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## Right to Be Present: People v. Mitchell

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*N.Y. CONST. art. I, § 6:*

*In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature of the cause of the accusation and be confronted with the witnesses against him.*

*U.S. CONST. amend. VI:*

*In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and . . . to be confronted with the witnesses against him . . . .*

## **COURT OF APPEALS**

People v. Mitchell<sup>2036</sup>  
(decided December 17, 1992)

In three consolidated cases,<sup>2037</sup> the defendants claimed that the rule set forth in *People v. Antommarchi*<sup>2038</sup> should be applied retroactively rather than prospectively. The court held that the *Antommarchi* rule, which states that trial courts cannot question potential jurors about that juror's bias or hostility unless the defendant is present should be applied prospectively only.<sup>2039</sup> Accordingly, the court found no violation of the defendants'

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2036. 80 N.Y.2d 519, 606 N.E.2d 1381, 591 N.Y.S.2d 990 (1992).

2037. The three cases simultaneously decided by the *Mitchell* court include *People v. Chambers*, 180 A.D.2d 541, 579 N.Y.S.2d 408 (1st Dep't 1992), *People v. Mitchell*, 174 A.D.2d 579, 572 N.Y.S.2d 650 (2d Dep't 1991) and *People v. Casiano*, 176 A.D.2d 632, 575 N.Y.S.2d 478 (1st Dep't 1991).

2038. 80 N.Y.2d 247, 604 N.E.2d 95, 590 N.Y.S.2d 33 (1992). In *Antommarchi*, the New York Court of Appeals held that trial courts cannot question potential jurors about that juror's bias or hostility unless the defendant is present. *Id.* at 250, 604 N.E.2d at 97, 590 N.Y.S.2d at 35.

2039. *Mitchell*, 80 N.Y.2d at 528, 606 N.E.2d at 1386, 591 N.Y.S.2d at 995. The pre-*Antommarchi* rule permitted trial courts to question prospective jurors about that juror's bias or hostility in the defendant's absence. *Id.*

constitutional<sup>2040</sup> or statutory<sup>2041</sup> right to be present and affirmed the convictions of the defendants.<sup>2042</sup>

The facts in all three cases are indistinguishable for purposes of this appeal.<sup>2043</sup> The trial court questioned prospective jurors during side-bar conferences held in the defendants' absence.<sup>2044</sup> The trial court then inquired whether the prospective juror, or the juror's friends or relatives, had been the victim of a crime or involved in a criminal proceeding.<sup>2045</sup> Since *Antommarchi* prohibited such questioning in the defendant's absence, the defendants contended that their right to be present was violated.<sup>2046</sup> This claim, however, was dependent upon a finding that the *Antommarchi* rule should be applied retroactively.

Because *Antommarchi* was based on state law,<sup>2047</sup> the court concluded that state rules on retroactive application applied.<sup>2048</sup>

2040. U.S. CONST. amends. V, XIV. The federal constitutional right to be present is not absolute, rather, "the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Mitchell*, 80 N.Y.2d at 526, 606 N.E.2d at 1384, 591 N.Y.S.2d at 993 (citing *Snyder v. Massachusetts*, 291 U.S. 97, 107-08 (1934)).

2041. N.Y. CRIM. PROC. LAW § 260.20 (McKinney 1981).

2042. *Mitchell*, 80 N.Y.2d at 529, 606 N.E.2d at 1386, 591 N.Y.S.2d at 995.

2043. *Id.* at 530, 606 N.E.2d at 1386-87, 591 N.Y.S.2d at 995-96. The court affirmed the convictions of defendants Mitchell and Casiano, since it declined to apply the *Antommarchi* rule retroactively. *Id.* The conviction of defendant Chambers, however, was reversed as a violation of *Batson v. Kentucky*. *Id.* See *Batson v. Kentucky*, 479 U.S. 79 (1986) (holding that use of peremptory challenges to exclude racial minorities from a jury constitutes a violation of equal protection).

2044. *Mitchell*, 80 N.Y.2d at 524, 606 N.E.2d at 1383, 591 N.Y.S.2d at 992.

2045. *Id.*

2046. *Id.*

2047. The decision rendered in *Antommarchi* was based on a violation of N.Y. CRIM. PROC. LAW. § 260.20. See *Antommarchi*, 80 N.Y.2d at 250, 604 N.E.2d at 97, 590 N.Y.S.2d at 35.

2048. *Mitchell*, 80 N.Y.2d at 527-28, 606 N.E.2d at 1385, 591 N.Y.S.2d at 994. The defendant claimed that the Supreme Court's decision in *Griffith v. Kentucky*, 479 U.S. 314 (1987), was binding on the New York Court of Appeals. *Id.* at 526, 606 N.E.2d at 1384, 591 N.Y.S.2d at 993. In *Griffith*, the

Relying on an earlier decision in *People v. Pepper*,<sup>2049</sup> the *Mitchell* court determined that the *Antommarchi* rule should be applied prospectively.<sup>2050</sup> In *Pepper*, the New York Court of Appeals held that three factors are to be evaluated in order to determine whether to confer retroactive effect to a new rule or to apply the old rule prospectively.<sup>2051</sup> These factors include “(1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect on the administration of justice of retroactive application.”<sup>2052</sup>

Applying the first factor, the *Mitchell* court found that the purpose of the rule is to permit the defendant to have a more active role in juror examination and selection and not to correct any constitutional debility inherent in pre-*Antommarchi* practices.<sup>2053</sup> Furthermore; the court noted that retroactive application is not absolutely necessary since involvement in the side-bar conference does not relate directly to the fact-finding process.<sup>2054</sup> Turning to the second factor, the court found that

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Supreme Court held that new constitutional rules must be given retroactive effect to those cases which are pending on direct review or not yet final. 479 U.S. at 322. The New York Court of Appeals, however, rejected the defendant’s contention, noting that retroactive application is an issue of state law when federal constitutional principles are not implicated. *Mitchell*, 80 N.Y.2d at 526, 606 N.E.2d at 1384, 591 N.Y.S.2d at 993. Since *Antommarchi* was decided on the basis of state law, the court was not bound to follow *Griffith*, and thus rejected defendant’s argument. *Id.*

2049. 53 N.Y.2d 213, 423 N.E.2d 366, 440 N.Y.S.2d 889, *cert. denied*, 454 U.S. 967 (1981).

2050. *Mitchell*, 80 N.Y.2d at 526-28, 606 N.E.2d at 1385-86, 591 N.Y.S.2d at 994-95.

2051. *Pepper*, 53 N.Y.2d at 220, 423 N.E.2d at 369, 440 N.Y.S.2d at 891-92.

2052. *Mitchell*, 80 N.Y.2d at 528, 606 N.E.2d at 1385, 591 N.Y.S.2d at 994 (citing *Pepper*, 53 N.Y.2d at 220, 423 N.E.2d at 369, 440 N.Y.S.2d at 892 and *People v. Morales*, 37 N.Y.2d 262, 269, 333 N.E.2d 330, 334, 372 N.Y.S.2d 25, 32 (1975)).

2053. *Mitchell*, 80 N.Y.2d at 528, 606 N.E.2d at 1386, 591 N.Y.S.2d at 995.

2054. *Id.* (citing *Pepper*, 53 N.Y.2d at 221, 423 N.E.2d at 369, 440 N.Y.S.2d at 892 and *Morales*, 37 N.Y.2d at 269, 333 N.E.2d at 344, 372 N.Y.S.2d at 32 (1975)).

there has been substantial reliance by the courts on the prior practice.<sup>2055</sup> Prospective jurors have routinely been examined in defendants' absence to expedite the voir dire process, to prevent juror embarrassment and to promote juror candor.<sup>2056</sup> With reference to the third factor, the court reasoned that since jury selection is conducted in every jury trial, an inordinate amount of criminal convictions on appeal will present an *Antommarchi* question.<sup>2057</sup> Thus, review of appeals based on *Antommarchi* would cause a significant burden to the administration of justice and would defer the disposition of an exorbitant amount of pending cases.<sup>2058</sup> Furthermore, the court noted that in many of these cases there is no record from which review can be made.<sup>2059</sup> Consequently, the Court held that the *Antommarchi* rule applies only to those cases in which jury selection occurred after the date *Antommarchi* was decided.<sup>2060</sup>

Under Federal law, the United States Supreme Court has adopted a different rule on retroactive application than applied by the New York Court of Appeals in *Pepper*.<sup>2061</sup> In *Griffith v. Kentucky*,<sup>2062</sup> the Court held that new rules involving constitutional issues are to be applied retroactively to all cases which are on appeal.<sup>2063</sup> The Supreme Court, in *Griffith*, set forth several reasons for its holding.<sup>2064</sup>

First, the Court noted that the integrity of judicial review mandates application of a new rule to all similar cases.<sup>2065</sup> The basic norms of constitutional adjudication would be violated in the event that a newly declared rule is not applied to cases

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2055. *Mitchell*, 80 N.Y.2d at 528, 606 N.E.2d at 1386, 591 N.Y.S.2d at 995.

2056. *Id.*

2057. *Id.* at 529, 606 N.E.2d at 1386, 595 N.Y.S.2d at 995.

2058. *Id.*

2059. *Id.*

2060. *Id.*

2061. *Id.* at 525-26, 606 N.E.2d at 1384, 591 N.Y.S.2d at 993.

2062. 479 U.S. 314 (1987).

2063. *Id.* at 328.

2064. *Id.* at 323.

2065. *Id.*; see also *Mackey v. United States*, 401 U.S. 667, 679 (1971).

pending on direct review.<sup>2066</sup> Secondly, selectively applying a new rule contravenes the proposition that similarly situated defendants should be treated alike.<sup>2067</sup> Moreover, failure to apply new rules retroactively to cases pending on appeal is inequitable because similarly situated defendants are treated arbitrarily, with some receiving the benefits of the new rule, while others do not.<sup>2068</sup>

In conclusion, federal courts apply a new rule for the conduct of criminal prosecutions retroactively to all cases pending on direct review or those which are not yet final.<sup>2069</sup> Where a federal constitutional issue is involved, New York courts must adhere to federal rules on retroactivity.<sup>2070</sup> However, where no federal constitutional issue is implicated, New York courts balance the three factors enumerated in *Pepper* to determine whether retroactive application of a new rule is warranted.<sup>2071</sup>

## SUPREME COURT, APPELLATE DIVISION

### *SECOND DEPARTMENT*

People v. Hannigan<sup>2072</sup>  
(decided August 30, 1993)

The defendant contended that his constitutional right to be present during side-bar voir dire pursuant to the State<sup>2073</sup> and

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2066. *Griffith*, 479 U.S. at 322.

2067. *Id.* at 323.

2068. *Id.*

2069. *Id.* at 328.

2070. *Mitchell*, 80 N.Y.2d at 526, 606 N.E.2d at 1384, 591 N.Y.S.2d at 993.

2071. *Id.* at 528, 606 N.E.2d at 1385, 591 N.Y.S.2d at 994.

2072. 193 A.D.2d 8, 601 N.Y.S.2d 928 (2d Dep't 1993).

2073. N.Y. CONST. art. I, § 6. This section states in relevant part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel . . . ."