DEATH PENALTY, TAXING THE NON-RESIDENT EMPLOYEE

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This month we discuss the Court of Appeals' decision in the second death penalty case decided under New York's current statute, in which a divided Court vacated the death sentence but affirmed the defendant's murder conviction. We also discuss the Court's decision on New York's taxation of income earned by a New York employee while working out of state for the "convenience of the employee."

Death Penalty

The Court divided sharply in deciding the death penalty case of *People v. James Cahill,* with four lengthly opinions, some sarcastic in tone. Judge Albert M. Rosenblatt wrote for the majority, joined by Chief Judge Judith S. Kaye and Judge Carmen Beauchamp Ciparick. Judge George Bundy Smith wrote a separate opinion, concurring with the majority and addressing additional issues, in which Judge Ciparick joined in part. Judges Victoria A. Graffeo and Susan Phillips Read each authored dissents and joined in portions of each other's dissent.

Cahill had beaten his wife with a baseball bat and put her in a coma. He at first claimed that he acted in self-defense because his wife was wielding a knife, but later admitted to the police that the continued to hit his wife with the bat after she no longer had a knife. Approximately six months later, and shortly after his wife began to show signs of recovery and ability to communicate, Cahill entered her hospital room dressed as a janitor and administered a fatal dose of potassium cyanide.

Cahill was charged with two counts of first degree murder based on two of the 13 aggravating factors that can elevate a second degree (intentional) murder into first degree murder eligible for the death penalty. These factors were witness elimination murder and murder committed "in the course of . . . and in furtherance of" second degree burglary. The majority held that neither aggravating factor was applicable and thus reduced the conviction to second degree murder, a result with which both dissenters disagreed.

The Court held that for witness elimination murder, the motive to eliminate a witness must be a "substantial factor" in the murderer's intent, not the sole motive (as defendant had argued) or merely one of multiple motives (as the prosecution had argued). The majority concluded that while the evidence adduced on this count was "legally sufficient" to meet that standard, a finding of witness elimination murder was "against the weight of the evidence," and therefore reversed. It explained that the two tests have different criteria. In deciding legal sufficiency, a court must determine whether "any valid line of reasoning and permissible inferences . . . could lead a rational person to the conclusion reached by the jury."

But in performing a weight-of-the-evidence review, an appellate court "sits, in effect, as the 'thirteenth juror,'" to decide whether a result different than that reached by the jury "would not have been unreasonable," and if the jury failed to give the evidence the weight it should be accorded.

The Court determined that the weight of the evidence did not support a finding that witness elimination was a "substantial factor" in Cahill's murder of his wife, finding that "[t]he better part of the evidence reveals that defendant was motivated to poison his wife because their marriage and family life were being destroyed, not because he wanted to kill a witness to the assault case." The majority relied in part upon the fact that Cahill's confession eliminated self-defense as a defense to the assault charge, and thus elimination of his wife's testimony on that charge was unnecessary, and that at the time of the murder the wife's condition would not have supported a belief that she could testify at Cahill's trial.

Judge Graffeo's dissenting opinion disagreed vehemently with this conclusion. It pointed out that Cahill still maintained self-defense at his assault and murder trial, and that Cahill administered the poison shortly after he learned his wife was regaining the ability to communicate. Judge Graffeo criticized that majority for substituting its judgment for that of the jury.

Judges Graffeo and Read also accused the majority of substituting its judgment for that of the Legislature in interpreting the Penal Law in such a way as to invalidate the other first degree murder conviction. The majority ruled that where the intent element of a burglary is predicated exclusively entering a building (here, a hospital room) with the intent to commit a murder, the statute would not permit the burglary to constitute an aggravating factor. Instead, the burglary must have a mens rea separate from that of the murder in order to elevate the murder to first degree. The dissenters interpreted the statute differently and suggested that the majority's interpretation was strained and contrary to legislative intent.

The majority also found reversible errors in jury selection. Because the errors pertained only to the jurors' attitude toward the death penalty, however, the conviction did not need to be vacated, just the death sentence. The opinion explained that jurors in such cases must be both "death qualified" and "life qualified," that is, not rule out voting for or against the death penalty in the matter. CPL 270.20(1)(f) provides that a prospective juror may be challenged for entertaining opinions either for or against the death penalty that "preclude" him or her from rendering an impartial verdict or exercising the discretion conferred on jurors under the death penalty statute. The Court interpreted this provision to mean that "jurors must be dismissed if they 'express an inability to set aside their personal views on the death penalty in deference to the Court's instructions.'"

Applying this standard, the majority held that one prospective juror should have been excused for cause upon the motion of the defendant and that another juror was improperly removed for cause upon the motion of the prosecution. The dissenters disagreed with the majority's interpretation of the questioning of both jurors. They argued that the majority was substituting its judgment for that of the trial court, which had the opportunity to

evaluate the demeanor of the prospective jurors during selection. In the words of Judge Read, "[w]e were not there; the Trial Judge was."

Judge Smith wrote a separate opinion in order to address two issues that the majority opinion did not reach -- the deadlocked jury instruction and "the arbitrariness of the death penalty statute." Judge Ciparick joined the concurring opinion with respect to the first issue.

The CPL requires the trial court in a capital punishment case to instruct the jury that, in the event it fails to reach a unanimous decision with respect to whether the defendant should receive either the death sentence or a sentence of life imprisonment without possibility of parole, the court will sentence the defendant to a minimum term of 20 – 25 years and a maximum of life. The sentence a court may impose, unlike that the jury may impose, allows the possibility of parole. Judge Smith would find such a sentencing scheme to be "irrational" and create a "substantial risk" of coercing a unanimous sentencing decision from the jury. A juror who believes that life without parole is the appropriate sentence, the concurrence maintained, may be coerced into voting for death in order to avoid the possibility of the defendant getting parole if the jury's decision is not unanimous. Judge Smith proposed that the law be changed so that the only sentence a judge could impose in the event of a jury deadlock is the lesser sentence considered by the jury – life without parole.

The concurring opinion went on to discuss two aspects of whether New York's death penalty scheme is unconstitutionally arbitrary, although it did not come to a "definitive conclusion" on the issue. One aspect is the degree of prosecutorial discretion in deciding whether to seek the death penalty. Judge Smith pointed out that a District Attorney is not required to set forth his or her reason for seeking or not seeking the death penalty. However, a defendant should be able to challenge the filing of a death notice, the concurrence argued, and "[t]o deny a defendant's challenge where the District Attorney is allowed to conceal reasoning improperly stacks the deck against the defendant."

Judge Smith also discussed the "sad and ugly badge of shame that the imposition of death in this country has been tainted with racial prejudice." At the same time, Judge Smith acknowledged that there is no evidence race has played a role in the decision of whether to seek the death penalty under New York's current statute. The opinion concluded that under the New York State constitution "the death penalty cannot be imposed if the risk that race played a role in its imposition is significant," and argued that "before a death sentence can be imposed, the issue must be addressed and resolved."

Judge Graffeo's dissenting opinion made clear the depth of the division within the Court:

> The extreme disagreement that envelops the members of this Court stems from . . . . general ideas and differing philosophies about how we should exercise the power that the State Constitution vests in this institution. . . . In this case, I would respect, rather than second guess, the life/death qualification

> assessments of the trial judge, the factual findings of the jury and the public policy choice made by the Legislature.

Judge Read's dissent made equally clear the degree to which she disagreed with the majority, calling its opinion "a remarkable piece of judicial legerdemain, shot though with after-the-fact analysis."

Taxing the Non-Resident Employee

Edward A. Zelinsky, a law professor at Cardozo School of Law in New York City, commutes to his job from his home in Connecticut. He teaches and performs other professorial tasks at the law school three days a week and stays at home two days a week and when school is not in session doing other law school-related work. In 1994 and 1995, he and his wife filed joint New York State tax returns in which they apportioned a percentage of his law school salary based upon the days he was at the law school; the balance was allocated to Connecticut where taxes were paid on the allocated income.

The Zelinskys' returns were challenged by New York's taxing authority, which, applying the "convenience of the employee" test, determined that the days Professor Zelinsky worked from his home should be counted as work days in New York because he worked at home on those days to suit his own convenience and was not required to do so by the law school. He was therefore not entitled to any credit for the taxes he paid to Connecticut.

The taxing authority was unsuccessfully challenged in an Article 78 proceeding in the Appellate Division, Third Department, which, in a well-reasoned opinion, rejected Professor Zelinsky's federal constitutional claims that the "convenience of the employee" test was unconstitutional under the Commerce and Due Process Clauses.

In a unanimous opinion by Chief Judge Judith S. Kaye in *Matter of Zelinsky*, the Court affirmed the Third Department in a comprehensive opinion that may be reviewed by the Supreme Court of the United States because New York's use of the "convenience of the employee" test has been the focus of criticism and can result, as it did here, in double taxation of the same income. Professor Zelinsky, who throughout has appeared *pro se*, may see the Supreme Court as his next step. This is by no means an insignificant issue in terms of tax revenue for New York State, which collects what has been said to be approximately $100 million from taxpayers like Professor Zelinsky.