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A Note to Our Readers

The Editors

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A NOTE TO OUR READERS

In this, our third annual issue on New York State Constitutional Law, the Editors are proud to once again provide its readers with a comprehensive look at the decisions of the New York courts on issues impacting the state constitution. This year, as in past years, has found the New York Court of Appeals relying on the state's constitution in direct contravention with prior United States Supreme Court decisions. Most notably, the companion cases *People v. Scott*¹ and *People v. Keta*.²

We are mindful that the New York Court of Appeals is and will continue to be in the forefront of state adjudication. We are also mindful that the language of the New York Constitution continues to provide the state's citizens with rights more expansive than their federal counterparts. Not only has this been recognized in the New York courts, but the federal courts as well. Of notable mention is a recent case that decided in the Second Circuit, *Claudio v. Scully*,³ that addressed the scope of the right to counsel in New York.

In *Claudio*, a criminal defendant, convicted of murder, sought a petition for a writ of habeas corpus contending that his constitutional right to effective assistance of counsel⁴ was violated when his assigned counsel failed to rely on New York constitu-

1. 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992).

2. *Id.*

3. 982 F.2d 798 (2d Cir. 1992).

4. U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Id.* It has been recognized that the right to counsel includes the right to effective assistance of counsel. See *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980) ("inadequate assistance does not satisfy the Sixth Amendment right to counsel made applicable to the States through the Fourteenth Amendment"); see also *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (stating that "it has been clear that a defendant pleading guilty to a felony charge has a federal right to the assistance of counsel."). See *Reece v. Georgia*, 350 U.S. 85, 90 (1955). In *Reece*, the Court stated that it has long been recognized that the right to counsel is the right to the effective assistance of counsel. Furthermore, no distinction is made between assigned counsel and retained counsel. *Cuyler*, 446 U.S. at 344.

tional⁵ law during a pre-trial appeal of an order denying the suppression of his confession made upon the advice of his prior counsel.⁶

The Second Circuit, noting that New York's right to counsel has been interpreted more broadly than its federal counterpart,⁷ found that it did in fact attach at the time the defendant gave his confession.⁸ Therefore, the Second Circuit, in determining whether the subsequent representation was constitutionally defective because of the assigned counsel's failure to raise ineffective assistance of counsel at the pre-trial appeal,⁹ held that the defen-

5. N.Y. CONST. art. I, § 6. Article I, section 6 provides in pertinent part: "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" *Id.* The court of appeals has also interpreted the New York right to counsel to include the effective assistance of counsel. *See* *People v. Baldi*, 54 N.Y.2d 137, 146, 429 N.E.2d 400, 404, 444 N.Y.S.2d 893, 897 (1981) ("What constitutes effective assistance is not and cannot be fixed with yardstick precision, but varies according to the unique circumstances of each representation."). Like its federal counterpart, no distinction is made between retained and assigned counsel. *People v. Aiken*, 45 N.Y.2d 394, 401, 380 N.E.2d 272, 276, 408 N.Y.S.2d 444, 449 (1978).

6. *Claudio*, 982 F.2d at 799.

7. The Second Circuit stated: "New York constitutional law has been enormously supportive of right to counsel claims The New York Court of Appeals has consistently interpreted the right to counsel under the New York Constitution more broadly than the Supreme Court has interpreted the federal right to counsel." *Id.* at 803.

8. *Id.* The Second Circuit found that under New York constitutional law, the defendant's right to counsel, which includes the effective assistance of counsel, "extended . . . to situations where a person is not in custody but has retained counsel as a result of a police investigation." *Id.* at 804 (citing *People v. Skinner*, 52 N.Y.2d 24, 31-32, 417 N.E.2d 501, 505, 436 N.Y.S.2d 207, 211 (1980)). The court noted that the *Skinner* right to counsel rule "simply recognizes the right and need of an individual to have a *competent* advocate at his or her side in dealing with the State." *Id.* (quoting *Skinner*, 52 N.Y.2d at 29, 417 N.E.2d at 503, 436 N.Y.S.2d at 209) (emphasis added).

9. The Second Circuit stated the test for determining whether a defendant's federal constitutional right to effective assistance of counsel has been violated as follows:

A defendant is denied his federal constitutional right to the effective assistance of counsel when his attorney's conduct falls outside the wide range of 'professionally competent assistance' and when there is a

dant's "Article I, section 6 claim had a reasonable probability of success despite the Appellate Division's¹⁰ decision to deny the claim."¹¹ The court further held that the assigned counsel's representation at the pre-trial appeal "was professionally unreasonable and constitutionally defective . . . in light of all the circumstances" ¹²

Interestingly enough, the Second Circuit found fault with the appellate division's interpretation of New York constitutional law, particularly its "distinction between the right to counsel and the right to effective counsel" ¹³ The circuit court stated that the appellate division misunderstood the extent of the New

'reasonable probability' that, but for counsel's inadequate representation, the result of the proceeding would have been different.

Id. (citing *Strickland v. Washington*, 466 U.S. 668, 690, 694 (1984)). The Second Circuit noted that while the *Strickland* test addressed the "trial counsel context," it has adopted it to assess the "effectiveness of appellate counsel." *Id.*

10. *People v. Claudio*, 85 A.D.2d 245, 447 N.Y.S.2d 972 (2d Dep't 1982), *aff'd*, 59 N.Y.2d 556, 453 N.E.2d 500, 466 N.Y.S.2d 271 (1983). The appellate division determined that the defendant's right to counsel under the New York Constitution had attached prior to the time of his confession. *Id.* at 255, 447 N.Y.S.2d at 979. However, it maintained that "prior to the initiation of formal [judicial] proceedings the right to counsel is more limited[,] consequently the right to effective assistance of counsel was not invoked. *Id.* at 258, 447 N.Y.S.2d at 980-81. Therefore, the court concluded that the defendant's right to counsel was not violated by the "incompetency" of his counsel's advice, *id.* at 260, 447 N.Y.S.2d at 982, because his attorney's error of allowing him to confess to the district attorney "did not occur in the context of a trial or other proceeding, wherein a judge should have been aware of it and corrected it." *Id.* at 258, 447 N.Y.S.2d at 981. The court of appeals affirmed the decision on Sixth Amendment grounds only. The court concluded that while the defendant's confession was "induced by the faulty advice of his lawyer," it need not be suppressed because his "right of effective assistance of counsel . . . had not attached[] because criminal proceedings against him had not commenced." *People v. Claudio*, 59 N.Y.2d 556, 563, 453 N.E.2d 500, 505, 466 N.Y.S.2d 271, 274 (1983).

11. *Claudio*, 982 F.2d at 803.

12. *Id.* at 805.

13. *Id.* at 804. Indeed, the court stated that it had "serious doubts as to whether this is a correct interpretation of New York constitutional law." *Id.* at 803-04.

York Court of Appeals' decision in *People v. Skinner*.¹⁴ Unlike the appellate division,¹⁵ the Second Circuit maintained that "[t]he right to effective assistance of counsel appears to be at the heart of the *Skinner* court's decision to adopt a more expansive reading of the right to counsel."¹⁶ In support of this contention, the Second Circuit noted that *Skinner* extended the right to counsel to non-custodial interrogations where the retention of counsel was based on the initiation of a police investigation. The court stated:

In retaining an attorney specifically in response to repeated police-initiated contacts, defendant unequivocally indicated that he felt himself unable to deal with the authorities without legal assistance. In a real sense, he had activated his constitutional right to interpose an attorney between himself and the overwhelming power of the State.¹⁷

Consequently, the Second Circuit remanded the case to the district court¹⁸ with instructions to grant the petition unless the defendant is afforded an opportunity to bring a state claim in the New York Court of Appeals, pursuant to article I, section 6 of the New York Constitution.

We believe that the continued reliance on State constitutional law is of utmost importance. No longer is it enough for an attorney or judge to rely solely on the Federal Constitution when determining the rights and protection of citizens. We believe that *Claudio v. Scully* is a testament to that belief.

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14. *People v. Skinner*, 52 N.Y.2d 24, 31-32, 417 N.E.2d 501, 505, 436 N.Y.S.2d 207, 211 (1980).

15. *See supra* note 10.

16. *Claudio*, 982 F.2d at 804.

17. *Id.* (quoting *Skinner*, 52 N.Y.2d at 31-32, 417 N.E.2d at 505, 436 N.Y.S.2d at 211).

18. The district court had previously denied the defendant's habeas petition. *See Claudio v. Scully*, 791 F. Supp. 985 (E.D.N.Y. 1992).