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Criminal Defendant Is Per Se Entitled to Vacatur of His Conviction When Represented by an Attorney Whose License Is Subsequently Revoked

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and consistency in the law.

Fara Agrusa

Criminal defendant is per se entitled to vacatur of his conviction when represented by an attorney whose license is subsequently revoked

Fundamental to the right to a fair trial under the sixth amendment is the right of the accused to the assistance of counsel¹ at all critical stages of a criminal proceeding.² This right extends

¹ See 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.*; see *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." *Id.* The *Gideon* Court recognized the right to counsel as essential to a fair trial and concluded that the states are required by the fourteenth amendment to appoint counsel for indigent defendants to ensure that they receive fair trials. See *id.* at 341-44. The right of indigent defendants to have counsel appointed for them was constitutionally recognized for the first time in *Powell v. Alabama*, 287 U.S. 45, 71-72 (1932). See W. LAFAYE & J. ISRAEL, *CRIMINAL PROCEDURE* § 11.1, at 473 (student ed. 1985). The *Powell* Court did not focus on the right to counsel under the sixth amendment, but instead focused on the due process clause of the fourteenth amendment, stating that under the circumstances . . . the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was . . . a denial of due process within the meaning of the Fourteenth Amendment." *Powell*, 287 U.S. at 71. In *Johnson v. Zerbst*, 304 U.S. 458 (1938), the Supreme Court recognized the right of a person charged with a crime in federal court to the assistance of counsel under the sixth amendment. See *id.* at 462-63; W. LAFAYE & J. ISRAEL, *supra*, § 11.1, at 475. Twenty-five years later, the right was made obligatory in state criminal prosecutions through operation of the fourteenth amendment. See *Gideon*, 372 U.S. at 342; W. LAFAYE & J. ISRAEL, *supra*, § 11.1, at 476.

² See *Coleman v. Alabama*, 399 U.S. 1, 7 (1970). The right to counsel attaches "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment," and is not limited to the time of trial. *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972); see *Brewer v. Williams*, 430 U.S. 387, 398-99 (1977); *Massiah v. United States*, 377 U.S. 201, 205 (1964); see also W. LAFAYE & J. ISRAEL, *supra* note 1, § 11.1(b), at 484 ("The Sixth Amendment right to appointed counsel applies only to 'critical stages' in the criminal prosecution . . . [where] the 'substantial rights of the accused may be affected' . . .").

Where substantial rights of the accused may be affected by a particular state criminal procedure or statute governing criminal procedure, the Supreme Court has looked to the law of that state to determine whether the right to the assistance of counsel has attached under the sixth amendment. See *Meadows v. Kuhlmann*, 812 F.2d 72, 76-77 (2d Cir.), *cert. denied*, 107 S. Ct. 3188 (1987); see, e.g., *Coleman*, 399 U.S. at 9-10 (sixth amendment right to coun-

beyond the mere presence of counsel and requires counsel's assistance to be effective.³ Under the New York Constitution,⁴ the right to counsel guarantees representation by a licensed attorney.⁵ When

sel exists at preliminary hearing granted under state law); *White v. Maryland*, 373 U.S. 59, 60 (1963) ("Whatever may be the normal function of the 'preliminary hearing' under Maryland law, it was in this case as 'critical' a stage as arraignment under Alabama law."); *Hamilton v. Alabama*, 368 U.S. 52, 53-54 (1961) (arraignment is "critical stage" in state where unraised defenses are waived).

³ See *Glasser v. United States*, 315 U.S. 60, 70-71 (1942); see also *Powell*, 287 U.S. at 71. In *Powell*, a capital case involving indigent defendants, the Court recognized that the "duty [to appoint counsel] is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." *Id.* (emphasis added).

The right of a defendant to have competent and effective counsel when pleading guilty to a felony charge was noted by the Supreme Court in *McMann v. Richardson*, 397 U.S. 759, 770-71 & 771 n.14 (1970). In *McMann*, the Court stated that "defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." *Id.* at 771.

The test to determine whether the assistance of counsel has been "so defective as to require reversal of a conviction," requires the defendant to demonstrate that counsel's assistance was "deficient" and that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In order to obtain a reversal, the defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* The defendant may be able to demonstrate that the conduct was not professionally reasonable, but unless prejudice to the defendant as a result of the conduct is shown, a reversal will not be granted. See 2 J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 7:18, at 339 (1986). For an argument rejecting the *Strickland* prejudice requirement on the ground that once a defendant establishes that effective assistance of counsel has been denied, he has per se received an unfair trial and is thereby entitled to a new trial, see Gabriel, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1288-89 (1986).

⁴ N.Y. CONST. art. 1, § 6. "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel . . ." *Id.*

⁵ See *People v. Felder*, 47 N.Y.2d 287, 291-92, 391 N.E.2d 1274, 1275, 418 N.Y.S.2d 295, 296 (1979). In *Felder*, the Court of Appeals held that as used in the sixth amendment the word "counsel is indeed synonymous with attorney at law"; therefore, where a defendant is represented by an "unlicensed lay person," he has been denied his sixth amendment right to counsel. *Id.* at 294, 391 N.E.2d at 1277, 418 N.Y.S.2d at 298.

In dealing with the related issue of the right of a criminal defendant to be represented by a person of his or her own choosing, courts have held that the right to counsel does not extend to assistance by one other than a licensed attorney. See 2 J. COOK, *supra* note 3, § 7:18, at 345. A number of federal courts have rejected claims made by defendants that they were denied their right to counsel because they were not permitted to be represented by laypersons. See, e.g., *United States v. Wilhelm*, 570 F.2d 461, 465 (3d Cir. 1978) (sixth amendment does not guarantee right to be represented by friend who did not graduate law school and is not member of bar); *United States v. Hinderman*, 528 F.2d 100, 103 (8th Cir. 1976) (defendant has right to act as own attorney in criminal trial but does not have constitutional right to be represented by unlicensed attorney); *Turner v. American Bar Ass'n*, 407

this right has been violated, case law demands the vacatur of a criminal defendant's conviction without inquiry into whether the defendant was prejudiced by denial of the right.⁶ Recently, in *People v. Williams*,⁷ the Supreme Court, Criminal Term, Queens County, applied this per se rule and vacated the conviction of a defendant represented by an attorney whose license was subsequently revoked.⁸

In *Williams*, defendant Timothy Williams had been represented by Joel Steinberg in a 1986 criminal prosecution in which the defendant pleaded guilty to criminal possession of a controlled substance in the fourth degree—a class C felony—and was sentenced to five years probation.⁹ Two years later, while serving time in a correctional facility for another conviction, the defendant learned of Steinberg's alleged involvement in a murder and of a pending investigation into Steinberg's background.¹⁰ The defendant then filed a pro se motion to have his conviction vacated on the ground that it was obtained in violation of his right to counsel.¹¹

F. Supp. 451, 474 (N.D. Tex., W.D. Pa., N.D. Ind., D. Minn., S.D. Ala., W.D. Wis. 1975) ("counsel" within meaning of sixth amendment not "meant to include a layman off the street without qualification as to either training or character"), *aff'd sub nom.* Taylor v. Montgomery, 539 F.2d 715 (7th Cir. 1976), *aff'd sub nom.* Pilla v. American Bar Ass'n, 542 F.2d 56 (8th Cir. 1976).

⁶ See *Felder*, 47 N.Y.2d at 291, 391 N.E.2d at 1275, 418 N.Y.S.2d at 296. The *Felder* court rejected application of harmless error analysis to these cases, determining in the language of the Supreme Court that "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Id.* at 296, 391 N.E.2d at 1278, 418 N.Y.S.2d at 299 (quoting *Glasser*, 315 U.S. at 76). Relying on *Chapman v. California*, 386 U.S. 18 (1967), the court in *People v. Crimmins*, 36 N.Y.2d 230, 326 N.E.2d 787, 367 N.Y.S.2d 213 (1975), had stated that constitutional errors require reversal of a conviction unless it can be demonstrated "that there is no reasonable possibility that the error might have contributed to defendant's conviction and that it was thus harmless beyond a reasonable doubt." *Id.* at 237, 326 N.E.2d at 791, 367 N.Y.S.2d at 218. The *Felder* court reasoned that "the right to . . . counsel is an essential ingredient in our system of criminal jurisprudence" and is so basic to the notion of a fair trial that its denial could never be considered a harmless error. 47 N.Y.2d at 295-96, 391 N.E.2d at 1278, 418 N.Y.S.2d at 299. Therefore, when a defendant is "represented by a layman masquerading as an attorney but in fact not licensed to practice law," *Felder* mandates that the conviction be vacated regardless of whether the defendant was "individually prejudiced by such representation." *Id.* at 291, 391 N.E.2d at 1275, 418 N.Y.S.2d at 296.

⁷ 140 Misc. 2d 136, 530 N.Y.S.2d 472 (Sup. Ct. Queens County 1988).

⁸ See *id.* at 140-41, 530 N.Y.S.2d at 475.

⁹ *Id.* at 136-37, 530 N.Y.S.2d at 473.

¹⁰ See *id.* at 137, 530 N.Y.S.2d at 473. The defendant became aware of Steinberg's involvements through an article written by columnist Jimmy Breslin for the *New York Daily News*. *Id.*

¹¹ See *id.* The defendant's motion was made pursuant to CPL § 440.10 (McKinney

Subsequently, in anticipation of a ruling by the Appellate Division, First Department, as to whether Steinberg had been properly admitted to the bar of New York,¹² the motion to vacate was withdrawn without prejudice.¹³ The Appellate Division subsequently found that Steinberg had withheld material information when he applied for admission and for the Court of Appeals' bar examination waiver.¹⁴ Consequently, the court revoked his license to practice law in New York, ordering that the revocation take effect immediately.¹⁵ The defendant thereafter reinstated his motion to vacate and it was granted.¹⁶

In granting the motion to vacate the conviction, Justice Friedmann, relying solely on the Appellate Division's order revoking Steinberg's license to practice law, stated that Steinberg's disbarment had retroactive effect and, therefore, the defendant was denied his federal and state constitutional rights to the assistance of "licensed" counsel at his plea and sentence.¹⁷ Applying the per se

1983). *Id.* After receiving the defendant's motion, the court appointed an attorney from the 18-B Panel of the Eleventh Judicial District to represent the defendant in the motion because it anticipated possible additional criminal liability. *See id.*

¹² *See In re Steinberg*, 137 App. Div. 2d 110, 528 N.Y.S.2d 375 (1st Dep't), *appeal denied*, 72 N.Y.2d 807, 529 N.E.2d 424, 533 N.Y.S.2d 56 (1988).

¹³ *Williams*, 140 Misc. 2d at 137, 530 N.Y.S.2d at 473.

¹⁴ *See Steinberg*, 137 App. Div. 2d at 115, 528 N.Y.S.2d at 379. Under the Rules of the Court of Appeals in existence at the time Steinberg applied for admission to the bar, an applicant could have the bar examination waived if he or she met certain requirements. *Id.* at 111, 528 N.Y.S.2d at 376. The court found that Steinberg failed to satisfy two of the criteria: "his law school studies were not 'interrupted by active service in the armed forces'" because he had been suspended from school for "poor scholarship" eleven months before he entered the Air Force, and he did not have the required two-thirds of his academic credits completed at the time he left law school. *Id.* at 112, 528 N.Y.S.2d at 376-77 (quoting then-existing Rules of Court of Appeals).

¹⁵ *Id.* at 117, 528 N.Y.S.2d at 379. The Appellate Division revoked Steinberg's license pursuant to Judiciary Law section 90(2). *See id.* at 111, 528 N.Y.S.2d at 376. That section provides: "[T]he appellate division of the supreme court is hereby authorized to revoke [the admission to practice of an attorney] for any misrepresentation or suppression of any information in connection with the application for admission to practice." N.Y. JUD. LAW § 90(2) (McKinney 1980). The *Steinberg* court found that Steinberg's suppression of "material information as to his lack of qualifications for invocation of the Court of Appeals' waiver rule" warranted revocation of his license without a hearing despite the fact that he had been admitted into practice for seventeen years. *Steinberg*, 137 App. Div. 2d at 115, 528 N.Y.S.2d at 378. The court conceded that the measure was drastic, but felt it was necessary in order to maintain "a high standard of honesty" among future applicants. *Id.* Consequently, Steinberg's license was revoked and his name was stricken from the roll of attorneys, "effective immediately." *Id.* at 117, 528 N.Y.S.2d at 379.

¹⁶ *See Williams*, 140 Misc. 2d at 140-41, 530 N.Y.S.2d at 475-76.

¹⁷ *See id.* Judge Friedmann rejected, for lack of evidence, Williams' contention that he was denied "effective" assistance due to both Steinberg's alleged cocaine dependency and

rule set forth in *People v. Felder*,¹⁸ Justice Friedmann reasoned that because the defendant had not been represented by a "licensed" attorney, he was obliged to vacate the conviction regardless of whether Williams had been prejudiced by Steinberg's representation.¹⁹

It is submitted that the *Williams* court's failure to distinguish between representation by an "unlicensed layman," the factual predicate for *Felder*, and representation by an attorney whose license is subsequently revoked, led it to apply the rule of *Felder* in an inappropriate factual context.²⁰ Furthermore, it is submitted that the *Williams* court misconstrued the effect of the decision revoking Steinberg's license.²¹

In *Felder*, the Court of Appeals specifically limited its holding to the facts presented—legal representation by an unlicensed layperson never admitted to practice law in New York or any other jurisdiction.²² The court, in a footnote, specifically excluded from its holding representation by disbarred attorneys or attorneys licensed to practice in other jurisdictions but not in New York,²³ and did not address the effect of *subsequent* discipline of an attorney. It is submitted that the *Williams* court should have addressed the distinction between representation by a layperson who has

his "alleged attorney-client cocaine dealings." *Id.* at 140, 530 N.Y.S.2d at 475.

¹⁸ 47 N.Y.2d 287, 391 N.E.2d 1274, 418 N.Y.S.2d 295 (1979); *see supra* notes 5-6 and accompanying text.

¹⁹ *See Williams*, 140 Misc. 2d at 139-41, 530 N.Y.S.2d at 475-76. The court treated Steinberg's representation of Williams as constituting the absolute denial of "effective and unimpaired counsel," necessitating application of the *per se* rule. *See id.* at 141, 530 N.Y.S.2d at 475-76; *see also supra* note 6 and accompanying text (discussing *Felder per se* analysis).

²⁰ The *Williams* court did not address any perceived distinction between an attorney never admitted to practice and one whose admission is subsequently revoked; it merely assumed the two situations were identical.

²¹ *See infra* notes 25-26 and accompanying text.

²² *See Felder*, 47 N.Y.2d at 294 n.6, 391 N.E.2d at 1277 n.6, 418 N.Y.S.2d at 298 n.6. Both state court decisions relied on by *Felder* applied to representation by laypersons. *See People v. Cox*, 12 Ill. 2d 265, 272, 146 N.E.2d 19, 23 (1957); *Higgins v. Parker*, 354 Mo. 888, 888, 191 S.W.2d 668, 669 (1945), *cert. denied*, 327 U.S. 801 (1946).

In *Solina v. United States*, 709 F.2d 160 (2d Cir. 1983), the Second Circuit, in vacating a defendant's conviction, explicitly limited its holding to the facts it addressed—representation by a person who, unknown to the defendant, was not authorized to practice law in any state because authorization was not sought or was denied on the basis of legal ability. *See id.* at 167.

²³ *See Felder*, 47 N.Y.2d at 294 n.6, 391 N.E.2d at 1277 n.6, 418 N.Y.S.2d at 298 n.6. The *Felder* court did not decide whether such representation violates the state and/or federal constitutions. *Id.*

never been admitted to practice law and representation by an attorney whose license is subsequently revoked. If, as *Felder* stated, "counsel" means an attorney admitted to practice, it appears that an attorney whose license is revoked after the challenged conviction satisfies this definition since he or she is an attorney admitted to practice at the time of the representation.²⁴

Without discussing or citing any authority, the *Williams* court decided that the revocation rendered Steinberg unlicensed retroactively, stating that the "retroactive effect" of the revocation of Steinberg's license provided a sufficient basis for its holding.²⁵

²⁴ Cf. N.Y. JUD. LAW § 486 (McKinney 1983). Section 486 provides:

Any person whose admission to practice as an attorney and counselor-at-law has been revoked . . . , who does any act forbidden by the provisions of this article to be done by any person not regularly admitted to practice law in the courts of record of this state . . . shall be guilty of a misdemeanor.

Id. The language of section 486 does not appear to apply to representation prior to the revocation. *See id.* Under Judiciary Law sections 474 and 484, it is unlawful for any natural person to practice or appear as an attorney for a person without first being admitted into practice. *See* N.Y. JUD. LAW §§ 478, 484 (McKinney Supp. 1989). A person who violates either of these sections is guilty of a misdemeanor. N.Y. JUD. LAW § 485 (McKinney 1983); *see* *Dacey v. New York County Lawyers' Ass'n*, 290 F. Supp. 835, 840 (S.D.N.Y. 1968), *aff'd*, 423 F.2d 188 (2d Cir. 1969), *cert. denied*, 398 U.S. 929 (1970); *In re Friedman*, 126 Misc. 2d 344, 345, 482 N.Y.S.2d 686, 687 (1984).

Bar disciplinary proceedings revoking attorneys' licenses in this state are few in number and none address the effects of the revocation with regard to prior representation of criminal defendants. *See, e.g., In re Mishkoff*, 135 App. Div. 2d 57, 58, 524 N.Y.S.2d 218, 219 (2d Dep't 1988) (attorney's admission to practice was revoked for misrepresenting on bar application that he received degree from certain school); *In re Braunstone*, 265 App. Div. 337, 338, 38 N.Y.S.2d 593, 594 (1st Dep't 1942) (suppression of information on application for admission regarding fraud suit against him was sufficient to warrant revocation); *In re Moshkow*, 250 App. Div. 780, 791, 294 N.Y.S. 474, 475 (2d Dep't 1937) (attorney's failure to advise committee on character and fitness of "certain shortcomings" sufficient to warrant revocation). Some courts have held that representation by a disbarred or suspended attorney does not necessarily deprive the defendant of effective assistance of counsel. *See, e.g., Waterhouse v. Rodriguez*, 848 F.2d 375, 383 (2d Cir. 1988) (refusing to apply per se rule to defendant's claim that he was denied right to counsel because he was represented by disbarred attorney); *United States v. Mouzin*, 785 F.2d 682, 698 (9th Cir.) (application of per se rule rejected where defendants represented by disbarred or suspended attorneys), *cert. denied*, 479 U.S. 985 (1986); *White v. State*, 464 So. 2d 185, 186 (Fla. Dist. Ct. App. 1985) (rejecting application of per se rule to representation by attorney whose license was suspended); *see also* *Commonwealth v. Sellon*, 380 Mass. 220, 228, 402 N.E.2d 1329, 1336 (1980) (presence at counsel table of disbarred attorney who gave advice in the defense did not deny defendant effective assistance of counsel where disbarred attorney's presence did not have measurable impact and licensed attorneys represented defendant).

²⁵ *See Williams*, 140 Misc. 2d at 140-41, 530 N.Y.S.2d at 475. The court stated: "The disbarment of Mr. Steinberg as an attorney with retroactive effect by the Appellate Division . . . furnished sufficient grounds to vacate defendant's judgment of conviction before this court." *Id.*

However, nothing in the Appellate Division's decision revoking the license compels that conclusion.²⁶ It is submitted that the *Williams* court's mechanical application of the *Felder* per se rule to facts different from those to which the rule was meant to apply led it to unnecessarily and unwisely extend the scope of the rule.

Vacating a conviction years after it is rendered has far-reaching consequences. Prosecutors are faced with the choice of dismissing the charges against a defendant, or retrying him, a difficult task if witnesses are unavailable or have suffered memory lapses.²⁷ Because application of the *Felder* rule was intended to be limited to narrowly-defined factual settings, in cases outside its narrow scope the more prudent approach would be to abandon the per se rule, and instead analyze the effectiveness of counsel's representation on a case by case basis.

Claudia A. Farella

New York County Supreme Court expands the continuous relationship doctrine to toll the statute of limitations

The statute of limitations¹ protects persons who are called to

²⁶ See *In re Steinberg*, 137 App. Div. 2d 110, 528 N.Y.S.2d 375 (1st Dep't), *appeal denied*, 72 N.Y.2d 807, 529 N.E.2d 424, 533 N.Y.S.2d 56 (1988). The Appellate Division did not at any point in its decision state that its findings or its order to revoke Steinberg's license rendered Steinberg "unlicensed" throughout the seventeen years he had been admitted to practice law. *Id.* Moreover, there is no indication or support in the Appellate Division's decision for the *Williams* court's conclusion that the revocation applied retroactively. *Id.*; see also *Mishkoff*, 135 App. Div. 2d at 58, 524 N.Y.S.2d at 219 (court revoked attorney's license but did not state that revocation rendered him unlicensed retroactively).

²⁷ See *Solina v. United States*, 709 F.2d 160, 169 (2d Cir. 1983). The *Solina* court acknowledged the severity of the consequences of a per se rule, stating that "[i]t may well be impracticable for the Government to retry Solina 13 years after the event." *Id.*

¹ See CPLR art. 2 (McKinney 1972 & Supp. 1989). CPLR 201 provides: "An action . . . must be commenced within the time specified in this article unless a different time is prescribed by law or a shorter time is prescribed by written agreement. No court shall extend the time limited by law for the commencement of an action." CPLR 201 (McKinney 1972). Courts, however, may extend the time limitation for performing certain procedural requirements, see *id.* 2004, and a defendant's actions may be deemed by the court to estop him or her from pleading the defense. See, e.g., *Simcuski v. Saali*, 44 N.Y.2d 442, 448-50, 377 N.E.2d 713, 716-17, 406 N.Y.S.2d 259, 262-63 (1978) (plaintiff relieved of time bar where physician's intentional concealment of malpractice delayed commencement of action). The