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Trial Error Blunder: Compounded Use of Defendant's Post-Arrest Silence for Impeachment and Summation Purposes is Not Harmless - People v. Tucker

Robert Mitchell
Touro Law Center

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Cover Page Footnote

28-3

TRIAL ERROR BLUNDER: COMPOUNDED USE OF DEFENDANT'S POST-ARREST SILENCE FOR IMPEACHMENT AND SUMMATION PURPOSES IS NOT HARMLESS

SUPREME COURT OF NEW YORK APPELLATE DIVISION, SECOND DEPARTMENT

People v. Tucker[1]
(decided September 20, 2011)

I. THE MATTER OF *PEOPLE V. TUCKER*

The defendant in this action appealed his conviction of two counts of second degree attempted murder and first degree attempted robbery.[2] After his arrest, the defendant was questioned by law enforcement officers yet remained silent.[3] At trial, "the People were permitted to question him about his post-arrest silence" and comment further upon it repeatedly during summation.[4] On appeal, the court determined "post-arrest silence . . . cannot be used for impeachment purposes"[5] and the use of such silence against a defendant is

[1] 929 N.Y.S.2d 631 (App. Div. 2d Dep't 2011).

[2] *Id.* at 632.

[3] *Id.* at 632-33.

[4] *Id.*; *see* People v. Conyers, 420 N.E.2d 933, 935 (N.Y. 1981) ("[W]e conclude that the use of such evidence for impeachment purposes cannot be justified . . . .").

[5] *Tucker*, 929 N.Y.S.2d at 633; *see* Brecht v. Abrahamson, 507 U.S. 619, 628 (1993) (stating the use of a defendant's silence for impeachment purposes after *Miranda* warnings were given is a violation of "the Due Process Clause of the Fourteenth Amendment [and] [t]his rule 'rests on the fundamental unfairness of implicitly assuring a suspect that his silence will not be held against him and then using his silence to impeach an explanation subsequently offered at trial' ") (quoting Wainright v. Greenfield, 474 U.S. 284, 291 (1986)).

"fundamentally unfair."[6] The Appellate Division held both issues were permitted in error, overturned the conviction, and remanded the matter for a new trial.[7]

People v. Tucker[8] concerns the shootings of Asin Nelson and Stanley McKinnon.[9] Within hours of the shootings, the defendant, Tucker, was arrested as a suspect and read his *Miranda*[10] rights.[11] The police asked the defendant if he was willing to talk about the incident.[12] He responded, "No."[13] Subsequently, a police officer informed the defendant that he was going to be charged for attempted murder.[14] It was at this point the defendant said, "I was there, but I didn't shoot anybody."[15] After he made that statement, the defendant remained silent.[16] A suppression hearing was held and the statement was suppressed.[17] During the jury trial, an eye witness and the two victims testified that the defendant was the shooter, and that he wore a black hooded sweatshirt at the time of the incident.[18] The jury was shown grainy video footage of the shooting, post-arrest photographs of the defendant, and still images from the video.[19] The eyewitness and the victims were unable to identify one man in the video who was wearing a "do-rag" and a white long-sleeved t-shirt.[20] In his own defense, the defendant testified he was the man in the white t-shirt.[21] While this established his presence at the shooting, the defendant

[6] *Tucker*, 929 N.Y.S.2d at 633; *see also Brecht*, 507 U.S. at 628.

[7] *Tucker*, 929 N.Y.S.2d at 635.

[8] 929 N.Y.S.2d 631 (App. Div. 2d Dep't 2011).

[9] *Id.* at 636 (Rivera, J., dissenting).

[10] Miranda v. Arizona, 384 U.S. 436 (1966).

[11] *Tucker*, 929 N.Y.S.2d at 636; *see also Miranda*, 384 U.S. at 479 (holding if someone is taken into custody the four Miranda warnings are: (1) before being questioned the suspect must be warned about his or her "right to remain silent;" (2) that anything the suspect says "can be used against him [or her] in a court of law;" (3) that the suspect "has the right to the presence of an attorney;" (4) that if the suspect "cannot afford an attorney one will be appointed for him [or her] prior to any questioning if [the suspect] so desires").

[12] *Tucker*, 929 N.Y.S.2d at 632-33 (majority opinion).

[13] *Id.* at 633.

[14] *Id.*

[15] *Id.* at 636 (Rivera, J., dissenting).

[16] *Id.* at 633 (majority opinion).

[17] *Tucker*, 929 N.Y.S.2d at 636 (Rivera, J., dissenting).

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

claimed he was not the shooter.[22] Instead, he testified the person in the video dressed in black was his friend "Mustafa" and that "Mustafa" was responsible for the victim's injuries.[23]

During cross-examination, the prosecutor asked the defendant multiple times if he had told the police the identity of the shooter after his arrest.[24] The following is the pertinent part of the prosecutor's questioning the defendant:

> Q. Did you tell the police it was Mustafa who did the shooting?
>
> A. I told the police. They asked me did you shoot him. I told the police [,] I was there but I didn't shoot nobody.
>
> Q. But you didn't tell them it was Mustafa; right?
>
> A. They asked me. They asked me—
> THE COURT: Answer the question.
> Q. Did you tell them it was Mustafa?
>
> THE COURT: Answer that question.
>
> A. No.[25]

Another major issue occurred during the prosecutor's summation.[26] A repeated reference to the defendant's silence after his arrest was stressed by the district attorney.[27] It was said, "[A]n innocent person when they're arrested for a crime they didn't commit and they know who did it will say [who] did it."[28] This was combined with the statement that "the defendant tailored his testimony that he was the man dressed in white after listening to the testimony of the victims."[29]

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[22] *Tucker*, 929 N.Y.S.2d at 636.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.* at 632 (majority opinion).
[27] *Tucker*, 929 N.Y.S.2d at 635.
[28] *Id.*
[29] *Id.* at 636 (Rivera, J., dissenting).

The reasoning of the Appellate Division concentrated on whether it was improper to use post-arrest silence for impeachment purposes at the defendant's criminal trial.[30] The risk of prejudice is considerable and of little probative value "whenever the prosecution attempts to impeach a defendant's trial testimony by questioning him about his prior failure to come forward."[31] The United States Supreme Court has held "[i]n such circumstances it [is] 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."[32] However, if a suspect speaks to police and the "given circumstances make it most unnatural to omit certain information from a statement, the fact of the omission is itself admissible for purposes of impeachment."[33] Here, the defendant invoked his right to remain silent.[34] The court found this case was "squarely controlled" by the decisions in *People v. Santiago*[35] and *People v. Torres.*[36] In *Santiago*, the Appellate Division stated, "the defendant's mere denial of his involvement in the shooting upon arrest was not tantamount to a waiver of his right to remain silent."[37] Similarly, the New York Court of Appeals held "[t]he State is denied the right to draw adverse inferences from the fact that the defendant has maintained effective silence, even if something less than total."[38]

In the instant matter, after his arrest, Tucker did not wish to

[30] *Id.* at 633 (majority opinion).

[31] *Conyers*, 420 N.E.2d at 935.

[32] Doyle v. Ohio, 426 U.S. 610, 618 (1976).

[33] People v. Savage, 409 N.E.2d 858, 861 (N.Y. 1980) (stating that "an omission speaks more eloquently than words" especially when "[i]t [would have] put an entirely different cast on the event" if it had been mentioned).

[34] *Tucker*, 929 N.Y.S.2d at 634.

[35] 501 N.Y.S.2d 402, 403-04 (App. Div. 2d Dep't 1986); *see also Tucker*, 929 N.Y.S.2d at 634.

[36] 490 N.Y.S.2d 793, 794-95 (App. Div. 2d Dep't 1985); *see also Tucker*, 929 N.Y.S.2d at 634 (stating the defendants in *Santiago* and *Torres* simply denied participation in their respective crimes); *Santiago*, 501 N.Y.S.2d at 403-04 (explaining the State is not allowed the right to "draw adverse inferences" from the defendant invoking his right to remain silent and "the prosecutor's questioning of the defendant [during the trial] in this regard was in error"); *Torres*, 490 N.Y.S.2d at 794-95 (stating the "prosecutor's inquiry concerning the failure of [the] defendant . . . to report [his] alibi to the police was improper . . . [and] the prosecutor's comments during summation were improper [especially] [t]he prosecutor's consistent implication that defendant and his trial counsel had concocted the alibi").

[37] *Santiago*, 501 N.Y.S.2d at 403.

[38] *Savage*, 409 N.E.2d at 862.

speak to the police and he succinctly told them his feelings.[39] In one sentence, he stated he was not the shooter.[40] This statement only implicated him as being present at the incident.[41] The court held "the defendant maintained an effective silence."[42] This conclusion was ascertained from the fact the defendant wanted to remain silent, understood he had no obligation to elaborate, did not have to implicate his friend, and had "knowledge . . . his decision not to speak would not be used against him at trial."[43] Ultimately, the defendant's post-arrest omission about naming the actual shooter was found to be "of minimal probative value."[44] If presented to a jury, however, a defendant's " 'pretrial failure to speak when confronted by law enforcement officials' " carries the risk of being highly prejudicial.[45]

Lastly, the court concluded the defendant "did not use his *Miranda* rights as a shield against contradictions of untruths."[46]

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[39] *Tucker*, 929 N.Y.S.2d at 634.

[40] *Id.* at 633.

[41] *Id.*

[42] *Id.* at 634.

[43] *Id.*

[44] *Tucker*, 929 N.Y.S.2d at 634; *see also Conyers*, 420 N.E.2d at 935 (stating a defendant's "silence in such circumstances may simply be attributable to his awareness that he is under no obligation to speak or to the natural caution that arises from his knowledge that anything he says might later be used against him at trial").

[45] *Tucker*, 929 N.Y.S.2d at 633 (quoting *Conyers*, 420 N.E.2d at 935); *see also Conyers*, 420 N.E.2d at 934. The New York Court of Appeals created what has become known as "the *Conyers* proscription [against use of post-arrest silence for impeachment purposes]" (quoting *Tucker*, 929 N.Y.S.2d at 634).

> [T]he risk of prejudice is substantial whenever the prosecution attempts to impeach a defendant's trial testimony by questioning him about his prior failure to come forward with an exculpatory version of events. Jurors, who are not necessarily sensitive to the wide variety of alternative explanations for a defendant's pretrial silence, may be prone to construe such silence as an admission and, as a consequence, may draw an unwarranted inference of guilt. Because evidence of a defendant's pretrial silence may have a disproportionate impact upon the minds of the jurors and because the potential for prejudice inherent in such evidence outweighs its marginal probative worth, we conclude that the use of such evidence for impeachment purposes cannot be justified in the absence of unusual circumstances.

Id. at 935-36.

[46] *Tucker*, 929 N.Y.S.2d at 634; *see also* Harris v. New York, 401 U.S. 222, 226 (1971) ("The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from risk of confrontation with prior inconsistent statements.").

> [T]he United States Supreme Court held that a statement obtained in violation of any aspect of a defendant's *Miranda* rights, although not admissible as evidence-in-chief, may be used to impeach a defendant who chooses to take the stand and whose testimony is inconsistent with his illegally obtained statement.[47]

But here, the defendant's statements at trial were consistent with his pre-trial statements.[48] The defendant here was impeached "not with an inconsistent statement, but, rather, with his failure to speak, to tell the police" the identity of the shooter.[49] Therefore, the case falls under the purview "of [*People v.*] *Conyers*,[50] which concerns the use of post-arrest silence" and the prosecutor's general prohibition "from using such silence for impeachment purposes."[51] The court found it improper for the People to use the post-arrest silence to impeach the defendant.[52] Due to its substantial prejudicial effect, the error was not harmless as it could have affected the verdict.[53] The summation references to the post-arrest silence compounded the error and a new trial was warranted.[54]

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[47] People v. Maerling, 474 N.E.2d 231, 233 (N.Y. 1984).

[48] *Tucker*, 929 N.Y.S.2d at 635. The defendant was perfectly consistent when he testified he was at the shooting and that Mustafa was the shooter, and when he said during a pre-trial interrogation that he was at the shooting and was not the shooter.

[49] *Id.*

[50] 420 N.E.2d 933 (N.Y. 1981).

[51] *Tucker*, 929 N.Y.S.2d at 635; *see also Conyers*, 420 N.E.2d at 934; *id.* at 935 (stating the New York Court of Appeals has recognized "evidence of defendant's pretrial silence may have a disproportionate impact on the minds of the jurors").

[52] *Tucker*, 929 N.Y.S.2d at 635.

[53] *Id.* (articulating the only evidence provided that the defendant was the shooter was "in-court identification of the defendant by two brothers and their friend" and "grainy surveillance video and still pictures taken from the video" from which the identity of the shooter was not discernable).

[54] *Id.*; *but see Tucker*, 929 N.Y.S.2d at 637-38 (Rivera, J., dissenting) (stating defendant prevailed at suppression hearing and was not insulated from cross-examination for impeachment purposes regarding omission of shooter's identity as it was the ultimate issue in the case and because the *Miranda* shield is not permitted to be used as a sword. Further, the summation remarks were improper but not flagrant enough for a reversal as evidence of guilt was overwhelming).

II. REFERENCE DURING TRIAL REGARDING DEFENDANT'S SILENCE AT OR NEAR TIME OF ARREST

The Fifth Amendment of the United States Constitution guarantees that "no person shall be" compelled "to be a witness against" him or herself in a criminal matter.[55] This amendment, which encompasses the right to remain silent and the self-incrimination clause, is said to "register[ ] an important advance in the development of our liberty—one of the great landmark's in man's struggle to be civilized."[56] The Supreme Court stated that the right to remain silent "reflects many of our fundamental values and most noble aspirations . . . [and allows an individual the privilege] 'to a private enclave where he may lead a private life.' "[57] Although it may "sometimes [be] 'a shelter to the guilty,' [it] is often 'a protection to the innocent.' "[58]

A. The Federal Approach

The right to remain silent is a constitutional privilege against self-incrimination in criminal matters because anything an individual says can be used against him or her in court.[59] Once a suspect is arrested and a "custodial interrogation" is initiated by law enforcement, the suspect may "indicate[ ] in any manner, at any time prior to or during questioning, that he wishes to remain silent [and] the interrogation must cease."[60] Additionally, any statement obtained by or used by the government in violation of a defendant's Fifth Amendment rights is inadmissible during the defendant's criminal trial.[61] *Miranda* warnings are only administered to a suspect during

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[55] U.S. CONST. amend. V. ("No person 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 . . . .").

[56] Ullman v. United States, 350 U.S. 422, 426 (1956); *see also* Malloy v. Hogan, 378 U.S. 1, 3 (1964). In this landmark case, the Court held the privilege against self-incrimination is applicable to the states through the Due Process Clause of the Fourteenth Amendment.

[57] Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964) (quoting United States v. Grunewald, 233 F.2d 566, 581-82 (2d Cir. 1956) (Frank, J., dissenting)).

[58] *Murphy*, 378 U.S. at 55 (quoting Quinn v. United States, 349 U.S. 155, 162 (1955)).

[59] *Miranda*, 384 U.S. at 479.

[60] *Id.* at 473-74.

[61] New Jersey v. Portash, 440 U.S. 450, 459-60 (1979). When given a grant of immunity

or after being placed in custody when the objectively reasonable person would ascertain they are under arrest.[62] After he or she is given *Miranda* warnings, a suspect may "knowingly and intelligently waive these rights and agree to answer questions or make a statement."[63] Therefore, unless *Miranda* warnings "and waiver are demonstrated by the prosecution at trial, no evidence obtained as the result of an interrogation can be used against [the defendant]."[64] However, the Court determined in *Harris v. New York*[65] that use of evidence for impeachment purposes allows for a more lenient interpretation.[66]

In *Harris*, the petitioner was arrested for allegedly selling heroin to an undercover police officer and was interrogated without being properly Mirandized.[67] The statements made during the police interrogation were rendered inadmissible for the prosecution's case-in-chief under *Miranda*.[68] The petitioner took the stand in his own defense and testified he knew who the arresting police officer was, but that he never sold heroin to the undercover cop.[69] The testimony contradicted the statements made during the post-arrest police

to provide testimony before a grand jury, the witness testimony given cannot be later used in the case-in-chief nor for impeachment purposes in a criminal trial against that witness.

[62] *Miranda*, 384 U.S. at 485 (stating warnings must be given "as soon as practicable after arrest" and prior to any "interview with [a] person for a confession of admission of his own guilt"). *See also* Berkemer v. McCarty, 468 U.S. 420, 442 (1980) (stating during a DWI stop, the defendant knew while he was being questioned that he was not under arrest or functionally under arrest and was not waiving his rights).

[63] *Miranda*, 384 U.S. at 479.

[64] *Id.* at 479-80 (explaining "the Constitution has prescribed the rights of the individual when confronted by the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself [and] [t]hat right cannot be abridged . . . . [L]iberty [] demand[s] that government officials shall be subject[ ] to . . . rules of conduct . . . [because] [c]rime is contagious [and] [i]f the government [became] a lawbreaker, it [would] breed[ ] contempt for [the] law [and] invite[ ] every man to become a law unto himself; it [would] invite[ ] anarchy").

[65] 401 U.S. 222 (1971).

[66] *Id.* at 225-26 ("Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment.").

[67] *Id.* at 222-23.

[68] *Id.* at 223-24 (stating the defendant was not informed of his right to an attorney before being questioned); *see also Miranda*, 384 U.S. at 479.

[69] *Harris*, 401 U.S. at 223 (claiming the bag sold did not contain heroin but only baking soda).

interrogation.[70] On cross-examination, the prosecutor impeached the petitioner by asking about and reciting the statements made to the police post-arrest.[71] The petitioner "testified that he could not remember virtually any of the questions or answers" made during that interrogation.[72] The jury convicted the petitioner and the petitioner appealed.[73] The Court stated that physical evidence could be used for impeachment purposes despite being inadmissible for use during the case-in-chief.[74] Furthermore, it reasoned, "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of the defense, free from the risk of confrontation with prior inconsistent statements."[75] The judgment was affirmed and the use of the "earlier conflicting statements" was appropriately utilized to impeach the petitioner.[76]

The Supreme Court has reviewed many issues surrounding the right to remain silent and the nuances involved in resolving the constitutionality of using a defendant's statements for impeachment purposes. In *Doyle v. Ohio*,[77] the Court held the use of a Mirandized suspect's silence for impeachment purposes at trial was fundamentally unfair and a violation of due process.[78] This is known as a *Doyle* violation.[79] However, in *Jenkins v. Anderson*,[80] the Court held that prior to *Miranda* warnings, a suspect's silence can be used

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[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Harris*, 401 U.S. at 224; *see* Walder v. United States, 347 U.S. 62, 65 (1954) (holding physical evidence inadmissible during case-in-chief allowed for impeachment purposes).

[75] *Harris*, 401 U.S. at 226. The Court logically elaborated on its reasoning in stating:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.

Id. at 224.

[76] *Id.* at 226.

[77] 426 U.S. 610 (1976).

[78] *Id.* at 618.

[79] *See Doyle*, 426 U.S. at 619 ("We hold that the use for impeachment purposes of the petitioner's silence, at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment.").

[80] 447 U.S. 231 (1980).

for impeachment purposes by the prosecution when cross-examining a defendant.[81] The *Jenkins* decision "does not force any state court to allow impeachment through the use of prearrest silence."[82] It only states that this form of impeachment is constitutional.[83] The crucial difference between *Doyle* and *Jenkins* focuses on fundamental fairness based upon the fact 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."[84]

The Court has also considered what standard should be utilized when assessing the impact on a jury verdict where a defendant's post-*Miranda* silence was improperly used for impeachment purposes.[85] In *Brecht v. Abrahamson*,[86] a *Doyle* violation occurred when post-*Miranda* silence was used by the government to impeach the defendant during a murder trial.[87] The defendant was arrested, given his *Miranda* rights, and charged with murder for allegedly shooting his brother-in-law in the back with a rifle.[88] The defendant took the stand and mentioned for the first time that he committed the shooting, but stated it was an accident.[89] The prosecutor inferred the defendant remained silent until all the evidence was heard and then testified by creating "this crazy story" that the shooting was an "accident."[90] The Court held it was an error to use the post-*Miranda* silence for impeachment purposes.[91] The standard to determine the impact on the verdict is whether the error had a "substantial and injurious effect or influence in determining the

[81] *Id.* at 240 ("We hold impeachment by use of prearrest silence does not violate the Fourteenth Amendment . . . [but this] decision today does not force any state court to allow impeachment through the use of prearrest silence . . . [and] [e]ach jurisdiction remains free to formulate [its own] rules . . . [to define when] silence is viewed as more probative than prejudicial.").

[82] *Id.*

[83] *Id.* at 240-41.

[84] *See Jenkins*, 447 U.S. at 239-40.

[85] *See Brecht*, 507 U.S. 619 (1993).

[86] 507 U.S. 619 (1993).

[87] *Id.* at 625-26; *see also Doyle*, 426 U.S. at 618.

[88] *Brecht*, 507 U.S. at 623-24.

[89] *Id.* at 624.

[90] *Id.* at 625.

[91] *Id.* at 628-29.

jury's verdict" and not whether the error was "harmless beyond a reasonable doubt."[92] The Court affirmed the conviction because the petitioner's post-*Miranda* silence was mentioned infrequently and the weight of the matter was primarily decided on the substantial circumstantial evidence.[93]

More recently, in *Berghuis v. Thompkins*,[94] the Court held that a suspect who makes any uncoerced statement to police waives the right to remain silent.[95] Thompkins was arrested in Ohio for murder and given his *Miranda* warnings.[96] However, he refused to sign a document stating he understood the *Miranda* warnings.[97] The police then questioned him for about three hours.[98] Thompkins remained silent almost the entire time.[99] Then the police switched their questioning to beliefs about God.[100] An officer asked if Thompkins would pray to God and ask for forgiveness for killing the victim.[101] Thompkins answered in the affirmative.[102] This was the key evidence submitted for his murder conviction.[103]

The Supreme Court held in *Thompkins* that one can waive the right to remain silent by uttering a one-word answer.[104] The Court granted certiorari to determine: (1) if Thompkins' silence invoked his

[92] *Id.* at 622-23; *see Brecht*, 507 U.S. at 638 (holding a "harmless-error standard applies in determining whether habeas relief must be granted because of a constitutional error of the trial type"); *see also* Kotteakos v. United States, 328 U.S. 750, 776 (1946) (stating that the "substantial and injurious effect" standard was established in this matter which is a less burdensome standard of review where relief for trial error is granted if actual prejudice resulted); Chapman v. California, 386 U.S. 18, 24 (1967) (holding "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt").

[93] *Brecht*, 507 U.S. at 638-39.

[94] 130 S. Ct. 2250 (2010).

[95] *Id.* at 2264.

[96] *Id.* at 2256.

[97] *Id.*

[98] *Id.*

[99] *Thompkins*, 130 S. Ct. at 2258 ("[E]vidence demonstrates that Thompkins was silent for two hours and forty-five minutes.").

[100] *Id.* at 2257 (stating police asked Thompkins about his belief in God about two hours and forty-five minutes into the interrogation and that Thompkins eyes swelled up in tears).

[101] *Id.* ("Do you pray to God to forgive you for shooting that boy down?").

[102] *Id.* ("Thompkins answered 'Yes' and looked away.").

[103] *Id.* (describing denial at suppression hearing concerning inadmissibility of one-word answers made during interrogation with police).

[104] *Thompkins*, 130 S. Ct. at 2264.

right to remain silent, and (2) if Thompkins had adequately waived that right.[105] The Court ruled in favor of the government on both issues.[106] The Court held that simply being silent was not enough to invoke the right to remain silent, but that a suspect needed to expressly invoke the right to remain silent.[107] This holding is similar to the earlier reasoning in *Davis v. United States*,[108] where the Court held an express request for an attorney is necessary to invoke the right to counsel.[109] Secondly, the Court held Thompkins waived his right to remain silent as soon as he uttered a word.[110] Thompkins could have simply remained silent because he understood anything he said would be held against him.[111]

B. New York Approach

In *Conyers*, the New York Court of Appeals stated that the rules of evidence in New York prevent the use of a defendant's post-arrest silence for impeachment purposes at trial.[112] The court did not address either the due process clause of the New York Constitution or the *Jenkins v. Anderson* decision reached a year earlier by the

[105] *Id.* at 2259.

[106] *Id.* at 2664 ("Thompkins did not invoke his right to remain silent . . . he waived his right to remain silent by making a voluntary statement to the police.").

[107] *Id.* at 2260 ("Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police . . . . [H]e did neither, so he did not invoke his right to remain silent.").

[108] 512 U.S. 452 (1994).

[109] *Id.* at 459 ("[T]he suspect must unambiguously request counsel . . . he [or she] must articulate his [or her] desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstance would understand the statement to be a request for an attorney.").

[110] *Thompkins*, 130 S. Ct. at 2263 (holding Thompkins waived his right to remain silent because his conduct indicated waiver based on the fact he was fully aware of his rights and voluntarily responded to the question "about praying to God for forgiveness for shooting the victim").

[111] *Id.* ("If Thompkins wanted to remain silent, he could have said nothing to [the police officer's] questions, or he could have unambiguously invoked his *Miranda* rights and ended the interrogation."); *id.* at 2263-64 (stating an accused's statement is admissible at trial if *Miranda* warnings were given and a subsequent implied or express waiver of *Miranda* rights has been determined); *see also id.* at 2264. The Court held a one-word answer was a waiver of the right to remain silent.

[112] *Conyers*, 420 N.E.2d at 934 ("[O]ur State rules of evidence preclude the use of a defendant's [post-arrest] silence to impeach his trial testimony.").

United States Supreme Court.[113] Thomas Conyers' armed robbery conviction was overturned by the Appellate Division because the prosecutor used his post-arrest silence for impeachment purposes.[114] The New York Court of Appeals stated a defendant's post-arrest silence is of low probative value because of the awareness of no obligation to speak.[115] However, the use of post-arrest silence for impeachment purposes in front of a jury presents a "grave danger of prejudice."[116] The Appellate Division's decision was affirmed because the New York "judicially created rule of exclusion was premised upon the familiar standard [of] whether the prejudicial effect outweighs the probative worth of the evidence."[117]

In New York, one can be faced with various nuances regarding impeachment issues. Cross-examination of the defendant is only permitted for impeachment purposes if the "door is opened" by the defendant's direct testimony.[118] This examination is permitted to impeach the defendant, but not to establish fact.[119] Similar to federal law, New York law holds that as soon as the defendant's testimony is discovered to be only suitable for purposes of impeachment "any *Miranda* infirmity becomes irrelevant."[120] However, voluntary statements obtained by law enforcement in violation of a defendant's *Miranda* rights are only permitted to be used for impeachment purposes and not for use in the case-in-

[113] *Id.* ("[W]e do not find it necessary to consider whether the use of a defendant's postarrest silence for impeachment purposes is permissible under the constitutional principles articulated in *Jenkins* or whether the due process clause of our State Constitution [ ] precludes the use of such evidence to impeach a defendant's trial testimony."); *see also Jenkins*, 447 U.S. 231; N.Y. CONST. art. I, § 6.

[114] *Conyers*, 420 N.E.2d at 934 (affirming the finding of a due process violation in using post-arrest silence for impeachment purposes). The People requested certiorari and the Supreme Court remanded the case due to the *Jenkins* holding on pre-arrest silence having similar constitutional issues. *Id.*

[115] *Id.* at 935.

[116] *Id.* at 936 n.2.

[117] *Id.* at 936 ("[O]ur decision today represents a simple recognition of our judicial responsibility to formulate rules of evidence to protect the integrity of the truth-finding process.").

[118] People v. Wise, 385 N.E.2d 1262, 1266 (N.Y. 1978).

[119] *Id.* at 1267.

[120] *Id.*; *see also* Oregon v. Hass, 420 U.S. 714, 721-22 (1975) ("[I]t does not follow from *Miranda* that evidence inadmissible against [the defendant] in the prosecution's case-in-chief is barred for all purposes . . . . [T]he impeaching material would provide valuable aid to the jury in assessing the defendant's credibility.").

chief.[121] In *People v. Maerling*,[122] the defendant invoked his right to counsel yet made voluntary statements pertaining to a murder, which were improperly obtained, and these statements were allowed to be used for impeachment purposes.[123] In *People v. Savage*,[124] the defendant was read his *Miranda* rights and voluntarily waived his right to remain silent to inform the police about a shooting.[125] While giving testimony at trial, the defendant mentioned for the first time the gun "inadvertently" went off while the victim attempted to rob him.[126] The Court of Appeals held this flagrant omission was properly used for impeachment purposes by the prosecutor.[127] However, as a balancing precaution, "the State is denied the right to draw adverse inferences from the fact that a defendant has maintained an effective silence, even if something less than total."[128]

The New York harmless error rule pertaining to non-constitutional trial errors is different than the federal rule for constitutional trial errors.[129] In New York, all errors of law are

[121] People v. Maerling, 474 N.E.2d 231, 233 (N.Y. 1984).

> We have permitted the use of illegally obtained evidence for [impeachment] purpose[s] . . . . Our rule permits the use for impeachment not only statements obtained in violation of a defendant's *Miranda* rights, but also of those obtained in violation of his right to counsel under the State Constitution. [However], a statement obtained in violation of the defendant's Federal constitutional right to counsel is not admissible for impeachment purposes . . . . [A]dmissibility rests . . . on a determination of voluntariness. If a statement was voluntary it may be used to impeach; if it was not, it may not be admitted.

Id.

[122] 474 N.E.2d 231 (N.Y. 1984).

[123] *Id.* at 232.

[124] 409 N.E.2d 858 (N.Y. 1980).

[125] *Id.* at 859 (stating the defendant said "I'm glad I'm caught - I'm tired" and subsequently told the police about him shooting a man outside a bar).

[126] *Id.* at 859-60.

[127] *Id.* at 860-61. The defendant never mentioned anything about a robbery or the accidental firearm discharge prior to trial. *Id.* at 861 (holding when someone is a victim of a robbery or a gun accidently discharges and such major items are not mentioned the "omission speaks more eloquently than words. It is an elementary rule of evidence, and of common sense, in our State . . . that, when given circumstances make it most unnatural to omit certain information from a statement, the fact of the omission is itself admissible for purposes of impeachment").

[128] *Savage*, 409 N.E.2d at 862.

[129] People v. Crimmins, 326 N.E.2d 787, 793 (N.Y. 1975); *id.* at 791 (stating the test for harmless constitutional trial error is "that there is no reasonable possibility that the error might have contributed to the defendant's conviction and that it was harmless beyond a

prejudicial and require a reversal "unless that error can be found to have been rendered harmless by the weight and the nature of the other proof."[130] In one New York Appellate Division case, the defendant took the stand during his trial for manslaughter.[131] He was improperly asked why he did not make a statement regarding his version of events prior to the trial.[132] On appeal, the prosecutor's acts were declared improper.[133] The conviction was overturned as the acts were not harmless and the defendant was deprived of a fair trial.[134] However, in another Appellate Division case, the prosecutor impeached the defendant by asking why he did not ask his friends to exonerate him at the police station after his arrest for allegedly stealing property.[135] During summation, the prosecutor informed the jury of the defendant's post-arrest silence.[136] The court did not overturn the conviction because the overwhelming evidence rendered the prosecutor's trial errors harmless.[137]

In New York, it would seem a prosecutor with a strong case can take improper steps for impeachment purposes and use the prejudicial silence card to cement and maintain high conviction rates. This would plausibly coincide with the United States Supreme Court's holding regarding the standard used to determine whether the impact of the prosecution's 'error' had a "substantial and injurious effect or influence" on a jury's verdict.[138] Therefore, it appears the possibility of a strong case getting overturned for impeachment errors is highly unlikely where guilt was overwhelmingly established through utilizing real evidence rather than conjecture.

III. CONCLUSION

Tucker's conviction was overturned and a new trial was

reasonable doubt").

130 *Id.* at 794.

131 People v. Livingston, 512 N.Y.S.2d 889, 890 (App. Div. 2d Dep't 1987).

132 *Id.*

133 *Id.*

134 *Id.*

135 People v. Materon, 716 N.Y.S.2d 313, 313 (App. Div. 2d Dep't 2000).

136 *Id.*

137 *Id.*

138 *Brecht*, 507 U.S. at 637-38.

granted.[139] In light of the Supreme Court's holding in *Thompkins*, it strongly appears Tucker waived his right to remain silent.[140] He expressly invoked his right to remain silent, but shortly afterwards said, "I was there, but I did not shoot anybody."[141] *Thompkins* held that a suspect who makes an uncoerced statement to police waives the right to remain silent.[142] Tucker was not coerced.[143] He spoke after he was told he was going to be charged with attempted murder.[144] Tucker appeared to understand his rights because he initially told the police he had nothing to say.[145] If he wanted to remain silent, then he simply could have done so. The right to remain silent can be waived by communicating a single word answer.[146] Thereafter, what was said can be used in court to impeach the defendant.[147] However, the New York Court of Appeals maintains there is such a thing as "effective silence."[148] The United States Supreme Court simply does not—there is either complete silence or there is waiver.[149] Therefore, anything Tucker said should have been allowed to be used against him for impeachment purpose.[150]

As the dissent indicated, the shooter's name was the ultimate issue in the case and this blatant name omission left Tucker's testimony open for impeachment purposes.[151] The appellate court could have addressed the omission issue differently by not downplaying the shooter's name in the analysis.[152] In custody, Tucker waived his right to remain silent as per *Thompkins*,[153] but the

139 *Tucker*, 929 N.Y.S.2d at 635.
140 *See Thompkins*, 130 S. Ct. at 2262-63.
141 *Tucker*, 929 N.Y.S.2d at 636 (Rivera, J., dissenting).
142 *Thompkins*, 130 S. Ct. at 2263.
143 *Tucker*, 929 N.Y.S.2d at 632-33 (majority opinion).
144 *Id.* at 633.
145 *Id.* at 632-33.
146 *Thompkins*, 130 S. Ct. at 2264.
147 *Harris*, 401 U.S. at 226.
148 *Savage*, 409 N.E.2d at 861-62 ("[T]he intent behind the privilege against self incrimination, exemplified by the supportive *Miranda* procedures it has spawned, is not to induce silence but only to insure that the choice to speak is free and uncompelled.").
149 *Thompkins*, 130 S. Ct. at 2264.
150 *Maerling*, 474 N.E.2d at 233.
151 *Tucker*, 929 N.Y.S.2d at 638 (Rivera, J., dissenting).
152 *Id.* at 635 (majority opinion).
153 *See Thompkins*, 130 S. Ct. at 2264.

omitted exculpatory information was only first presented at trial.[154] It appears his credibility could have been properly impeached.[155] However, the decision determining the unfairness of the defendant's impeachment during cross-examination ignored the recent *Thompkins* holding and instead allowed New York's concept of "effective silence" to prevail.[156]

The prosecutor made a trial error by ignoring the suppression hearing decision.[157] The mentioning of Tucker's post-arrest "silence" during summation was improper.[158] However, the defendant admitted to being at the crime scene during the time of the shooting.[159] After three other witnesses testified that he was the shooter, Tucker testified he was in the grainy video that captured the occurrence of the crime.[160] Tucker further claimed that the shooter was an individual named "Mustafa" and this statement may have divested him of the protections granted from the suppression hearing.[161] It is plausible Tucker attempted to incorrectly use his *Miranda* rights as a sword, rather than the shield such rights were designed to be, in protecting a suspect against self-incrimination.[162] The weight of circumstantial evidence in this matter could have been seen as substantial enough to render harmless the prosecutorial error made during summation.[163] In other words, the summation error could appear harmless against "the weight and the nature of the other proof."[164] However, despite these conceivable arguments, a new trial

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[154] *Tucker*, 929 N.Y.S.2d at 633.

[155] *Thompkins*, 130 S. Ct. at 2264; *see also Savage*, 409 N.E.2d at 861.

[156] *Tucker*, 929 N.Y.S.2d at 634-35; *see also Thompkins*, 130 S. Ct. at 2264; *Savage*, 409 N.E.2d at 861.

[157] *Tucker*, 929 N.Y.S.2d at 636 (Rivera, J., dissenting).

[158] *Id.* at 635 (majority opinion).

[159] *Id.* at 633.

[160] *Id.* at 635.

[161] *Id.* at 637 (Rivera, J., dissenting).

[162] *Tucker*, 929 N.Y.S.2d at 637.

[163] *Id.* at 638; *see also Crimmins*, 326 N.E.2d at 794.

[164] *See Crimmins*, 326 N.E.2d at 794.

> What is meant here, of course, is that the quantum and nature of proof, excising the error, are so logically compelling and therefore forceful in the particular case as to lead the appellate court to the conclusion that 'a jury composed of honest, well-intentioned, and reasonable men and women' on consideration of such evidence would almost certainly have convicted the defendant.

was warranted due to a "lack of overwhelming evidence of the defendant's guilt" and the highly prejudicial effect of referencing the defendant's post-arrest silence during the government's cross-examination and summation.[165]

The true point of contention is that the prosecution's multiple summation errors did much more than simply compound the government's cross-examination error.[166] Tucker's post-arrest statements were held not be used during the government's case-in-chief.[167] A prosecutor who repeatedly makes blatant comments referencing suppressed evidence during summation should simply suffer the consequences of a mistrial. Such an audacious disregard of Fifth Amendment rights should not be tolerated or held to be "harmless." When the law demands you are not to be given an inch, justice mandates severity when a yard is deliberately taken. We need to seriously consider the aggregate effect of such flagrant prosecutorial misconduct regarding one of our fundamental constitutional rights. After all, "[o]ur government is the potent, the omnipresent teacher . . . liberty demand[s] that government officials shall be subject[ ] to . . . rules of conduct . . . [and if those rules are disregarded] it [would] breed[ ] contempt for [the] law [and] invite[ ] every man to become a law unto himself; it [would] invite[ ] anarchy."[168]

Robert Mitchell[*]

Id.

[165] *Tucker*, 929 N.Y.S.2d at 635 (majority opinion).

[166] *Id.*

[167] *Id.* at 637 (Rivera, J., dissenting).

[168] *See Miranda*, 384 U.S. at 479-80.

[*] Associate Editor, *Touro Law Review*. J.D. Candidate, Touro Law Center, May 2013; B.S. Marketing, St. John's University. I would like to express my deepest gratitude to my family and friends for their devotion and support during my law school years, with particular thanks to my wonderful children. Special thanks to all the talented members of the *Touro Law Review*, especially and most importantly, Andrew Koster, for their excellent advice and assistance. I dedicate this article to my two children, Shane and Ava; thank you both for allowing me the privilege to re-live childhood through adult eyes. I love you both dearly and I am sincerely grateful for all the times we get to share and enjoy. I feel so fortunate that I am your father and you are my children. My fatherly advice is simple: work hard, never stop dreaming, discover love, walk in the light, and be strong. Stay young at heart and remain happy. God bless you both.