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## Self-Incrimination, Supreme Court, Appellate Division Second Department People v. Hendricks

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advise the witness to consult with an attorney. The jurisdictions are also consistent in deciding that it is proper to instruct a jury that a defense witness' refusal to answer questions on self-incrimination grounds during cross-examination may be considered in weighing the witness' credibility.

## SUPREME COURT, APPELLATE DIVISION

### SECOND DEPARTMENT

People v. Hendricks<sup>49</sup>

(decided August 19, 1996)

Defendant, John Hendricks, appealed his conviction of attempted rape and claimed that the trial court erred when it permitted the prosecution to introduce police testimony concerning an oral statement that the defendant allegedly made to the police because it violated his fundamental and basic constitutional right to remain silent.<sup>50</sup> The Appellate Division, Second Department, affirmed the decision of the trial court and held that, since the defendant never invoked his right to remain silent, the admission of Detective Kenneth Diehm's testimony did not constitute an improper reference to defendant's exercise of his privilege against self-incrimination.<sup>51</sup>

At trial, the prosecution presented the testimony of Detective Diehm who interviewed the defendant after his arrest on charges

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49. 222 A.D.2d 74, 646 N.Y.S.2d 845 (2d Dep't 1996).

50. U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part: "No person shall . . . be compelled in any criminal case to be a witness against himself." N.Y. CONST. art. I, § 6. Article I provides in pertinent part: "No person shall . . . be compelled in any criminal case to be a witness against himself."

51. *Hendricks*, 222 A.D.2d at 81, 646 N.Y.S.2d at 849.

of attempted rape of his live-in girlfriend.<sup>52</sup> The testimony included a question by the prosecutor to Detective Diehm regarding what he said to the defendant and what the defendant responded.<sup>53</sup> The detective testified that he told the defendant that he wanted to take a detailed statement as to what had transpired.<sup>54</sup> The defendant replied: "I'll talk to you, but I am not signing anything else."<sup>55</sup> Upon cross-examination of the defendant, the defendant testified that when Detective Diehm asked him if he wanted to read the *Miranda*<sup>56</sup> card and write a statement, he replied "I am not in a position to write a statement."<sup>57</sup>

On appeal, the defendant argued that the trial court erred in admitting Detective Diehm's testimony because it violated his constitutional right to remain silent.<sup>58</sup> The court disagreed with the defendant, finding that his argument "misapprehend[ed] both the nature and context of his statement as well as the applicable case law."<sup>59</sup>

A defendant has the constitutional right not to incriminate him or herself under both the United States Constitution and the New York State Constitution. In the landmark case of *Miranda v. Arizona*, the United States Supreme Court stated "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation and . . . the prosecution may not . . . use at trial the fact that he stood mute or claimed his privilege in the face of accusation."<sup>60</sup>

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52. *Id.* at 75, 646 N.Y.S.2d at 845-46.

53. *Id.* at 76, 646 N.Y.S.2d at 846.

54. *Id.* at 77, 646 N.Y.S.2d at 846.

55. *Id.*

56. *See* *Miranda v. Arizona*, 384 U.S. 436 (1966).

57. *Hendricks*, 222 A.D.2d at 77, 646 N.Y.S.2d at 847.

58. *Id.* at 77-78, 646 N.Y.S.2d at 847.

59. *Id.* at 78, 646 N.Y.S.2d at 847.

60. *Hendricks*, 222 A.D.2d at 77, 646 N.Y.S.2d at 847 (citing *Miranda v. Arizona*, 384 U.S. 436, 468 (1966)).

Likewise, in *Griffin v. California*,<sup>61</sup> the defendant was convicted of first degree murder.<sup>62</sup> During the trial, both the trial court and prosecutor made comments in reference to defendant's failure to testify.<sup>63</sup> The Supreme Court held that the comments made by the trial court and prosecutor in reference to the defendant's failure to testify constituted reversible error.<sup>64</sup> In reversing the defendant's convictions, the Supreme Court based its decision on the self-incrimination clause of the Fifth Amendment.<sup>65</sup> The Court stated that comment on a defendant's "refusal to testify is a remnant of the 'inquisitorial system of criminal justice' . . . which the Fifth Amendment outlaws."<sup>66</sup> The Court concluded by stating that "the Fifth Amendment, in its direct application to the Federal Government and in its bearing on the states by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."<sup>67</sup>

In *People v. Von Werne*,<sup>68</sup> the petitioner, Herbert Von Werne, was convicted of "two counts of criminal possession of stolen property in the second degree, illegal possession of a vehicle identification number plate and unauthorized use of a vehicle."<sup>69</sup> During the trial, a police officer was permitted to testify that the defendant had exercised his constitutional right to remain silent during police interrogation after initially answering questions.<sup>70</sup> The Court of Appeals for the Second Circuit reversed the appellate division and ordered a new trial holding that the admission of the defendant's election to exercise his right against self-incrimination was error.<sup>71</sup>

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61. 380 U.S. 609 (1965).

62. *Id.* at 609.

63. *Id.* at 609-11.

64. *Id.* at 613.

65. *Id.*

66. *Id.* at 614.

67. *Id.* at 615.

68. 41 N.Y.2d 584, 362 N.E.2d 982, 394 N.Y.S.2d 183 (1977).

69. *Id.* at 585, 362 N.E.2d at 983, 394 N.Y.S.2d at 185.

70. *Id.* at 587, 362 N.E.2d at 984, 394 N.Y.S.2d at 186.

71. *Id.* at 590, 362 N.E.2d at 986-987, 394 N.Y.S.2d at 188. The court in *Von Werne* stated "[t]he only apparent purpose of informing the jury that the

In the more recent case of *People v. Scalerico*,<sup>72</sup> evidence of defendant's initial request to give a written statement and subsequent refusal, was admitted into evidence.<sup>73</sup> The appellate division reversed, holding that the admission constituted reversible error.<sup>74</sup>

The *Hendricks* court distinguished the *Hendricks* case from both *Von Werne* and *Scalerico*. The court determined that, unlike those cases, the statement of the defendant refusing to sign a written statement was not made with the intent to end questioning.<sup>75</sup> Instead, the defendant had been advised of his *Miranda* rights and subsequently began talking.<sup>76</sup> The *Hendricks* court reasoned that this showed that the defendant failed to indicate an intent to exercise his Fifth Amendment rights.<sup>77</sup>

The *Hendricks* court cited *People v. Topping*,<sup>78</sup> where the defendant, after being advised of his *Miranda* rights, made detailed oral and written statements.<sup>79</sup> At trial, the defendant argued that his refusal to have his statements recorded consisted of an assertion of his Fifth Amendment rights.<sup>80</sup> However, the appellate division rejected the defendant's argument.<sup>81</sup>

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defendant had elected to remain silent during police interrogation is to permit them to infer consciousness of guilt. The use of such proof for this, its only purpose, is not permissible." *Id.* at 588, 362 N.E.2d at 985, 394 N.Y.S.2d at 186.

72. 140 A.D.2d 386, 388, 527 N.Y.S.2d 567, 569 (2d Dep't 1988) (finding that although the detective properly testified to the defendant's oral admissions, it was error to introduce testimony that the defendant initially agreed to give a written statement but later refused).

73. *Id.*

74. *Id.*

75. *Hendricks*, 222 A.D.2d at 80, 646 N.Y.S.2d at 849.

76. *Id.*

77. *Id.*

78. 74 A.D.2d 703, 426 N.Y.S.2d 116 (3d Dep't 1980).

79. *Id.* at 703, 426 N.Y.S.2d at 117.

80. *Id.*

81. *Id.*, 426 N.Y.S.2d at 117. The court stated that the "[d]efendant's mere refusal to have his statements recorded, when preceded by oral statements and followed by a written statement, can in no way be construed as an assertion of the right to remain silent." *Id.* at 703-04, 426 N.Y.S.2d at 117. See *People v. Sims*, 135 A.D.2d 591, 522 N.Y.S.2d 170 (2d Dep't

The *Hendricks* court found that, because the defendant John Hendricks never invoked his Fifth Amendment right to remain silent, his oral confession was thus properly admitted.<sup>82</sup> The court added that, even if the trial court had erred by permitting Detective Diehm to testify concerning the defendant's refusal to sign a written statement, such error would be deemed harmless.<sup>83</sup>

In sum, under both the Federal and New York Constitutions, a defendant in a criminal case has the right to refuse to incriminate himself or herself. Additionally, the assertion of a defendant's Fifth Amendment rights, after arrest, may not be used against him.

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1987). In *Sims*, the court rejected defendant's argument that his Fifth Amendment rights were violated when a detective testified that defendant refused to sign a confession after orally admitting to the crime. *Id.* at 592, 522 N.Y.S.2d at 172. The court stated that "[t]he defendant's oral confession had already been admitted in evidence as it was found that he had voluntarily waived his *Miranda* rights. His refusal to sign a written waiver does not, as a matter of law, preclude a finding of a waiver of those rights. *Id.*

82. *Hendricks*, 222 A.D.2d at 81, 646 N.Y.S.2d at 849.

83. *Id.*

