No. 16-813

IN THE

Supreme Court of the United States

DAVID ALAN RESNICK,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

NACDL appears at this stage because the Seventh Circuit's holding in this case has abridged the privilege against self-incrimination by affirming prosecutors ability to use a defendant's refusal to submit to a polygraph test in order to undermine a defendant's credibility before a jury. NACDL is also concerned that the Seventh Circuit's application of the "plain error" standard of review in this case will, in effect, cause a defendant's constitutional rights to become contingent on the strength of the prosecution's case.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, their members, and their counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Rule 37.2 (a), petitioner and respondent received timely notice of, and consented to, *amicus curiae*'s filing of this brief. Their consent letters have been filed with this brief.

SUMMARY OF THE ARGUMENT

Two additional arguments underscore the importance of the questions presented. First, the natural corollary to the well recognized rule that a defendant's choice to remain silent may not be used against him is that a refusal to submit to a polygraph examination should not be used as incriminating evidence. This corollary is all the stronger given that the defendant's refusal is not just a refusal to submit to questioning by authorities, it is a refusal to submit to unreliable scientific testing. Second, the Seventh Circuit's plain error review mistakenly rests upon an analysis akin to the "clearly established law" doctrine. Further it relies on an ex post facto determination as to the strength of the prosecution's case. If a constitutional right can be set aside because the circuit believed the prosecution's case was "overwhelming," then the constitutional right has little meaning.

ARGUMENT

1. The privilege against self incrimination would carry far less meaning if, once a defendant chose not to testify (or to remain silent), a prosecutor could argue to a jury that this choice suggested the defendant was guilty. See *Griffin* v. *California*, 380 U.S. 609, 611-13 (1965). There are reasons other than guilt that a defendant may decide to remain silent. "Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass [a defendant] to such a degree as to increase rather than remove prejudices against him." *Id.* at 613 (quoting *Wilson* v. *United States*, 149 U.S. 60, 66 (1893)). Recognizing these concerns, this Court has held any comment on a defendant's failure

to testify is reversible error. See *id*. at 612-13 (citing *Wilson*, 149 U.S. 60).

In *Miranda*, the Court extended the Fifth Amendment right against self-incrimination to any custodial interrogation by law enforcement. *Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966). As the panel majority in this case acknowledged, "[a] polygraph examination is almost always a custodial interrogation" to which *Miranda* rights attach. *United States* v. *Resnick*, 823 F.3d 888, 897 (7th Cir. 2016).

Had Mr. Resnick's trial occurred in another circuit, the result would have been different. *Garmon* v. *Lumpkin Cty.*, 878 F.2d 1406, 1410 (11th Cir. 1989). The Eighth and Eleventh Circuits treat the refusal to submit to a polygraph in the same manner as the right to remain silent and it cannot be used against a defendant. See *United States* v. *St. Clair*, 855 F.2d 518, 523 (8th Cir. 1988); *Garmon*, 878 F.2d at 1410. The "natural corollary" to the rule that a criminal defendant's constitutionally protected silence may not be used against him, is that generally "a defendant's refusal to submit to a polygraph examination cannot be used as incriminating evidence." *Id*.

Mr. Resnick's refusal to submit to a polygraph examination represents "a clear and obvious example of someone refusing to testify against himself." *Resnick*, 823 F.3d at 900 (Bauer, J., dissenting). Mr. Resnick's Fifth Amendment right was violated when evidence of his refusal was admitted at trial, and it was further violated when the prosecutor commented on Mr. Resnick's refusal during his closing argument: "[l]ast but not least, I want to leave you with the defendant's lies . . . [he] refused to take a polygraph . . . And, yeah, he said, I should talk to a lawyer before I do that. Well, guess what, he talked to a lawyer. There was no polygraph." *Id*.

The Seventh Circuit's rule places defendants in a classic catch-22 position—either they must submit to a test that "is more likely to find innocent people guilty than vice versa" (*United States* v. *Scheffer*, 523 U.S. 303, 333 (1998) (Stevens, J., dissenting)) or they must suffer the prosecutor's invitation to the jury to shortcut their independent credibility determinations and rely instead upon the refusal to "talk." "A fundamental premise of our criminal trial system is that 'the *jury* is the lie detector.'" *Id*. at 313 (quoting *United States* v. *Barnard*, 490 F.2d 907, 912 (9th Cir. 1973)). Yet, "the aura of infallibility attending polygraph evidence can lead jurors to abandon their duty to assess credibility and guilt." *Id*. at 314.

The Seventh Circuit's tortured reasoning excusing a patent constitutional violation on the basis of not-entirely-clear precedent regarding the general admissibility of polygraph evidence ignores the catch-22 implications of its decision and represents nothing more than a red herring.

2. It is hard to imagine that Congress, when enacting Federal Rule of Criminal Procedure 52, intended the "plain error" standard of review to help only innocent defendants. Yet, the "plain error" analysis applied by the Seventh Circuit in this case seems to preclude all defendants from being able to avail themselves of the benefit of this standard.

The panel majority opinion rests on two thin reeds. First, that there is no Seventh Circuit "settled law" *per se* banning polygraph evidence. And second, the error was proven harmless "beyond a reasonable doubt" because the evidence against Mr. Resnick was "overwhelming." Judge Bauer, in dissent, correctly assessed the practical implications of the Seventh Circuit's analysis: "[t]his implies that only an innocent defendant could have his conviction reversed

under plain error review. More disturbingly, it implies that a court may ignore a criminal defendant's clearly established rights if the evidence against him is strong enough." *Resnick*, 823 F.3d at 902 (Bauer, J., dissenting).

The Seventh Circuit attempted to characterize its own law regarding polygraph evidence as "not settled," and concluded there was no plain error. *Id.* at 897. Yet, the same majority itself recognized the circuit's decisions have, in practice, only ever affirmed the exclusion of polygraph evidence. *Id.* And, indeed, there is universal agreement amongst the federal circuit courts, as well as this Court, that polygraph evidence is unreliable. Accordingly, the Seventh Circuit's claim that the law is "not settled" is incorrect.

At bottom, however, the Seventh Circuit's contention regarding its purportedly unsettled case law is beside the point. The issue is not whether all polygraph evidence is prohibited *per se*, but whether a refusal to take a polygraph is properly considered an invocation of the privilege. As the panel majority has admitted that such a refusal is the equivalent of a refusal to submit to a custodial interrogation, ("[a] polygraph examination is almost always a custodial interrogation" *id.*) the applicable doctrine is well-established in *Griffin*; namely, a refusal cannot be used against the defendant. The Fifth and Fourteenth Amendments squarely "forbid[] . . . comment by the prosecution on the accused's silence." *Griffin*, 380 U.S. at 615.

Indeed, the panel majority appears to have impermissibly grafted a "clearly established law" doctrine onto "plain error" review. As the Court in *Olano* explained "[p]lain is synonymous with *clear* or, equivalently, *obvious*." *United States* v. *Olano*, 507 U.S. 725, 734 (1993) (internal citations omitted) (emphasis

added). A declaration of a *per se* prohibition on any and all polygraph evidence is not a prerequisite to "clear" or "obvious" errors.

It is also inconsistent with the principles of our adversarial system of criminal justice to provide constitutional protection on a sliding scale. Defendants perceived as innocent (or less guilty) should not receive more rigid constitutional protections than other defendants. Put differently, no "actual innocence" test applies to a defendant's constitutional right to invoke the privilege against self incrimination. Yet, this is exactly what happened here.

The government argued that because of the "overwhelming evidence of guilt," Mr. Resnick could not "prove that the prosecution's submitting and commenting on his refusal to submit to a polygraph test affected the verdict." Opinion — On Petition for Rehearing En Banc at 5, *United States* v. *Resnick*, No. 14-3791 (7th Cir. July 28, 2016) (Bauer, Posner, Flaum, & Kanne, JJ., dissenting). The panel majority accepted this argument, stating any error "did not affect his substantial rights in light of the record as a whole." *Resnick*, 823 F.3d at 898. That reasoning cannot stand in light of *Griffin's* holding that a prosecutor's commentary on the defendant's refusal to testify amounts to "reversible error." 380 U.S. at 612. Nor could an appellate court's assessment of the evidence ever adequately account for the fact that the jury was invited to shortcut or "abandon" its critical duty to assess credibility. A defendant's decision not to talk may appear to attorneys and judges to be a standard invocation, but to lay person jurors such evidence ineluctably leads to an inference that the defendant is guilty precisely because he would not explain his actions or otherwise "come clean."

To be sure, Mr. Resnick was charged with an appalling crime. It is also apparent, based on the treatment he received by the lower courts, that Mr. Resnick was an unsympathetic defendant. "The standard adage teaches that hard cases make bad law . . . I fear that these cases suggest a corollary: Shocking cases make too much law." *Kansas* v. *Carr*, 136 S. Ct. 633, 651 (2016) (Sotomayor, J., dissenting).

CONCLUSION

For the foregoing reasons, and those set forth in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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