SUPREME COURT OF NEW YORK
APPELLATE DIVISION, FOURTH DEPARTMENT

People v. Gibson[1]
(decided June 11, 2010)

Jeffrey D. Gibson appealed from a judgment of the Supreme Court, Erie County, where he was convicted of robbery in the first degree, based on DNA evidence which, unbeknownst to him, the police acquired from a discarded cigarette butt.[2] The acquired DNA evidence was used to link him to evidence found at the scene of a robbery he allegedly committed.[3] The defendant asserted that because he "was in custody on an unrelated charge for which he was represented by counsel,"[4] the police officer's offer of "a cigarette for the purpose of obtaining DNA evidence from his saliva in an effort to link him to the instant robbery"[5] violated both his privilege against self-incrimination and the "indelible right to counsel"[6] it invokes under both the Fifth Amendment to the United States Constitution and article I, section 6 of the New York Constitution.[7] The appellate court affirmed the decision of the lower court and allowed the admission of the DNA evidence at trial.[8] The court concluded that the DNA evidence ascertained from the cigarette butt was "real and physical evidence" as opposed to "testimonial and communicative

[1] 902 N.Y.S.2d 289 (App. Div. 4th Dep't 2010).

[2] *Id.* at 290.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Gibson*, 902 N.Y.S.2d at 290. *See also* People v. Bing, 558 N.E.2d 1011, 1015 (N.Y. 1990) (discussing that the right to counsel in New York attaches in two instances—at the commencement of formal proceedings and when "uncharged individuals in [police] custody . . . have retained or requested an attorney").

[7] The Fifth Amendment to the United States Constitution states, in relevant part: "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ." Article I, section 6 of the New York Constitution states, in pertinent part: "No person shall be . . . compelled in any criminal case to be a witness against himself or herself . . . ."

[8] *Gibson*, 902 N.Y.S.2d at 290.

evidence," and thus there was no contravention of the defendant's federal or state constitutional privilege against self-incrimination, nor the derivative right to counsel it invokes.[9]

While in police custody on a bench warrant for an unrelated charge for which he was represented by an attorney, the defendant, Mr. Gibson, asked to speak to an investigator with whom he had past dealings.[10] Unbeknownst to the defendant, the same investigator had knowledge of a prior robbery that he suspected the defendant was linked to.[11] The investigator did not only possess knowledge of the robbery, but the police department possessed the DNA of the perpetrator which was extracted from a knitted cap left at the crime scene.[12]

The knitted cap was found by the police in the backyard of a homeowner, approximately 200 feet from the crime scene.[13] Reportedly, a relatively short time after the robbery occurred, the defendant's girlfriend was observed walking within close proximity of the crime scene.[14] Shortly thereafter, about an hour or so, the defendant and his girlfriend were seen walking together about one-half mile from the robbery.[15] Even though the perpetrator's face was covered during the robbery, the general description of the perpetrator was said to match that of the defendant, Mr. Gibson.[16]

It is very unlikely that the defendant was aware of the incriminating information the investigator possessed when he requested to meet with him. Nevertheless, despite this contention, a conversation ensued between the defendant and the investigator.[17] During that conversation the investigator offered the defendant a cigarette, the remains of which were surreptitiously seized and later used to charge and convict him.[18] The dissent asserted that it was the intention of the investigator to offer and subsequently use the remains of the cigarette to acquire the defendant's DNA solely for purposes of

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[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Gibson*, 902 N.Y.S.2d at 291.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.* at 290.
[18] *Gibson*, 902 N.Y.S.2d at 290.

linking him to the robbery.[19] The dissent further asserted that the investigator used his knowledge of the defendant's smoking habit, and his inaccessibility to cigarettes, as a manipulative device to eventually acquire the defendant's DNA.[20] Whether this is true or not is unknown. Yet, what is true is that the investigator made an offer that the defendant accepted to his disadvantage.[21] The discarded cigarette remains were later tested by the police for DNA.[22] And because the DNA on the cigarette matched the DNA found on the knitted cap, the defendant, Mr. Gibson, was charged and eventually convicted of robbery in the first degree.[23]

Because no formal charges were brought against Gibson pursuant to the robbery case, the appellate court decided that his right to counsel attached based on the formal proceedings and bench warrant from his unrelated charge.[24] But to the detriment of the defendant, the attachment of this right served no consolation. The court held that the DNA constituted "real and physical evidence"—the type of evidence that is not afforded protection under the New York or United States Constitutions.[25]

The court in *Gibson* adopted the reasoning of *People v. Hager*[26] which asserted that unless the evidence communicates or testifies to the defendant's subjective knowledge or thought process, it is not self-incriminatory.[27] Therefore, as the court held that there was no contravention of the defendant's privilege against self-incrimination, it eventually followed that his derivative right to counsel was not violated.[28]

Pursuant to the reasoning of *Schmerber v. California*,[29] the majority held that there could be no viable right to counsel claim where the defendant was not entitled to assert his privilege against

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[19] *Id.* at 292 (Green, J., dissenting).

[20] *Id.*

[21] *Id.* at 290 (majority opinion).

[22] *Id.*

[23] *Gibson*, 902 N.Y.S.2d at 290.

[24] *Id.*

[25] *Id. See infra* notes 54-58 and accompanying text for a discussion of *Schmerber v. United States*.

[26] 505 N.E.2d 237 (N.Y. 1987).

[27] *Id.* at 238.

[28] *Gibson*, 902 N.Y.S.2d at 291.

[29] 384 U.S. 757 (1966).

self-incrimination as appurtenant to the Fifth Amendment.[30] Reasoning by analogy, the majority concluded that the DNA acquired from the surreptitious taking of the defendant's discarded cigarette did not constitute a constitutional violation under either the Fifth Amendment or article I, section 6 of the New York State Constitution.[31] As a result, there was no need to suppress the DNA evidence.[32]

The majority in *Gibson* accused the dissent of reading too far into the matter of when the right to counsel attaches.[33] The majority asserted that if the court were to welcome such a broad interpretation, as the one suggested by the dissent, any "person stopped by the police" who was being represented on unrelated charges, or who would request an attorney, could preclude the use of evidence obtained as a result of field sobriety or chemical tests.[34] As a result, the majority rejected this view because it would almost always preclude the prosecution from securing a conviction.[35]

The dissenting opinion in *Gibson* suggested that the defendant's privilege against self-incrimination, together with his right to be free from an unreasonable search and seizure, was violated within the context of both the State and Federal Constitutions; thus the evidence should have been suppressed.[36] The dissent contended that as the defendant was represented by counsel on an unrelated charge, the police had no right to interrogate him on any other matter absent the presence of his attorney.[37] The dissent acknowledged that the defendant was not required to submit to interrogation because his counsel was not present and, moreover, the detective was aware of this.[38]

The dissent asserted that the detective's behavior conceptualized the idea of "interrogation," as discussed in *People v. Kollar*,[39] as the detective used his knowledge of the defendant being

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[30] *Gibson*, 902 N.Y.S.2d at 290-91. *See infra* notes 50-54 and accompanying text.

[31] *Gibson*, 902 N.Y.S.2d at 291.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Gibson*, 902 N.Y.S.2d at 292.

[37] *Id.*

[38] *Id.*

[39] *See infra* notes 74-84 and accompanying text.

a smoker and their prior relationship as a means to knowingly acquire evidence to incriminate him.[40] Lastly, the dissent also proposed that even if the majority were to differ from the aforementioned precedents, the State could only ascertain a DNA sample from the defendant in the presence of a court order or if the defendant consented to giving the sample absent coercion.[41] Such reasoning maintains the defendant's right to be secure in his person against unreasonable searches and seizures.[42] Nevertheless, as the defendant's right to counsel arose from the unrelated charge, the detective was not supposed to proffer a request for the sample in the absence of the defendant's counsel.[43]

Great disparity exists between the majority and dissent's application of the New York jurisprudential standard with regard to the privilege and the indelible right to counsel it invokes. Yet the Supreme Court's explication of a defendant's privilege against self-incrimination and the right to counsel it invokes was cogently set forth in the seminal case *Miranda v. Arizona*.[44] In *Miranda*, the Court acknowledged that custodial interrogation, absent a non-adversarial party to the accused, creates inherently compelling pressures which in turn catalyzes the accused to proffer a forced confession.[45] The procedural emanations from *Miranda*, the "right to remain silent" and the "right to counsel," were the safeguards

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[40] *Gibson*, 902 N.Y.S.2d at 292.

[41] *See* People v. Dail, 894 N.Y.S.2d 78, 80 (App. Div. 2d Dep't 2010); *In re* Abe A., 437 N.E.2d 265, 266 (N.Y. 1982). In order for the State to obtain a court order for a blood sample they must establish the following:

> (1) [P]robable cause to believe the suspect has committed the crime, (2) a "clear indication" that relevant material evidence will be found, and (3) the method used to secure it is safe and reliable. In addition, the issuing court must weigh the seriousness of the crime, the importance of the evidence to the investigation and the unavailability of less intrusive means of obtaining it, on the one hand, against concern for the suspect's constitutional right to be free from bodily intrusion on the other. Only if this stringent standard is met, as we conclude it was here, may the intrusion be sustained.

Id.

[42] *See* U.S. CONST. amend. IV; N.Y. CONST. art. I, § 12.

[43] *See* People v. Loomis, 682 N.Y.S.2d 743, 743-44 (App. Div. 4th Dep't 1998) (affirming a decision in which evidence found in defendant's home was suppressed as the defendant gave the police consent to search his home when police were precluded from requesting such consent as they knew defendant could not proffer such consent in absence of his attorney).

[44] 384 U.S. 436 (1966).

[45] *Id.* at 467.

implemented to affect the Court's incessant desire to preserve the privilege against compulsory self-incrimination.[46]

The right to counsel attaches at the commencement of criminal proceedings.[47] Nevertheless, *Miranda* established that the privilege against self-incrimination, which invokes the derivative right to counsel, extends outside of criminal proceedings and into the setting of "custodial interrogation" of the defendant by law enforcement or a prosecuting attorney.[48] Moreover, the privilege "serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."[49] As a result, the Court put procedural guidelines in place to assure that the privilege is properly effectuated.[50] Those guidelines included: (1) an explicit statement from the interrogator(s) to the person in custody that they have the right to remain silent; (2) an additional and explicit warning that should he or she decide to act alternatively, all statements made can and shall be used against him or her; and lastly (3) the right to counsel, not only preceding custodial interrogation, but during it as well.[51] *Miranda* reinforced the contention that once the Fifth

[46] *Id.* at 468.

[47] Kirby v. Illinois, 406 U.S. 682, 689 (1972) (finding that criminal proceedings include preliminary hearing, information, or indictment).

[48] *Miranda*, 384 U.S. at 444-45. The Court defined *custodial interrogation* as the "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444.

[49] *Id.* at 467.

[50] *See id.* at 469-70.

[51] *Id.* In addition to the explicit statement of one's right to remain silent, the Court was adamant in the belief that an attorney should be present during a custodial interrogation, as it ruled:

> [T]he right to have counsel present at the interrogation is indispensable to the protection of the *Fifth Amendment* privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end . . . . Thus, the need for counsel to protect the *Fifth Amendment* privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning in which the defendant so desires.

Miranda, 384 U.S. at 469-70 (emphasis added). The Court also asserted the idea that counsel being present during the interrogation process: (1) enhances the integrity of the fact

Amendment privilege is invoked, all interrogation must cease.[52] Nevertheless, even though the privilege is preserved in the form of *Miranda* warnings, an accused may derogate away from invocation of the privilege and waive his right to counsel.[53]

In *Schmerber v. California*,[54] the Supreme Court emphasized that the Fifth Amendment privilege protects the accused only from being "compelled to testify against himself [or herself], or otherwise provide the State with evidence of a testimonial or communicative nature."[55] The Court in *Schmerber* concluded that a distinction must be drawn between the states' use of physical or moral compulsion to obtain communication from an individual and the use of one's person

finding process as counsel's presence assures that whatever the defendant/accused communicates to the police will be correctly communicated to the prosecution at trial; (2) decreases the probability of police coercion; and (3) provides the defendant/accused with a secure environment in which he can tell his story under otherwise intense and compelling conditions without the fear and anxiety that the interrogation process normally brings. *Id.* at 466, 470.

[52] *Id.* at 473-74.

[53] Edwards v. Arizona, 451 U.S. 477, 488 (1981) (discussing that if a party waives the right to counsel, the waiver must be voluntary and constitute a knowing and "intentional relinquishment or abandonment of a known right or privilege . . . [which] must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused") (internal citations omitted). See Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (2010), as the Court opined that although there has been no clear holding establishing whether the same standard is applicable for the right to remain silent (as to the right of counsel), the same standards apply as the two privileges are combative against compulsory self-incrimination. *See also* Moran v. Burbine, 475 U.S. 412, 421 (1986) (discussing that should an accused waive either his right to remain silent or his right to counsel it must be done: (1) voluntarily in the sense that is was the product of free deliberate choice and absent any form of coercion, intimidation, or deception; and (2) it must be made intelligently and knowingly as to say the accused must know of the rights that is being abandoned and that he is actually abandoning it); Michigan v. Mosley, 423 U.S. 96, 103-05 (1975). Consistent with the right of the accused to remain silent is the accused's power to control the length of the interrogation, the content of what is discussed, as well as the time in which the questioning occurs. *Id.* at 103-04. Therefore, should he deviate from his right after he previously invoked it, the Court has held that the admissibility of the statements ascertained are dependent on whether law enforcement has "scrupulously honored" the defendant's right to remain silent. *Id.* at 104. Some of the factors, though neither definite nor dispositive, reviewed by the Court to determine whether the right was "scrupulously honored" are: the cessation of the initial interrogation once the accused invoked the right; the amount of time that has elapsed between the initial invocation of the right and the subsequent interrogatories; the relation of the interrogatories to the actual crime in question; whether a new set of Miranda warnings were read to the accused; and whether the accused understood them. *Id.* at 104-05.

[54] 384 U.S. 757 (1966).

[55] *Id.* at 761.

as evidence.[56] In acknowledging such a distinction, the Court held that only testimonial and communicative evidence, and not compulsion of an individual to produce "real or physical evidence," was afforded protection under the Self-Incrimination Clause of the Fifth Amendment.[57] The court reasoned that if the evidence was not testimonial in nature, but instead was real or physical, then the privilege did not apply and the absence of the presence of counsel during the procurement of the DNA was irrelevant.[58]

Prior to *Schmerber's* explication as to what evidence can be deemed self-incriminatory, there was *Holt v. United States*.[59] *Holt* plainly stated that "compelling a man . . . to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."[60] One may assume that this holding is what bore the subsequent distinction found in *Schmerber*—that the Fifth Amendment privilege only extended to "testimonial and communicative evidence" as opposed to "real and physical evidence."[61] However, it is without doubt that at this point in Fifth Amendment jurisprudence that the Court provided the exception to the valued privilege against self-incrimination.

In *Pennsylvania v. Muniz*,[62] the Court acknowledged that the privilege did not protect a defendant from being compelled to produce "real or physical evidence."[63] In order for evidence to be afforded the protections of the privilege, it must assert communications that in and of itself "explicitly or implicitly, relate a factual assertion or disclose information," and therefore put the accused in a position where he could incriminate himself.[64]

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[56] *Id.* at 763 (citing Holt v. United States, 218 U.S. 245, 252-53 (1910)).

[57] *Id.* at 764-65.

[58] *Id.* at 766.

[59] 218 U.S. 245 (1910).

[60] *Id.* at 252-53.

[61] *Schmerber*, 384 U.S. at 764.

[62] 496 U.S. 582 (1990).

[63] *Id.* at 589 (quoting Doe v. United States, 487 U.S. 201, 210 (1988)).

[64] *Id.* at 594. The Court asserted that the purpose of the privilege was to spare the accused from having to reveal, whether explicitly or implicitly, knowledge about the offense to the government. *Id.* They further asserted that the privilege was founded and premised on their unwillingness to subject the accused to what they believed was a "trilemma of self-accusation, perjury or contempt" that if allowed would result in a non-favorable inquisitorial system of criminal justice versus the accusatorial system that they prefer. *Id.* at 595 n.8.

Therefore, because DNA merely constitutes the chemical analysis of the physiological make up of a defendant, and does not proffer any communications of the subjective cognitions of a defendant, Fifth Amendment protections are inapplicable.[65]

Gilbert v. California[66] was actually decided a year after *Miranda* and held that hand writing exemplars are forms of physical evidence, as they serve to identify a physical characteristic.[67] According to the Court, the use of one's hand writing and voice are means used to facilitate communication.[68] However, as long as the content of what was said and/or written was not testimonial and communicative in nature, the exemplars can be used to identify physical characteristics of the defendant, thus precluding him from the protections of the privilege.[69]

Wilson v. Collins[70] and *United States v. Zimmerman*[71] more specifically dealt with DNA evidence. In following the precedent of *Muniz*, both cases held that DNA did not implicate the privilege against self-incrimination as it was physical evidence.[72] *Collins* further held that a DNA sample was analogous to fingerprints, photographs, or any other type of physical evidence that identified the accused.[73]

Based on the progeny of cases that has succeeded *Miranda*, it is evident that the implemented procedural safeguards serve as impediments between the subjective cognitions of the accused and his accuser. Thus, the only way that an accused can subject himself to self-incrimination is if he is compelled to relinquish his right to his thoughts. *Miranda* serves as the prohibition against such compulsion. Similarly, New York case law has created procedural impediments within its own constitutional jurisprudence in an effort to afford New York citizens the same, if not greater protections.

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[65] *See Schmerber*, 384 U.S. at 765 (finding that the results of the DNA test depended on chemical analysis alone and thus was not incriminating to the defendant because it was not testimony or some evidence relating to a communicative act or writing by the defendant).

[66] 388 U.S. 263 (1967).

[67] *Id.* at 266-67.

[68] *Id.* at 266.

[69] *Id.*

[70] 517 F.3d 421 (6th Cir. 2008).

[71] 514 F.3d 851 (9th Cir. 2007).

[72] *Collins*, 517 F.3d at 431 (citing *Zimmerman*, 514 F.3d at 855).

[73] *See id.*

The privilege against self-incrimination is valued in the State of New York, and thus has developed separate from its federal counterpart.[74] The Fifth Amendment and article I, section 6 of the New York State Constitution confer similar rights to the accused.[75] Nevertheless, as the right to counsel is deemed a "cherished principle" in New York State jurisprudence, "[o]ur decisional law has advanced this principle by holding that the State constitutional right to counsel attaches indelibly in two [instances]."[76]

The right to counsel may attach when formal judicial proceedings are commenced (i.e. post indictment, arraignment, or upon the filing of an accusatory instrument).[77] Should it not attach in the former instance, it attaches when an uncharged individual has retained a lawyer in the matter in question or while in custody, requests a lawyer to represent him or her in the matter in question.[78] In furtherance of this principle, a greater protection was established. The court in *People v. Burdo*[79] actually referred to this protection as a "workable, comprehensible, bright line rule."[80] The rule states that "once a defendant in custody on a particular matter is *represented by or requests* counsel, custodial interrogation about any subject, whether related or unrelated to the charge upon which representation is sought or obtained, must cease."[81] The presence of an attorney serves as a mitigating factor between the likelihood of an accused to self-incriminate due to his vulnerability in an overwhelming environment, and the coercive power of the state to compel an accused to do so.[82] Furthermore, *People v. Kollar*[83] stated that interrogation was not only limited to "express questioning, but also [included] any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect."[84]

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[74] People v. Settles, 385 N.E.2d 612, 615 (N.Y. 1978).

[75] *See supra* text accompanying note 7.

[76] People v. Ramos, 780 N.E.2d 506, 509 (N.Y. 2002).

[77] *Settles*, 385 N.E.2d at 615.

[78] *Ramos*, 780 N.E.2d at 509.

[79] 690 N.E.2d 854 (N.Y. 1997).

[80] *Id.* at 856.

[81] *Id.* at 859 (internal citations omitted) (emphasis added).

[82] *Id.* at 855.

[83] 760 N.Y.S.2d 449 (App. Div. 1st Dep't 2003).

[84] *Id.* at 451 (quoting Rhode Island v. Innis, 446 U.S. 291, 301 (1980)) (internal quotation

Analogous to the precedents of *Schmerber* and *Gilbert*, *Hager* discussed how evidence must be distinguished in order to warrant Fifth Amendment protections.[85] In *Hager*, the defendant struck a pedestrian and fled the scene of the crime.[86] When the police finally apprehended him, they smelled alcohol on his breath and subsequently transported him to the central testing headquarters.[87] The defendant agreed to take several field sobriety tests that he later failed due to his inebriation.[88] Even though the defendant contended that the evidence should be suppressed as no *Miranda* warnings were given prior to the administration of the tests, thus contravening his Fifth Amendment rights, the court denied his claim.[89] The court reasoned that because real and physical evidence did not communicate or reveal the defendant's subjective knowledge or thought process, it therefore did not invoke protections under the Fifth Amendment.[90]

The disparity between New York State and federal jurisprudence is greatly, if not entirely, seen in the right to counsel. Similar to federal constitutional jurisprudence, in New York the right to counsel attaches at the commencement of the criminal proceeding.[91] However, the criminal proceedings may commence upon the issuance of a warrant.[92] As a result, unlike the Federal Constitution, the New York State Constitution does not permit interrogation of a suspect absent counsel even if the arrest was made pursuant to a warrant.[93] In extraordinary circumstances, though it does not attach automatically, a right to counsel may even attach in delayed proceedings.[94]

Another factor to be distinguished is that only in New York State does the indelible right attach while an uncharged individual in

marks omitted).

[85] 505 N.E.2d 237, 238 (N.Y. 1987).

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] Hager, 505 N.E.2d at 238. The court stated that "[p]hysical performance tests do not reveal a person's subjective knowledge or thought processes but, rather, exhibit a person's degree of physical coordination for observation by police officers." *Id.*

[91] *Bing*, 558 N.E.2d at 1015.

[92] People v. Harris, 570 N.E.2d 1051, 1054 (N.Y. 1991).

[93] *Id.*

[94] People v. Hopkins, 449 N.E.2d 419, 420 (N.Y. 1983).

custody has either retained or requested an attorney.[95] At this point, a police officer must refrain from questioning the individual, or should they not refrain, any information that they may ascertain will be inadmissible.[96]

> Nevertheless, because this right to counsel can arise when an individual has actually retained a lawyer, it cannot be said to arise under the privilege against self-incrimination alone; instead . . . this right is rooted in "the privilege against self incrimination, the right to be aided by counsel and due process."[97]

Both the United States Constitution and the New York State Constitution afford many privileges to all of those whom they govern—one of the most important is the privilege to not subject oneself to self-incrimination.[98] Even though the right to counsel[99] is a mandated entitlement coupled with both the Fifth Amendment and New York State Constitution article I, section 6 privilege, the defendant-appellant, Jeffrey D. Gibson, asserted that he was divested of both the privilege and entitlement.[100] Defendant-appellant Gibson contended that the lower court erred in its decision not to suppress DNA, which unbeknownst to him, was ascertained from his discarded cigarette which was subsequently used to link him to a prior robbery.[101] This contention was premised on what the defendant-appellant believed was a contravention of his right to counsel—a right invoked by one's privilege against self-incrimination under both the United States and New York State

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[95] *Bing*, 558 N.E.2d at 1015.

[96] *Id.*

[97] *Burdo*, 690 N.E.2d at 857 (dissenting opinion) (internal citations omitted).

[98] The Fifth Amendment to the United States Constitution states, in relevant part: "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ." Article I, section 6 of the New York Constitution states, in pertinent part: "No person shall be . . . compelled in any criminal case to be a witness against himself or herself . . . ."

[99] *See Miranda*, 384 U.S. at 444 (discussing that a suspect or defendant's right to counsel, while in custodial interrogation, is one of the methods employed in order to assure that the party in custody is not divested of the constitutional safeguard provided by the Fifth Amendment); *see also Settles*, 385 N.E.2d at 615 (discussing that absent an attorney an unsophisticated indicted or arraigned defendant may relinquish his or her privilege and succumb to "compulsory self-incrimination").

[100] *Gibson*, 902 N.Y.S.2d at 290.

[101] *Id.*

Constitutions.[102]

The majority opinion erred in its application of the law to the defendant's claim. It is without dispute that the DNA evidence acquired was "real and physical evidence." Nevertheless, it was wrongfully acquired as the defendant was already represented by counsel on an unrelated charge and thus should not have been interrogated by the investigator.[103] The majority reasoned that should the court adopt this approach,

> [Any] person stopped by the police on suspicion of driving while intoxicated could refuse without consequence to submit to field sobriety tests [or] . . . chemical test if he or she happened to be represented by counsel on pending charges or, indeed, if he or she simply asked for an attorney. Because under those circumstances the right to counsel previously would have attached or would thereby be invoked upon the request for an attorney, the refusal of the suspect to consent to the tests could not be used against him or her at trial, thus making it virtually impossible in many cases for the prosecution to obtain a conviction.[104]

Indeed, the court may view this as a viable concern. However, it is not viable enough to supersede the precedential guidelines that the court, itself, has put into place regarding self-incrimination and the right to counsel. Most importantly, it is not viable enough to supersede the purpose of the both Sixth Amendment and article I, section 6, to provide a protective mechanism for the defendant in the adversarial criminal process. Ironically, the courts clear manipulation of New York jurisprudence, with regard to self-incrimination and the right to counsel it invokes, appears to have misconstrued this purpose.

The purpose of article I, section 6 of the New York Constitution is to provide a procedural mechanism for the defendant—one in which guarantees him a fair and just trial. Moreover, the purpose of precedent that surrounds it is to facilitate

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[102] *Id*.

[103] *Burdo*, 690 N.E.2d at 855.

[104] *Gibson*, 902 N.Y.S.2d at 291.

and effectuate the guarantee—not to secure convictions for the prosecution. As a result, the reasoning of the *Gibson* court was not only counterintuitive and contrary to the court's precedent, but it was also a miscarriage of justice on behalf of the defendant.

In an effort to effect one area of justice, the court divested the defendant of his rights provided by another. If the court was truly concerned that intoxicated drivers would purposely refuse to take field sobriety tests, absent sanction, and invoke their right to counsel as a protective device to avoid being charged and convicted of driving under the influence, it should have submitted this concern to the New York legislature, as a matter of this gravity is within the state's police power to regulate. Ironically, as viable as this concern may be, it is not appurtenant to the facts of the present case because defendant Gibson was neither intoxicated nor a driver when his DNA was surreptitiously seized by the investigator. Instead, he was a defendant that the detective knew was represented by counsel on an unrelated charge, and thus a defendant whom should not have been interrogated.[105]

The detective's behavior constituted interrogation because he used that act of giving the defendant the cigarette as a mechanism to elicit the defendant's use and later discard of the cigarette solely with the intent of acquiring the DNA from the remains to incriminate him.[106] The defendant did not voluntarily or spontaneously give his DNA, a product of his person, to the detective to use as he so pleased. Instead, the defendant's DNA was surreptitiously seized as a result of an "impermissible interrogation."[107] Based on the foregoing reason the defendant's DNA should have been suppressed as New York state jurisprudence precludes an accused, represented by counsel, from being interrogated on related or unrelated matters in absence of the

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[105] *Burdo*, 690 N.E.2d at 855.

[106] *See Kollar*, 760 N.Y.S.2d at 451.

[107] *Id.* The court defined impermissible interrogation as:

> words or actions the police knew or should have known would prompt an incriminating response, any knowledge the police may have about a suspect's particular susceptibility is important in determining whether the particular conduct was inappropriate. . . . [Furthermore,] the definition of impermissible interrogation "focuses primarily on the perceptions of the suspect, rather than the intent of the police."

Id. (citing *Innis*, 466 U.S. at 301, 302 n.8).

accused's counsel.[108] It is for this reason the court erred in its decision.

The *Gibson* court's complete deviation away from the jurisprudential standard set forth in *Burdo* does not only show its disregard for precedents that it has created, but a total disregard for the judicial process.[109]

In *Weeks v. United States*,[110] the Supreme Court opined that:

> The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.[111]

Gibson's holding, without doubt, showed its disrespect for this longstanding principle.

Whether it appears in the presence of a federal safeguard or a state safeguard, the privilege against self-incrimination is an essential one. A man's thoughts are one of his most precious possessions, if not the most precious, and should be rightfully protected as such. And even in cases, such as this one, where the cognitions of the accused are not the subject of his detriment, the constitutional safeguards put in place should be followed to procure the use of the privilege should the need ever arise. This decision has derogated away from the very purpose exemplified by *Miranda*—the purpose of preventing the subjugation of the accused into the will of his or her examiners.[112] Nevertheless, as New York State constitutional jurisprudence continues to evolve, adequate protective devices will

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[108] *Burdo*, 690 N.E.2d at 855.

[109] *Id.* ("Our holding [in *Rogers*] . . . emphasized that since defendant was *represented* on the charge on which he was held in custody, *he could not be interrogated in the absence of counsel on any matter*, whether related or unrelated to the subject of the representation" (internal citations omitted) (emphasis added)).

[110] 232 U.S. 383 (1914).

[111] *Id.* at 393.

[112] *Miranda*, 348 U.S. at 457.

continue to be employed from preventing another decision to come out like this again.

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