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## Right to Be Present: People v. Hannigan

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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 . . . ."

Federal<sup>2074</sup> Constitutions, was violated because the holding of *People v. Sloan*<sup>2075</sup> was not applied retroactively to this case.<sup>2076</sup> The second department found that *Sloan* was based on state rather than federal law and thus, applied state rules concerning retroactivity.<sup>2077</sup> Consequently, the court held that *Sloan* should be applied prospectively and accordingly, found no violation of defendant's right to be present.<sup>2078</sup>

In the defendant's absence, the trial court questioned potential jurors who indicated that they had some knowledge of the case as a result of pretrial publicity.<sup>2079</sup> Since *Sloan* prohibited such questioning in the defendant's absence, the defendant claimed that his constitutional right to be present during the questioning was violated.<sup>2080</sup> This claim, however, was dependent upon a finding that *Sloan* should be applied retroactively.<sup>2081</sup>

2074. U.S. CONST. amend. VI. This amendment states in relevant part: "In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation . . . ."

2075. 79 N.Y.2d 386, 592 N.E.2d 784, 583 N.Y.S.2d 176 (1992). In *Sloan*, the New York Court of Appeals held that criminal defendants have a fundamental right to be present when prospective jurors are questioned about the effects of pretrial publicity. *Id.* at 390, 593 N.E.2d at 785, 583 N.Y.S.2d at 177; *see also Right to be Present*, 9 TOURO L. REV. 953 (1993) (discussing *Sloan*).

2076. *Hannigan*, 193 A.D.2d at 9, 601 N.Y.S.2d at 929.

2077. *Id.* at 13, 601 N.Y.S.2d at 932.

2078. *Id.* at 13-14, 601 N.Y.S.2d at 932.

2079. *Id.* at 9, 601 N.Y.S.2d at 929.

2080. *Id.* at 10, 601 N.Y.S.2d at 929.

2081. *Id.* If the court found that *Sloan* was based on the Federal Constitution, federal rules on retroactivity would apply, resulting in retroactive application to all cases pending on appeal. *Griffith v. Kentucky*, 479 U.S. 314, 322-23 (1987). If, on the other hand, *Sloan* was based on state law, state rules on retroactivity would apply. *Hannigan*, 193 A.D.2d at 13, 601 N.Y.S.2d at 932; *see also People v. Mitchell*, 80 N.Y.2d 519, 527, 606 N.E.2d 1381, 1385, 591 N.Y.S.2d 990, 994 (1992) (finding that *People v. Antommarchi*, 80 N.Y.2d 247, 604 N.E.2d 95, 590 N.Y.S.2d 33 (1992), was based on state law and thus, applied state rule on retroactivity).

The court held that *Sloan* was based on state law<sup>2082</sup> and therefore, applied the state rule on retroactivity set forth in *People v. Pepper*.<sup>2083</sup> In *Pepper*, the court created a three-pronged test to determine whether a new rule should be applied retroactively or prospectively.<sup>2084</sup> The elements of this test 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>2085</sup>

In applying these factors to the *Sloan* rule, the court found that *Sloan* should be applied prospectively.<sup>2086</sup> First, retroactivity is not required because the *Sloan* rule does not relate directly to the fact-finding process.<sup>2087</sup> Second, there has been substantial reliance on the pre-*Sloan* rule, which was commonly employed by trial courts and approved by appellate courts.<sup>2088</sup> Finally,

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2082. *Hannigan*, 193 A.D.2d at 10, 601 N.Y.S.2d at 930. In coming to this conclusion, the court noted that the *Sloan* court cited N.Y. CRIM. PROC. LAW § 260.20 (McKinney 1981) and N.Y. CONST. art. I, § 6, as the basis of its decision. *Hannigan*, 193 A.D.2d at 10, 601 N.Y.S.2d at 930. The court also relied heavily upon *Mitchell*, where the court of appeals held that the *Antommarchi* rule was based on state rather than federal law. *Mitchell*, 80 N.Y.2d at 526, 606 N.E.2d at 1384, 591 N.Y.S.2d at 993; *see also Hannigan*, 193 A.D.2d at 10-12, 601 N.Y.S.2d at 930-31. The *Hannigan* court further observed that although language in *Mitchell* indicated that *Antommarchi* involved more than a statutory violation, that language was addressed to the state rather than federal constitution. *Id.* at 13, 601 N.Y.S.2d at 931.

2083. *People v. Pepper*, 53 N.Y.2d 213, 220, 423 N.E.2d 366, 369, 440 N.Y.S.2d 889, 892, *cert. denied*, 454 U.S. 967 (1981); *Hannigan*, 193 at 13, 601 N.Y.S.2d at 932.

2084. *Hannigan*, 193 A.D.2d at 12, 601 N.Y.S.2d at 931 (citing *Pepper*, 53 N.Y.2d at 220, 423 N.E.2d at 369, 440 N.Y.S.2d at 892).

2085. *Hannigan*, 193 A.D.2d at 12, 601 N.Y.S.2d at 931 (citing *Pepper*, 53 N.Y.2d at 220, 423 N.E.2d at 369, 440 N.Y.S.2d at 892).

2086. *Hannigan*, 193 A.D.2d at 13-14, 601 N.Y.S.2d at 932.

2087. *Id.* at 13, 601 N.Y.S.2d at 932 (citing *Mitchell*, 80 N.Y.2d at 528, 606 N.E.2d at 1386, 591 N.Y.S.2d at 995); *see also Pepper*, 53 N.Y.2d at 221, 423 N.E.2d at 369, 440 N.Y.S.2d at 892; *People v. Morales*, 37 N.Y.2d 262, 269, 333 N.E.2d 339, 344, 372 N.Y.S.2d 25, 32 (1975).

2088. *Hannigan*, 193 A.D.2d at 13, 601 N.Y.S.2d at 932 (citing *People v. Laezza*, 143 A.D.2d 289, 290, 532 N.Y.S.2d 178, 179 (2d Dep’t 1988) and *People v. Ryan*, 93 A.D.2d 848, 849, 461 N.Y.S.2d 344, 345 (2d Dep’t 1983)).

retroactive application of *Sloan* would adversely effect the administration of justice because pre-screening jurors for effects of pretrial publicity occurred only in the most infamous and time consuming cases.<sup>2089</sup> Thus, the court held that the *Sloan* rule should be applied only prospectively.<sup>2090</sup> Since jury selection occurred before *Sloan* was decided, the court found no violation of defendant's right to be present.<sup>2091</sup>

Federal courts apply new constitutional rules retroactively to all cases pending on direct review or not yet final.<sup>2092</sup> Where a federal constitutional issue is involved, New York courts must apply the federal rule on retroactivity.<sup>2093</sup> If, however, no federal constitutional issue is involved, New York courts will apply the *Pepper* test to determine retroactive or prospective application of a new rule.<sup>2094</sup>

People v. Cohen<sup>2095</sup>  
(decided February 7, 1994)

Defendant claimed that his right to be present<sup>2096</sup> at all material stages of a trial was violated when prospective jurors

2089. *Hannigan*, 193 A.D.2d at 13, 601 N.Y.S.2d at 932 (citing *Mitchell*, 80 N.Y.2d at 529, 606 N.E.2d at 1386, 591 N.Y.S.2d at 995).

2090. *Hannigan*, 193 A.D.2d at 13-14, 601 N.Y.S.2d at 932.

2091. *Id.* The court also rejected additional arguments made by the defendant as being either inappropriate for appellate review or without merit. *Id.* at 14, 601 N.Y.S.2d at 932. In a concurring opinion, Justice O'Brien agreed. *Id.* at 15, 601 N.Y.S.2d at 933 (O'Brien, J., concurring). Justice O'Brien stated that the defendant failed to preserve the record and that there was no need for expanding the record because the defendant did not seek such relief. *Id.* at 14-15, 601 N.Y.S.2d at 933 (O'Brien, J., concurring). Moreover, the defendant did not suffer any serious deprivation of constitutional rights. *Id.* (O'Brien, J., concurring).

2092. *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987).

2093. *Mitchell*, 80 N.Y.2d at 526, 606 N.E.2d at 1384, 591 N.Y.S.2d at 993.

2094. *See, e.g., Hannigan*, 193 A.D.2d at 13, 601 N.Y.S.2d at 932 (applying *Pepper* to determine whether the *Sloan* rule should be applied retroactively or prospectively); *Mitchell*, 80 N.Y.2d at 528, 606 N.E.2d at 1386, 591 N.Y.S.2d at 995 (applying *Pepper* to determine whether the *Antommarchi* rule should be applied retroactively or prospectively).

2095. \_\_\_ A.D.2d \_\_\_, 607 N.Y.S.2d 374 (2d Dep't 1994).