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# Self-Incrimination, Supreme Court, Bronx County: Seabrook v. Johnson

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The *Hall* court stated that had the issue been preserved, it would have held that a defense witness's right to assert his Fifth Amendment protection against self incrimination does not interfere with the prosecution's right to cross examination because remedial measures are available as discussed above.<sup>148</sup> The jury instructions given by the *Hall* court providing that the jury was permitted to consider the witness's refusal to testify to affect only his credibility, allowed the jury the benefit of drawing inferences while at the same time protecting the witness against self incrimination. The court's interpretation is that a witness's right to invoke his privilege of silence was not diminished by the court's instruction allowing the jury to consider the silence as affecting the witness's credibility.<sup>149</sup> This instruction was the least harmful remedial measure that the court could impose on defendant.<sup>150</sup>

## SUPREME COURT

### BRONX COUNTY

Seabrook v. Johnson<sup>151</sup>  
(decided May 5, 1997)

During 1996, five corrections officers were indicted for the falsification of business records in the first degree, "offering a false instrument for filing in the first degree," and "assault in the third degree."<sup>152</sup> Petitioner, Norman Seabrook, President of the Correction Officers' Benevolent Association, is the collective bargaining representative for about 10,000 New York City

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<sup>148</sup> *People v. Hall*, 236 A.D.2d at 789-90, 654 N.Y.S.2d at 491-93 (4th Dep't 1997).

<sup>149</sup> *Siegel*, 87 N.Y. 2d at 545, 663 N.E.2d 876, 640 N.Y.S.2d at 835.

<sup>150</sup> *Id.* at 544, 663 N.E.2d 875, 640 N.Y.S.2d at 834 (citing *People v. Chin*, 67 N.Y.2d 22, 28, 490 N.E.2d 505 (1986)).

<sup>151</sup> 173 Misc. 2d 15, 660 N.Y.S.2d 311 (Sup. Ct. Bronx County 1997).

<sup>152</sup> *Id.* at 16, 660 N.Y.S.2d at 314. Note, Henry Neil was indicted for falsifying business records and "offering a false instrument," but he was not indicted for charges of assault. *Id.*

Correction Officers.<sup>153</sup> Petitioners assert that they are immune from prosecution and claim a violation of their right against compelled self-incrimination pursuant to the Fifth and Fourteenth Amendments of the Federal Constitution<sup>154</sup> and Article I, section 6 of the New York State Constitution.<sup>155</sup>

Petitioners seek to prohibit the Bronx County District Attorney, Robert T. Johnson, from engaging in further prosecutorial proceedings.<sup>156</sup> Petitioners' indictments stem from a departmental investigation conducted by the Department of Corrections into the alleged misconduct by the five correctional officers.<sup>157</sup> Petitioners contend that under threat of losing their jobs, they were each ordered to submit a "Use of Force Report" which is required pursuant to the departmental rules and regulations.<sup>158</sup> Furthermore, each petitioner alleged that he did not believe the report could be used against him as evidence in a related criminal investigation.<sup>159</sup>

Petitioners contended that they answered questions at a deposition by the Federal Bureau of Investigation under the belief that if they did not answer they would be terminated from their employment.<sup>160</sup> Although immunization is automatic for public employees under both the Federal and State Constitutions when a statement is made under threat of dismissal, respondents successfully cross-moved to dismiss the petition asserting that the petitioners failed to show "a clear legal wrong" in accordance

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<sup>153</sup> *Id.*

<sup>154</sup> U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part: "No person shall be . . . compelled in any criminal case to be a witness against himself." *Id.* See also U.S. CONST. amend. XIV. The Fourteenth Amendment provides in pertinent part: "No state shall enforce any law which shall abridge the privileges or immunities of citizens of the United States". *Id.*

<sup>155</sup> N.Y. CONST. art. I, § 6. Article I, Section 6 provides: "nor shall he be compelled in any criminal case to be a witness against himself. . ." *Id.*

<sup>156</sup> *Seabrook*, 173 Misc. 2d at 16, 660 N.Y.S.2d at 313.

<sup>157</sup> *Id.* at 16-17, 660 N.Y.S.2d at 314

<sup>158</sup> *Id.* at 16-20, 660 N.Y.S.2d at 314-16.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

with CPLR 7804(f).<sup>161</sup> The court agreed with respondents as it suggested that the petitioners “failed to establish a clear legal right, either in fact or law, for such extraordinary relief requested.”<sup>162</sup>

While petitioner’s contended that they completed the “Use of Force Report” in response to the threat of job forfeiture, the court held that the purpose of the report was not to incriminate the officer, but, in part, was to protect the officers and the department.<sup>163</sup> Furthermore, the court stated that “the mere possibility of incrimination is insufficient to defeat the strong policies in favor of disclosure in instances where force is used.”<sup>164</sup>

In *California v. Byers*,<sup>165</sup> defendant, allegedly involved in an automobile accident and did not stop to identify himself in accordance with the California State statute.<sup>166</sup> Defendant argued that requiring him to stop “violated his privilege against compulsory self-incrimination.”<sup>167</sup> The United States Supreme Court, however, held that automobile accidents do not rise to the level of a “substantial risk of self-incrimination.”<sup>168</sup> In this regard, the Supreme Court gave deference to the state police power to regulate the use of automobiles.<sup>169</sup>

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<sup>161</sup> *Id* at 18, 660 N.Y.S.2d at 315. See *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Matt v. Larocca*, 71 N.Y.2d 154, 159, 518 N.E.2d 1172, 1174, 524, N.Y.S.2d 180, 182 (1987). N.Y. C.P.L.R. 7904 (f) (McKinney 1994). The statute provides in pertinent part: “among defenses that the court has explicitly denominated objections in point of law include failure to state a cause of action, lack of standing, lack of finality, failure to exhaust administrative remedies, statute of limitations, failure to join a necessary party and lack of jurisdiction.” *Id*

<sup>162</sup> *Seabrook*, 173 Misc. 2d at 19, 660 N.Y.S.2d at 315.

<sup>163</sup> *Id.* at 19-20, 660 N.Y.S.2d at 316.

<sup>164</sup> *Id.*

<sup>165</sup> 402 U.S. 424 (1970).

<sup>166</sup> *Id.* at 426.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 431.

<sup>169</sup> *Id.* at 432.

Comparatively, in *People v. Samuel*,<sup>170</sup> defendant alleged he was protected against self incrimination when he allegedly violated a New York Statute by leaving the scene of an accident.<sup>171</sup> The New York Court of Appeals held that “the risk of inculcation by identification” when reporting a motor vehicle accident is limited and incidental; the statute should not be inhibited by the privilege of self-incrimination.<sup>172</sup> The New York Court of Appeals also recognized that there must exist a balance between social and individual interests.<sup>173</sup>

The *Johnson* court drew a distinction between self-reporting requirements between activities which are lawful and those that are unlawful.<sup>174</sup> Similarly, in *United States v. Sullivan*,<sup>175</sup> defendant failed to properly file his tax return as required by the statute.<sup>176</sup> Since defendant was involved in the unlawful trafficking of liquor, he asserted that he was protected by the Fifth Amendment of the United States Constitution from reporting this information as such a statement would violate his right against self-incrimination.<sup>177</sup> The court, however, found that in this instance the protection of the Fifth Amendment was “pressed too far” and “it would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime.”<sup>178</sup>

In *People v. Patterson*,<sup>179</sup> defendant, a probationary officer, “had failed to report the discharge of her police issued firearm.”<sup>180</sup> Defendant contended that the privilege against self-incrimination protected her from reporting the fact that she

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<sup>170</sup> 29 N.Y.2d 252, 277 N.E.2d 381, 327 N.Y.S.2d 321 (1971).

<sup>171</sup> 29 N.Y.2d at 256, 277 N.E.2d at 382, 327 N.Y.S.2d at 323.

<sup>172</sup> *Id.* at 257, 277 N.E.2d at 313, 327 N.Y.S.2d at 324.

<sup>173</sup> *Id.* at 258, 277 N.E.2d at 384, 327 N.Y.S.2d at 324.

<sup>174</sup> *Seabrook*, 173 Misc. 2d at 21, 660 N.Y.S.2d at 316.

<sup>175</sup> 256 U.S. 259 (1927).

<sup>176</sup> *Id.* at 263.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 263-64.

<sup>179</sup> 169 Misc. 2d 787, 646 N.Y.S.2d 762 (Sup. Ct. Kings County 1996).

<sup>180</sup> *Id.* at 789, 646 N.Y.S.2d at 763.

discharged her firearm.<sup>181</sup> Consistent with the holding in *Seabrook v. Johnson*,<sup>182</sup> the *Patterson* court held that the police department regulation to report the discharge of a firearm does not violate the defendant's privilege against self-incrimination because the regulation is lawful and its purpose is not to incriminate.<sup>183</sup>

In *Seabrook v. Johnson*,<sup>184</sup> the court also addressed the petitioners' contention that the representatives of the Federal Bureau of Investigations led them to believe that if they did not answer questions, they would be terminated from their jobs.<sup>185</sup> The court did not decide this issue because the court explained, petitioners can have an adequate remedy within their respective pending criminal cases.<sup>186</sup>

In sum, there exists common interpretations of the Federal Constitution and New York Constitutions with regard to the privilege against self-incrimination. As discussed in *Seabrook v. Johnson*,<sup>187</sup> both federal and New York State courts look to the lawfulness or the unlawfulness of the activity. In *Seabrook*, the purpose of the report was not only a legal activity, but it was also intended to protect the individual officers.<sup>188</sup> By the same token, if the purpose of the report was to incriminate the officers who had committed unlawful acts, then, arguably, the report would have been found to violate the officer's rights against self incrimination.<sup>189</sup> In this instance, however, the fact the report served to incriminate the officers was merely "incidental" to the intended use of the form.<sup>190</sup> If necessary, as illustrated *Sullivan*, a court will implement judicial discretion in determining the weight

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<sup>181</sup> *Id.* at 788, 646 N.Y.S.2d at 763.

<sup>182</sup> 660 N.Y.S.2d 311, 316, 173 Misc. 2d 15, 21-22 (Sup. Ct. Bronx County 1997).

<sup>183</sup> *Patterson*, 169 Misc. 2d at 793, 646 N.Y.S. 2d at 766.

<sup>184</sup> 173 Misc. 2d 15, 660 N.Y.S.2d 311 (Sup. Ct. Bronx County 1997).

<sup>185</sup> *Id.* at 20, 660 N.Y.S.2d at 316.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 20, 660 N.Y.S.2d at 316.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

of the social interest against the weight of the individual interest.<sup>191</sup> Furthermore, the Supreme Court in *Byers* pointed out that, in some cases, the courts may give deference to the legislature where a state is using its police powers to regulate a legitimate state interest.<sup>192</sup>

## SUPREME COURT

## SUFFOLK COUNTY

People v. Shulman<sup>193</sup>  
(printed December 4, 1997)

Defendant Shulman was accused of a single count of first degree murder, along with four counts of murder in the second degree.<sup>194</sup> The State had indicated that they would pursue a death penalty sentence upon conviction.<sup>195</sup> Defendant submitted several motions seeking to invalidate and declare as unconstitutional section 400.27 (14)(a)(ii), section 220.10 (5)(e), section 220.30 (3)(b)(vii), and section 220.60 (2) of the New York State Criminal Procedure Law [hereinafter "CPL"].<sup>196</sup> The first stated

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<sup>191</sup> *Sullivan*, 274 U.S. at 260.

<sup>192</sup> *Byers*, 402 U.S. at 432.

<sup>193</sup> N.Y. L.J., Dec. 4, 1997, 35 (Sup. Ct. Suffolk County).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* N.Y. CRIM. PROC. LAW § 400.27 (14)(a)(ii) provides that:

The defendant shall, unless previously disclosed and subject to a protective order, make available to the prosecution the statements and information specified in subdivision two of section 240.45 and make available for inspection, photographing copying or testing, subject to constitutional limitations, the reports, documents, and other property specified in subdivision one of section 240.30.

*Id.* N. Y. CRIM. PROC. LAW § 220.10(5) (e) provides that:

A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section 125.27 of the penal law; provided, however, that a defendant may enter