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New York Criminal Law Newsletter

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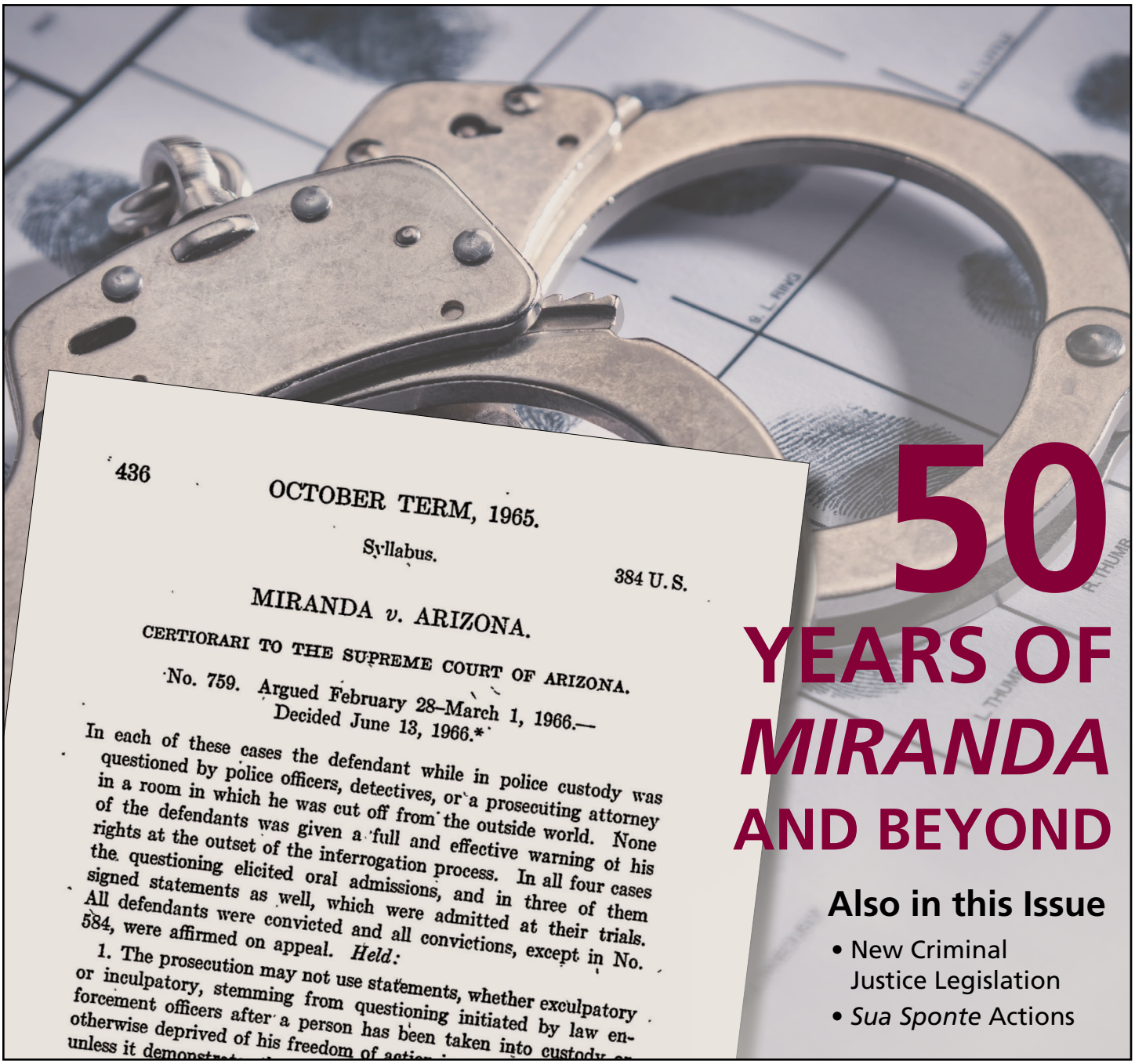

50 YEARS OF *MIRANDA* AND BEYOND

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Message from the Chair

The Internet and social media have created a whole new way and place where members of our society, particularly teenagers, can be accused of victimizing others or be victimized. Unfortunately, various social media sites encourage teenagers to act in ways that are criminal by glamorizing nudity and verbal disparagement of one another. Teenagers turn to social media for acceptance, compliments, self-confidence and socialization, but too often negative responses or improper posts lead to low self-esteem, depression, embarrassment and, frequently, criminal charges. A psychologist I know once likened taking a teenager's cellular phone away to removing his or her arm. Yet these are the very devices that land many teenagers in trouble with the criminal justice system.

Attorneys, especially those of us practicing in the area of criminal justice, are in a unique position to help teenagers from falling into the talons of sexual predators, becoming victims of cyber bullying, being subjected to allegations of being a cyber bully, or allegations of promoting child pornography. We can help by working to educate communities about which behaviors are problematic and potentially criminal. Of course, cyber bullying must be stopped or, at least, controlled and child pornography cannot be allowed. But, in this author's opinion, creating sex offenders or criminals out of teenagers, most of whom do not understand that their behavior is criminal, is not the answer.

In the criminal justice community and the legislature, there have been ongoing discussions and legislation proposed that would raise the age of criminal responsibility, allow sealing of some criminal convictions, and "ban the box," preventing employers from questioning a person's criminal background. These types of changes would be helpful to prevent lifetime damage to teenagers who misuse social media. However, we as practitioners, no matter on which side of the "well" we sit, know that these measures do not protect our youth from entering the criminal justice system. On a daily basis, law enforcement agents and prosecutors have to determine how to handle potential charges brought against teenagers for their behavior on social media. Defense attorneys find themselves representing teenagers who were simply acting within today's social norms, and judges are often deciding issues of law and dolling out sentences that will affect a young person's future. I believe, with the proper outreach, we can work together to limit the number of young people who become victims, clients and defendants of the social media era.

Educating our communities on these issues is one way to prevent teenagers from acting or being influenced to act. Informing the members of our communities that behavior, such as a teenage girl posting a nude photo on social media, or retaining such a photo on a cell phone, is actually criminal, can at least limit these behaviors. Further, anyone, whether adult, child or teen, should be made aware that disparaging another person via social media is cyber bullying and can also be criminal. They must know that this type of behavior can lead to horrific outcomes for the subjects of those comments or posts, which can include substance abuse, depression and suicide. These are only a few examples of the devastation teenagers using social media can inflict on one another and for which they can be held responsible.

The best answer sounds like the one often suggested in a health class: abstinence, but, as I noted above, we must face the reality of the prevalence of social media. So, the next best answer is education. As we all know, ignorance is not an excuse.

Sherry Levin Wallach

Message from the Editor

We are a varied and interesting Section. Our Section's *Newsletter* is ample evidence of the breadth of backgrounds, interests and concerns of our membership. Let's start with who we are. Last issue, we had two articles from law student members who have aspirations of careers in criminal justice. This current issue includes, among others, articles from a jurist, trial counsel, an appellate expert and an expert on search and seizure. We also have an intriguing article from Spiros Tsimbinos, this publication's former editor, about the status and future of our Court of Appeals.

The Section is concerned about the history, current status and future of criminal practice in New York and around the country, including, of course, the Supreme Court. *Miranda at Fifty and Beyond* is a great example of that perspective. This article, which will conclude in our next edition, tells the story of how the Supreme Court moved to the point where a decision protecting the rights of suspects was the result of various factors influencing the Court. One of the important lessons young criminal practitioners learn is how arguments build upon precedent. The *Miranda* case is a wonderful example of that concept. Many thanks to Edward L. Fiandach and Erinmarie Byrnes for this article.

Speaking of the Supreme Court, this issue has a discussion of Supreme Court cases, including some on the docket, that deserve close attention. We are a Section that must stay current with developments from the nation's highest court in order to protect the rights of clients. That, also, is why the article on the "Cuomo" Court of Appeals offers important insights. The Court of Appeals is comprised of an interesting and experienced group of judges and each year that panel has the opportunity to shape criminal practice and procedure in New York. Thanks again to Spiros Tsimbinos for these perspectives.

Of course, our Legislature also influences criminal justice issues. Barry Kamins, a regular contributor on this subject, provides us with an article about new legislation. It is informative about laws that impact many aspects of criminal practice, ranging from the processing of evidence to penal statutes (including those relating to boats) and parole matters. Many of our members will be very interested in the discussion of defense funding.

Addressing financial matters, Roger Bennet Adler has written an important piece about federal forfeiture and restitution on defendants' retirement funds. His discussion about the state of the law and a recent decision in this area offers fair warning to those who represent criminal defendants in prosecutions of federal financial crimes.

"Fair warning" is clearly a key takeaway from Judge John J. Brunetti's article about *sua sponte* rulings. While the other articles address influences on criminal practitioners, this article offers practical advice about how a judge may enter the fray in circumstances beyond the traditional "sustained" and "overruled" realm.

As I mentioned at the outset, these articles reveal the breadth of our Section and the knowledge that our members possess. But we cannot forget the commitment of our members to the overall welfare of those impacted by criminal justice. In this regard, I'd like to give a quick salute to Rick Collins, who provided an article in our Fall issue concerning the status of our Section's efforts to have the Legislature pass sealing legislation. Rick, a founding member of Collins Gann McCloskey and Barry PLLC, is widely known as an internationally recognized legal authority on the non-medical use/abuse of anabolic steroids and other performance-enhancing substances. Notwithstanding his national practice, Rick has taken the time to contribute to this publication and to the Executive Committee of our Section. Rick's dedication is emblematic of the spirit of many in the Criminal Justice Section.

Jay Shapiro

Miranda at Fifty and Beyond (Part I)

By Edward L. Fiandach and Erinmarie Byrnes

Since it was handed down on June 13th, 1966, *Miranda v. Arizona*[1] has occupied a position which is truly unique. More than any of the monumental decisions which were decided by the Warren Court in the area of criminal law, *Miranda* stands paramount as undoubtedly the case best known, not only by practitioners, but by the public as well. Furthermore, *Miranda*, despite the passage of fifty years, has yet to show any signs of fading. In the last decade alone, *Miranda* was cited 22,800 times as opposed to a mere 7,889 times in the decade following its decision. Nor has time dimmed the efforts of those who seek to limit what they perceive to be *Miranda*'s unholy reach. Thirty-four years after its decision, the United States Supreme Court in *United States v. Dickerson*[2] turned aside what was unquestionably a challenge by Congress to supersede the holding by statute in the Federal Courts.

This article will discuss important historical and legal features underlying *Miranda.* The first part will describe the historical background of criminal admissions and the slow transition from reliability to voluntariness as the means through which those statements of defendants were to be judged. We will then turn to *Gideon v. Wainwright,*[3] *Malloy v. Hogan*[4] and *Escobedo v. Illinois*[5] to discuss the recognition of those rights, the waiver of which the *Miranda* Court found must be based upon a meaningful advisement. In the next issue, we will turn to the manner in which *Miranda* got to the Court, the origin of the famous fivefold warning and whether Chief Justice Earl Warren's "special assignment" achieved all that the eminent jurist had sought. Lastly, as we make recommendations concerning its continued viability, we will argue that the *Miranda* decision was a Constitutional compromise that attempted, but did not insure, the protection of those interrogated by the police, and in the long run has only served to eviscerate the Constitutional protections promulgated by the Supreme Court up and until its decision.

Background: Reliability, Due Process and Voluntariness

Three Constitutional provisions regulate the receipt of admissions in a criminal trial, the self-incrimination clause,[6] and the Due Process clauses found in both the Fifth[7] and Fourteenth Amendments.[8] Despite the seemingly obvious applicability of the self-incrimination clause, it did not serve as the initial battleground in the dispute over just what circumstances would allow the receipt of admissions or confessions[9] at trial. In large part, this was undoubtedly because the "self-incrimination clause" of the Fifth Amendment[10] was not binding upon the states until 1964.[11] While this standard would have been available to invalidate confessions obtained in Federal cases, to do so would have required the Court to utilize dramatically different standards and to depart from a rich vein created by the English common law[12] that seemed to adequately respond to the most pressing need—the need to determine whether the statement had been coerced.[13] Accordingly, in *Hopt v. Utah,*[14] the Court embarked on its earliest voluntariness analysis, extensively discussed the English precedents, and concluded that the question to be answered was whether the actions of law enforcement were such that the presumption against falsely implicating one's self "ceases."[15]

Modern constitutional analysis of confessions first appears in *Bram v. United States*.[16] *Bram* was a capital case involving a murder upon a seagoing American vessel. In *Bram*, the United States Supreme Court, without rationale or elaboration, suddenly declared:

> In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the constitution of the United States commanding that no person "shall be compelled in any criminal case to be a witness against himself."[17]

The Court immediately found "traditional" voluntariness, outright coercion, to be the applicable standard. In doing so, it set a standard that would not see full fruition for almost 100 years:

> The legal principle by which the admissibility of the confession of an accused person is to be determined is expressed in the text-books. * * * But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.[18]

Arguably, the juxtaposition of these two statements could mean that the Court considered the voluntariness standard to fall under the self-incrimination clause. This is not an implausible conclusion in that it means that the clause, which was derived from a maxim well known to the Framers, "nemo tenetur seipsum accusare,"[19] was being interpreted as embracing the longstanding concept of voluntariness which was founded in free will.[20] Such was not to be, however, as the Court quickly retreated from the Fifth Amendment as well as the newly minted Fourteenth Amendment and its Due Process clause.[21] This occurrence was probably inevitable. The self-incrimination clause would not be binding upon the states until the decision of the Court in *Malloy v. Hogan* in 1963. Hence, utilization of this clause in Federal cases to determine voluntariness

would have mandated the need for two parallel means of analysis founded upon two distinctly different constitutional amendments.

Maintaining strong allegiance with the English precedents, the Court nevertheless undertook the need for an examination of the inherent reliability of any statement made against the penal motives of the maker as a fundamental assumption. The essential rationale at this point was that any hope of reliability would be presumed to vanish in those situations where the will of the declarant has been overborne by some form of duress. Under a Due Process analysis, the quintessential question to be answered will ultimately become the quantum of duress that must be shown to permit the court to hold that the will of the declarant has been overborne. As noted above, the *Bram* Court seemed to set a very high bar, observing that the confession "must not be extracted by *any* sort of threats or violence, nor obtained by *any* direct or implied promises, *however slight*, nor by the exertion of *any* improper influence."[22] If fully applied this would have led to a virtual *per se* rule of Constitutional inadmissibility where any form of influence was applied during the course of questioning. Such a result, of course, never achieved credence with the Court.[23] Nevertheless, and with surprisingly little citation, the use of the adjective "any" would have the slow and incalculable effect of subtly shifting the debate from the circumstances of the interrogation to an examination of the effect those circumstances had upon the defendant.

At the outset, early American voluntariness cases often dealt with the obvious; horrific examples of brutality. In *Ziang Sung Wan v. United States,* for instance,[24] the defendant was suffering from spastic colitis, a painful gastrointestinal condition, and was bedridden for one week. He was questioned continuously for 13 days without medical attention. He ultimately gave five statements, the first of which was given after seven days of nearly constant interrogation. His conviction for the murder in the District of Columbia was reversed under the voluntariness standard described in *Bram*.[25]

As a federal case, *Ziang Sung Wan* clearly fell within the purview of the Fifth Amendment. State cases, prior to the Court's decision in *Mapp v. Ohio*,[26] did not present this opportunity.[27] Nonetheless, the factual climate of the various cases that were rapidly making their way to the Court cried out for some sort of relief notwithstanding the general unavailability of the Bill of Rights.[28] The first state court case arose under what may broadly be characterized as a mandatory humanitarian command involving a confession made under draconian conditions was *Brown v. Mississippi*.[29] Under any circumstance, *Brown* was a case that was simply too hot *not* to handle. A capital case, the defendants ultimately confessed following multiple whippings, a hanging, threats and other forms of horrific abuse[30] which forced the Court to declare that "the rack and the torture chamber may not be substituted for the witness stand."[31] It also presented a unique situation in that since the Fifth Amendment was not yet binding upon the states,[32] *Bram* was not available and resort had to be to the Fourteenth Amendment. In the well-known decision, the Court held that the process employed by the State of Mississippi in securing the confessions served to deny the defendants of *any* aspect of Due Process of Law.

With *Brown* establishing the outer parameter of what would commonly be known as the Due Process[33] voluntariness test, the next two decades would see the Court move closer to the Fifth Amendment as espoused in *Bram*.[34] In so doing, the Court's focus would inexorably shift from an examination of the statement's reliability to the motivation on the part of the Defendant to make the statement. This progression ultimately led to an analysis of whether the decision to testify against one's self was "free and voluntary."[35] In *Lisenda v. California,*[36] for example, the Court, although affirming the conviction and sentence of death, observed that the demeanor of the Petitioner "negat[ed] the view that he had so lost his freedom of action that the statements made were not his but were the result of the deprivation of his free choice to admit, to deny, or to refuse to answer."[37]

By 1949, the transition from the venerable English precedents and reliability of the statement was rendered complete. In *Watts v. Indiana*,[38] the Petitioner was interrogated by a succession of officers, deprived of food and kept in inhuman conditions. Even so, and unlike *Brown*, the reversal of the conviction did not turn on the improbable reliability of the statement. Instead, the Court chose to expand the position first seen in *Lisenda* and concluded that, as a result of the inhuman techniques, the Petitioner's will *and hence his opposition to confession* had been broken:

> A confession by which life becomes forfeit must be the expression of free choice. A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal. * * * To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of Due Process.[39]

By 1953, the division between common law reliability, which was based upon an examination of the probable truthfulness of the statement, and the newer Due Process approach, which examined the forces that lay beneath the Defendant's decision to confess, was complete. In *Stein v. New York*,[40] the Court declared, "[w]hen [physical violence] was present, there is no need to weigh or measure its effects on the will of the individual victim." Thus under

such circumstances, the Court was bound to apply what was virtually a "*per se*" Due Process standard.[41] On the other hand, when the interrogation techniques fell short of physical violence, the Court would assess the situation under a "totality of the circumstances" Due Process analysis.[42] When one recognizes that the fact pattern in *Watts* and numerous other cases was amenable to examination under *either* standard, the unworkability of the then current methodology becomes apparent. At this point, it is evident that time was running out on the increasingly difficult task of categorizing all questions concerning interrogation techniques under a single Due Process label.

In 1959, the Court decided *Spano v. New York*.[43] Given its unique set of factual circumstances, *Spano* starkly demonstrated the difficulties inherent in attempting to maintain dogmatic reliance upon the Due Process clause. In *Spano*, the authorities utilized a childhood friend who had become a police officer to play upon the suspect's emotional instability and eventually obtained a confession. While the Court ultimately decided the case on the issue of voluntariness, equally compelling was that *Spano* was an indicted defendant who had surrendered himself with his retained attorney and thereafter was denied counsel. Nevertheless, the Court was three years and two votes from *Gideon v. Wainwright*.[44] With limited options at its disposal, the Court was forced to once again expand[45] its Due Process analysis to hold the confession involuntary. Finding it unnecessary to reach the issue of right to counsel, in *Spano* we see a complete abandonment of reliability as a basis for examination:

> We conclude that petitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused after considering all the facts in their post-indictment setting. Here a grand jury had already found sufficient cause to require petitioner to face trial on a charge of first-degree murder, and the police had an eyewitness to the shooting. The police were not therefore merely trying to solve a crime, or even to absolve a suspect. They were rather concerned primarily with securing a statement from defendant on which they could convict him.[46]

"Given its unique set of factual circumstances, Spano *starkly demonstrated the difficulties inherent in attempting to maintain dogmatic reliance upon the Due Process clause."*

Waiver

The Fifth Amendment commands that no person shall "be compelled to testify against himself." To compel is "to force or constrain to do something."[47] Categorically, none of the Due Process cases saw a defendant being literally compelled to give testimony against him or herself *at trial*. Nevertheless, each case bore the common thread of a confession, obtained by agents of the state in a custodial setting, being offered as evidence in a criminal trial. Despite the rather draconian factual situations presented in some of the petitions decided under the rubric of Due Process, in each case the proponent of the statement would have to assert that the privilege against self-incrimination had somehow been waived.

"The term *waiver* is one of those words of indefinite connotation in which our legal literature abounds; like a cloak, it covers a multitude of sins."[48] Nevertheless, when discussing waiver in the context of criminal admissions, we are not without guidance. In *Johnson v. Zerbst*,[49] the Petitioner was convicted of passing counterfeit money. He was tried and convicted in a proceeding at which he represented himself. The central issue in *Johnson* was whether the Petitioner waived the right to have counsel present at his trial. Commencing by recognizing that the presumption is against waiver and that a waiver could not be presumed, Justice Black proceeded to define a "waiver" as "an intentional relinquishment or abandonment of a known right or privilege."[50] Further, the Court found that if on remand the District Court did not find that the Petitioner "competently and intelligently waive[d] his right to counsel, * * * the trial court did not have jurisdiction to proceed to judgment and conviction[.]"[51]

It is therefore clear beyond question that on the eve of *Miranda*, abandonment of a Constitutionally protected trial right must not only be "voluntary," but must be based upon a knowing relinquishment of the right being waived.

The Foundation Trilogy: *Gideon, Malloy* and *Escobedo*

I. *Gideon v. Wainwright*

By 1963 and the decision in *Spano,* the Fourteenth Amendment Due Process analysis had been stretched to the breaking point. By and large, this was due to the fact that situations now confronting the Court commonly included Sixth Amendment right to counsel issues.[52] Further, the inclusion in *Spano* of the denial of counsel as a factor in the Court's Due Process analysis additionally served to blur the virtually indiscernible boundary between Due Process, voluntariness, and the right to counsel. With the dawning of a new decade, it was only a matter of time be-

fore the Court would be forced to address the panoply of issues that the right to counsel entailed.

The first indication of change came in the rather unlikely form of a *pro se* petition for a *writ of certiorari.*[53] Clarence Earl Gideon was charged with breaking into a pool room with intent to commit a misdemeanor, which, rather ironically, was a felony under Florida law. Before his trial, he requested counsel.[54] His request was denied. Proceeding *pro se,* he was convicted and sentenced to five years in the state penitentiary.

The issue which the Court sought to dispose of in what became *Gideon v. Wainwright*[55] was two-fold. Initially, there was the question of whether the Sixth Amendment's declaration that "[i]n all criminal prosecutions, the accused shall enjoy * * * the Assistance of Counsel for his defense" was binding upon the states through the operation of the Fourteenth Amendment. Assuming that it was, the inquiry remained as to whether, by the same authority, an indigent defendant in a state court criminal prosecution is entitled to the appointment of counsel. Previously, in *Betts v. Brady*,[56] the Court had refused to make the Sixth Amendment's right to counsel binding upon the states on the theory that such a right was not historically recognized as a fundamental right.

The *Gideon* Court, of course, overruled *Betts* and answered both questions in the affirmative. From March 18, 1963 onward, the right to appointed counsel would be a fundamental constitutional right binding upon the states, the waiver of which could be found only in a knowing and intelligent relinquishment.[57]

II. *Malloy v. Hogan*

William Malloy was arrested during a gambling raid in 1959. He pleaded guilty to the Connecticut crime of pool selling, a misdemeanor, and was sentenced to one year in jail and fined $500. His sentence was suspended after 90 days, and he was placed on two years' probation. About 16 months after his guilty plea, he was ordered to testify before a referee appointed by the Superior Court of Hartford County to conduct an inquiry into alleged gambling and other criminal activities in the county. He refused, was adjudged in contempt of court, and sentenced to prison until he was willing to answer the proffered questions. His petition for a *writ of habeas corpus* was denied by the Superior Court and the Connecticut Supreme Court of Errors affirmed.[58] *Certiorari* was granted and before the Supreme Court and the issue was clear: in *Malloy v. Hogan*[59] the Court was asked whether the Fourteenth Amendment incorporated and therefore guaranteed the Petitioner the protection of the Fifth Amendment's privilege against self-incrimination.

Holding that the guarantee was binding upon the states, the Court attempted to set a deep historical basis for its decision, noting that incorporation had begun as early as 1897.[60] It also took the unusual step of pointing out that ten justices of the Court had favored complete incorporation of the first eight amendments.[61] In essence, the decision melded together the Due Process considerations discussed above with the Court's recent decision in *Mapp v. Ohio*[62] and rejected the long-standing position that the Fourth, Fifth and Sixth Amendments were Federal evidentiary considerations available to the states only in a "watered down" fashion.[63]

Foretelling their positions in *Miranda*, *Malloy* sparked scathing dissents from Justices Harlan, Clark, White and Stewart. Nevertheless, time would render their opinions little more than historical footnotes. From June 15, 1964 onward, the Fifth Amendment's protection against self-incrimination would be a fundamental constitutional right binding upon the states, the waiver of which could only be found in a knowing and intelligent relinquishment.[64]

III. *Escobedo v. Illinois*

Up to this point, the Court had protected the trial and the naked imposition of compelled self-incrimination. The final member of the incorporation trilogy was the pre-trial right to counsel, which also came to be during that amazing spring of 1964. In *Escobedo v. Illinois*,[65] Benedict DiGerlando, a witness who was already in custody, told the police that the Danny Escobedo had fired the fatal shots in a homicide. That evening, the police arrested Escobedo and his sister and brought them to the police station for questioning. When he was told by the police that they had a good case against him, Escobedo, a 22-year-old Mexican-American, said he wanted a lawyer. Shortly after Escobedo reached the police station, his retained lawyer arrived and requested permission to see his client. Told by the homicide detective that he could not, he eventually went to the Chief of Police and even filed a complaint with the Police Commissioner, all to no avail.

Despite the fact that Escobedo continued requests to speak to his lawyer, whom he had actually seen at the police station, he remained without counsel. A Spanish speaking officer, who grew up in Escobedo's neighborhood, informed Escobedo that if he implicated DiGerlando in the killing, he and his sister could go home. The police then arranged for Escobedo and DiGerlando to meet. During the confrontation, Escobedo stated: "'I didn't shoot Manuel, you did it." Based upon this initial inculpatory statement, the detectives continued to question Escobedo, who later made additional statements that implicated him in the murder for which he was ultimately convicted.

The issue in *Escobedo*, as framed by the Court, was:

> [W]hether . . . the refusal by the police to honor petitioner's request to consult with his lawyer during the course of an interrogation constitutes a denial of "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as made obligatory upon the States by the Fourteenth Amendment.[66]

Gideon,[67] of course, had previously determined that in all criminal prosecutions the accused shall enjoy the right to counsel. The crucial difference between *Gideon* and *Escobedo*, however, lies in the facts. Gideon requested counsel *for his trial*. Escobedo, on the other hand, requested counsel *while in custody*. In holding that Escobedo was indeed entitled to counsel at this critical stage, the Court emphasized an inherent truism. Unless a suspect's right to counsel is protected in whatever pre-trial examinations are sought by the state, "the most illustrious counsel"[68] would be of little use. As articulated by Justice Goldberg:

> In *Gideon v. Wainwright*, we held that every person accused of a crime, whether state or federal, is entitled to a lawyer at trial. The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation; and the "right to use counsel at the formal trial (would be) a very hollow thing (if), for all practical purposes, the conviction is already assured by pretrial examination."[69]

Accordingly, the Court held that such interrogations do fall within the grasp of the newly strengthened and incorporated Sixth Amendment. In so doing, however, the Court leaped beyond the mere incorporation seen in *Malloy* and *Gideon* and foreshadowed the eventual holding of *Miranda v. Arizona*.[70] Along with extending the Sixth Amendment to custodial interrogation, the Court called for an advisement of the right to remain silent:

> [w]here, * * * the suspect has requested and been denied an opportunity to consult with his lawyer, *and the police have not effectively warned him of his absolute constitutional right to remain silent*, the accused has been denied "The Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment," and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.[71]

While waiver sees only brief discussion by the majority in a footnote to the opinion,[72] on the first day of summer in 1964, it was clear that waiver of counsel in a custodial setting had joined waiver of counsel at trial, and abandoned the Fifth Amendment's protection against self-incrimination in requiring a "knowing and intelligent relinquishment."[73]

Endnotes

1 Miranda v. Arizona, 384 U.S. 436 (1966).

2 United States v. Dickerson, 530 U.S. 428 (2000).

3 Gideon v. Wainwright, 372 U.S. 335 (1963).

4 Malloy v. Hogan, 378 U.S. 1 (1964).

5 Escobedo v. Illinois, 378 U.S. 478 (1964).

6 U.S. Const Amend. 5, cl. 3.

7 U.S. Const Amend. 5, cl. 4.

8 U.S. Const Amend. 14, § 1.

9 While the terms "admission" and "confession" share many common attributes, the most obvious being the fact that they are utterances against the penal interest of the defendant, they are not the same. For our purposes, admissions are statements, generally oral, in which a criminal defendant describes activity constituting at least one element of a criminal act. Confessions are likewise admissions to the extent that they describe criminal activity of the defendant, but acknowledge or admit every element of the crime charged. Given that the primary focus of custodial interrogation is to derive inculpatory statements constituting both admissions *and* confessions, the convention employed in balance of this article will be to use the narrower term, "confessions."

10 US Const Amend. 5, cl. 3.

11 Malloy v. Hogan, 378 U.S. 1 (1964)

12 *See*, e.g., Regina v. Baldry, 2 Denison, 430; Regina v. Moore, 169 Eng. Rep. 608, 2 Den.C.C. 522 (Ct. Crim. App.1852); Regina v. Garner, 169 Eng. Rep. 267, 1 Den.C.C. 329 (Ct. Crim. App. 1848); Cass' Case (1784) 1 Leach, 293; Rex v. Thompson (1783) 1 Leach (4th Ed.) 291; Rex v. Griffin (1809) Russ. & R. 151; Reg. v. Cheverton (1862) 2 Falc. & F. 833; Reg. v. Thompson [1893] 2 Q. B. 12; [citations collected in Hopt v. Utah, 110 U.S. 574, 584 (1884)].

13 *See*, King v. Warickshall, 1 Leach, 263 (1783) ["A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected."]. *See, also*, Hawkins' Pleas of the Crown (6th Ed., by Leach, published in 1787, bk. 2, c. 31, § 2):

> And where a person upon his arraignment actually confesses he is guilty, or unadvisedly discloses the special manner of the fact, supposing that it doth not amount to felony where it doth, yet the judges, upon probable circumstances, that such confession may proceed from fear, menace, or duress, or from weakness or ignorance, may refuse to record such confession, and suffer the party to plead not guilty.

14 Hopt v. Utah, 110 U.S. 574, 584 (1884).

15 *Id*. at 585.

16 Bram v. United States, 168 U.S. 532 (1897).

17 168 U.S. at 543.

18 168 U.S. at 542–43, quoting, 3 Russ. Crimes (6th Ed.) 478.

19 "No man is bound to accuse himself."

20 Grano, J. (1979). *Voluntariness, Free Will, and the Law of Confessions*. Virginia Law Review, 65(5), 859-945. doi:1. Retrieved from http://www.jstor.org/stable/1072509.

21 *See*, Ziang Sung Wan v. United States, 266 U.S. 1 (1924). Surprising as it may seem, the source of voluntariness in Federal cases remained in controversy as late as 1951 when, in United States v. Carignan, 342 U.S. 36 (1951), the Court questioned whether receipt of an admission was to be governed under the Fifth Amendment's self incrimination clause or a generic rule, presumably under Due Process, that coerced confessions are untrustworthy (342 U.S. at 41).

22 Bram v. United States, 168 U.S. 532 (1897), at 542-43 [*emphasis* supplied herein].

23 *See, e.g.*, Corker v. California, 357 U.S. 433 (1958).

24 Ziang Sung Wan v. United States, 266 U.S. 1 (1924).

25 *Id*. at 4. "But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise." 266 U.S. at 14–15.

26 Mapp v. Ohio, 367 U.S. 643 (1961).

27 Barron v. City of Baltimore, 32 U.S. 243 (1833) had previously held that the Fifth Amendment was binding solely upon the Federal government. Notwithstanding enactment of the Fourteenth Amendment, that doctrine was continued largely as a result of the Court's decision in United States v. Cruikshank, 92 U.S. 542 (1875).

28 *Id.*

39 Brown v. Mississippi, 297 U.S. 278 (1936).

30 The record actually established that at least one defendant appeared in court with ligature marks about his neck. 297 U.S. at 281.

31 297 U.S. 278, at 286.

32 *See* note 26, *supra*.

33 Any doubt as to whether the voluntariness test employed by the Court in *Brown* and later cases was rooted in the Due Process clause of the 14th Amendment was firmly erased by the Court in Chambers v. Florida, 309 U.S. 227 (1940). Likewise, when the Court cataloged its Due Process holdings in Watts v. Indiana, 338 U.S. 49 (1949) it described Brown as a "[c]onfession . . . found to be procured under circumstances violative of the Due Process Clause[.]".

34 The majority of these decisions would deal with state matters as the passage of Rule 5(a) of the Federal Rules of Criminal Procedure, and the Court's effectuation of that Rule in McNabb v. United States, 318 U.S. 332 (1943) would largely obviate Federal Fifth Amendment concerns (*see*, Miranda v. Arizona, at 464).

35 *Compare*, Brown v. Mississippi, *supra*, Chambers v. Florida, *supra.*, and Rogers v. Richmond, 365 U.S. 534 (1961) [Confession set aside "not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system."].

36 Lisenba v. California, 314 U.S. 219 (1941).

37 314 U.S. at 241

38 *Supra*.

39 Watts v. Indiana, 338 U.S. 49 (1949), at p. 53–54.

40 Stein v. New York 346 U.S. 156 (1953), *ovrld* by Jackson v. Denno, 378 U.S. 368, 84 (1964).

41 *Id.*

42 *See,* Haynes v. Washington, 373 U.S. 503 (1964).

43 Spano v. New York, 360 U.S. 315 (1959).

44 Gideon v. Wainwright, 372 U.S. 335 (1963).

45 The Court explicitly disputed that *Spano v. New York* somehow expanded its previous Due Process holdings by citing *Malinski v. New York*, 324 U.S. 401 (1945) for the proposition that it had "reversed a conviction on facts less compelling than these." In *Malinski v. New York* the defendant was taken to a hotel room where he was stripped and kept naked for approximately three hours after which he was allowed to put on his shoes, socks and underwear. Malinski claimed to have been beaten, a fact which was denied by the police. There was no visible sign of any beating, such as bruises or scars; and Malinski made no complaint to the judge on arraignment nor to the jail authorities where he was later held (324 U.S. at 402). Whether Malinski was "less compelling" than *Spano* is debatable. In any event, it seems that the Court in Spano, like Shakespeare's lady, "doth protest too much, me thinks" (Hamlet, Act 3, scene 3).

46 Spano v. New York, 360 U.S. 315 (1959) at 323–24 [internal citations omitted].

47 Webster's New World College Dictionary, 4th Ed., 2000.

48 William R. Anson, Principles of the Law of Contract 419 (Arthur L. Corbin ed., 3d Am. ed. 1919).

49 Johnson v. Zerbst, 304 U.S. 458 (1938).

50 *Id.*, at 465.

51 *Id.*, at 469.

52 *See,* e.g., Haynes v. Washington, 373 U.S. 503 (1963).

53 Gideon v. Cochran, 370 U.S. 908 (1962).

54 Despite his lack of legal training, Gideon's request could not have been better framed:

THE DEFENDANT: The United States Supreme Court says I am entitled to be represented by Counsel. 372 U.S. 335 (1963).

55 Gideon v. Wainwright, 372 U.S. 335 (1963).

56 Betts v. Brady, 316 U.S. 455 (1942), *ovrld by* Gideon v. Wainwright, 372 U.S. 335 (1963).

57 Johnson v. Zerbst, 304 U.S. 458 (1938).

58 Malloy v. Hogan, 187 A.2d 744 (1963), *judgement rev'd,* Malloy v. Hogan 378 U.S. 1 (1964). Ironically, the Connecticut court noted that Malloy had not properly invoked the privilege against self incrimination that was available to him under the Connecticut constitution.

59 Malloy v. Hogan, 378 U.S. 1 (1964).

60 Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226 (1897) which held that the Due Process Clause requires the States to pay just compensation for private property taken for public use.

61 Malloy v. Hogan, 378 U.S. 1 (1964), at n.2.

62 Mapp v. Ohio, 367 U.S. 643 (1961). In Mapp, the Court determined that the Fourth Amendment was binding upon the states through the operation of the Fourteenth Amendment.

63 Malloy v. Hogan, 378 U.S. 1 (1964), at 10.

64 Johnson v. Zerbst, 304 U.S. 458 (1938).

65 Escobedo v. Illinois, 378 U.S. 478 (1964).

66 Escobedo v. Illinois, 378 U.S. 478 (1964) at 479.

67 Gideon v. Wainwright, 372 U.S. 335 (1963).

68 378 U.S. at 488.

69 Escobedo v. Illinois, 378 U.S. 487, *quoting In re* Groban, 352 U.S. 330 (Black J., dissenting).

70 Miranda v. Arizona, 384 U.S. 436 (1966).

71 378 U.S. at 490–91 (*emphasis* supplied herein).

72 378 U.S. at 490, n.14.

73 Johnson v. Zerbst, 304 U.S. 458 (1938).

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New Criminal Justice Legislation

By Hon. Barry Kamins

This article discusses new criminal justice legislation signed into law by Governor Andrew Cuomo amending the Penal Law, Criminal Procedure Law and other related statutes. The discussion that follows will primarily highlight key provisions of the new laws and as such the reader should review the legislation for specific details. In some instances, where indicated, legislation enacted by both houses is awaiting the Governor's signature and, of course, the reader must check to determine whether a bill is signed or vetoed by the Governor.

There were two substantive pieces of criminal justice legislation enacted in the last session. The first shifts the costs of indigent defense services from individual counties to the State. In compliance with the mandate of *Gideon v. Wainwright*,[1] New York State originally required each county to fund the costs of providing indigent defendants the right to counsel. The results were uneven and dependent upon a particular county's ability or inability to properly fund the program.

In 2006, the State Commission on the Future of Indigent Defense Services examined the county-based system and concluded that there is "a crises in the delivery of defense services to the indigent throughout New York State and that the right to effective assistance of counsel. . .is not being provided to a large portion of those entitled to it."[2] It was determined that counties have no system for, among other things, supervising caseloads, the quality of representation or ensuring that every person is represented by an attorney at arraignment.

The proposed legislation[3] transfers all costs to the State in phases over the next seven years. It builds on a 2014 settlement in which the State agreed to settle a class action lawsuit[4] that accused the state of failing to provide adequate representation to indigent defendants in five counties (Suffolk, Washington, Ontario, Onondaga and Schuyler). The settlement committed the State to pay for improved services to indigent defense systems in those counties, but it did not address New York's other 57 counties.

Under the new legislation, effective April 1, 2017, the State would first take over 25% of the indigent defense costs and increase its contribution until it assumed 100% of the costs in 2023.

The bill also gives the Indigent Legal Services Office the authority to promulgate rules and regulations that will ensure the presence of counsel at arraignment, establish caseload and workload standards, and improve the quality of representation. In general, the legislation would eliminate disparities in funding and quality of public defense among counties.

A second and related substantive piece of legislation would support efforts to standardize indigent defense services in New York. The proposed legislation[5] requires the Chief Administrative Judge to establish off-hours arraignment parts in each county outside New York City. This will ensure that defendants are provided counsel at arraignment. The legislation also removes any jurisdictional impediments that would prevent the creation of these courts. Thus, for example, a justice elected in a town or village at one end of a county can now arraign a defendant in a locality at the other end of the county.[6]

"Under the new legislation, effective April 1, 2017, the State would first take over 25% of the indigent defense costs and increase its contribution until it assumed 100% of the costs in 2023."

Each year, the Legislature has amended the definition of certain crimes and increased penalties for others, and this year was no exception. First, the Legislature amended the definition of a gravity knife. Over the last 13 years, 60,000 New Yorkers were arrested for possession of a gravity knife, making this one of the most prosecuted crimes.

A gravity knife is defined as "any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device."[7] The knife was originally designed for use by paratroopers in World War II who needed to cut themselves free from a parachute that had become tangled in a tree or other obstruction. The knife could be opened by using only one hand; the user pointed the knife downward and the blade became free from the force of gravity and the flick of the wrist.

The law has been criticized as being too broad in that it has been enforced against large groups of individuals who use these knives every day as part of their trade. Law enforcement officials, however, caution that these knives present a threat to safety and that there are many alternative instruments that can be used by tradespeople, including the widely used utility knife with a half-inch blade and the standard folding knife.

The legislation amends the definition of a gravity knife and a switch blade knife by clarifying that they do not include knives that have a mechanism "designed to create a bias toward closure" and which require exertion by hand, wrist or arm to overcome the "bias toward closure" in order to open the knife.[8]

The Legislature also added the machete to the list of dangerous instruments that are unlawful to possess when they are possessed with the intent to use unlawfully against another.[9]

A new law increases the penalty for assaulting three classes of individuals: process servers; employees of a public utility; and transit employees who clean trains and bus terminals. Simple assaults against these individuals will now elevate a misdemeanor charge to a class D felony.[10]

The Legislature has enacted a new law which links driving while intoxicated crimes to boating while intoxicated offenses. The bill seeks to punish those intoxicated boaters who have a record of alcohol-related automobile incidents. The legislation was named after a young woman in upstate New York who was killed in 2006 while traveling as a passenger in a boat operated by an intoxicated person. The boat operator had a record of alcohol-related automobile incidents but under the law could only be charged as if this were his first alcohol-related boating incident. The legislation requires a sentencing judge in a boating case "to consider" past DWI offenses as follows: when sentencing for a boating offense carrying a 30-day sentence, a court must consider any prior driving convictions within the past five years. When sentencing for a boating offense carrying a 180 day sentence, the court must consider any driving convictions within the past ten years.[11]

A new law removes ioflupane from the list of controlled substances. Ioflupane is the active ingredient in DaTscan, the agent used by physicians to differentiate between Parkinsonian syndromes and other neurological symptoms. Because of the substance's unique ability and the minuscule amount used, it was determined that it should be removed from the controlled substance list so that it may be more widely available for treatment.[12]

Finally, cities within Orange County were given the ability to increase the penalty for certain fireworks offenses; "sparkling devices" can be included under the definition of "fireworks" and given more aggressive treatment.[13] Orange County is close to Pennsylvania, where many more firework devices are legal.

The Legislature enacted a number of new crimes in the last session. A new law seeks to protect young girls from the harmful practice known as female genital mutilation (FGM). FGM is a 5,000-year-old harmful cultural practice that consists of procedures performed on the female genitalia without a medical purpose. It is prevalent among communities of different religious backgrounds and is, among many groups, performed to preserve a girl's virginity, control her sexuality, or is a prerequisite to marriage.

Although the practice has been unlawful in this state for 19 years, individuals have avoided prosecutions by sending female children overseas during school vacations as part of a trip to expose girls to the customs of their ancestral homelands. The new legislation creates a new crime, Facilitating Female Genital Mutilation,[14] making it a class A misdemeanor to intentionally assist in subjecting a girl to FGM knowing that a person intends to subject the girl to this practice.

The Legislature has enacted a comprehensive new law to regulate combative sports in the state.[15] The New York State Athletic Commission will now regulate traditional fighting (professional boxing and wrestling) as well as mixed martial arts, *i.e.*, a combination of kickboxing, wrestling and judo.

Several new crimes were enacted that relate to the combative sports. It is now a class A misdemeanor to knowingly advance or profit from a combative sport conducted outside the supervision of the Commission; the penalty is increased to a class E felony if one has been convicted within the past five (5) years of this crime. In addition, the law creates unclassified misdemeanors for the following acts: conducting a combative sport without a license; participating in a combative sport as a referee, judge, matchmaker, timekeeper, manager, or trainer without a license or promoting a wrestling match without a license.

Finally, the Legislature has come to the aid of New Yorkers who have found it exceedingly difficult to purchase tickets for concerts and shows because events have sold out quickly. It is now a class A misdemeanor for a person or entity to sell or offer to sell a ticket that has been obtained through the use of ticket purchasing software that allows a single buyer to purchase hundreds of tickets at one time. The use of this software, known as bots, has now been criminalized as it pertains to ticket purchasing.[16]

A number of procedural changes were enacted in the last legislative session. First, a new law provides a trial court with discretion to grant poor person status for assignment of appellate counsel at the time of sentence. This will streamline the delivery of indigent services and, in the event the trial court denies the application, a defendant would still have the option of making an application to an appellate court.[17]

The Legislature has enacted a measure which seeks to curb "organized retail theft crime" which is defined as a larceny of retail merchandise in quantities that would not normally be purchased for personal use or consumption for the purpose of reentering such merchandise in com-

merce. This crime can be prosecuted in any county where the defendant committed at least one such crime as part of the scheme as long as the county is contiguous to at least one other county in which one or more of the crimes was committed.[18]

Two new laws will impact the judicial diversion program. One prohibits a court from conditioning participation in the program on the use of a specific brand of medication.[19] The other allows courts to permit an eligible defendant to participate in the program near his or her home; previously, participation in diversion programs was limited to treatment programs offered in the court jurisdictions where offenders were charged.[20]

In an effort to ensure that rape kits are processed more efficiently, the Legislature has enacted a law that sets specific time limits (10 days) by which a law enforcement agency must submit sexual offense evidence kits to an appropriate forensic laboratory; the laboratory will then have 90 days to submit its report.[21] In addition, every law enforcement agency must submit, within 180 days of the effective date of this law, any sexual offense evidence kit in its custody that was collected prior to the effective date of the law; labs must process those kits within 120 days of receipt of the kits.

Finally, under a new law, the four federal district courts in New York will have access to lists of citizens (New York tax filers, unemployment insurance recipients and recipients of public assistance) that were previously unavailable for purposes of selecting potentially qualified jurors.[22] Previously federal administrators were granted access under state law only to lists of registered voters and licensed drivers.

A number of new laws will affect sex offenders. Volunteer ambulance companies and ambulance services must now screen applicants who wish to be EMTs or paramedics to determine if they are registered sex offenders. In the event they are found to be on the registry, the companies must then determine whether a person is eligible for the position.[23] In addition, a sex offender must now register all of his or her residences[24] and the Division of Criminal Justice Services must notify local law enforcement no more than 48 hours after a sex offender has had a change of address.[25]

A number of new laws will affect prisoners. One bill strengthens the prohibition of the use of restraints on pregnant women who are being transported to the place where they will give birth.[26] Next, when an inmate dies in a state correctional facility, the State Commission of Correction will now be required to notify next of kin and provide a death certificate.[27]

With regard to parole boards, a qualified interpreter must now be provided to inmates who appear before the Board and who speak English as a second language, or who do not speak English at all.[28] In addition, appeal decisions by the Board must now be posted on a website within 60 days of its determination.[29] Finally, a victim's statement to the Board shall have no expiration date and will remain on file for future parole hearings.[30]

The New York City Council has enacted the Criminal Justice Reform Act which will affect the prosecution of low-level quality-of-life offenses in the city. With respect to these offenses, *e.g.*, open container of alcohol, public urination, littering and public park offenses, the Council determined that, except for limited circumstances, civil rather than criminal enforcement should be utilized. Thus police officers now have the discretion to issue a "civil summons" instead of a criminal summons. In addition, the new law reduces the amount of criminal fines and creates a series of civil penalties for these offenses.[31]

The ultimate impact of the legislation will depend upon the extent to which police officers, in their discretion, decide to issue civil summonses instead of the traditional criminal summons. By next year, the Police Department must make public new guidelines which provide guidance to uniformed officers on whether civil enforcement or criminal enforcement should be utilized.

"A sex offender must now register all of his or her residences and the Division of Criminal Justice Services must notify local law enforcement no more than 48 hours after a sex offender has had a change of address."

Endnotes

1. *Gideon v. Wainwright*, 372 U.S. 335 (1963).
2. Report of the Commission on the Future of Indigent Services (June 18, 2006), at 15.
3. A. 10706, awaiting the Governor's signature.
4. *Hunell-Harring v. New York*, 15 N.Y.3d 8 (2010).
5. A. 10360, awaiting the Governor's signature.
6. *See also* S. 6849, S. 6088 and S. 7469 authorizing various local facilities to be used for arraignments (all awaiting the Governor's signature).
7. Penal Law §265.00(5).
8. A. 9042, awaiting the Governor's signature.
9. L. 2016, Ch. 269 (amending Penal Law §265.01), eff. Aug. 19, 2016.
10. L. 2016, Ch. 268 (amending Penal Law §120.05), eff. Nov. 1, 2016; L. 2016, Ch. 267 (amending Penal Law §120.05), eff. Nov. 1, 2016; L. 2016, Ch. 281 (amending Penal Law §120.05), eff. Nov. 1, 2016).

11. L. 2016, Ch. 239 (amending Navigation Law §49-a), eff. Nov. 1, 2016.
12. L. 2016, Ch. 244 (amending PHL §3306), eff. Aug. 18, 2016.
13. A. 9455, awaiting the Governor's signature.
14. L. 2016, Ch. 49 (adding Penal Law §260.22), eff. Sept. 6, 2016.
15. L. 2016, Ch. 32 (adding GBL, Article 41), eff. Sept. 1, 2016.
16. A. 10713, awaiting the Governor's signature. The law relating to the resale of tickets was extended for another year, until June 20, 2017 (L.2016, Ch. 34, eff. May 14, 2016).
17. A. 9522, awaiting the Governor's signature.
18. L. 2016, Ch. 63 (amending CPL 20.40), eff. Nov. 1. 2016.
19. L. 2016, Ch. 67 (amending CPL 216.05), eff. June 22, 2016.
20. L. 2016, Ch. 315 (amending CPL 216.05), eff. Sept. 9, 2016.
21. S. 8117, awaiting the Governor's signature.
22. L. 2016, Ch. 284 (amending Labor Law §537, Tax Law §697, and Social Service Law §20), eff. Aug. 24, 2016.
23. S. 5542, awaiting the Governor's signature.
24. A. 1819, awaiting the Governor's signature.
25. A. 9239, awaiting the Governor's signature.
26. L. 2016, Ch. 17 (amending Corrections Law §611), eff. May 21, 2016.
27. A. 7500, awaiting the Governor's signature; and L. 2016, Ch. 323 (amending PHL 4174), eff. Dec. 8, 2016.
28. S. 992, awaiting the Governor's signature.
29. S.6806, awaiting the Governor's signature.
30. L. 2016, Ch. 130 (amending Executive Law §259-i), eff. Oct. 19, 2016.
31. Local Laws 70, 71, 74 and 75; the effective dates of significant provisions are June 13, 2017, June 13, 2017, July 13, 2016 and Aug. 12, 2016, respectively.

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Sua Sponte Action by Criminal Trial Judges: A Surprising Body of Case Law

By Judge John J. Brunetti

The Court of Appeals once said that a "trial judge is something more than a mere automaton."[1] Yet, some trial judges are perceived by some trial lawyers as "butt-inskies." Paul Newman, playing attorney Frank Galvin, captured that sentiment in *The Verdict* when he lamented: "Judge, if you are going to try my case for me, I wish you wouldn't lose it!" In real life, when a judge acts *sua sponte*, she or he may appear to be helping (or harming) one side or the other. Yet, time and again, a variety of *sua sponte* actions of a trial judge have been approved by the Appellate Division or Court of Appeals. This article will discuss those *sua sponte* actions of a trial judge, with one important disclaimer: by no means is the author endorsing the use of all of them.

By way of introduction, the following *sua sponte* actions by a criminal court trial judge have been approved:

Sua sponte Ordering the Closure of the Courtroom.[2]

Sua sponte Raising a *Batson* Issue.[3]

Sua sponte Advising a Witness of the Right Against Self Incrimination and the Two Contradictory Sworn Statements Rule.[4]

Sua sponte Advising a Witness of the Penalties of Perjury and Suggesting Review of Prior Statements.[5]

Sua sponte Inquiring of a Witness as to Whether He Has Been Threatened.[6]

Sua sponte Discharging Jurors Who Say They Cannot Be Fair.[7]

Sua sponte Raising Rape Trauma Syndrome Outside the Jury's Presence.[8]

Sua sponte Interrupting an Improper Summation.[9]

Sua sponte Interrupting an Improper Cross-Examination.[10]

Sua sponte Objecting.[11]

Sua sponte Requesting Further Proof from the People on an Issue at a Suppression Hearing.[12]

Sua sponte Raising an Additional Ground for Suppression.[13]

Sua sponte Questioning Defense Counsel's Actions Where a Colorable Claim of Ineffective Assistance May Be Developing Right Before the Judge's Eyes.[14]

If the above summary is not surprising enough, consider that the Court of Appeals has recognized the possibility that a judge may properly call his/her own witness during a criminal jury trial, over the objection of a party, in "unusual circumstances in which a court feels compelled to do so."[15]

In some cases, the court's efforts are directed at reining in a lawyer who is pushing the limits of advocacy. For example, in *People v. Overlee,* cited above, where the prosecutor was said to have employed sarcasm, and made a reference to "Lorena Bobbitt, who had achieved a measure of notoriety by mutilating her husband…., the comments, concededly sarcastic, amounted to fair questioning as to the details of defendant's testimony….the court, *sua sponte,* admonished the prosecutor that it was improper and instructed the jury to disregard it."

Returning to Frank Galvin's lamentation, when it comes to *sua sponte* questioning during direct and cross-examination, there are three authorized purposes for such action, two of which make sense, but one of which may seem at odds with our adversary system: [1] clarification of testimony for the jury; [2] facilitation of the orderly progression of a trial; and [3] raising matters on the court's own initiative in order to elicit significant facts. This doctrine is based, in part, on a 1957 decree by the Court of Appeals that reads: "a trial Judge in criminal matters may take an active part in the examination of witnesses where questioning is necessary to elicit significant facts, to clarify or enlighten an issue or merely to facilitate the orderly and expeditious progress of the trial."[16] That decree has evolved to the point where a trial court "clearly 'is permitted to raise matters on its own initiative in order to elicit significant facts.'"[17] Appellate courts will tolerate even more intrusion when the proceeding is a bench trial[18] or when the witness the judge is questioning is an expert."[19]

The following sentences, which appear one after the other in a single paragraph of a Second Department case,[20] say it all. They are followed by a comment from Frank Galvin, Esq.

> "The Trial Judge interrogated all of the witnesses at length. Most of his questioning was for the purpose of clarifying testimony. The remainder was to elicit significant facts or to facilitate the orderly and expeditious progress of the trial, and, therefore, was proper." *Frank's Comment:* A judge is authorized to question every single witness at length?
>
> "Although a Trial Judge should proceed with caution on his prerogative to question witnesses, in this instance his con-

duct did not deprive defendant of a fair trial. The Trial Judge did not indicate disbelief of witnesses or convey to the jury that he believed defendant was guilty." *Frank's Comment:* This is the only restriction?

"His frequent interruptions elicited evidence favorable to the defendant as well as to the prosecution." *Frank's Comment:* Oh, so if the judge tries both sides' cases, that's O.K.?

"Counsel for both sides generally acquiesced in this questioning." *Frank's comment:* Acquiesced? You saw what happened to me when I complained!

"As the Court of Appeals noted in that case, '[t]he role of the Trial Judge is neither that of automaton nor advocate.'"

After reading the above-quoted passages, trial lawyers like Frank Galvin might find some solace in knowing that the Court of Appeals once rebuked a trial judge for asking more than 1,300 questions during a trial,[21] but probably not that much solace. Still, as the Court of Appeals noted in that case, "[t]he role of the Trial Judge is neither that of automaton nor advocate." It is that middle ground that represents the delicate balance that must be achieved.

Endnotes

1. People v. Ohanian, 245 N.Y. 227, 232 (1927).
2. People v. Hok Ming Chan, 230 A.D.2d 165 (1st Dep't 1997), *aff'd sub nom.* People v. Ming Li, 91 N.Y.2d 913 (1998); People v. Jones, 47 N.Y.2d 409 (1979).
3. People v. Nelson, 214 A.D.2d 411 (1st Dep't 1995).
4. People v. Green, 74 A.D.3d 1899 (4th Dep't 2010).
5. People v. West, 210 A.D.2d 147 (1st Dep't 1994).
6. People v. Gamble, 248 A.D.2d 896 (3d Dep't 1998).
7. People v. Anderson, 48 A.D.3d 825 (2d Dep't 2008); People v. Owens, 136 A.D.3d 841 (2d Dep't 2016).
8. People v. Glover, 185 A.D.2d 458 (3d Dep't 1992).
9. People v. Meggett, 192 A.D.2d 468 (1st Dep't 1993); People v. Casanova, 119 A.D.3d 976 (3d Dep't 2014).
10. People v. Overlee, 236 A.D.2d 133, 142 (1st Dep't 1997); People v. Gardner, 27 A.D.3d 482 (2d Dep't 2006) ("In any event, even assuming the prosecutor's remarks were improper, the trial court's prompt, sua sponte, curative instruction minimized any possible prejudice arising from the prosecutor's remarks.").
11. People v. Knapper, 230 A.D. 487 (1st Dep't 1930) ("In general, the learned trial court found it necessary to take an active part in the trial in order to exclude incompetent, inadmissible testimony, to compel responsive answers, to exclude testimony volunteered, to clear up obscure testimony, and to facilitate the orderly progress of the trial. But if in any instance the remarks of the court should be considered as bordering on the unfair, this is more than offset by the charge of the court to the jury, where the court carefully and at great length explained the reasons for action upon his part and instructed the jury that it should not be construed by them as denoting any opinion on the part of the court as to how the case should be decided.").
12. People v. McRae, 284 A.D.2d 657 (3d Dep't 2001).
13. People v. Rice, 309 A.D.2d 1078 (3d Dep't 2003) ("During the *Wade/ Huntley* hearing, Supreme Court, sua sponte, informed the parties that an issue had been implicated as to whether defendant's arrest was illegal.").
14. People v. Wilson, 133 A.D.2d 179 (2d Dep't 1987) ("As the trial progressed, however, and the nature of counsel's representation became apparent, the court, *sua sponte,* repeatedly questioned the wisdom of the defense counsel's decision to eschew reliance upon expert testimony, stating at one point that "'I want to make sure [the defendant] is adequately represented.' Counsel replied that the defendant's own testimony 'will raise the issue of psychiatric soundness sufficiently.' On more than one occasion counsel informed the court that neither he nor anyone from his office had asked the defendant to undergo any psychiatric examination…. Subsequently, the trial court expressed its concern, again *sua sponte,* when it realized that counsel was about to commence his examination of the defendant without having reviewed the report prepared by the People's examining psychiatrist. It was only at the court's insistence that counsel agreed to review the document prior to his examination of the defendant.").
15. People v. Arnold, 98 N.Y.2d 63, 68 (2002).
16. People v. Mendes, 3 N.Y.2d 120 (1957).
17. People v. Robinson, 123 A.D.3d 1224 (3d 2014).
18. People v. Gilbert, 103 A.D.2d 967 (3d Dep't 1984) ("Similarly unavailing is defendant's contention that the trial court denied her a fair trial by assuming the prosecutor's role in questioning her medical experts. In this nonjury trial, the risk of prejudicing the jury by this behavior was nonexistent. The court, through its questions, was attempting to ascertain whether the witnesses could offer opinions as to the ultimate issue in the case—defendant's mental condition on May 7, 1982. Since it is the duty of the trial court to clarify issues and develop significant facts, the court's questioning of defendant's witnesses in this case was entirely proper.").
19. People v. Gonzalez, 228 A.D.2d 340 (1st Dep't 1996) (question of expert by judge was necessary "to assist the jurors in comprehending matters of specialized knowledge").
20. People v. Limage, 57 A.D.2d 906 (2d Dep't 1977), *aff'd*, 45 N.Y.2d 845 (1978).
21. People v. Yut Wai Tom, 53 N.Y.2d 44 (1981).

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"The Cuomo Court"

An Analysis of the Voting Patterns of the Judges of the New York Court of Appeals with Regard to Criminal Law Cases

By Spiros Tsimbinos

The Cuomo Court

Beginning in 2013 and continuing up to the present date, Governor Cuomo has had the opportunity to appoint six of the seven judges currently sitting on the Court. In a few months, due to the mandatory retirement of Judge Pigott, the last of the Pataki appointees, which will become effective as of December 31, 2016, Governor Cuomo will make his seventh selection and the Court will consist entirely of his appointees. In this regard, he will have had a dramatic and long-term impact on the future direction of the Court and the decisions that flow therefrom.

In making his appointments, the Governor has utilized two main goals. He has sought to move the Court further to the liberal or left side and he has sought to make the Court more diverse. Of the six appointments already made, four are woman, two are Hispanic and one is Black. In terms of geographical diversity, three of his appointments have been from the City of New York, two are from Upstate, and one is from Westchester. In terms of political affiliation, five have been Democrats and one has been a Republican.

The Governor's Appointments

His first appointment, Judge Rivera, is a liberal Democrat law professor who replaced another liberal Democrat, Judge Ciparick. With this appointment, Governor Cuomo also replaced one Hispanic member with another Hispanic. Judge Rivera, however, has turned out to be more liberal than Judge Ciparick and is currently viewed as the most liberal member of the Court. In terms of criminal cases, with regard to 42 decisions we reviewed which were issued from March 26, 2016 to July 1, 2016, she voted with the defense 33% of the time, the highest pro-defense rating on the Court.

The Governor's second appointment is Judge Abdus-Salaam, a Democrat to replace Judge Jones, also a Democrat. Judge Abdus-Salaam, however, has turned out to be more of a centrist and with regard to criminal cases supported the defense 18% of the time, a rate equal to that of the Court as a whole. For example, in a significant 4-3 decision involving the issue of confrontation, *People v. John*, Judge Abdus-Salaam voted with Judge Garcia and Judge Pigott in dissent and in favor of the prosecution.

It was with regard to the Court's next two appointments that Governor Cuomo shifted the Court heavily to the left. Rather than re-appoint Republican Conservative Judge Graffeo, a Pataki appointee who was a well-regarded jurist, he selected Judge Leslie Stein, a liberal Democrat, and gave as one of his reasons her positions on certain social and political issues. His next appointment replaced Republican Conservative Robert S. Smith, also a Pataki appointee, with a liberal Democrat, Eugene Fahey. Both of these appointments replaced reliably conservative votes with reliably liberal positions, with Judge Fahey in particular being viewed as quite liberal and largely pro-defense with a voting record in favor of the defense 25% of the time, second only to Judge Rivera.

With the appointment of Chief Judge DiFiore in December 2015 to replace Chief Judge Lippman, Governor Cuomo restored a jurist from an Italian-American background to the Court in keeping with his goal of diversity on the Court. He tempered, however, his movement to a more liberal Court by selecting more of a centrist to replace the more liberal and defense-minded Judge Lippman. Chief Judge DiFiore has in fact taken a more middle-of-the road approach with regard to criminal law decisions. Influenced perhaps by her former position as District Attorney of Westchester County and her prior election to the Westchester Supreme Court as a Republican, she has voted for the defense only about 17% of the time.

With regard to his most recent appointment, Governor Cuomo had been under increasing pressure to appoint a Republican to the Court following his refusal to reappoint Judge Graffeo. His critics argued that his stated goal of diversity should include political diversity and that a Court consisting solely of Democrats was not a good thing. It was even rumored that Republican Senate leaders had threatened to block or delay the confirmation of Chief Judge DiFiore unless the Governor appointed a Republican to fill the seat of Judge Read, which she had vacated in August of 2015. Thus, on January 21, 2016, in a somewhat surprising move, Governor Cuomo announced his appointment of Michael Garcia, a Republican, a Hispanic and a former prosecutor.

From our analysis of the 42 criminal law decisions, it is clear that Judge Garcia is presently the most conservative member of the Court and has voted for the defense only 4 times out of 42 cases, for a pro-defense rating of 9.5% and a pro-prosecution rating of 90.5%. Judge Garcia most strongly advocated the pro-prosecution position in *People v. John*, decided in April 2016. There, he issued a vigorous dissent in the 4-3 ruling which declared that under confrontation principles enunciated by the United

States Supreme Court in the *Crawford* line of cases, prosecutors must produce forensic experts with requisite personal knowledge of how DNA samples are handled when that evidence is used against a criminal defendant. Judge Garcia, in his dissenting opinion, joined in by Judges Pigott and Abdus-Salaam, characterized the majority view as being logically inconsistent and predicted that the decision will be burdensome for prosecutors.

Judge Pigott, the last Pataki appointee, who was appointed in 2006, has basically been a moderate Republican who on several occasions would side with the defense. In the 42 criminal law cases we reviewed, he supported the defense 12% of the time, somewhat more often than Judge Garcia but less than the appointees who were Democrats.

Governor Cuomo by December 1, 2016 will be presented with a list from the Judicial Nominating Commission from which he would make his final selection. Speculation is high that the Governor would select Stephen Younger, former President of the New York State Bar Association, as his final choice. It is expected that Mr. Younger will be on the new list since he has been on the list of potential nominees with respect to past appointments. He is a Democrat from Upstate New York and he would be a logical candidate to replace Judge Pigott. We await developments on the Governor's final selection.

The Future Direction of the Court

It is without question that the Governor, after having made his final selection, has basically accomplished his goals of moving the Court further to the liberal side and increasing the diversity of the Court. The Court will have a majority of women members. Before making his first selection, the Court had four Republicans and three Democrats. It appears certain that when the Governor makes his final selection, the Court will have six Democrats and only one Republican. Minority groups will also have significant representation with two Hispanics and one black member.

Criminal lawyers who may be arguing a criminal law case where the issue is close should probably approach their oral argument from the standpoint that at least two of the judges, to wit, Judge Rivera and Judge Fahey, would tend to be pro-defense and on their side. From the point of view of the prosecution, it appears that they could usually count on Judge Garcia as a pro-prosecution vote. The three centrist judges, comprised of Judges Abdus-Salaam, Judge Stein and Chief Judge DiFiore, will continue to occupy an important role as the swing votes on the Court. The views of the Governor's new and final appointee remain to be ascertained.

When Governor Cuomo finally leaves office, it appears that his most enduring legacy will be the complete reshaping of the Court because of his appointment of all seven judges. The oldest judge presently sitting on the Court is 64 years of age. Thus, all of them will be able to serve a significant portion of their 14-year terms. Long after he has left office their decisions will have important impacts on the lives of New Yorkers and the judges' decisions and actions can be directly attributable to the Governor who appointed them. There is no doubt that the present Court of Appeals wears the label as "the Cuomo Court."

Spiros Tsimbinos is the former editor of the *New York Criminal Justice Section Newsletter* and a recognized expert on New York Criminal Law and related subjects.

The Restitution Conflict Revisited—Does the MVRA Trump ERISA?

By Roger Bennet Adler

Back in 2008, this writer wrote an initial *Newsletter* article addressing the emerging conflict between the federal restitution statute (18 U.S.C. § 3613), and state pension laws and private pensions (i.e., 401Ks and I.R.A.s) from which criminal forfeiture and restitution payments could be appropriately levied upon.

On August 17, 2016, a panel of the United States Court of Appeals for the Second Circuit took a decisive step supporting such prosecutorial initiatives when in *United States v. Stevenson*, __ F.3d __ [2d Cir. 2016, Dock # 14-1862-cr), it upheld a forfeiture order by Chief United States District Judge Loretta Preska against contributions made by former Bronx County State Assemblyman Eric Stevenson, pursuant to the "New York State Retirement and Social Security Law" Section 516-517, and Article V Section 7[1] of the New York State Constitution. At issue, as framed by Circuit Judge Christopher Droney, was whether contributions made by Stevenson (D–Bronx), a former assemblyman (who had contributed but *not* vested in New York State's retirement system), were subject to levy by the United States Attorney's Office to satisfy a forfeiture award.

One month later, a panel of the Second Circuit in *United States v. Larry Seabrook*, __Fed Appdx.__ [2d Cir. 2016] in a summary order affirmed a forfeiture order of New York City Councilman Larry Seabrook's New York City pension. Seabrook's counsel noted Seabrook had assigned receipt of his pension payments to a third party. Relying, however, on *Stevenson*, the Court upheld levying on the government pension as a "substitute asset."

Citing to the United States Constitution's "supremacy clause" (Article VI, Clause 2), the panel concluded that the United States Constitution "trumped" both state laws and constitutional protections, at least as applicable to a pension plan contributor who had *not vested* and whose retirement payments had not begun to be received.

The panel relied upon *inter alia* Senior Circuit Judge Hall's opinion in *United States v. Bollin*, 264 F. 3d 391, 422-424 [4th Cir. 2001], which rejected the defendant's reliance upon a Georgia statute (Georgia Code Sec. 18-4-22) limiting garnishment to 25% in a defendant's Individual Retirement Account (IRA). However, Judge Droney's panel opinion puzzlingly failed to discuss the "anti-alienation" provisions afforded by the ERISA Statute (29 U.S.C. § 1056(d)(1),[2] or a 2006 panel decision by the late Judge Cardamone in *United States v. Irving*, 452 F.3d 110, 126 [2d Cir. 2006].

In *Irving*, the issue was whether a fine imposed on a convicted defendant could be satisfied from retirement funds. Circuit Judge Cardamone both recognized and discussed the conflict between the restitution statute (18 U.S.C. § 3613) and ERISA "anti-alienation" provisions. Judge Cardamone relied primarily on lower court authority from the District Court (*United States v. James*, 312 F. Supp. 2d 802, 806 [E.D. Va. 2004]), and ruled in favor of the Government.

Here in the Second Circuit, the conflict between the two statutes: (1) Mandatory Victims Restitution Act (M.V.R.A.), and (2) ERISA (29 U.S.C. § 1056(d)(11) initially arose in *United States v. Irving*, 452 F. 3d 126 [2d Cir. 2006].

In *Irving*, the Panel, in a decision authored by Judge Cardamone, dealt with a *fine* and the applicability of the ERISA anti-alienation provisions. Judge Cardamone recognized the conflict between the MVRA and ERISA and, noting that the MVRA was enacted subsequent to the ERISA statute, and primarily relying upon out of circuit, lower court authority (*United States v. James*, 312 F. Supp. 2d 802, 806 [E.D.Va 2004]) held for the Government.

James involved a guilty plea to a charge of theft of government funds (18 U.S.C. § 666). District Judge Ellis sentenced Mr. James to one year in prison based upon a loss of $202,000, and court-ordered restitution of $93,000 to be paid in monthly installments of $150, following his release from prison. Thus, the first anti-alienation case involved restitution to a government entity—The National Science Foundation.

The Ninth Circuit confronted the statutory conflict in *United States v. Novak*, 476 F.3d 1041 [9th Cir. 2007]. In *Novak*, the majority opinion by Circuit Judge Marsha Berzon was confronted with an appeal by a defendant who had pleaded both to conspiracy to transport stolen goods (18 U.S.C. § 371) stolen from the Nestle Food Company, and filing false tax returns (26 U.S.C. § 7206[1]). He was sentenced by the Court to serve a 24-month term of imprisonment, and pay in excess of $3 million in restitution.

When it was ascertained that Novak had been employed by, and was covered by the May Department Store retirement plans, both the initial panel decision (441 F.3d 819), and the recently published *en banc* majority, held that the retirement plans were the appropriate subject of garnishment to pay the restitution award imposed by the sentencing court. Judge Berzon and her majority recognized the existing "apparent tension" between the two statutes. Nonetheless, the Court found that the recent MVRA amendment trumped ERISA. It placed heavy reli-

ance upon the opening language in MVRA—"[n]otwithstanding any other federal law…may be enforced against all property or rights of property" (*United States v. Novak*, *supra*).

An additional question, which Judge Berzon highlighted, relates to when a retirement plan participants interest constitutes "property" under 18 U.S.C. § 3613(a). This issue related to the Government's efforts to seek to have May Department Stores *immediately* cash out a portion of the retirement benefits held on Novak's behalf, rather than await Novak's retirement.

The Court recognized that this was concededly a more "aggressive approach" than simply diverting the retirement checks written from Novak's retirement account to the Probation Department (generally sixty days after the plan retiree turns age 65). Thus, the Government must await the retiree's initial retirement, unless the defendant's retirement benefits entitle the defendant to a "lump sum" annuity payment of the full value of the annuity.

Put another way, the Government essentially steps into the defendant's "retirement shoes," but is not empowered to compel a premature "cash out." Accordingly, the Court remanded the case back to the sentencing judge to resolve payment. It significantly placed the burden on the defendant to establish that, under the retirement plans, there are no current rights to immediate payment.

Senior Circuit Judge Betty B. Fletcher filed a strong dissenting opinion for herself and Judges Reinhardt, Pregerson, Rawlinson and Thomas. She observed at the outset, as a function of statutory construction, that any evaluation in the perceived tension between the two statutes begins with the recognition that Congress cannot repeal a prior law unless it expresses a "clear and manifest" intent to do so (*Radzanower v. Touche Ross + Co.*, 426 U.S. 148, 154, 96 S.Ct. 1989, 48 L.Ed.2d 540 [1976]).

The dissent then proceeded to examine the legislative history attendant to the MVRA, noting that Arizona Senator John McCain had proposed an amendment to MVRA to expressly achieve, and authorize, such garnishment. However, the MVRA was *subsequently enacted*, and signed into law *sans* the McCain amendment. The perceived significance of the "McCain amendment," and a 1997 ERISA amendment to authorize the garnishment of funds where the crime victim, was the retirement entity itself! Simply put, the dissent viewed this as reflecting Congress' ability to repeal anti-alienation status if, when, and to the extent, legislatively desired.

Since *Novak* was decided, the issue has not generated significant attention writing in reported cases (*see e.g.*, *United States v. Hyde*, 497 F.3d 103, 107-108 [1st Cir. 2007]—Government attempt to garnish the proceeds of a house sale protected by the Massachusetts homestead exemption claimed under a Chapter 7 federal bankruptcy proceeding), and Judge James B. Zagel's opinion in *United States v. Prebis*, __ F. Supp. 2d __, 2007 U.S. Dist. Lexis 46105 [N.D. Ill. 6/26/07].

In the current state of decisional authority, counsel's need to tread cautiously, and proceed prudently, unless and until the United States Supreme Court rules. This underscores the importance of sharp negotiation skills, since it is unlikely now that a legislative solution to resolve this conflict will be forthcoming any time soon, due to partisan congressional gridlock.

Sadly lost in the controversy are the spouses and dependents of the defendants, who rely upon the defendants for their financial support. These innocent third parties are the apparent "collateral damage" of the Government's attempts to punish defendants where it hurts the most—in their pocketbooks.

Endnotes

1. Article 5, Section 7 of the New York State Constitution in pertinent part states: "[M]embership in any pension or retirement system of the State…shall be a contractual relationship, the benefits of which shall not be diminished or impaired."
2. 29 U.S.C. 1056(d)(1) states: "Each pension plan shall…not be assigned or alienated" (*Kickham Hanley P.C. v. Kodak Retirement Income Plan*, 558 F. 3d 204, 210-211 [2d Cir. 2009] [panel rejects law firm's attempt to collect legal fees from ERISA Plan administrators]).

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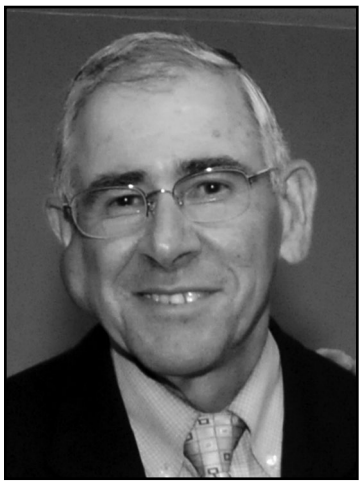
United States Supreme Court News

By Spiros Tsimbinos

Introduction



The Court opened its 2016-17 term on Monday, October 3, 2016, and during the next several weeks heard oral argument with regard to several cases which had been held over from the previous term. In addition, during the summer months it did issue a few decisions which were primarily based upon earlier rulings. The Court currently has approximately 40 cases on its docket, including several which involve business-related issues, such as patent rights and anti-trust matters.

Batson Violations

Flowers v. Mississippi

Williams v. Louisiana

Floyd v. Alabama, 136 S. Ct. _____, (June 20, 2016)

On May 23, 2016, in a 7-1 decision in *Foster v. Chapman*, 136 S.Ct., 1737 (2016), the Court issued a ruling in a decision written by Chief Justice Roberts which concluded that Georgia prosecutors had committed *Batson* violations when they issued peremptory challenges against several black jurors. The Court found that a pattern existed of racial discrimination during jury selection and that the reasons provided by prosecutors for their actions were not believable and were instead motivated in substantial part by race when they struck black citizens from the jury. Many years after the original conviction, notes were obtained which indicated that the prosecutors had focused on potential black jurors and had handwritten notes next to their name indicating a definite NO.

Based upon the *Foster v. Chapman* ruling, the United States Supreme Court on June 20, 2016, granting certiorari in three cases, vacated the judgments and remanded for further consideration. The cases originated from Alabama, Louisiana and Mississippi. The Court issued its rulings based upon a 6-2 determination with Justice Alito and Thomas dissenting. The two dissenting Justices claimed that the *Foster* decision had not changed the *Batson* analysis and that the Court was not making a responsible use of its power in arbitrarily granting certiorari, vacating the judgments and remanding without a full oral argument and deliberation on the case.

Officer's Discovery of Valid Arrest Warrant After Unlawful Stop

Nevada v. Torres, 136 S. Ct. _____ (June 27, 2016)

On June 27, 2016, the Court granted certiorari, vacated the judgment and remanded the matter back to the Nevada courts for further consideration in light of its earlier decision in *Utah v. Strieff*, 136 S. Ct. 2056 (June 20, 2016). In that case, the Supreme Court held that a police officer's discovery of a valid, pre-existing, and untainted arrest warrant attenuated the connection between the officer's purportedly unlawful stop and the drug-related evidence seized from the defendant in a search incident to the arrest. Thus, the drug-related evidence was admissible at the defendant's trial. The *Strieff* decision was a 5-3 ruling with Justice Breyer breaking from the usual liberal grouping to join the more conservative justices. Justice Sotomayor in *Strieff* issued a strong dissent in which she argued that the Court's majority decision would allow the police to stop anyone on the street, demand identification and check for an outstanding warrant even if they had done nothing wrong. In the *Nevada* case, the Nevada Supreme Court had held that the discovery of a valid arrest warrant did not attenuate the taint from a police officer's illegal seizure of the defendant. Thus, the firearm evidence during the incident to the arrest was inadmissible as fruit of the poisonous tree. Based upon the United States Supreme Court ruling, the Nevada Supreme Court must now reconsider its earlier determination.

Racial Gerrymandering

McCrory v. Harris, 136 S. Ct. _____ (June 27, 2016)

The United States Supreme Court has noted its probable jurisdiction for an appeal by North Carolina officials from a three-judge district court's finding that, even assuming that compliance with the Voting Rights Act (VRA) was a compelling state interest, the North Carolina legislature engaged in unconstitutional racial gerrymandering in violation of equal protection. The violation was caused by the decision to redraw two congressional districts with an increased number of potential African-American voters, because racial gerrymandering was not reasonably necessary under a constitutional reading and application of federal law. The Court is expected to reach a definitive ruling in this matter early in the term.

Deportation Issue

***United States v. Texas*, 137 S. Ct. _____ (October 3, 2016)**

On October 3, 2016, the Justices rejected a request by the Obama Administration to reconsider its prior ruling regarding the President's authority to prevent deportation proceedings against millions of undocumented immigrants. In June, the Court, as a result of a 4-4 tie, left in place an Appeals Court ruling that had blocked the Obama Plan, which would have allowed millions of undocumented immigrants to remain and to work legally in the United States. The Obama Administration had filed a petition seeking rehearing and requesting that the matter should be resolved once a ninth member was added to the Court so that a definitive ruling could be issued. In a brief order, the Court rejected the request for a rehearing.

Pending Cases

***Buck v. Davis*, 137 S. Ct. _____ (_____, 2016)**

In October, during the first month of its new term, the Court heard oral argument on a case which presented new aspects with respect to the death penalty. The issue in the instant case involves the effective assistance of counsel and the question of when death row inmates are too intellectually disabled to be executed. During the last year Justices Breyer and Ginsburg had raised concerns about the constitutionality of the death penalty and had indicated that it was time to revisit the issue. It appears that on a case-by-case basis the Court may be steadily restricting the use of the death penalty until it reaches a point when it may be totally eliminated. The recent trend in the United States Supreme Court appears to be following a drop in support for the death penalty within the United States. A recent Pew Center poll conducted in September of 2016 found that just 49% of Americans now support capital punishment. This represents a seven point decline within the last two years and a steep drop from the 80% of the population which supported the death penalty in 1994. The survey also found that men are more likely than women to support the death penalty. Whites are much more likely to support the death penalty than Hispanics or African-Americans. Further, fewer Americans between the age of 18 and 29 support the death penalty than any other age group. Last year, there were only 15 executions conducted in the United States, down from 98 in 1999. During the past five years, nine states have suspended capital punishment. It is still legally available in 30 states but its actual usage has been confined to only a small group of states, primarily located in the South and West. We will keep our readers advised of the forthcoming decision in *Buck*, which is expected to be issued sometime around the beginning of the new year.

***Salman v. United States*, 137 S. Ct. _____ (_____, 2016)**

On October 5, 2016, the United States Supreme Court heard argument in a case involving insider trading prosecutions. A decision by the Federal Court of Appeals for the Second Circuit had made it harder for the government to proceed in certain insider trading prosecutions. During oral argument, however, the questioning by the Justices appeared to have a pro prosecution tenor. The Justices indicated that the integrity of the stock markets was very important for the country and that a change in the rules would threaten that integrity. The issue in this case has been defined as whether and what kind of personal benefit for the tipper must be proven to successfully prosecute an insider trading case. From the questions asked, it appeared that the Justices would be content with a broad definition of personal benefit that would include a tipper helping a family member without necessarily pocketing any money himself or herself.

Supreme Court Determination of Circuit Court Rulings

A review of the Court's past term with regard to how the various Federal Circuit Courts fared in the United States Supreme Court reveals some interesting results. According to an annual review conducted by Martin Flumenbaum and Brad S. Karp, litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison, and which appeared in the *New York Law Journal* of September 28, 2016 at page 3, the Court issued 63 decisions which involved Circuit Court determinations. Several of the Circuits had most of their decisions reversed or vacated. The Eleventh Circuit, which had three cases before the Court, was reversed on all three for a reversal rate of 100%. The Sixth, Tenth and Federal Circuits had 75% of their matters reversed. The Ninth Circuit had a reversal rate of 73%. The Third Circuit had a reversal rate of 67%. Three Circuits, the Fourth, Fifth and DC Circuit, had reversal rates of 50% and 56% respectively. The three Circuits with the smallest reversal rates were the First, Second and Eighth, where only 33% of the decisions were reversed. The Seventh Circuit was the only one which had no cases before the Court. For further details, readers can reference the above cited article.

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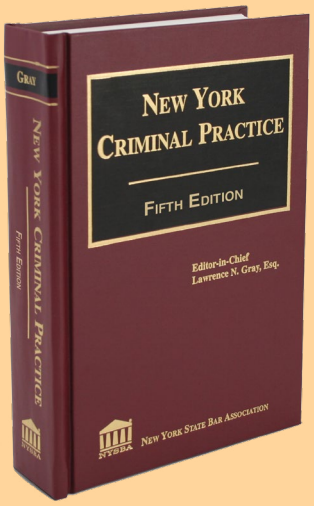

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