

[CAPTION]

MOTION TO EXCLUDE ANY REFERENCE TO DEFENDANT'S SILENCE

The Defendant, by counsel, moves this Court to enter an order requiring the State to (1) order any and all witnesses called by the State at trial to refrain from mentioning Defendant's silence during any questioning of him/her by law enforcement officials or any person or persons acting on the behalf of law enforcement officials; (2) refrain from questioning the Defendant or any witnesses called at trial by the defense concerning Defendant's silence during questioning; (3) and refrain from commenting in the presence of the jury on the fact that Defendant remained silent while questioned. In support of this Motion the Defendant states:

1. On [insert date], the State responded to the Defendant's Motion for Discovery. In the State's answer to Defendant's Motion for Discovery, the State claimed that Defendant made no statements to the police or to any law enforcement officials at any time concerning the offenses with which he/she is charged in this cause.

2. Defendant has reason to believe that the State intends to introduce at trial the fact of his/her silence when interrogated by law enforcement officials, contrary to his/her Fifth Amendment and Article I, Section 14 privilege against self-incrimination.

WHEREFORE, the Defendant respectfully requests this Court to enter an order requiring the State to:

- a. order any and all witnesses called by the State at trial to refrain from mentioning Defendant's silence during any questioning of him/her by any person or persons acting on their behalf;
- b. refrain from questioning the defendant or any witnesses called by the defense concerning Defendant's silence during any questioning of him/her

by law enforcement officials or by any persons or persons acting on their behalf; and

- c. refrain from commenting in the presence of the jury on the fact that the Defendant remained silent during questioning of him/her by law enforcement officials or any person or persons acting on their behalf.

(Signature)

REFERENCES

CASEBANK J.8.a; J.8.b; J.8.c; O.1.b

U.S. Constitution Amend. V, XIV

Indiana Constitution, Art. I, Section 14

CASE LAW

Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 48 L.Ed.2d 91 (1976) (it would be fundamentally unfair to allow the Defendant's silence to be used to impeach her explanation subsequently given at trial after the Defendant had been assured, by Miranda warnings, that her silence would carry no penalty).

Minnesota v. Murphy, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984) (privilege against self-incrimination not only permits a person to refuse to testify against himself at a criminal trial in which he is a Defendant, but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings).

Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982) (where the Defendant's silence is invoked after arrest but before Miranda warnings, his silence is admissible for impeachment purposes). See also Beach v. State, 512 N.E.2d 440 (Ind.Ct.App. 1987).

Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986) (use of Defendant's post-Miranda silence to rebut Defendant's claim of insanity violates due process); See also Wilson v. State, 514 N.E.2d 282 (Ind. 1987) (admission of testimony re Defendant's exercise of rights to remain silent and to consult with an attorney, presented as evidence of Defendant's sanity, constituted fundamental error).

Reynolds v. State, 797 N.E.2d 864 (Ind.Ct.App. 2003) (in attempted murder and burglary prosecution, State engaged in prosecutorial misconduct by commenting in closing argument about Defendant's invocation of Fifth Amendment at trial during cross examination; prosecutor's argument included direct and deliberate comment upon Defendant's exercise of his right against self incrimination and constituted fundamental error).

Cook v. State, 544 N.E.2d 1359, 1363 (Ind. 1989) (where the Defendant's silence is invoked after receiving Miranda warnings, the Defendant's silence may not be used to impeach his testimony at trial).

Pennycuff v. State, 745 N.E.2d 804 (Ind. 2001) (post-Miranda silence may only be used to rebut impression of cooperation, and use of silence cannot be an obvious reach beyond fair limits to impeach the Defendant's explanatory story as recent fabrication). But see Vitek v. State, 750 N.E.2d 346 (Ind. 2001); Wentz v. State, 766 N.E.2d 351 (Ind. 2002).

Robinette v. State, 741 N.E.2d 1162 (Ind. 2001) (despite the trial court giving a limiting instruction to disregard a videotaped statement, admission of the Defendant's four hour

interrogation during which she asserted her right to remain silent nearly fifty times was reversible error; the assertion of her right to remain silence cannot be used as proof of sanity).

Garrison v. State, 249 Ind. 206, 231 N.E.2d 243 (1967) (where the accused is in custody and accusations are made in his presence, he is under no duty to deny them and the failure to reply or respond to the accusations does not constitute an admission; this rule applies without regard to whether the person making the accusation is a law enforcement officer).

Teague v. State, 891 N.E.2d 1121, 1126 (Ind.Ct.App. 2008) (over Defendant's objection, State was permitted to ask him on cross-examination whether he had told his version of events to the police anytime since the arrest and leading up to trial; State can impeach Defendant at trial based on pre-arrest, pre-Miranda silence, but using a defendant's post-arrest, post-Miranda silence to impeach a story told for the first time at trial violates due process under Doyle v. Ohio, 426 U.S. 610 (1976)). See also Sobolewski v. State, 889 N.E.2d 849 (Ind.Ct.App. 2008).

Ludack v. State, 967 N.E.2d 41 (Ind.Ct.App. 2012) (Detective's comment that Defendant neither admitted nor denied allegations of child molesting and "just asked to stop speaking" did not violate Fifth Amendment right against compulsory self-incrimination resulting because it was defense counsel who first questioned the detective as to what Defendant did not say during the interview; Defendant opened the door to the testimony).