NEW YORK COURT OF APPEALS ROUNDUP

COURT OF APPEALS AGAIN TACKLES ADEQUACY OF EDUCATION OPPORTUNITIES

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This month we discuss the Court of Appeals' dismissal of an action against the State that challenged the adequacy of education provided to students in certain schools outside of New York City, as well as several decisions relating to criminal practice. In those decisions the Court held that there is no time limit for filing post-conviction requests for DNA testing, and placed the burden on the People to establish whether evidence exists that can be tested; overturned its own precedent, now ruling that the plea allocution of a person not subject to cross-examination is inadmissible; and upheld the rule adopted by Chief Administrative Judge Jonathan Lippman allowing Administrative Judge review of trial court decisions to depart from the 18-B fee schedule for appointed defense counsel.

Upstate Schools Failure

In *Campaign for Fiscal Equity, Inc. v. State of New York*, 100 N.Y.2d 893 (2003) ("*CFE II*"), the Court of Appeals upheld the determination of the trial court (Hon. Leland DeGrasse) that the State had violated Article XI, § 1 of the New York constitution, the "Education Article," by failing to provide New York City school students with the opportunity for a sound basic education. Considerable attention has been paid to Judge DeGrasse's recent decision that found the State did not enact reforms necessary to remedy the situation within the timeframe set by the Court of Appeals and adopted a school funding plan, which decision Governor George E. Pataki has stated he will appeal.

Meanwhile, a case challenging the education provided by certain schools outside of New York City has been wending its way through the courts, and last month was dismissed by the Court of Appeals in a unanimous decision written by Chief Judge Judith S. Kaye. *New York Civil Liberties Union v. State of New York* ("*NYCLU*"), was a purported class action filed on behalf of approximately 7,500 students attending 150 schools. The crucial distinction between *CFE II* and *NYCLU*, is that the latter case was directed at individual schools that are failing and sought State intervention that, the Court believed, would subvert local control.

Plaintiffs in *NYCLU* asserted two claims, the first for violation of the Education Article. The Court explained that this constitutional cause of action has two elements,

deprivation of a sound basic education *and* "causes attributable to the State." The State, however, is responsible for providing adequate funding to school districts, not to individual schools; because plaintiffs had not pleaded district-wide failure, they had failed to state a claim.

Moreover, lack of funding was not the central focus of the action. Rather, the gravamen of the complaint was that the State should be permanently enjoined, first to determine what, including possibly additional funds, may be needed at particular schools, and then to provide it directly to those schools, bypassing the school districts. However, as the Court has held in previous decisions, "the Education Article enshrined in the [New York State] Constitution a state-local partnership" in which communities, through local school boards, "make the 'basic decisions on funding and operating their own schools'." [1] Clearly, if the issue is allocation of resources within a district, courts will require that it be addressed at the district level.

Plaintiffs' second cause of action asserted failure to comply with a Department of Education regulation, 8 NYCRR 100.2, which provides that the Commissioner of Education shall place under review for possible revocation of their registration to operate those schools "determined to be farthest from meeting the school accountability performance criteria" and "most in need of improvement." The superintendent of the districts in which these schools are found shall be required to develop corrective action plans, the implementation of which shall be monitored by the Commissioner.

Here, too, plaintiffs sought State intervention on behalf of specific schools. In dismissing the regulatory claim, the Court stated that the sole remedy for testing a public officer's inaction is an Article 78 proceeding seeking mandamus, and that mandamus is not available to enforce performance of a "discretionary" duty such as the Commissioner's duty to determine which schools should be placed under registration review.

DNA Testing

"[F]orensic DNA testing has become an accurate and reliable means of analyzing physical evidence . . . and has played an increasingly important role in conclusively connecting individuals to crimes and exonerating prisoners who were wrongfully convicted." The Court made this observation in two cases decided together, *People v. Bernard Pitts* and *People v. Anthony Barnwell,* in which it held that there is no time limit for bringing a post-conviction motion for forensic DNA testing. The Court also held that a defendant seeking such testing does not bear the burden of establishing that evidence exists in quantities sufficient for testing; instead, the prosecution, "as the gatekeeper of the evidence", must show what evidence exists and whether it is available for testing. The decision for the unanimous Court was written by Judge George Bundy Smith.

CPL 440.30 (1-a) provides that a defendant may request DNA testing on evidence, and that the court shall grant the request if it determines that evidence containing DNA was secured and that, had DNA testing been conducted and admitted at the trial, "there exists a reasonable probability that the verdict would have been more favorable to the defendant."

In *Pitts,* the County Court denied the *pro se* request for testing on several grounds, including that the defendant had failed to exercise due diligence in making his application over five years after his direct appeals were exhausted and almost three years after a prior CPL 440 motion. The Court of Appeals ruled that it was error to impose any due diligence time requirement. The Court affirmed the denial of the motion, however, on the basis that there was no reasonable probability that DNA evidence would have led to a verdict more favorable to Pitts.

Barnwell involved a rape charge, and misidentification was Barnwell's defense. The government opposed the *pro se* request for testing with an affidavit reflecting that an employee of the Property Clerk's Office advised the affiant that the rape kit for the case had been destroyed. The Supreme Court denied Barnwell's application on the basis that the evidence no longer existed. The Appellate Division affirmed, stating that it was incumbent upon the defendant to show that evidence in sufficient quantities to be tested was still in existence. The Court of Appeals reversed.

Significantly, the Court held that once the Supreme Court made the "reasonable probability" determination required by 440.30 (1-a), the People had the burden of establishing "with sufficient specificity" whether the evidence existed and could be tested, and that the People's hearsay affidavit was insufficient as a matter of law. The case was remanded with instructions that the Supreme Court should obtain from the government "reliable information" as to the existence of evidence.

Plea Allocutions Inadmissible

As necessitated by a recent U.S. Supreme Court decision, *Crawford v. Washington,* 541 U.S. 36 (2004), the Court of Appeals unanimously overruled its prior precedent and held that a co-defendant's plea allocution is admissible only when the defendant has an opportunity to cross-examine the declarant, although violations of rule are to be reviewed under the harmless error standard.

In *People v. Thomas*, 68 N.Y.2d 194 (1986), the Court had held that, "in limited circumstances," another's plea allocution could be admitted into evidence as a statement against the declarant's penal interest, even if the declarant was not available at trial. Last year in *Crawford*, however, the Supreme Court ruled that it violates the Sixth Amendment's confrontation clause to admit "testimonial" statements such as a plea allocution unless the

declarant is unavailable and the defendant had the opportunity to cross-examine the declarant.

The Court of Appeals therefore overturned *Thomas* in its unanimous decision in *People v. T.J. Charles Hardy*, and held that the trial court had erred in admitting portions of the plea allocution of defendant's brother, who did not testify at trial. Judge Carmen Beauchamp Ciparick's opinion in *Hardy* then analyzed whether the constitutional violation was harmless beyond a reasonable doubt. The Court found it was not, placing emphasis on the fact that the principal evidence linking the defendant to the crime came from a witness who was testifying in exchange for a reduced sentence in a separate matter.

18-B Fee Review

The underlying issue in *Levenson v. Lippman* can be said to have its origin 42 years ago in the landmark decision of the U.S. Supreme Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963). Because the Florida courts had refused to appoint a lawyer to represent him in a criminal case, Gideon was required to represent himself. A jury returned a verdict of guilty and he was sentenced to 5 years in prison. The Supreme Court reviewed whether a defendant in a state criminal case has a federal constitutional right to counsel. The Court answered with a resounding "yes," overruling its prior decision in *Bett v. Brady*, 316 U.S. 455 (1942). In doing so it noted the vast sums of money "quite properly" spent by state and federal governments "to try defendants accused of crime," and held that defense counsel in criminal cases are not "luxuries." The decision had a significant financial effect upon state and local governments, which had to bear the cost of defense to indigent criminal defendants.

While there is obviously a difference between denying an indigent criminal defendant any lawyer and letting such defendant have a lawyer who is paid by the government $25 an hour to prepare the case and $40 an hour to try it (with a cap of $1,200 for felonies and appellate matters and $800 for misdemeanors),[2] it can be argued that there are cases in which this difference may be only a matter of degree. *Gideon* issues were not, however, directly involved in *Levenson*.

The core issue in *Levenson* was whether the Chief Administrative Judge could, by amending the Rules of the Chief Administrator of the Courts (22 NYCRR 127.2[b]), authorize Administrative Judges to review, and reverse on an abuse of discretion basis, a trial court order compensating assigned counsel in excess of the statutory rates because the case presented "extraordinary circumstances." The rule had been promulgated with the advice and consent of the Administrative Board of the Courts (consisting of the Chief Judge of the Court of Appeals and the Presiding Justices of the four Appellate Divisions) because there was no mechanism to review enhanced compensation awards either judicially or administratively. The Court of Appeals, in a *per curiam* opinion, with a concurring opinion by Judge Albert M. Rosenblatt, and with Chief Judge Judith S. Kaye taking no part, held that the Chief Administrative Judge acted

within his authority and the rule he promulgated was valid.

The three criminal defense lawyers in *Levenson* had submitted applications to the respective trial judges requesting compensation in excess of the statutory limits. In each case the trial judge found that extraordinary circumstances existed – a basis under the statute for departing from the limits – and that the application should be granted.[3] In each case the Administrative Judge reduced the compensation to the statutory rate, pursuant to the rule. The lawyers brought declaratory judgment actions challenging the determination of the Administrative Judges. The Supreme Court, New York County dismissed their challenge, but the Appellate Division, First Department, unanimously reversed. An appeal was then taken as of right to the Court on constitutional grounds.

The Court of Appeals in its opinion recognized that the trial judges had authorized compensation beyond the statutory limits because of their concern that lawyers had become unwilling to represent the indigent under the "fee caps" and the resulting paucity of lawyers threatened to deny such defendants their constitutional right to a defense. Some trial judges relied upon this situation to find "extraordinary circumstances."

In affirming the validity of the rule, the Court disagreed with the conclusion of the Appellate Division that the rule had divested that court of its constitutional right to review compensation orders. Prior decisions of the Court of Appeals had held that the award of compensation was administrative in nature and that appellate review of such awards was not available.[4] The Court also concluded that the Chief Administrative Judge had the power under the State constitution and the Judiciary Law to adopt the rule.

The concurring opinion by Judge Rosenblatt is significant in that it shows that the promulgation of the rule came only *after* the Legislature had failed to enact legislation introduced at the request of the Office of Court Administration, on the recommendation of the Administrative Board, that would have given the Appellate Division the authority to conduct expedited review of enhanced payment. Thus, it would be incorrect to view *Levenson* as a "turf war" between the courts and the Chief Administrative Judge because the rule was intended to fill a void in a review process rather than usurp the power of the Appellate Division. Hopefully, the Legislature will reconsider the matter.

In our view, the Administrative Judges in reviewing compensation awards by trial judges should exercise their discretion with *Gideon* in mind, so that indigent defendants are given effective representation and there is balance between the "muscle" the prosecution can bring to such cases and fairness to defendants accused of criminal acts. That is a matter for the courts to deal with free of political constraints by "localities responsible for paying" enhanced awards, or anyone else.

[1] *Paynter v. State of New York,* 100 N.Y.2d 434, 442 (2003), *quoting Board of Educ., Levittown Union Free School Dist. v. Nyquist,* 57 N.Y.2d 27 (1982).

[2] New York County Law § 722-b, which fixed these rates, has since been amended. Effective January 1, 2004, compensation rates for assigned counsel was increased to $75 per hour (for work performed in and out of court) for felony cases and appeals, with a maximum compensation cap of $4,400. For misdemeanor cases, the compensation rates were increased to $60 per hour, with a cap of $2,400.

[3] Ironically, the increased hourly rate allowed in each case was at or below the hourly rate set by the 2004 amendment.

[4] *See Matter of Werfel v. Agresta*, 36 N.Y.2d 624 (1975); *Matter of Director of Assigned Counsel Plan of City of New York (Bodek)*, 87 N.Y.2d 191 (1995).