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# The Sounds of Silence: Can Post-Miranda Silence Be Used to Rebut an Insanity Defense

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# *The Sounds of Silence: Can Post-*Miranda *Silence Be Used to Rebut an Insanity Defense?*

by Michael L. Perlin

**Louie L. Wainwright**
**v.**
**David Wayne Greenfield**
(Docket No. 84-1480)

*To be argued November 13, 1985*

## ISSUE

Almost a decade ago, the Supreme Court held, in *Doyle v. Ohio* (426 U.S. 610 (1976)), that a criminal defendant's silence in response to receiving post-arrest, post-*Miranda [v. Arizona*, 384 U.S. 436 (1966)] warnings could not be inquired into by the prosecution on cross-examination, because such silence was "insoluably ambiguous." Now, the Florida Attorney General is asking the Court to carve out an exception to the *Doyle* doctrine and rule that a defendant's post-*Miranda* warnings silence is admissible, as state of mind evidence, to rebut a defendant's insanity plea.

In recent terms, the Supreme Court has appeared almost eager to create new limitations to *Miranda*'s doctrine that a criminal defendant must be warned that he or she has the right to remain silent as well as the right to assistance of counsel prior to interrogation. Following its initial "cut-back" decision of *Harris v. New York* (401 U.S. 222 (1971), which held *Miranda* does not bar the prosecution's use of defendant's responses for impeachment purposes), the Court has sanctioned using what would otherwise be characterized as "tainted" evidence: 1) to locate witnesses identified in the statement (*Michigan v. Tucker*, 417 U.S. 433 (1974)); 2) in questioning witnesses during grand jury proceedings (*United States v. Calandra*, 414 U.S. 338 (1974)), and 3) where the public safety would otherwise be imperiled (*New York v. Quarles*, 104 S. Ct. 2626 (1984)). The Court's disposition of the current case may well augur the degree to which it will countenance further *Miranda* inroads.

A second issue in the case arises from trial counsel's failure to object to introducing testimony as to defendant's silence: the Court will consider whether *this* failure constitutes a "procedural default" barring subsequent review under *Wainwright v. Sykes* (433 U.S. 72 (1977)).

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## FACTS

In June of 1975, David Wayne Greenfield was walking on a wooded path toward a beach area when he grabbed a passerby, choked her, dragged her into the woods and forced her to have oral sex. Subsequently, he made several inconsistent statements to the victim, including, "I don't know why I did this/I know why I did this." After smoking one of the victim's cigarettes, he found her car keys (which had apparently been lost during the assault) and released her.

The victim went immediately to police headquarters and described her assailant; approximately two hours later, an officer came to the beach area, located Greenfield and arrested him. After being given his *Miranda* warnings, Greenfield indicated that he wished to speak to a lawyer and further thanked the policeman for giving him the warnings.

Greenfield was charged in Florida state court with the crime of "sexual battery committed with force likely to cause serious personal injury," and pled not guilty by reason of insanity. As part of the state's case, it introduced police testimony indicating the defendant's silence and request for a lawyer when he was given his *Miranda* warnings. Greenfield made no objection to the testimony.

Greenfield did not take the stand, but did call two psychiatrists, both of whom testified that defendant demonstrated "classic symptoms of paranoid schizophrenia," and that he did not know right from wrong (the insanity test in Florida) during the alleged crime. On rebuttal, the state called a psychiatrist who disagreed sharply with each of the defense psychiatrists' conclusions. In his summation and over defense counsel's objections, the prosecutor focused sharply on Greenfield's behavior after apprehension:

> This is supposedly an insane person under the [throes] of an acute condition of schizophrenia paranoia at the time. He goes to the car and the officer reads him his [*Miranda*] rights. Does he say he doesn't understand them? Does he say, "What's going on?" No. He says, "I understand my rights. I do not want to speak to you. I want to speak to an attorney." Again an occasion of a person who knows what's going on around his surroundings, and knows the consequences of his acts. ... And after [defendant] talked to the attorney again he will not speak. Again another physical overt indication by the defendant .... So here again we must take this in consideration as to his guilt or innocence, in regards to sanity or insanity.

The jury found Greenfield guilty and sentenced him to life imprisonment.

After his motion for a new trial or acquittal (because of the prosecutor's comments on his post-arrest silence) was denied, Greenfield appealed to the state courts which affirmed his conviction (337 So. 2d 1021 (1976) and 364 So. 2d 885 (1978)). He then filed a petition for a writ of habeas corpus in federal district court. After hearing evidence regarding whether *Wainwright v. Sykes* (which precludes habeas consideration of claims not raised at trial or on direct appeal in accordance with state trial procedures) barred consideration of his claim, the magistrate recommended that the issue *not* be considered barred because the state appellate court *did* reach the merits. However, it recommended dismissal on the merits.

On appeal, the Eleventh Circuit reversed (741 F. 2d 329 (1984)), holding that: 1) Greenfield's failure to contemporaneously object to the key testimony did not preclude his right to seek appellate review (in light of his strenuous objections to the prosecutor's summation on that point), and 2) evidence of his post-*Miranda* silence here was *inadmissible* as substantive evidence to rebut Greenfield's insanity defense. Relying primarily on *Doyle v. Ohio*, the court found, first, that defendant's silence was not probative of sanity. The court stressed the difficulties inherent in interpreting the silence of a mentally disabled person: "The probative value of a person's post-arrest, post-*Miranda* warning silence in determining his sanity at the time of the crime will vary markedly with the disease he has, the symptoms he bends to exhibit, and the closeness in time between the arrest and warning and the crime." Second, because defendant did not testify (but, rather, raised the defense through expert testimony), the testimony as to silence was not admissible as a rebuttal of perjury. According to the court, "Petitioner's assertion of insanity, through psychiatric testimony, made no reference to his conduct at the time of the arrest, did not constitute perjury, and therefore did not open the door to the prosecutor's use of post-*Miranda* silence as permitted by *Doyle*."

**BACKGROUND AND SIGNIFICANCE**

This is an area of the law which has, up until this point, seen surprisingly little development. Other than the two cases distinguished by the Eleventh Circuit in *Greenfield*, which had held that *Doyle* was inapposite in an insanity defense context, (*Sulie v. Duckworth*, 689 F. 2d 128 (7th Cir. 1982) and *United States v. Trujillo*, 578 F. 2d 285 (10th Cir. 1978)), the issue here has simply not been litigated in this context. As previously indicated, *Greenfield* gives the Supreme Court another opportunity to limit *Miranda* as well as to diminish the impact of *Doyle*. If it chooses to use this case as a vehicle for such a limitation, it will be significant for two reasons.

First, in *Doyle*, notwithstanding the fact that defendants both testified in a way (according to the three *Doyle* dissenters) "graphically inconsistent" with their silence, the Court chose to reverse the conviction because such silence was "insolubly ambiguous." Since Greenfield did *not* testify, a rejection of the *Doyle* principles will be a clear signal that the Court's impatience with *Miranda* is growing rapidly.

Second, if the Court chooses to so limit *Miranda* and *Doyle* in an insanity defense case, it will be forced to tiptoe through the landmines of what, exactly, *is* post-arrest behavior that comports with mental disability? The jury in this case apparently accepted the prosecutor's theory, and found that the defendant's actions were those of "a person who ... knows the consequences of his act." Greenfield quotes standard psychiatric textbooks to support his contention that "irregular shifts between lucid and confused moments are a clinical feature of schizophrenia." In fact, he argues that "paranoid forms of psychosis also frequently manifest themselves *in the very caution and preoccupation with real or perceived rights which [the state] would attribute to sanity.*"

If the Supreme Court chooses to accept explicitly the state's theory that evidence that Greenfield's behavior "was not ranting, raving incoherent or obviously confused or unbalanced while not conclusive proof of sanity, was certainly relevant," it will of necessity be forced to articulate yet another theory on the role of the courts in interpreting psychiatric data.

Finally, there remains the "other" procedural issue in *Greenfield*: whether defense counsel's failure to object to the police testimony as to the defendants "normal" behavior constitutes a "procedural default" under *Sykes*. The state argues that such failure does preclude further review (construing Florida law to bar raising such as issue on appeal, absent a contemporaneous mistrial motion). Greenfield, on the other hand, suggests that the issue is not properly before the Supreme Court (as the state failed to assign the issue as error below); or that, alternatively, counsel's objections to the prosecutor's reference to the critical testimony during summation sufficiently preserved the issue.

**ARGUMENTS**

***For Louie L. Wainwright** (Counsel of Record, Ann Garrison Paschall, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, FL 33602; telephone (813) 272-2670)*

1. Since sanity is a nebulous issue, the interests of justice are best served when the trier of fact has access to all the evidence reasonably bearing on the accused's demeanor near the time of the offense. Thus, using post-*Miranda* warning behavior does not violate *Doyle*.
2. Failure to object to the police testimony at trial precludes further litigation of the issue under *Sykes*.

***For David Wayne Greenfield*** *(Court-Appointed Counsel, James D. Whittemore, One Tampa City Center, Suite 2470, Tampa, FL 33602; telephone (813) 224-9550)*

1. Silence is ambiguous, and there is neither a constitutional nor a rational basis for not applying *Doyle* in an insanity case where a defendant chooses not to testify. There is no conflict between defendant's being able to rationally understand his *Miranda* rights when arrested and his being not responsible during commission of the questioned act.
2. Failure to assign the *Sykes* issue as error bars its consideration now. In the alternative, the record is sufficiently preserved by defense counsel's objections to summation.