6.25 Impeachment by Silence

In a criminal proceeding when, before or after a defendant's arrest, the defendant is silent following a statement made to the defendant by a person the defendant knows to be a member of law enforcement, during the performance of his or her duties, the defendant's silence is not admissible as an admission or to impeach the defendant's testimony, except as provided in paragraphs (1) and (2).

(1) The silence of a defendant, who at the time was a law enforcement officer, in the face of an accusation of criminal conduct by a fellow officer is admissible if the defendant was under a duty to inform his or her superiors of his or her activities.

(2) A defendant who, prior to trial, makes a voluntary statement relating to the criminal transaction at issue and then provides testimony at a criminal proceeding with respect to that transaction may be impeached by the defendant's omission of critical details from the defendant's pretrial statement that would have been natural to include in that statement.

Note

This rule governs the admissibility in a criminal proceeding of a defendant's silence during police questioning. *See* Guide to NY Evidence rule 8.05 (Admission by Adopted Statement or Silence) in which this rule is incorporated.

Specifically, evidence of a criminal defendant's pre-arrest and post-arrest silence during police questioning may not be used in the People's direct case or for impeachment purposes, a rule derived from the State Constitution (*see e.g. People v De George*, 73 NY2d 614, 618 [1989] [pre-arrest silence]; *People v Von Werne*, 41 NY2d 584, 588 [1977] [post-arrest silence]; *People v Conyers*, 52 NY2d 454, 457 [1981] [post-arrest silence]).

In summing up New York law, the Court of Appeals has stated: "We hold, as a matter of state evidentiary law, that evidence of a defendant's selective silence generally may not be used by the People as part of their case-in-chief, either to allow the jury to infer the defendant's admission of guilt or to impeach the credibility of the defendant's version of events when the defendant has not testified" (*People v Williams*, 25 NY3d 185, 188 [2015]).

Subdivision (1) is derived from *People v Rothschild* (35 NY2d 355, 360-361 [1974] ["The natural consequences of his status as a law enforcement officer would require him to promptly report any bribe or attempted bribe to his superiors, and certainly protest and reveal such an alleged scheme after his arrest to them, and to his fellow officers as well"]); and *People v De George* (73 NY2d 614, 619 [1989] ["we affirmed the (*Rothschild*) conviction because under the circumstances, the evidence of silence had an unusually high probative value. The officer was under a duty to inform his superiors of his undercover activities and thus his continued silence in the face of direct accusations by his fellow officers was probative of guilt"]).

Subdivision (2) is derived from *People v Savage* (50 NY2d 673, 676 [1980] ["a defendant who, having been given the warnings required by *Miranda v Arizona* (384 US 436 [1966]) and having elected to waive his right to silence, proceeds to narrate the essential facts of his involvement in the crime, may be cross-examined about his failure to inform the police at that time of exculpatory circumstances to which he later testifies at trial"]); and *People v Chery* (28 NY3d 139, 142, 145 [2016] [it was permissible for "the People to use defendant's selective silence, while making a spontaneous postdetention statement to the police, to impeach his trial testimony," given that the "defendant elected to provide some explanation of what happened at the scene, and it was unnatural to have omitted the significantly more favorable version of events to which he testified at trial"]).