

**Counsel's Obligation to Advise
a Defendant on the Right to Testify**

By: Mark M. Baker ¹

Attorneys handling criminal appeals will undoubtedly encounter trial records reflecting unilateral decisions by defense counsel which prevented their clients from testifying. This article briefly surveys the rights of the accused with regard to offering their own testimony and the obligation of defense counsel -- as opposed to the court -- to protect such rights. Also addressed is the remedy for an aggrieved defendant who has not been properly advised that the ultimate decision is not counsel's to make.

People v. Cosby

Recently, in People v. Cosby,¹ the Fourth Department addressed the issue of "whether a defendant's attorney has a duty to advise the defendant of his or her right to testify, even against the advice of the attorney." The evidence at a hearing pursuant to a motion to vacate judgment² revealed that, although Cosby had told his attorney of his desire to testify, he was never counseled that the decision whether to do so was his alone.

Concluding that a duty on the part of counsel exists, and referencing the

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Rules of Professional Conduct,³ the Court rejected the District Attorney's claim that such rule would run contrary to public policy:

[I]t is indeed sound public policy for defense counsel to notify a defendant that he or she has a fundamental right to testify on his or her own behalf and that the decision whether to testify rests with defendant, not counsel. Of course, defense counsel should still render advice to defendant concerning whether a good trial strategy would warrant testifying on his or her own behalf. But we cannot stress enough that defense counsel should make it clear to the defendant that it is the defendant, not counsel, who has the final word on the matter.⁴

Nevertheless, Cosby not only failed to establish that he would have indeed testified at trial to the version of events laid out in his motion, he had never actually shared that version with his attorney. Consequently, it was held “under the circumstances of this case that defense counsel's failure to advise defendant that the decision whether to testify was his alone to make was not so egregious and prejudicial as to deprive defendant of his constitutional right to effective assistance of counsel.”⁵

Long Established Principles

Assuming a defendant could later demonstrate that exculpatory testimony would have been offered, the precise requirement articulated in Cosby was hardly surprising. In Jones v. Barnes, the Supreme Court recalled that “the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an

appeal...[.]⁶ This logically reflects the principle that “the most important witness for the defense in many criminal cases is the defendant himself. There is no justification today for a rule that denies an accused the opportunity to offer his own testimony.”⁷

In fact, “[t]he right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution[,]” including the Fifth, Sixth and Fourteenth Amendments.⁸ Accordingly, “[a] defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness.”⁹

New York’s courts have likewise acknowledged that the determination whether to testify is one of those “fundamental” or “basic” decisions which are exclusively for a defendant to make.¹⁰ In this regard, the First Department’s extended discussion in People v. Mason¹¹ is most illuminating. There, the trial judge manifested a “fundamental” misunderstanding of this sacred right, where that defendant later asserted his desire to testify on the record, in the face of opposition from defense counsel who had even stated in the jury’s presence that the defendant should not testify.

Although, following counsel’s summation, the judge ultimately allowed the defendant to testify, the Appellate Division, reversing, held that the timing and the circumstances undermined the defendant’s constitutional rights. Rather, said the

panel, “the court's failure to follow the statutorily delineated order of trial had its genesis solely in the court's own fundamental error with regard to defendant's basic due process right to testify, and we find the deviation from the prescribed order of trial failed to cure the court's error.”¹²

Not confining its criticism to the trial court, Mason added that defense counsel’s own recalcitrance in this regard, including objecting to Defendant’s late testimony in the presence of the jury, amounted to ineffective assistance of counsel. Emphasizing that “it is elementary that the right to effective representation includes the right to assistance by an attorney who has taken the time to review and prepare both the law and the facts relevant to the defense,”¹³ the Appellate Division determined that “counsel, by misstating the law and thereafter convincing the court that the decision of whether defendant was to testify was ultimately hers [*i.e.*, counsel’s], set forth a chain of events which led to defendant's assertion of his own rights and, ultimately, to his prejudice.”¹⁴

Similarly, in People v. Harami,¹⁵ counsel rested without calling a witness. Following a charge conference, the defendant requested that he be allowed to take the stand. The judge noted that defendant's attorney had advised him against testifying and denied the request. The Second Department reversed and ordered a new trial.¹⁶

People v. Smith¹⁷ involved the converse situation. There, in a hearing on a CPL §440.10(1)(h) motion, based on allegations of ineffective assistance of counsel, the defendant, who testified at trial without adequate preparation, claimed, *inter alia*, that, in addition to lack of preparation, counsel had failed to apprise him of his right *not* to testify. Although determining that the defendant, “a reasonably intelligent young man, [who] was present during his *Sandoval* hearing[,]” “knew of his rights and, in that sense, let counsel make the decision for him[,]” the motion court explained that “counsel bears responsibility for unduly usurping that decision-making role in which Smith acquiesced.”¹⁸

Finally, facing a split among the federal circuits, the Second Circuit has “refused to find a waiver or forfeiture solely from a defendant's silence at trial.” Chang v. United States.¹⁹ Observing that it is “questionable to infer that television or similar sources of a general nature -- in contrast to a specific circumstance -- have educated a particular defendant not only as to the existence of a right to testify but also that the right may be exercised over the objections of counsel[,]” the Court ruled that

[a] defendant who is ignorant of the right to testify has no reason to seek to interrupt the proceedings to assert that right, and *we see no reason to impose what would in effect be a penalty on such a defendant*. We therefore conclude that Chang did not waive or forfeit his claim on appeal by failing to object at trial.”²⁰

Conclusion

In order to advise the accused properly, and thereby not be the subject of a future CPL §440.10(1) motion, trial counsel should state, on the record (and obviously, outside the presence of the jury), that the defendant fully understands that the decision whether or not to testify is personal and cannot be imposed, even if such is contrary to counsel's advice. On the other hand, if the appellate record is unclear, a convicted defendant who is legitimately aggrieved in this regard may resort to a motion to vacate judgment, upon demonstrating that the proposed exculpatory testimony would have indeed been given had such defendant been aware that the absolute right existed.

1. 82 A.D.3d 63, 916 N.Y.S.2d 689 (4th Dept. 2011), *lv. denied*, 16 N.Y.3d 857 (2010).
2. *See* CPL §440.10(1)(h).
3. *See* Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.2[a], 1200.0] rule 1.2(a).
4. Cosby, 82 A.D.3d at 67; 916 N.Y.S.2d 689, 693.
5. Cosby, 82 A.D.3d at 67; 916 N.Y.S.2d 689, 693.
6. 463 U.S. 745, 751 (1983) (citations omitted).
7. Rock v. Arkansas, 483 U.S. 44, 52 (1987).
8. Rock v. Arkansas, 483 U.S. at 51. *See also* Harris v. New York, 401 U.S. 222, 230 (1971) (Noting that from the standpoint of the Fifth Amendment, “[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so”).
9. Rock v. Arkansas, 483 U.S. at 52.

10. People v. Colon, 90 N.Y.2d 824, 825-826, 660 N.Y.S.2d 377 (1997); People v. Ferguson, 67 N.Y.2d 383, 390, 502 N.Y.S.2d 972 (1986); People v. Mason, 263 A.D.2d 73, 706 N.Y.S.2d 1 (1st Dept. 2000). *See also* Brown v. Artuz, *supra*, 124 F.3d 73, 77 (2d Cir. 1997) (characterizing the right to testify as “personal”).
11. 263 A.D.2d 73, 706 N.Y.S.2d 1,5 (1st Dept. 2000).
12. Mason, 263 A.D.2d at 77, 706 N.Y.S.2d 1, 3-4.
13. Mason, 263 A.D.2d at 78, *quoting* People v. Droz, 39 N.Y.2d 457, 462, 384 N.Y.S.2d 404, 407 (1976); internal quotes omitted.
14. Mason, 263 A.D.2d at 78-79, 706 N.Y.S.2d at 5.
15. 93 A.D.2d 867, 461 N.Y.S.2d 376 (2nd Dept. 1983).
16. The same court thereafter relied on Harami in People v. Hendricks, 114 A.D.2d 510, 512, 494 N.Y.S.2d 729 (2nd Dept. 1985), where it similarly reversed the judgment because “the trial court abused its discretion...by denying defendant's request to take the stand and testify in his own behalf[.]” Notably, the trial court, in the first instance, is under no obligation to inform a defendant of the right to testify. *See* People v. Cosby, *supra*, 82 A.D.3d at 66, 916 N.Y.S.2d at 692; Brown v. Artuz, *supra*, 124 F.3d at 79.
17. 169 Misc.2d 581, 643 N.Y.S.2d 315 (Sup. Ct. Kings Co. 1996), *aff'd*, 237 A.D.2d 388, 655 N.Y.S.2d 416 (2nd Dept. 1997).
18. 169 Misc.2d at 591, 643 N.Y.S.2d at 321. The Second Circuit has also embraced the view that “[d]efense counsel bears the primary responsibility for advising the defendant of his right to testify or not to testify.... [citing United States v. Teague, 953 F.2d 1525, 533 (11th Cir. 1992) (*in banc*)].” Brown v. Artuz, 124 F.3d at 79 (internal quotes omitted). Recently, the Second Department, *quoting* Brown, reiterated that “trial counsel's duty of effective assistance includes the responsibility to advise the defendant concerning the exercise of this constitutional right [internal quotes omitted]” (People v. Carpenter, 52 A.D.3d 729, 860 N.Y.S.2d 599 [2nd 2008] *lv. denied*, 11 N.Y.3d 830, 868 N.Y.S.2d 605 [2008]). In Carpenter, however, no error was found because “[u]ltimately, after a colloquy among defense counsel, the court, and the defendant, the defendant voluntarily chose to follow the advice of his attorney and not testify (*cf.* People v. Mason, [*supra*])” (52 A.D.3d at 729, 860 N.Y.S.2d at 600).
19. 250 F.3d 79, 84 (2d Cir. 2001)
20. 250 F.3d at 84; emphasis added. The First Circuit has similarly concluded. *See* Owens v. United States, 483 F.3d 48, 59 (1st Cir. 2007) (“there can be no effective waiver of a fundamental constitutional right unless there is an intentional relinquishment or abandonment of a *known* right or privilege...[citations omitted]” [quoting United States v. Teague, *supra*, 953 F.2d at 1532,

quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)]). As a result, said the court, “if Owens was unaware of his right to testify and his attorneys did not ask him whether he wanted to testify, Owens was effectively barred from testifying in his own defense.” 483 F.3d at 59-60. *But see* People v. Windley, 28 Misc.3d 1232(A), 2010 WL 3503526, *11 (Sup. Ct. Bx. Co. 2010) (court finding, that despite much opportunity to complain, the defendant’s “silence and inaction is entirely consistent with having voluntarily relinquished his right to testify”).