

Expanding a Trial Court's Discretion Over Criminal Court Calendars

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strict attorney has no "clear right" to compel a criminal court judge to restore cases onto the active calendar after they have been removed for specific reasons.

In *People v. Sanchez*, the Criminal Court of New York County held that a motorist charged with driving while intoxicated need not be given *Miranda* warnings before being asked to undergo chemical testing. Moreover, the *Sanchez* court stated that the defendant's uncoerced refusal to submit to chemical testing was admissible into evidence and was not a violation of his right against self-incrimination.

Finally, in *Berkshire Life Insurance Co. v. Fernandez*, the Appellate Division, Second Department, construing CPLR 203(b)(5), held that the use of that section's extension period was available to a plaintiff where the limitation period for commencing an action was fixed by an insurance contract.

The members of Volume 61 hope that the analysis of the topics contained in *The Survey* will be of value to the New York bench and bar.

DEVELOPMENTS IN THE LAW

Expanding a trial court's discretion over criminal court calendars

Traditionally, the inherent power of a trial court to control its calendar has rarely been challenged.¹ However, the current di-

Extremely valuable in understanding the CPLR are the five reports of the Advisory Committee on Practice and Procedure. They are contained in the following legislative documents and will be cited as follows:

1957 N.Y. Leg. Doc. No. 6(b)	FIRST REP.
1958 N.Y. Leg. Doc. No. 13	SECOND REP.
1959 N.Y. Leg. Doc. No. 17	THIRD REP.
1960 N.Y. Leg. Doc. No. 120	FOURTH REP.
1961 Final Report of the Advisory Committee on Practice and Procedure	FINAL REP.

Also valuable are the two joint reports of the Senate Finance Assembly Ways and Means Committee:

1961 N.Y. Leg. Doc. No. 15	FIFTH REP.
1962 N.Y. Leg. Doc. No. 8	SIXTH REP.

¹ See, e.g., *LTown Ltd. Partnership v. Sire Plan Inc.*, 108 App. Div. 2d 435, 441-42, 489 N.Y.S.2d 567, 572-73 (2d Dep't 1985); *Riglander v. Star Co.*, 98 App. Div. 101, 104-05, 90 N.Y.S. 772, 775 (1st Dep't), *aff'd sub nom. Riglander v. Morning Journal Ass'n*, 181 N.Y. 531, 73 N.E. 1131 (1905). See generally SIEGEL § 368, at 466 (court dictates rules governing calendar practice).

lemma concerning calendar congestion and delay in the criminal courts² has prompted questions regarding the extent of a judge's discretion in calendar control.³ To remedy the backlog, trial courts occasionally have ruled on matters which subsequently were held to lie beyond their judicial authority.⁴ Recently, however, in *Morgenthau v. Gold*,⁵ the New York Court of Appeals upheld the action of a lower court judge who dismissed an article 78⁶ proceeding on the basis that the district attorney had no "clear right" to compel a criminal court judge to place cases from the reserve calendar onto the active calendar.⁷

In *Morgenthau*, Judge Jay Gold of the Criminal Court of the City of New York, County of New York, in April and May of 1984, removed several cases from the active calendar and placed them on the reserve docket for specific reasons.⁸ The People attempted to

² Cole, *Courts and the Threat Of Litigation Overload*, 27 N.H.B.J. 155, 155 (1986); Address by Harold Medina, Circuit Judge, United States Court of Appeals, 1955 Homer S. Cummings Lecture, New York University School of Law (Feb. 3, 1955); see also *People v. Jones*, 126 Misc. 2d 919, 920, 484 N.Y.S.2d 415, 418 (N.Y.C. Crim. Ct. N.Y. County 1984) (backlog in New York County Criminal Court rose from 6,318 cases pending in November 1983 to 11,382 cases in October 1984); N.Y. Times, Aug. 14, 1986, at D23, col. 1 (by mid-August 1986, backlog in Criminal Court had risen to nearly 29,000 cases).

³ See *People v. Douglass*, 60 N.Y.2d 194, 196-97, 456 N.E.2d 1179, 1180, 469 N.Y.S.2d 56, 57 (1983) (trial judge may not dismiss criminal proceeding based on "calendar control" or "failure to prosecute"); *People v. Kitt*, 93 App. Div. 2d 77, 79, 460 N.Y.S.2d 799, 801 (1st Dep't 1983) ("trial court must be very wary that administrative pressures relating to calendar movement do not unduly influence it in the exercise of its sound discretion"); see also Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380 (1982) (courts should not use calendar control to relieve backlog); cf. Constantino, *Judges as Case Managers*, 17 TRIAL 56, 57 (Mar. 1981) (advocating judicial case management in the civil system); see generally Cole, *supra* note 2, at 175 n.72 (bibliography of source material on caseload management techniques).

⁴ See, e.g., *Douglass*, 60 N.Y.2d at 205, 456 N.E.2d at 1185, 469 N.Y.S.2d at 61-62; *Kitt*, 93 App. Div. 2d at 79, 460 N.Y.S.2d at 801; *People v. Cangiano*, 40 App. Div. 2d 528, 529, 334 N.Y.S.2d 510, 511 (2d Dep't 1972); see also *People v. Jones*, 79 App. Div. 2d 717, 719, 434 N.Y.S.2d 730, 732 (3d Dep't 1980) (Mahoney, J., dissenting) (trial court abused discretion in moving up trial date on grounds that court and jury had "nothing to do"), *aff'd*, 53 N.Y.2d 789, 422 N.E.2d 578, 439 N.Y.S.2d 918 (1981).

⁵ 69 N.Y.2d 735, 504 N.E.2d 696, 512 N.Y.S.2d 369 (1987).

⁶ CPLR 7801-7806 (McKinney 1981 & Supp. 1987). See *infra* note 11 (discussion of article 78 proceedings).

⁷ *Morgenthau*, 69 N.Y.2d at 737, 504 N.E.2d at 696, 512 N.Y.S.2d at 369. The Office of Court Administration has sanctioned a system of reserve calendars to which a case not yet ready for trial may be removed. See *People v. Jones*, 126 Misc. 2d 919, 921, 484 N.Y.S.2d 415, 418-19 (N.Y.C. Crim. Ct. N.Y. County 1984).

⁸ *Morgenthau v. Gold*, 117 App. Div. 2d 386, 503 N.Y.S.2d 327 (1st Dep't 1986). Five prostitution cases and an assault case were placed on the reserve docket because the People had not answered "ready for trial." *Id.* at 388, 503 N.Y.S.2d at 328-29. Judge Gold removed seven drug cases from the active calendar because the People had not received laboratory

restore a number of the cases to the active calendar by informing Judge Gold that they were prepared to answer "ready."⁹ Judge Gold refused and required that the People procure all the police reports filed in the cases before he would entertain a motion to restore.¹⁰ Instead of producing the requested material,¹¹ the district attorney commenced an article 78¹² proceeding petitioning for a writ of mandamus to compel Judge Gold to reinstate the cases to the active calendar.¹³ Special Term denied the application and granted cross motions to dismiss.¹⁴ The Appellate Division, First

reports from police chemists. *Id.* at 388, 503 N.Y.S.2d at 328-29.

⁹ *Id.* at 388-89, 503 N.Y.S.2d at 329.

¹⁰ *Id.* at 389, 503 N.Y.S.2d at 329. In the court's estimation, the People were unable to answer "ready" until the supplementary documents were produced. *Id.* The People objected, contending that Judge Gold was obligated to restore these cases to active status based on an earlier Court of Appeals decision, *People v. Douglass*, 60 N.Y.2d 194, 456 N.E.2d 1179, 469 N.Y.S.2d 56 (1983). *Douglass* involved a number of cases in which trial judges had dismissed complaints based on the People's "failure to prosecute." The court held that neither "failure to prosecute" nor "calendar control" were proper grounds for dismissal. *Id.* at 201, 456 N.E.2d at 1182, 469 N.Y.S.2d at 59. However, in discussing alternatives that might relieve calendar congestion, the court stated:

A system of open or reserved dockets is an example of how cases of unwarranted delay in prosecution can be dealt with properly. The cases are marked off the active calendar, *subject to the right of the prosecutor* upon oral application to have a case restored after filing the document, the absence of which led to the case being placed on the reserve calendar, or in other situations, after becoming ready to proceed, and so informing the court and the defendant.

Id. at 200, 456 N.E.2d at 1182, 469 N.Y.S.2d at 59 (emphasis added). The italicized language marked a change from the *Douglass* slip opinion which had stated that a district attorney may "apply for leave to restore" a case to the active calendar. *People v. Douglass*, slip op. at 6 (New York Court of Appeals) (cited in *Morgenthau*, 117 App. Div. 2d at 387-88, 503 N.Y.S.2d at 330). The Appellate Division in *Morgenthau* interpreted this language as granting to the district attorney the unqualified right to have cases placed on the reserve calendar restored to active status. *Morgenthau*, 117 App. Div. 2d at 388, 503 N.Y.S.2d at 330.

¹¹ *Id.* at 389, 503 N.Y.S.2d at 329.

¹² CPLR 7801-7806 (McKinney 1981 & Supp. 1987). Article 78 substituted for the common law writs of certiorari, mandamus and prohibition. CPLR 7801, commentary at 25 (McKinney 1972). The writ of mandamus compels the performance of an official duty clearly imposed by law. *Id.* at 31. There must be no question of the absolute right to performance; thus the duty must not be discretionary. *Id.* Mandamus lies to compel the performance of a legal duty, not to direct the manner in which it will be performed. *Klostermann v. Cuomo*, 61 N.Y.2d 525, 540, 463 N.E.2d 588, 596, 475 N.Y.S.2d 247, 255 (1984).

¹³ *Morgenthau*, 117 App. Div. 2d at 389, 503 N.Y.S.2d at 328. Petitioner alleged that a judge had a "duty to restore these cases to the Active Calendar and that his refusal to do so violated a clear legal right of petitioner." *Id.*

¹⁴ *Morgenthau v. Gold*, 126 Misc. 2d 856, 484 N.Y.S.2d 456 (Sup. Ct. N.Y. County 1985). The court concluded that the prior decision of the Court of Appeals in *People v. Douglass*, 60 N.Y.2d 194, 456 N.E.2d 1179, 469 N.Y.S.2d 56 (1983), granted no absolute right in the People to have criminal cases placed on the active calendar upon request. *Morgenthau*, 126 Misc. 2d at 858, 484 N.Y.S.2d at 458. Of considerable import is the fact that

Department, reversed the trial court's ruling and ordered Judge Gold to restore several of the cases to the active calendar.¹⁵ The Court of Appeals, however, dismissed the petition in a one line opinion, and held that mandamus did not lie absent a clear legal right to the relief sought.¹⁶

Writing for the majority in the appellate division, Presiding Justice Murphy found that Judge Gold's actions effectively dismissed meritorious cases without allowing the People an opportunity to be heard.¹⁷ The court reasoned that prior case law supported the district attorney's unqualified right to have the fifteen cases at issue restored to the trial calendar under these circumstances.¹⁸ Presiding Justice Murphy stated that Judge Gold had a ministerial, non-discretionary duty to once again place these cases on the active calendar.¹⁹ The court, concluding that the mandamus action was properly brought, granted the relief requested by the

eleven of the fifteen cases at issue were dismissed on "speedy trial," CPL § 170.30(1)(e) (McKinney 1982), and "interest of justice," *id.* §§ 170.30(1)(g); 170.40 (McKinney 1982), grounds in a collateral action, while Special Term's decision was pending, thus supporting Judge Gold's advocacy of increased judicial control over court calendars. *See People v. Jones*, 126 Misc. 2d 919, 929, 484 N.Y.S.2d 415, 424 (N.Y.C. Crim. Ct. N.Y. County 1984). In *Jones*, the court addressed twelve of the cases at issue in *Morgenthau*. *Id.* at 922, 484 N.Y.S.2d at 419. In one of these cases, *People v. Harris*, the People withdrew opposition to the motion for dismissal upon "speedy trial" grounds. *Id.* at 922 n.2, 484 N.Y.S.2d at 419 n.2. To avoid confusion, however, the court continued to refer to twelve cases rather than the accurate number of eleven cases. *Id.*

Section 170.30(1)(e) of the CPL provides, in pertinent part, "[a]fter arraignment upon an information, a simplified information, a prosecutor's information or a misdemeanor complaint, the local criminal court may, upon motion of the defendant, dismiss such instrument or any count thereof upon the ground that . . . [t]he defendant has been denied the right to a speedy trial" CPL § 170.30(1)(e) (McKinney 1982). Furthermore, section 170.30(g) provides for dismissal when "required in furtherance of justice, within the meaning of section 170.40." *Id.* § 170.30(g).

That these statutes were used to dismiss eleven of the fifteen cases here at issue indicates that the district attorney was *not* ready to prosecute them as he had stated at the time that he requested that they be restored to the active calendar.

¹⁵ *Morgenthau*, 117 App. Div. 2d at 392-93, 503 N.Y.S.2d at 331.

¹⁶ *Morgenthau*, 69 N.Y.2d at 737, 504 N.E.2d at 696, 512 N.Y.S.2d at 369. The court did not address the specific issue of a trial court's discretion over criminal court calendars, which was the primary focus of the Appellate Division opinion. *See id.*

¹⁷ *Morgenthau*, 117 App. Div. 2d at 392, 503 N.Y.S.2d at 331. The court added that a contrary finding would "announce the abandonment of what must be a primary goal of any civilized society: the deterrence and control of criminal conduct. The purpose of the court system, and of court personnel, is to serve the community; to exalt expediency over substance is to violate that purpose." *Id.*

¹⁸ *Id.* at 387-88, 503 N.Y.S.2d at 328.

¹⁹ *Id.* at 392-93, 503 N.Y.S.2d at 331.

prosecution.²⁰

Justice Milonas filed a vigorous dissent in which he asserted that a prosecutor had no right, by means of a writ of mandamus, to interfere with a judge's use of discretion.²¹ The dissent contended that, in actuality, the district attorney's complaint was with the manner in which Judge Gold exercised his discretion, not with his right to exercise it.²² The result, according to Justice Milonas, was that the prosecutor would have effective control over the court's calendar, a matter which, traditionally, has rested within the trial court's domain.²³ The dissent further asserted that since a prosecutor has no right to proscribe the manner in which a judge should exercise his discretion, the article 78 proceeding should have been dismissed.²⁴

The impact of the Court of Appeals decision in *Morgenthau* is unclear.²⁵ It is submitted that the act of maintaining cases on a court's reserve calendar is within a judge's discretion, and not merely a "ministerial duty." Exemplary dictum is an insufficient basis²⁶ for allowing a district attorney to arrogate the court's inher-

²⁰ *Id.*

²¹ *Id.* at 396, 503 N.Y.S.2d at 334 (Milonas, J., dissenting). The dissent noted that *Dougllass* expressly affirmed the trial court's discretion over management of its calendar. *Id.* at 395, 503 N.Y.S.2d at 333 (Milonas, J., dissenting). Justice Milonas further argued that the majority's decision was contrary to the principles underlying *Dougllass*. He asserted that placing matters not yet ready for trial on the active calendar would further delay the already overburdened criminal court system. *Id.* (Milonas, J., dissenting).

²² *Id.* at 396, 503 N.Y.S.2d at 333 (Milonas, J., dissenting). The dissent suggested that the People's real quarrel with Judge Gold was that he was "too quick to place a case on the Reserve Calendar and too slow to restore such matter to the Active Calendar." *Id.* (Milonas, J., dissenting); see also *Klostermann v. Cuomo*, 61 N.Y.2d 525, 540, 463 N.E.2d 588, 596, 475 N.Y.S.2d 247, 255 (1984) (distinguish between discretion in *whether* acts are performed and discretion in *how* acts are performed).

²³ *Morgenthau*, 117 App. Div. 2d at 395-96, 503 N.Y.S.2d at 333 (Milonas, J., dissenting). If the court must reactivate those prosecutions to which the People answer "ready," the calendar could become filled with cases, regardless of whether the district attorney is, in fact, prepared to proceed to trial. *Id.* at 395, 503 N.Y.S.2d at 333 (Milonas, J., dissenting).

²⁴ *Id.* at 394, 396, 503 N.Y.S.2d at 332, 334 (Milonas, J., dissenting).

²⁵ See *Wise, Appeals Court Upholds Judge in Calendar Dispute with DA*, N.Y.L.J., Jan. 22, 1987, at 1, col. 3. The head of the Appeals Bureau in the District Attorney's office, Mark Dwyer, stated that the Court of Appeals' ruling did not resolve the underlying issue, and that he would persist in his attempts to have similar cases restored to active status in the future. *Id.* The Deputy Solicitor General in the state Attorney General's office countered that the Court of Appeals affirmed the trial judge's discretion in these matters by stating that the district attorney had no "clear right" to the relief requested. *Id.* at 1, col. 4.

²⁶ See *Staber v. Fidler*, 65 N.Y.2d 529, 482 N.E.2d 1204, 493 N.Y.S.2d 288 (1985) (per curiam). "No opinion is an authority beyond the point actually decided, and no judge can write freely if every sentence is to be taken as a rule of law separate from its association."

ent authority to exercise discretion in calendar control matters.²⁷ The implementation of a reserve calendar system is itself a discretionary, rather than a mandatory, requirement of law.²⁸ Moreover, the court has a positive obligation to make meaningful inquiry into the People's statement of readiness.²⁹

The People have recourse if the court abuses its discretion in failing to place cases from the reserve to the active calendar.³⁰ However, the facts in *Morgenthau* do not give rise to such a finding.³¹ It is suggested that, contrary to the opinion of the appellate division, retaining these cases on the reserve calendar was not the "wholesale dismissal of meritorious cases."³² The People were in no way prejudiced by the maintenance of these cases on the reserve

Id. at 535, 482 N.E.2d at 1206, 493 N.Y.S.2d at 290 (quoting *Dougherty v. Equitable Life Assurance Soc'y*, 266 N.Y. 71, 88, 193 N.E. 897, 902 (1934)); *see also* *Crane v. Bennett*, 177 N.Y. 106, 112, 69 N.E. 274, 275-76 (1904) (opinion should not be extended to cases in which facts are essentially different); *People v. Rosano*, 69 App. Div. 2d 643, 654, 419 N.Y.S.2d 543, 549 (2d Dep't 1979) ("rule of stare decisis does not apply to dicta"), *aff'd*, 50 N.Y.2d 1013, 409 N.E.2d 1357, 431 N.Y.S.2d 683 (1980).

²⁷ *See* *Plachte v. Bancroft, Inc.*, 3 App. Div. 2d 437, 438, 161 N.Y.S.2d 892, 893 (1st Dep't 1957) (inherent power of court over calendar control is "ancient and undisputed law"); *Riglander v. Star Co.*, 98 App. Div. 101, 104, 90 N.Y.S. 772, 774 (1st Dep't 1904) (right to control court's business is within inherent discretion of court), *aff'd sub nom.* *Riglander v. Morning Journal Ass'n*, 181 N.Y. 531, 73 N.E. 1131 (1905). As mentioned, the precise matter before the court in *Douglass* was the dismissal of cases for failure to prosecute and for calendar control purposes. *See supra* note 10.

²⁸ *See* *Douglass*, 60 N.Y.2d at 200, 456 N.E.2d at 1182, 469 N.Y.S.2d at 59.

²⁹ *People v. Jones*, 126 Misc. 2d 919, 924, 484 N.Y.S.2d 415, 421; *see also* *People v. Kendzia*, 64 N.Y.2d 331, 337, 476 N.E.2d 287, 289-90, 486 N.Y.S.2d 888, 890-91 (1985) (People's statement of readiness must be an "indication of present readiness, not a prediction or expectation of future readiness").

³⁰ *See* SIEGEL § 529, at 732-33. The Court of Appeals will not substitute its judgment for that of the trial court unless there is absolutely no reasonable basis for court's use of discretion "within the generous outer limits of the extensive range 'discretion' occupies. . . ." *Id.* at 732. *See, e.g.,* *People v. Kitt*, 93 App. Div. 2d 77, 78, 460 N.Y.S.2d 799, 800 (1st Dep't 1983) (trial court abused discretion by forcing case to trial when assistant district attorney was engaged in another trial and having difficulty locating witnesses); *People v. Cangiano*, 40 App. Div. 2d 528, 529, 334 N.Y.S.2d 510, 511 (2d Dep't 1972) (abuse of discretion to dismiss for failure to prosecute where adjournments were granted either by consent or on application of defendant).

³¹ *Morgenthau*, 126 Misc. 2d at 858, 484 N.Y.S.2d at 458. A court, in exercising its judicial discretion may require the production of documents to prevent trial delay or mistrial. *See id.*; *see also* *People v. Rickert*, 58 N.Y.2d 122, 132, 446 N.E.2d 419, 423, 459 N.Y.S.2d 734, 738-39 (1983) (not abuse of discretion if all relevant factors were considered before dismissing in interests of justice); *People v. Bennette*, 56 N.Y.2d 142, 148-49, 436 N.E.2d 1249, 1252, 451 N.Y.S.2d 647, 650 (1982) (within discretion to improperly interrupt cross-examination to inquire into circumstances surrounding defendant's prior conviction).

³² *Morgenthau*, 117 App. Div. 2d at 392-93, 503 N.Y.S.2d at 331.

calendar, and could have proceeded with the prosecutions.³³ Instead, the People refused to comply with the court mandate to furnish documents necessary for trial.³⁴ Consequently, it was the district attorney, not the trial court, who ultimately was responsible for the subsequent dismissals.³⁵

Matters of calendar congestion have reached epidemic proportions and are not easily resolved.³⁶ For this reason, it is essential that parties be fully prepared on dates designated by the court.³⁷ This Survey has suggested that a viable method to ensure the People's preparedness was implemented by Judge Gold's refusal to restore to the active calendar cases not *actually* ready for trial. Finally, it is asserted that this calendar control technique was the necessary result of the court's obligation to determine whether the prosecution can substantiate its statement of its readiness for trial. Because the Court of Appeals failed to address this specific issue, the lower courts remain with insufficient guidance as to the precise scope of judicial discretion in matters of calendar control. It is hoped that the Court of Appeals will provide more comprehensive

³³ See *People v. Jones*, 126 Misc. 2d 919, 923-24 & n.4, 484 N.Y.S.2d 415, 420 & n.4 (N.Y.C. Crim. Ct. N.Y. County 1984). The prosecution may proceed with discovery demands and obligations at all times, in good faith, before trial, regardless of whether the case is on the active or reserve calendar. See CPLR 240 (McKinney 1982). It is submitted that calendar designation is also independent of the People's ability to prepare their case by, for example, obtaining police reports, interviewing witnesses and negotiating with defendant's counsel.

³⁴ *Morgenthau*, 117 App. Div. 2d at 393, 503 N.Y.S.2d at 332 (Milonas, J., dissenting); see also *Jones*, 126 Misc. 2d at 928-29, 484 N.Y.S.2d at 423 (failure to actively prosecute cases while article 78 proceeding pending, justified dismissal on "speedy trial" and "interests of justice" grounds).

³⁵ See *People v. Jones*, 126 Misc. 2d at 925, 928, 484 N.Y.S.2d at 421, 423. A failure of the People to procure necessary documents and otherwise announce their readiness for trial warranted a dismissal on "speedy trial" grounds and failure to abide by court mandates required an "interests of justice" dismissal. See *id.*; see also *People v. Brothers*, 50 N.Y.2d 413, 417, 407 N.E.2d 405, 407, 429 N.Y.S.2d 558, 560 (1980) (calendar congestion insufficient to defeat defendant's right to dismissal on "speedy trial" grounds); *People v. Hamilton*, 46 N.Y.2d 932, 933, 388 N.E.2d 345, 345-46, 415 N.Y.S.2d 208, 209 (1979) (delay of one year and thirteen days justifies "speedy trial" dismissal); *People v. Bonterre*, 87 Misc. 2d 243, 252-53, 384 N.Y.S.2d 351, 353 (N.Y.C. Crim. Ct. Bronx County 1976) (backlog of grand jury presentments and reduced stenographic staff does not relieve People of duty to provide speedy trial).

³⁶ See *supra* note 2 and accompanying text.

³⁷ See *supra* note 3 and accompanying text.

guidelines in the near future to prevent further confusion resulting from *ad hoc* decisions by trial courts.

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Miranda warnings not required when motorist charged with driving while intoxicated is requested to submit to chemical testing

The Constitution guarantees every individual the right to assistance of counsel¹ and the privilege against self-incrimination in criminal cases.² In *Miranda v. Arizona*,³ the United States Supreme Court held that a state has an affirmative duty to advise an individual taken into police custody of these constitutional rights.⁴

¹ U.S. CONST. amend. VI. The sixth amendment provides in part that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defence." *Id.* The accused is guaranteed the right to counsel not only at his trial but at any critical confrontation with the prosecution during pretrial proceedings where the absence of counsel might impede his right to a fair trial. *See* *United States v. Wade*, 388 U.S. 218, 224 (1967). The fourteenth amendment has extended this right to state criminal proceedings. *See* *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). Therefore, the accused "need not stand alone against the State" during any critical stage of the prosecution. *Wade*, 388 U.S. at 226. *See generally* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-38, at 1106-08 (1978) (discussing implications of right to counsel on criminal justice reform).

² U.S. CONST. amend. V. The fifth amendment provides in part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . ." *Id.* The fourteenth amendment precludes a state from abridging an individual's right against compulsory self-incrimination. *See* *Malloy v. Hogan*, 378 U.S. 1, 6 (1964). Since the American system of criminal prosecution is accusatorial rather than inquisitorial, both state and federal governments are "constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." *Id.* at 7-8. However, the fifth amendment privilege protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature. *See* *Schmerber v. California*, 384 U.S. 757, 764 (1966). This privilege does not apply to the withdrawal of blood for chemical analysis, as this act is not considered testimonial compulsion. *Id.* at 765. *See also* *People v. Haitz*, 65 App. Div. 2d 172, 175, 411 N.Y.S.2d 57, 59-60 (4th Dep't 1978) (admission of evidence of refusal to take chemical test not violative of fifth amendment privilege against self-incrimination). *See generally* L. TRIBE, *supra* note 1, § 12-23, at 709-10 (overview of fifth amendment privilege against self-incrimination).

³ 384 U.S. 436 (1966).

⁴ *Id.* at 467-69. In *Miranda*, the Supreme Court held that an individual taken into custody or otherwise deprived of his freedom by the authorities in any significant way must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one