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Right to Counsel

Amendment. In *United States v. Novak*,[1205] the Second Circuit echoed the New York courts' finding that when "serious" defects exist in an individual's ability to practice law, the defendant's right to counsel has been violated.[1206] The facts in *Novak* are substantially similar to those in *Chin Min Foo* because the attorney in question was the same person, Joel Steinberg, and the issue regarding his fitness as "counsel" was the same.[1207]

It appears that the Second Circuit and the New York state courts are in harmony on this issue. If a defendant is represented in a criminal matter[1208] by an individual whose inability to practice law is due to a "technical" defect, such as nonpayment of bar dues or failure to get admission *pro hac vice*, then it will not constitute a violation of the right to counsel under either the Sixth Amendment or article I, section 6 of the New York State Constitution. Only "serious" defects, such as failure to pass the bar examination, will render that individual a layman, and not "counsel," thereby affording the defendant a valid constitutional claim.

People v. Enrique[1209]
(decided July 7, 1992)

A criminal defendant claimed that his right to effective assistance of counsel under the federal[1210] and state[1211] constitutions was violated when, at his trial, his attorney was denied permission to confer with him during a lunch recess while the defendant was being cross-examined.

1205. 903 F.2d 883 (2d Cir. 1990).

1206. *Id.* at 888.

1207. *See id.* at 885-88.

1208. It should be noted that none of these cases have determined whether a violation of the constitutional right to counsel would exist in a similar civil matter.

1209. 80 N.Y.2d 869, 600 N.E.2d 229, 587 N.Y.S.2d 598 (1992).

1210. U.S. CONST. amend. VI.

1211. N.Y. CONST. art. I, § 6.

The court of appeals, in a short memorandum opinion, adopted the reasoning of the appellate division and held that the defendant's Sixth Amendment rights were not violated by the trial court's ruling which denied defense counsel permission to confer with the defendant. The court also held that it did not "perceive any basis for a different result under the State Constitution."[1212]

The defendant was arrested and charged with possession of a controlled substance in the first degree.[1213] At his trial, and during the course of his cross-examination, a luncheon recess was announced by the court. Once the jurors had departed for lunch, counsel for the defendant requested permission from the court to speak with the defendant. The court denied the request and informed defense counsel that it was within its discretion to prohibit such consultation.[1214] The trial court noted, however, that if defense counsel wished to inform the court what counsel intended to discuss with the defendant, it "'might entertain'" the request.[1215] Defense counsel refused to reveal the information, and the trial court denied counsel permission to speak with the defendant.[1216]

Before the trial resumed after the luncheon recess, the court entertained comments regarding its ruling. Defense counsel mentioned that one of the items he wanted to speak to the defendant about was "'strictly a procedural item on how to conduct himself as a witness.'"[1217] The second matter was more "substantive," and involved something the defendant testified to earlier, but

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1212. *Enrique*, 80 N.Y.2d at 870, 600 N.E.2d at 229, 587 N.Y.S.2d at 598.

1213. People v. Enrique, 165 A.D.2d 13, 15, 566 N.Y.S.2d 201, 202 (1991). The defendant was arrested, along with three other persons, in an apartment occupied by an "acquaintance" and was charged with possession of cocaine. *Id.* At trial, the defendant testified that he was there for the sole purpose of assisting the owner of the apartment in finding a new apartment. *Id.* He further testified that he was there for approximately ten minutes, and was standing at the door when the police arrived. *Id.* At no time, claimed the defendant, did he see anyone in the apartment with a gun or in possession of cocaine. *Id.*

1214. *Id.* at 15, 566 N.Y.S.2d at 202.

1215. *Id.* at 16, 566 N.Y.S.2d at 202.

1216. *Id.*

1217. *Id.* at 16, 566 N.Y.S.2d at 202-203.

nothing defense counsel expected to be raised in the future. While conceding he was being "'a little cryptic,'" defense counsel stated he could not elaborate, and objected to the trial court's ruling.[1218] The court let its ruling stand explaining that "'counsel cannot impart to his client anything with regard to [an] anticipated line of questioning.'"[1219] The jurors returned to the courtroom, the defendant's cross-examination was completed, and he was subsequently convicted.

The appellate division, first department, affirmed.[1220] The appellate division deemed significant the fact that the trial court imposed only an absolute ban on consultation after it "afford[ed] counsel the opportunity to identify the subjects he wished to discuss with his client"[1221] pursuant to the United States Supreme Court's ruling in *Perry v. Leeke*.[1222] Because the court found the trial court's ruling in accordance with the mandates of *Perry*,[1223] it affirmed the judgment convicting the defendant of criminal possession of a controlled substance in the first degree.[1224]

The appellate division acknowledged that the Supreme Court has interpreted the Sixth Amendment of the United States Constitution as "'requir[ing] the guiding hand of counsel at every step in the proceedings against him.'"[1225] The appellate division stated, nonetheless, that this is not an absolute right and may be restricted, at the court's discretion, "to control the conduct of a trial."[1226] In *Geders v. United States*,[1227] the appellate division

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1218. *Id.* at 16, 566 N.Y.S.2d at 203.

1219. *Id.*

1220. *Id.* at 16, 566 N.Y.S.2d at 203, 207.

1221. *Id.* at 19, 566 N.Y.S.2d at 205.

1222. 488 U.S. 272 (1989).

1223. *Enrique*, 165 A.D.2d at 20, 566 N.Y.S.2d at 205.

1224. *Id.* at 22, N.Y.S.2d at 207.

1225. *Id.* at 16, 566 N.Y.S.2d at 203 (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)). *See also* Argersinger v. Hamlin, 407 U.S. 25, 31 (1972) ("The assistance of counsel is often a requisite to the very existence of a fair trial."); Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963) (the right to counsel is a fundamental constitutional right necessary to ensure a fair trial).

1226. *Enrique*, 165 A.D.2d at 16-17, 566 N.Y.S.2d at 203. *See also* People v. Hilliard, 73 N.Y.2d 584, 540 N.E.2d 702, 702, 542 N.Y.S.2d 507, 507 (1989).

noted, the Supreme Court reversed the conviction of a defendant who was denied all rights of consultation with his counsel during a seventeen hour overnight recess which occurred between the defendant's direct and cross examination.[1228] The *Geders* Court held that such an order "impinged upon [the defendant's] right to the assistance of counsel guaranteed by the Sixth Amendment."[1229] Nevertheless, the Court expressed concern with the possibility of improper influence or "coaching" of the defendant-witness during the recess, but stopped short of imposing a total barrier between the defendant and his counsel for a period as long as seventeen hours.[1230]

The appellate division observed that *Geders* did not reach the question of "whether a ban on consultation during a 'brief routine recess' in the course of a defendant's testimony would be permitted."[1231] The Supreme Court answered this question in *Perry v. Leeke*. In *Perry*, the Court held that the Sixth Amendment does not compel the trial court to allow the defendant to consult with his attorney during cross-examination, if the judge decides to interrupt the proceedings by declaring a short recess.[1232] The Supreme Court ruled that such consultation would be permitted providing any discussion regarding the ongoing testimony is forbidden.[1233]

The Supreme Court stated that it did not rest its determination on the fact that counsel will engage in unethical coaching, but because once the defendant becomes a witness he, like all

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1227. 425 U.S. 80 (1976).

1228. *Enrique*, 165 A.D.2d at 17, 566 N.Y.S.2d at 203; *Geders*, 425 U.S. at 92.

1229. *Geders*, 425 U.S. at 91.

1230. *Id.* The Court suggested that the prosecutor could cross-examine the defendant as to the extent of any coaching during the recess to create a record with which the prosecutor could use during closing arguments to impinge the defendant's credibility. *Id.* at 90-91.

1231. *Enrique*, 165 A.D.2d at 17, 566 N.Y.S.2d at 203 (quoting *Geders*, 425 U.S. at 90 n.2).

1232. Perry v. Leeke, 488 U.S. 272, 284-85 (1989) (upholding trial court's discretion banning the defendant from consulting with anyone during a fifteen minute recess).

1233. *Id.* at 284 n.8.

witnesses, "has no constitutional right to consult with his lawyer while he is testifying."[1234] The Court noted that "[i]t is common practice for a judge to instruct a witness not to discuss his or her testimony with third parties until the trial is completed."[1235] Since the defendant "place[d] himself at the very heart of the trial process" by testifying,[1236] he was subject to the same rules governing the "truth-seeking" function of a trial that is generally applicable to other witnesses.[1237] The *Perry* Court distinguished *Geders*, because in *Geders* there was the possibility, due to the length of the delay, that matters other than the defendant's testimony would be discussed.[1238] The court added, when there is only a short recess, "it is appropriate [for the court] to assume that nothing but the testimony will be discussed."[1239]

The appellate division determined that the trial court imposed its ban only after defense counsel refused to inform the court of the purpose of the consultation. Furthermore, the trial court "made it clear that, based on counsel's response, it was prepared

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1234. *Id.* at 281.

1235. *Id.*

1236. *Id.* at 283 (quoting United States v. DiLapi, 651 F.2d 140, 151 (2d Cir. 1981) (Mishler, J., concurring)).

1237. *Id.* at 282. *See also* Pointer v. Texas, 380 U.S. 400, 404 (1965) (cross-examination exposes falsehoods and brings out the truth in a criminal trial); *DiLapi*, 651 F.2d at 150 (Mishler, J., concurring) (cross-examination ferrets out truth in the trial process); People v. Chin, 67 N.Y.2d 22, 27-28, 490 N.E.2d 505, 510, 499 N.Y.S.2d 638, 643 (1986) ("'Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.'") (quoting Davis v. Alaska, 415 U.S. 308, 316 (1974)). In *Enrique*, the defendant argued that the truth seeking function of cross-examination would be obscured if *Perry* was adhered to "'because the flustered truth teller is more vulnerable to cross-examination than is the calm truth teller.'" 165 A.D.2d at 19, 566 N.Y.S.2d at 205. Thus, the defense contended that a defendant should be allowed to confer with its attorney to "discuss potentially inconsistent testimony" and to allow an attorney to assist a defendant "who may be 'intellectually or emotionally ill equipped' in confronting 'surprise information' or a 'withering' cross-examination." *Id.* at 18, 566 N.Y.S.2d at 204.

1238. *Perry*, 488 U.S. at 284. Such possible matters mentioned included trial tactics, available witnesses, or negotiating plea bargains. *Id.*

1239. *Id.*

to change its ruling."[1240] This compromise, the appellate division concluded, is what *Perry* "expressly sanctioned."[1241] Therefore, the trial court's "directive was an appropriate exercise of discretion[] which fully respected defendant's right to the assistance of counsel."[1242]

The appellate division saw no reason to reject the standard set forth in *Perry* when interpreting the New York Constitution. First, the appellate division rejected the defendant's suggestion that it adopt a state rule that "'unless trial counsel is seeking to interfere with the orderly processes of the trial[,] . . . he is entitled, within the bounds of professional responsibility and ethics, to communicate with his client on any subject, at any time during the course of trial irrespective of the fact that an opportunity arises during the course of his testimony.'"[1243] The appellate division stated that the defendant failed to provide a "convincing reason for establishing a State constitutional rule different from the federal one."[1244] Furthermore, it observed that the defendant suggested neither an interpretive basis[1245] nor a significant noninterpretive consideration[1246] to justify construing

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1240. *Enrique,* 165 A.D.2d at 19, 566 N.Y.S.2d at 205.

1241. *Id.*

1242. *Id.* at 22, 566 N.Y.S.2d at 207.

1243. *Id.* at 21, 566 N.Y.S.2d at 206.

1244. *Id.*

1245. Under the interpretive basis analysis, the court considers:

> whether the textual language of the State Constitution specifically recognizes rights not enumerated in the Federal Constitution; whether language in the State Constitution is sufficiently unique to support a broader interpretation of the individual right under State law; whether the history of the adoption of the text reveals an intention to make the State provision coextensive with, or broader than, the parallel Federal provision; and whether the very structure and purpose of the State Constitution serves to expressly affirm certain rights rather than merely restrain the sovereign power of the State.

People v. P.J. Video, Inc., 68 N.Y.2d 296, 302-03, 501 N.E.2d 556, 560, 508 N.Y.S.2d 907, 911 (1986). *See also* People v. Harris, 77 N.Y.2d 434, 438, 570 N.E.2d 1051,1053, 568 N.Y.S.2d 702, 704 (1991); People v. Alvarez, 70 N.Y.2d 375, 378-79, 515 N.E.2d 1051, 1053, 521 N.Y.S.2d 702, 704 (1987).

1246. Under the noninterpretive analysis the court considers:

New York's right to counsel provision differently than its federal counterpart.[1247]

Secondly, the appellate division stated that New York cases which previously addressed the issue of "barring consultation between a defendant and his lawyer during the defendant's testimony have [never] even hinted that the State rule might differ from the [f]ederal."[1248] The appellate division noted that *People v. Narayan*,[1249] where the court of appeals concluded that a criminal defendant may not be deprived of the right to confer with counsel "for any substantial period of time,"[1250] did not create a "new and independent state standard" because it cited *Geders v. United States*, and not a state authority to support its proposition.[1251] Likewise, the appellate division denied that *People v. Phillips*,[1252] "established a special state rule," because it based its determination on federal case law and *People v. Narayan*.[1253]

Thus, under both the federal and state constitutions, a court may, in its discretion, deny the defendant the right to confer with

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any preexisting State statutory or common law defining the scope of the individual right in question; the history and traditions of the State in its protection of the individual right; any identification of the right in the State Constitution as being one of peculiar State or local concern; and any distinctive attitudes of the state citizenry toward the definition, scope or protection of the individual right.

P.J. Video, 68 N.Y.2d at 303, 501 N.E.2d at 560, 508 N.Y.S.2d at 911. *See also Harris*, 77 N.Y.2d at 438, 570 N.E.2d at 1053, 568 N.Y.S.2d at 704; *Alvarez*, 70 N.Y.2d at 378-79, 515 N.E.2d at 899, 521 N.Y.S.2d at 213.

1247. *Enrique*, 165 A.D.2d at 21, 566 N.Y.S.2d at 206.

1248. *Id.*

1249. 54 N.Y.2d 106, 429 N.E.2d 123, 444 N.Y.S.2d 604 (1981).

1250. *Id.* at 112, 429 N.E.2d at 125, 444 N.Y.S.2d at 606.

1251. *Enrique*, 165 A.D.2d at 22, 566 N.Y.S.2d at 206.

1252. 77 A.D.2d 927, 431 N.Y.S.2d 99 (2d Dep't 1980).

1253. *Enrique*, 165 A.D.2d at 22, 566 N.Y.S.2d at 206. *Phillips* presented facts quite similar to *Enrique*. However, the second department concluded that the trial court's ruling proscribing all communication between the defendant and his counsel during the luncheon recess was overbroad and violated the defendant's right to the assistance of counsel. *Phillips*, 77 A.D.2d. at 928, 431 N.Y.S.2d at 100.

counsel during a short recess which interrupts the defendant's cross-examination.