NEW YORK COURT OF APPEALS ROUNDUP:

SCHOOL FUNDING III, RELIGION CLAUSES AND HARMLESS SANDOVAL ERROR

ROY L. REARDON AND MARY ELIZABETH MCGARRY*
SIMPSON THACHER & BARTLETT LLP

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This month we discuss decisions of the Court of Appeals directing the appropriation of additional funds to New York City schools, although at a lesser level than plaintiffs had sought, and rejecting a constitutional challenge to legislation requiring certain employer health insurance policies to include coverage for contraception. Both cases raised the issue of judicial deference to the other branches of government. We also discuss the Court's holding that an incorrect ruling that a defendant's prior convictions may be brought out on cross-examination may be harmless error.

NYC School Appropriations

Last month the Court issued its third decision in Campaign for Fiscal Equity Inc. v. State of New York, an action brought on behalf of New York City public school students, and directed the Governor and Legislature to appropriate an additional $1.93 billion annually (in 2004 dollars, to be adjusted for inflation) to the New York City public schools. The principal issues on appeal -- and those over which the Court divided -- were whether the Governor and Legislature had determined that $1.93 billion was all that was needed to furnish a constitutionally adequate education and, if so, whether such determination was rational.

The majority opinion was the first decision by the Court's newest member, Judge Eugene F. Piggot, Jr. A concurring opinion was authored by Judge Albert M. Rosenblatt, who is retiring at the end of this month. Chief Judge Judith S. Kaye, whose term expires next March but who is seeking reappointment, wrote a dissenting opinion in which Judge Carmen Beauchamp Ciparick joined. Judge Victoria A. Graffeo took no part in the decision because she had been involved in the litigation while New York Solicitor General.

In its prior decisions in the case, the Court held that plaintiffs had stated a cause of action under the Education Article of the New York constitution, finding that the Article requires the State to "offer all children the opportunity of a sound basic education,"[1] and explained that a "sound basic education" means the "opportunity for a meaningful high school

* **Roy L. Reardon** *and* **Mary Elizabeth McGarry** *are partners at Simpson Thacher & Bartlett LLP.*

education, one which prepares [children] to function productively as civic participants."[2] The Court declined to "micromanage education financing,"[3] however, instead imposing upon the State a deadline of July 30, 2004, to ascertain the "actual cost" of a sound basic education in New York City and to implement the measures necessary to provide it.[4]

A commission appointed by Governor George E. Pataki (the "Zarb Commission") calculated a range for the gap between then-current spending for New York City and the cost of a providing a sound basic education, of $1.93-$4.69 billion. Ten days before the Court of Appeals' deadline, the Governor proposed a bill that, when coupled with federal funds, would have resulted in approximately $4.7 billion in additional funding to New York City over five years. The bill did not pass. In August 2004, the Legislature appropriated an additional $300 million in education aid for the City.

The matter returned to the trial court, which in 2001, following a bench trial, had found a causal link between the State's funding of the New York City school system and that system's failure to provide the opportunity for a sound basic education. New York Supreme Court Justice Leland DeGrasse appointed a panel of Referees to make a report and recommendations. The Referees concluded that the spending gap for New York City was $5.63 billion in school funding, and $9.179 billion in capital improvements over five years. The Supreme Court adopted their recommendations. On appeal, the Appellate Division, First Department, ruled that it was error for the Supreme Court to have conducted its own fact-finding into the necessary expenditures, and directed the appropriation over four years of at least $4.7 billion as the amount by which the Governor had proposed City school funding be increased. The First Department also directed the Governor and Legislature to implement a $9.179 billion capital-improvements plan over five years.

Declaring that the role of the courts is "to protect rights, not to make policy," the Court of Appeals modified the Appellate Division's order. It agreed that the Supreme Court "erred by, in effect, commissioning a *de novo* review of the compliance question." The Court rejected the Appellate Division's $4.7 billion figure on the ground that the litigation concerned the minimum cost of a sound basic education, whereas the Governor's proposal had reflected a policy choice to provide more than the minimum. In addition, the Legislature had adopted a capital construction program that would be "sufficient to remedy facilities deficiencies," rending the need for further judicial direction of capital improvements unnecessary.

The majority found that the executive and legislative branches had accepted the Zarb Commission's methodology, which had yielded $1.93 billion as the bottom of a range, and noted that the State was asserting in the litigation that $1.93 billion was the cost of a minimally adequate education. It stressed that the deference generally accorded acts of the Executive and Legislature is "especially necessary" when reviewing the State's budget plan because the Judiciary has no role in the budget process. Plaintiffs could not satisfy their "formidable burden"[5] to prove that the State's estimate of the minimum cost was irrational.

The dissenting opinion argued that, because executive and legislative branches had been unable to agree on any figure, there was no decision by the other branches to be deferred to, and the Court therefore should direct a remedy: "There is no State budget plan for bringing the schools into constitutional compliance; that is precisely the problem." According to Chief Judge Kaye's opinion, the assumptions necessary to justify a $1.93 billion estimate were without sound basis -- and not even supported by defendants' experts. The dissent stated that various governmental actors had determined what the Referees appointed by the Supreme Court and the Appellate Division also had determined, namely that a sound basic education would require an additional $5 billion to be spent on New York City annually.

Judge Rosenblatt joined the majority "in its rationale and result," and indicated that he was writing separately to emphasize that his vote should not be construed as an endorsement of $1.93 billion as "necessarily the proper additional budgetary amount," just the bare minimum needed for New York City, and to emphasize that there were school districts outside of the City that also should benefit from budget increases. A "statewide approach" is required, in Judge Rosenblatt's view, but it is best left to the other branches of government.

Insurance Coverage

In 2002, New York enacted the Women's Health and Wellness Act (WHWA), which mandated expanded health insurance coverage for women, including that employer plans providing prescription drug coverage must cover contraceptive drugs and devices. The Act contained specific provisions for "religious employers," permitting them to request insurance contracts that excluded coverage for forms of contraception that were contrary to their religious tenets, but requiring them to offer their employees coverage for such contraceptives at the employees' expense.

Catholic Charities of the Diocese of Albany v. Serio, was instituted by 10 faith-based social services organizations that fell outside of the statute's definition of "religious employer." Plaintiffs raised various constitutional challenges the WHWA as applied. The 3-2 decision of the Appellate Division, Third Department, dismissing of the complaint was affirmed by the Court unanimously, in an opinion by Judge Robert S. Smith (Judge Eugene F. Pigott, Jr. taking no part).

The WHWA defines "religious employer" as: an entity with the purpose of inculcating religious values; which employs primarily persons that share the religion's tenets; serves primarily persons who share those tenets; and is a non-profit religious organization under the Internal Revenue Code. The plaintiffs variously provided social services, operated health care facilities, or ran schools. All of the plaintiffs served persons not of their faith, most of them employed many persons not of their faith, and only three qualified for tax exemption.

The Court did not doubt the sincerity of the plaintiffs' religious beliefs. It rejected their position that the religious-employer exemption had been too narrowly drafted, however, observing that some of plaintiffs' arguments (if accepted) would likely discourage the

Legislature from adopting any religious exemptions to laws.

The Supreme Court held in Empl. Div. v. Smith, 494 U.S. 872 (1990), that where prohibiting the exercise of religion "is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision [of law]," the federal free exercise clause is not violated. Justice Stevens' concurrence in Smith stated that individuals must comply with a "valid and neutral law of general applicability," even if it prescribes conduct contrary to their religious beliefs. (Quotation omitted.) The Court of Appeals held that the WHWA was a "neutral" law because its object was not to regulate conduct due to its religious motivation.

Plaintiffs attempted to invoke exceptions to Smith. The Court of Appeals did not decide whether there is a "so-called 'hybrid-rights' exception," finding that even if there were, it would be inappliable, as was the "church autonomy" doctrine plaintiffs also asserted.

The Court found that plaintiffs' argument under New York's somewhat differently worded free exercise clause was stronger, but still unavailing. When a law imposing an "incidental" burden on the free exercise of religion is challenged, a court must balance the respective interests to assess whether the burden is justified. Catholic Charities gave the Court an opportunity to explain how courts should perform such balancing. It held that, "[s]trict scrutiny is not the right approach to constitutionally-based claims for religious exemptions." Instead, "substantial deference is due the Legislature, and . . . the party claiming an exemption bears the burden of showing that the challenged legislation, as applied to that party, is an unreasonable interference with religious freedom." Here, the WHWA stated that its purposes were to provide women with better health care and to foster equality between men and women, and these interests prevailed.

Lastly, plaintiffs' argument under the establishment cause was dismissed as without merit. The WHWA does not disfavor certain denominations, and instead distinguishes organizations on the basis of their activities.

Plaintiffs have filed a motion for reargument.

Harmless Sandoval Error

In People v. Egbert Grant, the Court definitively resolved the question of whether Sandoval[6] error in the trial court that results in a defendant's decision not to testify at trial is subject to a harmless-error analysis. The defendant argued that Sandoval error can never be harmless. Chief Judge Judith S. Kaye, in an opinion for the majority (with a dissent by Judge Robert S. Smith; Judge Eugene F. Pigott, Jr. taking no part), disagreed.

The defendant was charged and convicted of five counts of criminal contempt in the first degree. The charges were based on the fact that he went to the home of his ex-wife and their four children and harassed them in violation of an order of protection.

Prior to trial, the trial court had ruled that, should the defendant testify, the prosecution would be permitted to elicit all of the defendant's six prior criminal contempt convictions for violating orders of protection. The court was then informed by defense counsel that the defendant had chosen not to testify, in part because his criminal background would be exposed to the jury.

The Appellate Division, First Department, ruled that the trial court had committed error in that it had made no effort to limit the number of convictions that could be used against the defendant during cross-examination, or to balance the prejudicial effect of all such convictions against their probative value. The Appellate Division nonetheless found the error of the trial court to be harmless because the evidence against the defendant was overwhelming, and because there was no significant probability that the defendant would have been acquitted had the error not occurred and had he taken the stand in his own defense.

Recognizing that it had not previously been presented squarely with the question of whether *Sandoval* error resulting in a defendant's decision not to testify can ever be harmless, the Court of Appeals affirmed. The defendant, while raising on appeal a claim of violation of his constitutional right to testify in his own behalf, had not made that argument to the trial court and thus failed to preserve the issue. The Court therefore reviewed his claim under "the standard applicable to nonconstitutional harmless error."

Error will be deemed harmless where the proof of guilt is overwhelming and there is no significant probability that the jury would have acquitted the defendant had the error not occurred. The Court observed that, in reviewing the prejudicial impact of allowance of a defendant's prior convictions as impeachment evidence, the underlying issue is whether the allowance would "undesirably deter the defendant from taking the stand and thereby deny the jury or court significant material evidence" and "have a disproportionate and improper impact on the triers of fact."[7]

Finding that the evidence of defendant's guilt was overwhelming, the Court determined that any error was harmless because the jury was not deprived of any "critical information," and there was no significant probability that, had the defendant decided to testify, his testimony would have led to an acquittal.

Finally, the Court observed that nothing in the record suggested that the defendant would have been able to put forward a "creditable defense" to the charges by testifying. In terms of how the trial courts should deal with similar issues in future cases, the Court suggested requiring a defendant who seeks to assert his *Sandoval* rights to make "some minimal proffer" of the nature or existence of a defense.[8]

Judge Smith's dissent expressed significant concern that a *Sandoval* error that prevented a defendant from "telling his side of the story" to the jury can ever be harmless. (Interestingly, Judge Smith wrote the majority opinion in *People v. Mikel Wardlaw*, decided last term, holding that deprivation of the right to counsel can, in some circumstances, be harmless error; Chief Judge Kaye, who authored to majority opinion in *Grant*, and Judge Carmen

Beauchamp Ciparick, had dissented from Wardlaw.) While not disagreeing with the majority's view that the case against this defendant was overwhelming, Judge Smith's concern was that the question of whether the defendant's testimony could have led to an acquittal was for the jury to decide, and not the Court. The dissent also expressed that it would be inappropriate to require a "proffer" from a defendant to show the trial court that his testimony would be "creditable."

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[1] 86 N.Y.2d 307, 316 (1995).

[2] 100 N.Y.2d 893, 908 (2003).

[3] Id. at 925.

[4] Id. at 930.

[5] Quoting Wein v. Carey, 41 N.Y.2d 498, 505 (1977).

[6] People v. Sandoval, 34 N.Y. 2d 371 (1974).

[7] Quoting Sandoval, 34 N.Y.2d at 376.

[8] Although not discussed by the majority or dissenting opinions in Grant, it is interesting to note that, in federal court, a defendant who elects not to testify may not challenge on appeal an in limine ruling permitting impeachment by prior conviction, the rationale being that any harm from such a ruling is "wholly speculative" because it cannot be determined whether as the trial unfolded the prosecutor would have sought to impeach, or the court would have adhered to its initial ruling, or why the defendant decided against testifying, and because the rule is thought to discourage making in limine motions to "plant" reversible error in the event of conviction. See Luce v. United States, 469 U.S. 38, 41-42 (1984).