Use of Defendant's Silence At Time of Arrest for Impeachment Violates Due Process, Despite Absence of Miranda Warnings

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cability of the third party consent rule to such situations, moreover, would jeopardize a co-occupant's reasonable expectation of privacy. It is unrealistic to presume that a defendant assumed the risk that a person whose use of the premises was circumscribed could consent to a warrantless search.277 Indeed, it appears that the application of the third party consent rule beyond the limits set forth in Cosme would undercut a defendant's fourth amendment rights based on his granting even a modicum of access or control of his premises to another and would subvert the judicial policy favoring use of search warrants.278 It is suggested, therefore, that use of the third party consent rule be limited to situations where the consenting party enjoys "unfettered access to and control over" the premises searched.

Peter McNamara

Use of defendant's silence at time of arrest for impeachment violates due process, despite absence of Miranda warnings

It is well established in New York that a defendant's silence upon arrest may not be used by the prosecution in a criminal trial

31 N.Y.2d at 976, 293 N.E.2d at 559-60, 341 N.Y.S.2d at 311. Thus, it can be concluded that a third party's consent would not validate a warrantless search of an area used exclusively by a co-occupant.

It also appears that the consent of a third party would be invalid where the third party has less access and control than the nonconsenting individual. See Stoner v. California, 376 U.S. 483 (1964). In Stoner, a warrantless search of a hotel room was performed with the consent of the management in the absence of the occupant. Id. at 484-85. While acknowledging that the defendant impliedly shared control of the room with the hotel management, the Court held that the degree of control possessed by the hotel management was not sufficient to authorize consent to a police search. Id. at 488-90. It is logical to assume, therefore, that if a third party with less control cannot validly consent to a search in the absence of the occupant, he cannot do so in the presence of the occupant.

The doctrine of assumption of risk is based on the theory that the defendant voluntarily has chosen to encounter a risk that is both recognized and appreciated. See Bacigal, Some Observations and Proposals on the Nature of the Fourth Amendment, 46 Geo. Wash. L. Rev. 529, 541 (1978). As applied to third party consent situations, it has been reasoned that a willingness to share one's possession, use or control of property implies an assumption of the risk that the joint user might allow a police search of the property. Id. at 548. See also United States v. Matlock, 415 U.S. 164, 171 (1974); Frazier v. Cupp, 394 U.S. 731, 740 (1969).

as evidence of guilt.\footnote{279 See People v. Christman, 23 N.Y.2d 429, 430, 244 N.E.2d 703, 704, 297 N.Y.S.2d 134, 135 (1969); People v. Bianculli, 9 N.Y.2d 468, 174 N.E.2d 717, 715 N.Y.S.2d 33 (1961); People v. Peterson, 4 N.Y.2d 992, 993, 152 N.E.2d 532, 532, 177 N.Y.S.2d 510, 511 (1958) (per curiam). In People v. Rutigliano, 261 N.Y. 103, 184 N.E. 689 (1933), the Court of Appeals established the principle that since an arrestee is under no obligation to contradict accusatory statements made in his presence, his silence while in custodial detention cannot be used as evidence of his silence at the time of arrest, re-

\footnote{280 See People v. Rothschild, 35 N.Y.2d 355, 360, 320 N.E.2d 639, 641-42, 361 N.Y.S.2d 901, 905 (1974). Compare United States ex rel. Burt v. New Jersey, 475 F.2d 234 (3d Cir.), cert. denied, 414 U.S. 938 (1973), and United States v. Ramirez, 441 F.2d 950 (5th Cir.), cert. denied, 404 U.S. 569 (1971), with Johnson v. Patterson, 475 F.2d 1066 (10th Cir.), cert. denied, 414 U.S. 878 (1973). Prior to Rothschild, the rule in New York appeared to be that a defendant's silence while in police custody could not be used against him at trial for any purpose. People v. Musolini, 54 App. Div. 2d 22, 386 N.Y.S.2d 710 (3d Dep't 1976). In Rothschild, however, a police officer was arrested in the act of accepting a bribe. Although he remained silent at the time of his arrest, the defendant testified at trial that he had agreed to accept money from the complainant in order to set the defendant up for a later arrest on bribery charges. 35 N.Y.2d at 359, 320 N.E.2d at 641, 361 N.Y.S.2d at 904. The prosecutor was permitted to impeach the defendant's credibility by cross-examining him about his failure to inform any superior officer of this plan either before or after his arrest. Id. at 360, 320 N.E.2d at 641-42, 361 N.Y.S.2d at 904. The Court held that the defendant's prior silence was a proper subject of cross-examination since it was "patently inconsistent" with his trial testimony and, as a police officer, he had a "patent obligation to speak." Id. Post-Rothschild decisions have generally confined the impeachment use of postarrest silence to cases involving law enforcement officers, see People v. Bowen, 65 App. Div. 2d 364, 368-69, 411 N.Y.S.2d 573, 577 (1st Dep't 1978) (off-duty housing authority patrolman), although at least one lower court concluded that, under Rothschild, any criminal defendant may be impeached by prior inconsistent silence, see People v. Matonti, 53 App. Div. 2d 1022, 385 N.Y.S.2d 922 (4th Dep't 1976) (dictum).}

Regardless of whether he had been advised of his right to remain silent. Thomas Conyers was overtaken and arrested while fleeing the scene of an alleged armed robbery. At the time of his arrest, Conyers did not volunteer any information about the circumstances culminating in his apprehension and maintained his silence even though the police had not provided him with Miranda warnings. During his trial, however, the defendant took the stand and offered an exculpatory version of the events leading to his arrest. The prosecution was permitted, over a defense objection, to impeach Conyers' credibility by eliciting on cross-examination that he had failed to inform the police of his version of the incident at the time of the arrest. The defendant subsequently was convicted of armed robbery, attempted assault, and possession of a dangerous weapon. The Appellate Division, First Department, reversed the conviction, holding that the use of Conyers' silence while in police custody for impeachment purposes had deprived the defendant of a fair trial.

A closely divided Court of Appeals affirmed the reversal and directed a new trial, concluding that impeachment of a defendant's testimony by silence at the time of arrest violated his right to due process. Authoring the majority opinion, Judge Gabrielli rea-
soned that the federal and state constitutional guarantees against self-incrimination assure a defendant, at least implicitly, that his silence upon arrest will not be used against him. Moreover, the right to remain silent exists independently of the Miranda warnings. Judge Gabrielli concluded, therefore, that it would be fundamentally unfair and a denial of due process to permit the state to renege on its implied promise by using a defendant's silence for impeachment purposes, even though the defendant had not been formally apprised of his right to remain

Court held that the use of the defendant's postarrest silence for impeachment purposes was violative of the fifth amendment. Because the decision to remain silent in the custody of the police is, in and of itself, an assertion of the constitutional privilege against self-incrimination, id. at 182, 400 N.E.2d at 348, 424 N.Y.S.2d at 408, Judge Gabrielli concluded, to permit that silence to be used against a defendant at his later trial would "place a burden upon the direct exercise of a fundamental right." Id.; see People v. Dinkins, 69 App. Div. 2d 384, 418 N.Y.S.2d 627 (1st Dep't 1979); People v. Nolasco, 70 App. Div. 2d 549, 416 N.Y.S.2d 610 (1st Dep't 1979). Moreover, the majority reasoned, such a burden could not be justified by the state's interest in preventing perjury, since postarrest silence is consistent with innocence as well as guilt and, therefore, is only marginally probative of a defendant's credibility. 49 N.Y.2d at 181, 400 N.E.2d at 347, 424 N.Y.S.2d at 407.

As noted by Judge Meyer in his dissent, the alternative holding of the Conyers majority that impeachment by silence constitutes an impermissible burden on a defendant's fifth amendment privilege against self-incrimination, seems squarely inconsistent with Supreme Court precedent. See id. at 185, 400 N.E.2d at 349-50, 424 N.Y.S.2d at 410 (Meyer, J., dissenting). In Raffel v. United States, 271 U.S. 494 (1926), the Supreme Court upheld the use of a defendant's failure to take the stand at his first trial to impeach his exculpatory testimony on retrial. Id. at 497. Expressly rejecting the contention that impeachment by prior silence was an impermissible burden on a defendant's exercise of his fifth amendment rights, the Raffel Court concluded: "We are unable to see that the rule that [a defendant who] testifies . . . must testify fully, adds in any substantial manner to the inescapable embarrassment which the accused must experience in determining whether he shall testify or not." Id. at 499. The Raffel rule recently was reaffirmed in Jenkins v. Anderson, 48 U.S.L.W. 4693 (U.S. June 10, 1980), wherein the Supreme Court held that a defendant who elects to take the stand at trial waives any fifth amendment objection to the use of his pre-arrest silence for impeachment purposes. See id. at 4694-95.

Chief Judge Cooke and Judges Wachtler and Fuchsberg joined Judge Gabrielli in the majority. Judge Meyer authored a dissent in which Judges Jasen and Jones concurred.

291 Chief Judge Cooke and Judges Wachtler and Fuchsberg joined Judge Gabrielli in the majority. Judge Meyer authored a dissent in which Judges Jasen and Jones concurred.

292 49 N.Y.2d at 179, 400 N.E.2d at 346, 424 N.Y.S.2d at 406.

293 Id. The majority concluded that the Miranda warnings do not create the right to remain silent, but merely serve to ensure that an accused fully understands his rights. Id. Judge Gabrielli argued, moreover, that the absence of Miranda warnings does not preclude the possibility that an arrested suspect will knowingly rely on his privilege against self-incrimination since "it is a matter of common knowledge that a person who is arrested is not required to speak to the police, and that his silence may not be used against him." Id. at 180, 400 N.E.2d at 346, 424 N.Y.S.2d at 406. To conclude otherwise, the majority urged, would in effect "reward" improper police procedure by allowing the failure to administer Miranda warnings to serve as a foundation for admitting otherwise inadmissible evidence. Id. at 179, 400 N.E.2d at 346, 424 N.Y.S.2d at 406.
silent. 294

Dissenting, Judge Meyer urged that the ability of the prosecution to impeach a defendant by his silence at the time of arrest should depend "on a balancing of the prejudice to the defendant on the one hand and the probativeness of his silence as a measure of credibility on the other." 295 Judge Meyer argued that since the police had failed to advise Conyers of his right to remain silent, no governmental action had induced his failure to speak and, therefore, there was no state action upon which to predicate a due process claim. 296 Furthermore, the dissent asserted that by electing to testify at trial, the defendant was susceptible to impeachment by

294 Id. at 179-80, 400 N.E.2d at 346, 424 N.Y.S.2d at 406. The majority asserted that Conyers presented a constitutionally indistinguishable situation from that involved in Doyle v. Ohio, 426 U.S. 610 (1976), wherein the Supreme Court held that the use for impeachment purposes of a defendant's silence at the time of arrest and following Miranda warnings violated the due process clause of the fourteenth amendment. Id. at 619. In Doyle, the defendant was given Miranda warnings at the time of his arrest for selling marijuana. At that time, he made no statements to the police. At trial, however, he took the stand on his own behalf and testified that he had been "framed." Id. at 613. On cross-examination, the prosecution sought to impeach the defendant's exculpatory testimony by demonstrating that he had remained silent after arrest. Id. at 619-20. The Supreme Court, relying on its earlier decision in Miranda, see id., reversed the conviction:

[While it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Id. at 618.

The Court of Appeals distinguished Rothschild, see note 280 and accompanying text supra, as an "unusual" case in which the defendant's failure to protest his innocence upon arrest was so "extraordinarily probative" that use of his silence for purposes of impeachment was permissible. 49 N.Y.2d at 178, 181, 400 N.E.2d at 345, 347, 424 N.Y.S.2d at 405, 407.

295 49 N.Y.2d at 184, 400 N.E.2d at 349, 424 N.Y.S.2d at 409 (Meyer, J., dissenting). The dissent limited its proposed standard to silence at or before the time of arrest, as opposed to silence after arrest. Id. at 184 n.2, 400 N.E.2d at 349 n.2, 424 N.Y.S.2d at 409 n.2 (Meyer, J., dissenting).

296 Id. at 185-87, 400 N.E.2d at 350-51, 424 N.Y.S.2d at 410-11 (Meyer, J., dissenting). Judge Meyer cited the remark of Justice Stevens in Doyle that "if no [Miranda] warning had been given, . . . nothing in the Court's opinion suggests that there would be any unfairness in using petitioners' prior inconsistent silence for impeachment purposes." Id. at 185, 400 N.E.2d at 350, 424 N.Y.S.2d at 410 (citing 426 U.S. at 625-26 (Stevens, J., dissenting)). Furthermore, since the Conyers dissent approved the impeachment use of silence occurring at or before the time of arrest rather than while in actual police custody, see note 295 supra, Judge Meyer concluded that the custodial interrogation that triggers the right to remain silent and the Miranda obligation would not have begun. 49 N.Y.2d at 186, 400 N.E.2d at 350, 424 N.Y.S.2d at 411 (Meyer, J., dissenting).
any reasonably probative means.\textsuperscript{297} Since the defendant's failure to protest his innocence at the time of his arrest was "unnatural,"\textsuperscript{1286} Judge Meyer concluded that Conyers' prior silence was sufficiently probative to be a proper subject of cross-examination.\textsuperscript{299}

It is suggested that the Conyers Court was correct in finding a due process deficiency in the use for impeachment purposes of a defendant's silence while in custodial detention.\textsuperscript{300} Because an arrestee's silence may be "as consistent with innocence as guilt,"\textsuperscript{301} impeachment by silence at the time of arrest may be constitutionally defective simply because silence is not probative of a defendant's credibility.\textsuperscript{302} Moreover, any probative value that it does have may be outweighed by the danger that the jury will improperly construe it as evidence of guilt\textsuperscript{303} since postarrest silence is normally used to impeach alibi testimony or other defenses going to the crux of the guilt issue.\textsuperscript{304} It appears, therefore, that the Conyers rule will have the creditable effect of ensuring that criminal defendants will be convicted only upon evidence that is proba-


\textsuperscript{298} \textit{Id.} at 191-93 & n.8, 400 N.E.2d at 354-55 & n.8, 424 N.Y.S.2d at 414-15 & n.8 (Meyer, J., dissenting). According to Judge Meyer, the inconsistency between the defendant's silence upon arrest and his exculpatory testimony at trial was underscored by the fact that "we deal here not with one claiming simply innocence but with a person who claims to have been the \textit{victim} of crime." \textit{Id.} at 193 n.8, 400 N.E.2d at 355 n.8, 424 N.Y.S.2d at 415 n.8 (Meyer, J., dissenting) (emphasis in original).

\textsuperscript{299} \textit{Id.} at 191-93 & n.8, 400 N.E.2d at 354-55 & n.8, 424 N.Y.S.2d at 414-15 & n.8 (Meyer, J., dissenting). The dissent urged that a defendant's "human instinct" to extricate himself from an incriminating situation was at least as compelling as the duty of a police officer to speak. \textit{Id.} at 193, 400 N.E.2d at 355, 424 N.Y.S.2d at 415 (Meyer, J., dissenting); see note 280 supra.


\textsuperscript{301} 49 N.Y.2d at 182, 400 N.E.2d at 348, 424 N.Y.S.2d at 408.


\textsuperscript{304} \textit{Id.; see, e.g., People v. Christman, 23 N.Y.2d 429, 433, 244 N.E.2d 703, 704, 297 N.Y.S.2d 134, 135 (1969) (per curiam); People v. Smoot, 59 App. Div. 2d 898, 899, 399 N.Y.S.2d 135, 135 (2d Dep't 1977).}
tive of their guilt beyond a reasonable doubt.

It is submitted, however, that the Court of Appeals has left unresolved whether Conyers imposes a per se constitutional prohibition against the impeachment use of postarrest silence or whether, as an evidentiary matter, such use may sometimes be permissible. Because the Court failed to clearly distinguish its earlier holding in People v. Rothschild permitting impeachment by silence where the defendant’s failure to speak was “extraordinarily probative,” it appears that New York courts may avoid the Conyers safeguards by undertaking a case-by-case inquiry into the probative value of a defendant’s silence upon arrest. It is hoped, therefore, that the Court will clarify the scope of its holding in Conyers to guarantee its application in all instances.

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506 Id. at 360, 320 N.E.2d at 341-42, 361 N.Y.S.2d at 905; see notes 280 & 294 supra.
507 Since its decision in Conyers, the Court of Appeals has addressed the question whether a defendant may be cross-examined about his failure to include exculpatory information in a statement made to police at the time of his arrest. In People v. Savage, 50 N.Y.2d 673, 409 N.E.2d 858, 431 N.Y.S.2d 382 (1980), a majority of the Court, without mentioning Conyers, concluded that “when given circumstances make it most unnatural to omit certain information from a statement,” id. at 679, 409 N.E.2d at 861, 431 N.Y.S.2d at 384, the omission is “extraordinarily probative” and admissible for purposes of impeachment. Id. at 679, 409 N.E.2d at 861, 431 N.Y.S.2d at 385. While one concurring judge determined that “the majority’s studied silence on the matter” overruled Conyers, id. at 682, 409 N.E.2d at 863, 431 N.Y.S.2d at 387 (Cooke, C.J., concurring), it seems more likely that the Savage Court merely perceived the cases as presenting different issues; while Conyers involved the use of constitutionally protected postarrest silence, Savage involved omissions from a statement made once the privilege against self-incrimination had been voluntarily waived. Id. (Cooke, C.J., concurring); see United States v. Moore, 484 F.2d 1284, 1286 (4th Cir. 1973); United States v. Cordova, 421 F.2d 471, 474 (9th Cir.), cert. denied, 398 U.S. 941 (1970); People v. Dinkins, 69 App. Div. 2d 384, 389, 418 N.Y.S.2d 627, 637 (1st Dep’t 1979) (Silverman, J., dissenting); cf. United States v. Briddle, 443 F.2d 443, 448 (8th Cir.), cert. denied, 404 U.S. 942 (1971) (when defendant maintains silence at first, but later makes statement, silence can be used against him).

In view of the Supreme Court’s pronouncement in Jenkins v. Anderson, 100 S. Ct. 2124 (1980), it appears that, under the facts of Conyers, impeachment by silence may not violate the due process clause of the Federal Constitution. See People v. Savage, 50 N.Y.2d at 884 n.1, 409 N.E.2d at 861 n.1, 431 N.Y.S.2d at 385 n.1 (Gabrielli, J., dissenting). In Jenkins, the Supreme Court held that impeachment by pre-arrest silence did not violate the fourteenth amendment since the defendant had not been given Miranda warnings or otherwise indicated that he was relying on his right to remain silent. 100 S. Ct. at 2130. Reviewing its prior holding in Doyle, the Jenkins Court reasoned that “Miranda warnings inform a person that he has the right to remain silent and assure him, at least implicitly, that his subsequent decision to remain silent cannot be used against him.” Id. at 4696. Absent such an inducement by the state to remain silent, however, “the fundamental unfairness present in Doyle is not present . . . .” Id. See also Johnson v. United States, 318 U.S. 189 (1943) (where trial
court mistakenly informed defendant that he could claim privilege against self-incrimination, "[e]lementary fairness requires that an accused should not be misled on that score" and prosecutor may not comment on defendant's failure to speak).

It remains unclear whether the impeachment use of silence under the facts of Conyers violates the Federal Constitution. Nevertheless, the Jenkins decision would not vitiate the holding of the Conyers majority on state constitutional grounds. See Jenkins v. Anderson, 100 S. Ct. at 2130; People v. Savage, 50 N.Y.2d at 684 n.1, 409 N.E.2d at 861 n.1, 431 N.Y.S.2d at 385 n.1 (Gabrielli, J., dissenting).