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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

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premises cannot be subjected to a warrantless search of those premises based on the consent of a third party. 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.

[277] 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).

[278] *See generally* Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); Katz v. United States, 389 U.S. 347, 357 (1967); Trupiano v. United States, 334 U.S. 699, 705 (1948); United States v. Houle, 603 F.2d 1297, 1299 (8th Cir. 1979); United States v. Prescott, 599 F.2d 103, 105 (5th Cir. 1979); People v. Kreichman, 37 N.Y.2d 693, 697, 339 N.E.2d 182, 186, 376 N.Y.S.2d 497, 502 (1975); 2 W. LAFAVE, SEARCH AND SEIZURE § 4.1, at 3 (1978).

as evidence of guilt.[279] The use of prior silence for impeachment purposes, on the other hand, has been permitted where the defendant's failure to speak in the face of accusation was "patently inconsistent" with his exculpatory testimony at trial.[280] Recently, however, in *People v. Conyers*,[281] the Court of Appeals held that the credibility of a defendant's exculpatory trial testimony may not be impeached by proof of his silence at the time of arrest, re-

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[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 an implied admission of guilt. *Id.* at 105, 184 N.E. at 690. The Court stated:

> [N]o cautious person, when in custody, accused of crime would care to enter into a discussion of his guilt or innocence with his captors and co-defendants, when what he said might be used against him . . . . He is then under no duty to speak and his silence should not be counted as giving assent to what he hears. If he had counsel, he would doubtless be advised not to talk. If he had not, he should not be prejudiced thereby.

Id. at 107, 184 N.E. at 690. Similarly, the federal courts have uniformly held that the use of silence upon arrest as substantive evidence of guilt is impermissible. *See, e.g.*, United States v. Faulkenberry, 472 F.2d 879 (9th Cir.), *cert. denied*, 411 U.S. 970 (1973); United States v. Nolan, 416 F.2d 588 (10th Cir.), *cert. denied*, 396 U.S. 912 (1969); United States v. Nielsen, 392 F.2d 849 (7th Cir. 1968); United States v. Mullings, 364 F.2d 173 (2d Cir. 1966).

[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).

[281] 49 N.Y.2d 174, 400 N.E.2d 342, 424 N.Y.S.2d 402 (1979), *aff'g*, 65 App. Div. 2d 437, 411 N.Y.S.2d 303 (1st Dep't 1978).

gardless of whether he had been advised of his right to remain silent.[282]

Thomas Conyers was overtaken and arrested while fleeing the scene of an alleged armed robbery.[283] At the time of his arrest, Conyers did not volunteer any information about the circumstances culminating in his apprehension[284] and maintained his silence even though the police had not provided him with *Miranda* warnings.[285] During his trial, however, the defendant took the stand and offered an exculpatory version of the events leading to his arrest.[286] 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.[287] The defendant subsequently was convicted of armed robbery, attempted assault, and possession of a dangerous weapon.[288] 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.[289]

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.[290] Authoring the majority opinion,[291] Judge Gabrielli rea-

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[282] 49 N.Y.2d at 180, 400 N.E.2d at 346, 424 N.Y.S.2d at 406.

[283] *Id.* at 177, 400 N.E.2d at 345, 424 N.Y.S.2d at 405. The prosecution offered testimony at trial that the defendant and his accomplice had forced the two complainants at gunpoint into a nearby apartment building, and then bound and robbed them. *Id.* One complainant freed himself and chased the two men until the police finally intervened and arrested the suspects. *Id.*

[284] *Id.* at 177, 400 N.E.2d at 344, 424 N.Y.S.2d at 404.

[285] *Id.* at 179, 400 N.E.2d at 346, 424 N.Y.S.2d at 406. In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court held that an arrested person must be warned prior to custodial interrogation that he has the right to remain silent, that anything he says can be used against him, that he has the right to counsel, and that, if he so desires, an attorney will be appointed for him prior to questioning if he cannot afford counsel. *Id.* at 479.

[286] 49 N.Y.2d at 178, 400 N.E.2d at 345, 424 N.Y.S.2d at 405. The defendant testified that he and his alleged accomplice had visited the complainant's apartment to collect a gambling debt. When a scuffle ensued, Conyers purportedly took the complainant's gun and left the building with his codefendant. While in pursuit, however, the complainant yelled to police officers that he had been robbed. The defendants were then arrested. *Id.* at 192, 400 N.E.2d at 354, 424 N.Y.S.2d at 414 (Meyer, J., dissenting).

[287] *Id.* at 177, 400 N.E.2d at 344, 424 N.Y.S.2d at 404. The prosecutor also commented on Conyers' silence during her summation. *Id.*

[288] *Id.* at 176, 400 N.E.2d at 344, 424 N.Y.S.2d at 404.

[289] 65 App. Div. 2d at 442, 411 N.Y.S.2d at 307.

[290] 49 N.Y.2d at 180, 400 N.E.2d at 346, 424 N.Y.S.2d at 406-07. Alternatively, the

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.[292] Moreover, the majority asserted, the right to remain silent exists independently of the *Miranda* warnings.[293] 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

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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 prearrest silence for impeachment purposes. *See id.* at 4694-95.

[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

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[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:

> [W]hile 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.[297] Since the defendant's failure to protest his innocence at the time of his arrest was "unnatural,"[298] Judge Meyer concluded that Conyers' prior silence was sufficiently probative to be a proper subject of cross-examination.[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.[300] Because an arrestee's silence may be "as consistent with innocence as guilt,"[301] impeachment by silence at the time of arrest may be constitutionally defective simply because silence is not probative of a defendant's credibility.[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[303] since postarrest silence is normally used to impeach alibi testimony or other defenses going to the crux of the guilt issue.[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-

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[297] 49 N.Y.2d at 187-89, 400 N.E.2d at 351-52, 424 N.Y.S.2d at 411-12. (Meyer, J., dissenting). The dissent contended that Conyers had waived any fifth amendment objection to the impeachment use of his prior silence by taking the stand in his own defense. *Id.* at 187-88, 400 N.E.2d at 351-52, 424 N.Y.S.2d at 411-12 (Meyer, J., dissenting).

[298] *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 *victim* of crime." *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).

[299] *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. *Id.* at 193, 400 N.E.2d at 355, 424 N.Y.S.2d at 415 (Meyer, J., dissenting); *see* note 280 *supra.*

[300] A majority of state appellate courts addressing the issue of impeachment by postarrest silence have reached the same conclusion. *See, e.g.,* State v. Anderson, 110 Ariz. 238, 517 P.2d 508 (1973); Hines v. People, 497 P.2d 1258 (Colo. 1972); Darnell v. Commonwealth, 558 S.W.2d 590 (Ky. 1977); People v. Bobo, 390 Mich. 355, 212 N.W.2d 190 (1973). *But see* People v. Queen, 8 Ill. App. 3d 858, 290 N.E.2d 631 (1972); Thomas v. State, 285 So.2d 148 (Miss. 1973), *cert. denied,* 419 U.S. 826 (1974).

[301] 49 N.Y.2d at 182, 400 N.E.2d at 348, 424 N.Y.S.2d at 408.

[302] *Cf.* United States v. Hale, 422 U.S. 171, 180-81 (1975); Stewart v. United States, 366 U.S. 1, 5 (1961); Grunewald v. United States, 353 U.S. 391, 424 (1957) (all decided on nonconstitutional grounds).

[303] Comment, *Impeaching a Defendant's Trial Testimony by Proof of Post-Arrest Silence,* 123 U. PA. L. REV. 940, 973-74 (1975).

[304] *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 133, 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*[305] permitting impeachment by silence where the defendant's failure to speak was "extraordinarily probative,"[306] 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.[307]

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[305] 35 N.Y.2d 355, 320 N.E.2d 639, 361 N.Y.S.2d 901 (1974).

[306] *Id.* at 360, 320 N.E.2d at 341-42, 361 N.Y.S.2d at 905; *see* notes 280 & 294 *supra.*

[307] 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, 399, 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 684 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).