction should be given over the defendant's objection. An ungrudging application of *Griffin* requires that we do the same, *Id* at 347-348.

Whether he shall testify or not; if so, at what stage in the progress of his defense, are equally submitted to the free and unrestricted choice of one accused of crime, and are in the very nature of things beyond the control or direction of the presiding judge. Control as to either is coercion, and coercion is denial of freedom of action. *Brooks v. Tennessee* 406 U.S. 605, 608 quoting *Bell v. State*, 66 Miss. 192, 194.

And it may compel even a wholly truthful defendant, who might otherwise decline to testify for legitimate reasons, to subject himself to impeachment and cross-examination... *Brooks* at 612. Whether the defendant is to testify is an important

decision as well as a matter of constitutional right. Id.

The accused and his counsel may not be restricted in deciding whether and when in the course of presenting his defense, the accused should take the stand. Id. at 613

It does not comport with due process to permit the prosecution during the trial to call attention to the defendant's silence... *Doyle v. Ohio*, 426 U.S. 610, 619 (quoting *United States v. Hale* 422 U.S. 171, 182-183 (1975)).

The Court has recognized that prosecutorial misconduct may "so infect the trial with unfairness as to make the resulting conviction a denial of due process. *Greer v. Miller*, 483 U.S. 756 quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

I therefore agree with the 10 Illinois judges and 12 federal judges who have concluded that the rule of the *Doyle* case was violated when the prosecutor called the jury's attention to respondent's silence. *Greer v. Miller* at 767.

"This Circuit has consistently held that comments by prosecutors on an accused silence were plain, fundamental error" (citations omitted). *Greer* at 770.

What the Court overlooks, however, is the fact that a single comment is all the prosecutor needs to notify the jury that the defendant did not tell his story... Greer at 770.

Thus, as the lower courts have consistently found, a prosecutor may in a single comment effectively use a defendant's postarrest silence to impeach his or her credibility. Greer at 771 quoting *United States v. Remigio* 767 F.2d 730, 734-735

In the case on which Doyle was squarely based, however, the Court reversed a conviction because of improper questioning regarding post-Miranda silence even though the jury was immediately instructed to disregard that questioning. *Id.* quoting *United States v. Hale*, 422 U.S. 171, 175 n.3.

Moreover, the lower courts have routinely addressed similar situations, and in no case in which the prosecutor has commented on the defendant's silence have these courts found contemporaneous objections or curative instructions sufficient automatically to preclude finding a Doyle violation. Greer at 771.

"In no case has a prompt and forceful instruction alone been held sufficient to vitiate the use of post-arrest silence." *Id.* quoting

Morgan v. Hall, 529 F.2d 1161, 1167-1168 (CA1 1978)

Instruction that defendant's silence is not evidence of guilt is not enough to cure Doyle violations. Greer at 772 quoting United States v. Remigio, supra at 735.

The approach taken by the lower courts reflect both the serious impact of Doyle violations on the fairness of a trial, and the inherent difficulty in undoing the harm that they cause. With respect to their impact, more than one Circuit has recognized that Doyle violations are rarely harmless." Greer at 772 quoting Williams v. Zahradnick, 632 F.2d 353, 364 (CA4 1980).

This is because "questions of guilt and credibility [are often] inextricably bound together. Greer at 772 quoting Morgan v. Hall, supra at 1168 and because comments upon a defendant's failure to tell his or her story promptly after arrest may significantly undermine the defendant's credibility in the jury's eyes.

Lower courts have also recognized that once the prosecutor calls attention to the defendant's silence, the resultant harm is not easily cured. Greer at 773.

"Curative" instructions themselves call attention to defendant's

silence, and may in some cases serve to exacerbate the harm. Greer at 773 quoting *Lakeside v. Oregon* 435 U.S. 333, 347 (1978) (dissenting opinion).

For the judge or prosecutor to call the defendant's failure to testify] to the jury's attention has an undeniably adverse effect on the defendant. Greer at 773 quoting *Lakeside* at 345.

Justice Simon of the Illinois Supreme Court has elaborated on this point:

"An improper inquiry by the prosecutor concerning the defendant's post arrest silence is not automatically remedied by a cautionary instruction.... If [it were], the prosecutor would have little incentive to avoid such inquiries on cross examination of the defendant; he could safely inform the jury of the defendant's post-arrest silence, risking only an objection by the defendant's counsel and a cautionary instruction by the trial court. A cautionary instruction is at best only a partial remedy.... The instruction may confuse the jury; or the jury may disregard it and use the defendant's silence against him anyway. Greer at 774 quoting *People v. Miller*, 96 Ill. 2d 385, 398, 450 N.E. 2d 322, 328 (1983) (dissenting opinion).

Article 1, § 13, of the California Constitution provides in part:

"... in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." *Griffin v. California* 380 U.S. 609 fn. 2.

The case is here on a writ of certiorari which we granted, 377 U.S. 989, to consider whether comment on the failure to testify violated the Self Incrimination Clause of the Fifth Amendment which we made applicable to the States by the Fourteenth in *Malloy v. Hogan*, 378 U.S. 1, decided after the Supreme Court of California had affirmed the present conviction. *Griffin* at 611.

The overwhelming consensus of the States, however, is opposed to allowing comment on the defendant's failure to testify. The legislatures or courts of 44 States have recognized that such comment is, in light of the privilege against self-incrimination, an unwarrantable line of argument. *Griffin* Fn. 3 quoting *State v. Howard*, 35 S.C. 197, 203, 14 S.E. 481, 483. See *Wigmore*,

Evidence § 2272, n. 2 (McNaughton rev. ed. 1961 and 1964 Supp.)

If this were a federal trial, reversible error would have been committed. Griffin at 612 quoting *Wilson v. United States*, 149 U.S. 60, so holds. It is said however, that the *Wilson* decision rested not on the Fifth Amendment but on an Act of Congress, now 18 U.S.C. § 3481. Griffin at 612.

The act of Congress of March 16, 1878, 20 Stat. 30, c. 37, provides: "That in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes offences and misdemeanors, in the United States courts, territorial courts, and court-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him." *Wilson v. United States* 149 U.S. 60

Section 3481 reads as follows:

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory,

the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him." June 25, 1948 c. 645, 62 Stat. 833. The legislative history shows that 18 U.S.C. § 3481 was designed, inter alia, to bar counsel for the prosecution from commenting on the defendant's refusal to testify. Griffin at Fn. 4.

The question remains whether, statute or not, the comment rule approved by California, violates the Fifth Amendment. We think it does. It is in substance a rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify, Griffin at 613.

The Court in the Wilson case stated:
...the act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to everyone, and not wish to be witnesses. It is not everyone who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to

such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand. The statute, in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure of the defendant in a criminal action to request to be a witness shall not create any presumption against him. Griffin at 613 quoting *Wilson v. United States* at pg. 66.

If the words "Fifth Amendment" are substituted for "act" and for "statute," the spirit of the Self-Incrimination Clause is reflected. For comment on the refusal to testify is a remnant of the "inquisitorial system of criminal justice." *Murphy v. Waterfront Comm'n.* 378 U.S. 52, 55, which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another. Griffin at 614.

We said in *Malloy v. Hogan*, supra, p. 11, that "the same standards must determine whether an accused's silence in either a federal or state proceeding is justified." We take that in its literal sense and hold that the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt. *Griffin* at 615.

To prevent such presumption being created, comment, especially hostile comment, upon such failure must necessarily be excluded from the jury. The minds of the jurors can only remain unaffected from this circumstance by excluding all reference to it. *Wilson v. United States* 149 U.S. 60, 65

The refusal of the court to condemn the reference of the District Attorney and to prohibit any subsequent reference to the failure of the defendant to appear as a witness tended to his prejudice before the jury, and this effect should be corrected by setting the verdict aside and awarding a new trial.

CONCLUSION

The State of Mississippi has pronounced a rule of pressing national importance. It's ruling allowing a prosecutor to submit a jury instruction, commenting on a defendant's failure to testify, directly conflicts, with the precedents of this Court and numerous decisions of Federal and State Courts. For this reason, this Court should grant Writ of Certiorari to the State of Mississippi.

Respectfully, submitted
Jerry Lynn Lofton "Gerry"
Marshall County Correctional Facility "MCCF"
833 West st.
Holly Springs, Miss.
38635

Dated October 21, 2018