SURVEY OF RECENT DEVELOPMENTS IN THIRD CIRCUIT LAW

In this section, the Seton Hall Law Review *presents synopses of recent Third Circuit cases of interest to practitioners. In so doing, we hope to assist the legal community in keeping abreast of some of the more interesting changes in significant areas of federal practice.*

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Albert J. Ferens was injured in an accident involving a combine manufactured and distributed by John Deere, a Delaware corporation, on July 5th, 1982. 862 F.2d at 32. Ferens, a Pennsylvania resident, purchased the combine from the Uniontown Farm Equipment Company located in Uniontown, Pennsylvania. The injured party along with his wife, instituted two actions against Deere as a result of this accident. The first action was brought in the Western District of Pennsylvania on July 3rd, 1985, alleging breach of warranty. The breach of warranty complaint was filed within the four-year statute of limitations for such claims, and was stayed pending the resolution of the present matter. *Id.* at 32-33. The Ferenses instituted the second action in the Southern District of Mississippi on July 25th, 1985. The complaint was based on the doctrines of strict liability in tort and negligence. *Id.* at 33. The Ferenses elected to bring the strict liability suit in Mississippi because the defendant was authorized to conduct business there, and because the applicable statute of limitations in Mississippi was six years. Conversely, had the action originated in Pennsylvania, it would have been precluded by that state's two-year statute of limitations. *Id.* at 33 n.2.

After the defendant filed an answer, the Ferenses successfully transferred the Mississippi action to the Western District of Pennsylvania pursuant to 28 U.S.C. § 1404(a) (1988) whereupon the strict liability and negligence actions were consolidated with the breach of warranty claim. *Ferens*, 862 F.2d at 33. Subsequent to transfer, the Western District of Pennsylvania granted Deere's motion for summary judgment, determining that the strict liability and negligence actions were barred by Pennsylvania's two-year statute of limitations. *Id.* On appeal, the United States Court of Appeals for the Third Circuit affirmed. *Id.* The United States Supreme Court vacated and remanded the case to the Third Circuit for determination of whether the law of the transferee or transferror forum applied. *Id.*

The Third Circuit panel, consisting of Chief Judge Gibbons, and Judges Seitz and Aldisert, affirmed the decision of the district court holding that the two-year statute of limitations of Penn-

sylvania barred the claim. *Id.* at 36. Chief Judge Gibbons, writing for the court, began his analysis by stating that for conflict of law purposes, Mississippi treats its statute of limitations as procedural law. *Id.* at 34. Thus, the judge recognized that Mississippi's state courts, as well as its federal courts sitting in diversity, would implement Mississippi's statute of limitations in this case. *Id.* at 34 (citing *Sun Oil Co. v. Wortman*, 108 S. Ct. 2117, 2124 (1988)). The court, however, refused to embrace the Ferenses' position that this rule applied where a plaintiff procured a transfer pursuant to § 1404(a). *Id.* at 34-35. In holding that the Pennsylvania federal district court (transferee) was not required to apply the same procedural law as the Mississippi federal district court (transferror), the majority referred to the purpose behind § 1404(a). *Id.* at 35. The court explained that the Act should not be read to allow forum shopping, but instead should be construed in a manner that fosters federal-state uniformity. *Id.* (citing *Van Dusen v. Barrack*, 376 U.S. 612, 636-38 (1964); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

The majority recognized that the Ferenses first brought the action in Mississippi federal court because they were precluded, by the two-year statute of limitations, from bringing it directly in the state or federal court of Pennsylvania. *Id.* The court was unwilling to allow the Ferenses "to use § 1404(a) and a brief stop in Mississippi to achieve a result in the federal courts of Pennsylvania that they could not achieve in the state courts of Pennsylvania." *Id.* at 35-36. Further, the court reasoned that licensing plaintiffs to utilize § 1404(a) in this manner would, in effect, transform the "longest state statute of limitations into the federal statute of limitation to be applied in diversity cases where the plaintiffs can initially bring the action in the favorable state and subsequently transfer it to a convenient forum." *Id.* at 36.

In dissent, Judge Seitz stated that since the Ferenses were permitted to file in Mississippi's district court, insofar as venue and personal jurisdiction were concerned, the choice of law should remain unaffected by the subsequent transfer. *Id.* at 37 (Seitz, J., dissenting). Judge Seitz reasoned that the purpose of § 1404(a) is solely trial convenience, and is not intended to impact on change of law considerations. *Id.* The judge also asserted that the Act contains no language representing a design which prohibits a plaintiff from obtaining a transfer. *Id.*

The dissent further disagreed with the finding that to allow the Ferenses to utilize § 1404(a) would permit forum shopping.

Id. Judge Seitz posited that "[f]orum shopping is irrelevant to the objectives of the transfer statute because a transfer gives a plaintiff no procedural or substantive right he did not already possess." *Id.*

The Third Circuit correctly recognized the inherent danger in permitting plaintiffs to seek transfers in this manner. Indeed, the Ferenses brought the first action in Pennsylvania and the second action in Mississippi, because the latter would have been barred under Pennsylvania law. It is true, as the dissent asserts, that transfer does not give a plaintiff any additional rights. By allowing such transfers, however, plaintiffs are encouraged to bring frivolous actions or to sever genuine ones in illegitimate jurisdictions so that they may be later transferred. This illusive use of transfer is not within the true intent of the statutory provision.

Robert A. Burke

CIVIL RICO—LIMITATIONS ON ACTIONS—LAST INJURY DISCOVERY RULE IS INSUFFICIENT TO GOVERN CIVIL RICO LIMITATIONS PERIOD, NECESSITATING CREATION AND APPLICATION OF THE LAST PREDICATE ACT RULE TO DETERMINE COMMENCEMENT OF RELEVANT ACCRUAL PERIOD—*Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988).

The defendants, collectively referred to as the Houghton Group, submitted fraudulent insurance claims to Keystone Insurance Co. (Keystone) arising from automobile accidents occurring in November 1977 and July 1980. 863 F.2d at 1126. A July 1981 mailing to Keystone regarding the 1980 accident led to the conviction of the Houghton Group members on mail fraud charges involving the claims to Keystone, as well as other fraudulent claims to different insurance companies. *Id.* at 1126-27. The criminal record indicated that a mailing on September 19th, 1983, to an insurer other than Keystone, was the most recent mailing underlying the Houghton Group's conviction. *Id.* at 1127. A criminal court sentenced the defendants on June 20th, 1986, and one month later, Keystone filed a civil RICO claim in

the United States District Court for the Eastern District of Pennsylvania.

After a non-jury trial, the district court held that the relevant four-year statute of limitations period barred Keystone's suit and accordingly entered judgment for the Houghton Group. *Id.* at 1127. The district court found that although Keystone sufficiently proved each element of the civil RICO claim, the insurance company "knew or should have known," by mid-1981, of the last injury that Keystone incurred. *Id.* Accruing the limitations period from that time, the court concluded that Keystone filed its suit after the four-year limitations period had elapsed. *Id.* Keystone appealed, and the United States Court of Appeals for the Third Circuit reversed, announcing a new rule governing civil RICO statute of limitations analysis.

Writing for the three-judge panel, Judge Mansmann articulated the Third Circuit's newly fashioned rule defining the civil RICO limitations period:

> [T]he limitations period . . . runs from the date the plaintiff knew or should have known that the elements of a civil RICO cause of action existed, unless, as a part of the same pattern of racketeering activity there is further injury to the plaintiff or further predicate acts occur which are part of the same pattern. In that case, the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity. The last predicate act need not have resulted in injury to the plaintiff but must be part of the same "pattern."

Id. at 1126.

Prior to giving its reasoning for the decision, the court of appeals noted that federal courts had not previously adopted a uniform rule for determining when civil RICO causes of action accrue. *Id.* at 1127. Further, the court acknowledged that although the Supreme Court adopted the present, uniform four-year statute of limitations period, the nation's highest court had yet to decide the accrual issue. *Id.* Embracing its opportunity to color an empty canvas, the court of appeals began its analysis. *Id.*

Initially, the court explained that a proper accrual rule must reflect the congressional intent and purpose behind the RICO statute. *Id.* at 1129. Attempting to illustrate the congressional mindset, Judge Mansmann cited the legislative mandate that RICO "be liberally construed to effectuate its remedial purpose." *Id.* at 1128 (quoting Organized Crime Control Act, Pub. L. No. 91-452,

§ 904(a), 84 Stat. 942, 947 (1970) (codified at 18 U.S.C. § 1961 (1982)). Significantly, the court concluded that the liberal construction language required, at a minimum, that the court resist any inclination to restrict RICO. *Id.* Moreover, the court of appeals offered Supreme Court precedent that imposed a broad interpretation of the statute. *Id.* at 1128-29 (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498 (1985)). With this view, the appeals court next addressed the inadequacy of the accrual rule utilized by the district court. *Id.* at 1129.

Judge Mansmann charged that the "last injury" discovery rule applied by the district court did not sufficiently address the continuity element of the RICO offense because that rule applied solely to the injury component and not the "pattern" component of the RICO claim. *Id.* The last injury discovery rule requires the limitations period to accrue from the "date the plaintiff knew or should have known of the last injury to the plaintiff caused by a predicate act." *Id.* The court explained that the last injury discovery rule fails to effectuate the purpose of the RICO statute in situations where further predicate acts occur that do not injure the plaintiff, but are nonetheless part of the former "pattern" and occur after the plaintiff's last injury. *Id.* at 1130. Accordingly, the court concluded that the appropriate discovery rule should apply to not only the injury element of RICO, but the pattern element as well. *Id.* Further, in line with its recognition that the substantive elements of the RICO claim are distinct from the injury derived therefrom, the court modified the rule by applying a "knew or should have known" standard to each element of the RICO cause of action. *Id.* The court posited that before the limitations period can begin to accrue, the plaintiff must be in a position to "know or should know" of his injury, as well as "know or should know" that a predicate act, causing injury to him or another, is part of the same pattern of racketeering. *Id.*

Summarily, the court of appeals reasoned that because a plaintiff has not theoretically been injured under civil RICO until the requisite pattern element has been satisfied, it would be inappropriate to commence the limitations period before that pattern is *fully* developed. *Id.* at 1133 (emphasis added). The court's desire to promote the operative "pattern" component of RICO enabled it to avoid application of the simple discovery rule and the Clayton Act rule due to their inability to provide sufficient protection for RICO victims. *Id.* at 1133-35. In doing so, the court promotes the congressional intent regarding the statute's liberal interpretation and the actual substantive components of RICO. Significantly, the opinion fails to

refer to perhaps the most compelling support for its decision—public policy.

Conceptually, statutes of limitation are created, in part, on the "belief that there is a point beyond which a prospective defendant should no longer need to worry about the possible commencement in the future of an action against him or her." BARRON'S LEGAL DICT. 454 (1984). Indeed, a prospective defendant, who continues to violate the law through a "pattern" of injurious or criminal conduct, should and must be made to worry about the possibility of future action against him. The proper accrual rule, as fashioned by this court, does not afford a defendant such undeserved peace of mind. Instead, it offers additional protection and opportunity to the unfortunate victims of civil RICO violations.

Luke P. Iovine

BANKRUPTCY—CHAPTER 13—CRIMINAL RESTITUTION OBLIGATIONS CONSTITUTE DISCHARGEABLE DEBT—*In re Lorraine Johnson-Allen*, 871 F.2d 421 (3d Cir. 1989).

This case resulted from the consolidated appeals of three similarly situated criminal defendant-debtors: the Davenports, Lorraine Johnson-Allen, and Ruby Steffler (debtors). 871 F.2d at 422-23. After pleading guilty to charges of welfare fraud, the debtors were directed to pay restitution to the Pennsylvania Department of Public Welfare (DPW), and were placed on probation. Following their sentencing, the debtors all filed voluntary petitions for bankruptcy under Chapter 13 of the Bankruptcy Code. In each instance, their criminal restitution payments were denoted as unsecured debt owed to the DPW. The bankruptcy court, without any challenge from the creditors, approved the debtors' Chapter 13 plans.

The probation department subsequently instituted violation of probation proceedings against all the debtors when they failed to make their restitution payments. The court of common pleas established that the restitution order was applicable despite the debtors' Chapter 13 plans. *Id.* at 422. Thereafter, the Davenports instituted an action in bankruptcy court seeking declaratory relief with respect to the dischargeability of their criminal restitu-

tion payments. The bankruptcy court found that their responsibility to pay restitution was dischargeable under Chapter 13. *Id.* The district court, on appeal, disagreed, concluding that the obligation did not constitute debt within the meaning of the Bankruptcy Code. *Id.*

In a separate matter, the bankruptcy court similarly held that both Johnson-Allen's and Steffler's "restitution obligations were dischargeable under Chapter 13." *Id.* at 423. In reversing, the district court again held that discharge of a state imposed criminal obligation violated principles of comity and federalism. *Id.*

Judge Rosenn, writing for the court, recognized that the question of ripeness presented a threshold issue prior to review of the case on its merits. *Id.* Adopting the rationale of the Ninth Circuit, the court held that Johnson-Allen's and Steffler's claims were not ripe since neither had finished their Chapter 13 plan and thus it was unknown which discharge provision of the Bankruptcy Code would apply. *Id.* (citing *In re Heincy*, 858 F.2d 548, 550 (9th Cir. 1988)). Judge Rosenn then determined that because the Davenports had obtained a discharge of their debts under 11 U.S.C.A. § 1328(a), the issue of dischargeability was ripe with regard to them. *Id.*

Addressing the issue of whether the obligation to pay restitution constitutes a debt under the Bankruptcy Code, the court noted that the "Code defines 'debt' as a 'liability on a claim' " and further explained that a claim is "a right to payment." *Id.* at 424 (quoting 11 U.S.C.A. § 101(4), (11) (West 1979 & Supp. 1988)). The court observed that Congress had advised that the term "claim" be given the "broadest possible definition." *Id.* (quoting H. Rep. No. 595, 99th Cong., 2d Sess. 309; S. Rep. No. 989, 95th Cong., 2d Sess. 21-22).

Interpreting the "plain language of the statute," Judge Rosenn posited that the restitution obligation could not be construed as a "claim" or "debt" unless the obligation created a right to payment. *Id.* Judge Rosenn noted that the criminal statute under which the debtors were prosecuted, defines restitution as "the return of the property of the victim or payment in cash or the equivalent thereof pursuant to an order of the court." *Id.* at 424-25 (quoting 18 PA. CONS. STAT. ANN. § 1106(d) (Purdon 1983)). In addition, the court observed that the restitution statute confers sole responsibility for instituting judicial proceedings for enforcement with the probation department. *Id.* at 425 (citing 18 PA. CONS. STAT. ANN. § 1106(f) (Purdon 1983)).

Despite what he believed to be the plain language of the statute, Judge Rosenn acknowledged that a majority of bankruptcy courts have renounced the argument that "restitution obligations are 'debts' within the meaning of the Code." *Id.* at 424 (citing *In re Kohr*, 82 Bankr. 706 (Bankr. M.D. Pa. 1988); *In re Thompson*, 77 Bankr. 646 (Bankr. E.D. Tenn. 1987); *In re Pelligrino*, 42 Bankr. 129 (Bankr. D. Conn. 1984); *In re Johnson*, 32 Bankr. 614 (Bankr. D. Colo. 1983); *In re Button*, 8 Bankr. 692 (Bankr. W.D.N.Y. 1981)). Additionally, Judge Rosenn conceded that dicta in the Supreme Court's recent opinion of *Kelley v. Robinson*, 479 U.S. 36, 50 (1986), supported the contention that there was " 'serious doubt' as to whether Congress intended restitution obligations to constitute debt." 871 F.2d at 426 (citing *Kelly v. Robinson*, 479 U.S. 36, 50 (1986)).

However, Judge Rosenn concluded that *Kelly* was inapplicable since it dealt with the issue of debt under Chapter 7 of the Bankruptcy Code. *Id.* Judge Rosenn instead embraced the rationale applied by the Second Circuit in *In re Robinson*, 776 F.2d 30 (2d Cir. 1985), *rev'd on other grounds sub nom. Kelly v. Robinson*, 479 U.S. 36 (1986), holding that the restitution obligation constituted debt under Chapter 13 since the probation department had a right to enforce payment. *Id.* at 427.

Finally, Judge Rosenn noted that Chapter 13 requires the discharge of all debts upon completion of the repayment plan. *Id.* at 428. Judge Rosenn distinguished Chapter 7 which specifically exempts ten categories of debt from discharge, including criminal restitution obligations, from Chapter 13 which provides only one exception which notably does not deal with criminal restitution payments. *Id.* Judge Rosenn interpreted this silence, along with Congress's objective of increasing the accessibility of the Chapter 13 alternative and the plain language of the Chapter, to indicate Congress's approval of discharging criminal restitution under Chapter 13. *Id.* at 427-28.

Judge Hutchinson disagreed with the majority's characterization of criminal restitution payments as debt. *Id.* at 429 (Hutchinson, J., dissenting). In his dissent, Judge Hutchinson disagreed with the majority's reading of *Kelly* and their disregard for the judicially created exception to jurisdiction by bankruptcy courts over state criminal proceedings. *Id.* at 429-30 (Hutchinson, J., dissenting). Judge Hutchinson observed that while the United States Supreme Court has not decided whether criminal restitution payments are embodied within the meaning of debt, it

has differentiated them from other indebtedness. *Id.* at 430-31 (Hutchinson, J., dissenting). In light of the persuasive dicta in *Kelly* and the lack of specific legislative history contrary to the judicially recognized exception, Judge Hutchinson would hold that criminal restitution obligations are not affected by a discharge under Chapter 13. *Id.* at 431-32 (Hutchinson, J., dissenting).

Although the impact of this decision may be disturbing, the court has correctly adhered to the letter of the law. Congress's choice to exempt criminal restitution obligations from discharge under Chapter 7, while at the same time failing to include this same provision when amending Chapter 13, is not mere oversight. Until such time as either the Supreme Court or Congress decides to classify criminal restitution obligations as other than debt, the Third Circuit's interpretation of the law is warranted.

Douglas J. Olcott

CONSTITUTIONAL LAW—SIXTH AMENDMENT—ARBITRARY DENIAL OF DEFENDANT'S REQUEST FOR COUNSEL OF CHOICE PRO HAC VICE IS PER SE REVERSIBLE—*Fuller v. Diesslin*, 868 F.2d 604 (3d Cir. 1989).

On November 14th, 1980, a New Jersey state trooper stopped and detained for speeding a motor vehicle in which Glen Fuller was a passenger. 868 F.2d at 605, 612. During a consensual search of that vehicle, the state trooper found large quantities of cocaine and marijuana. As a result, Fuller and Douglas Chapee, the driver of the vehicle, were arrested and subsequently indicted in New Jersey Superior Court on charges of possession of a controlled dangerous substance, as well as the unlawful possession of a weapon. *Id.* at 605. Fuller filed a pretrial motion seeking representation pro hac vice by lawyers from Illinois and the District of Columbia. In denying Fuller's motion, the trial judge reasoned that Fuller's local counsel was competent and moreover, the probable delay and inconvenience that would result from utilizing out-of-state counsel clearly overcame a criminal defendant's right to choose his own counsel. *Id.* at 605-06. Fuller was subsequently denied leave to appeal that motion to the New Jersey appellate division as well as the supreme court.

Id. at 606. Fuller then filed suit in the United States District Court for the District of New Jersey, demanding injunctive relief against the state court proceedings. Because the state criminal proceeding was pending, the district court abstained. *Id.* (citing *Younger v. Harris*, 401 U.S. 37 (1971)).

Pursuant to an agreement with the prosecutor, Fuller and Chappee entered guilty pleas to the charges of possession of cocaine with intent to distribute. The prosecutor dismissed all remaining counts. Fuller preserved his counsel of choice issue for appeal and was sentenced to twenty years in prison and a $20,000 fine.

Fuller subsequently appealed to the appellate division which affirmed the conviction, holding that the trial court did not abuse its discretion when it denied Fuller's motion for admission of counsel pro hac vice. The court also noted that Fuller had received "extremely competent representation." *Id.* (citing *State v. Chappee*, 211 N.J. Super. 321, 335, 511 A.2d 1197, 1205 (App. Div. 1986)).

Fuller then filed a petition for habeas corpus in the United States District Court for the District of New Jersey, contending that he was arbitrarily denied his right to counsel of choice. *Id.* at 606. Granting the writ, United States District Judge Harold A. Ackerman ruled that the existence of competent local counsel does not trump the defendant's right to counsel of choice. Noting that modern transportation had made the legal profession extremely mobile, Judge Ackerman objected to the trial court's generalization regarding possible delays which would occur from the use of out-of-state counsel. The district court thus concluded that the deprivation of a criminal defendant's right to counsel of choice does not require a showing of prejudice and is per se reversible. *Id.* (citing *United States v. Rankin*, 779 F.2d 956, 960 (3d Cir. 1986); *United States v. Laura*, 607 F.2d 52, 58 (3d Cir. 1979)).

Writing for the majority, Judge Becker conducted a three-part analysis to determine whether Fuller's sixth amendment right to counsel had been violated. *Id.* at 606-11. The majority first addressed whether the sixth amendment right to counsel of choice included a right to counsel pro hac vice. *Id.* at 606-07. In noting that the issue was one of first impression, Judge Becker determined that the right to counsel pro hac vice should not be treated differently than other requests for counsel of choice. *Id.* at 607. Recognizing that litigants' requests for out-of-state counsel is occurring more frequently, the Third Circuit ruled that the

right to counsel pro hac vice is encompassed analytically within the sixth amendment right to counsel of choice legal framework. *Id.*

Although a defendant's right to counsel of choice should not be arbitrarily denied, the court noted that this right may be limited by a trial court in ensuring that fair and proper administration of justice is maintained. *Id.* (citations omitted). The majority determined that its recent decision in *United States v. Romano*, 849 F.2d 812 (3d Cir. 1988) controlled the instant case. *Fuller*, 868 F.2d at 607-08. In *Romano*, a federal district court revoked a defendant's pro se status and appointed counsel. *Id.* at 608 (citing *United States v. Romano*, 849 F.2d 812, 818 (3d Cir. 1988)). The defendant sought counsel of her choice and the district court denied her request. *Id.* at 608 (citing *United States v. Romano*, 849 F.2d 812, 818 (3d Cir. 1988)). The Third Circuit held that this denial violated the defendant's sixth amendment right to counsel of choice and that the arbitrary denial mandated per se reversal of the trial judge's ruling. *Id.* (citing *United States v. Romano*, 849 F.2d 812, 820 (3d Cir. 1988)).

The court next rejected New Jersey's argument that the denial of counsel of choice is not per se reversible and a harmless error or prejudice standard should apply. *Id.* at 608-09. New Jersey argued that the right to counsel of choice is encompassed analytically within the right to effective assistance of counsel. *Id.* at 608. And because a recent United States Supreme Court decision ruled that the essential aim of the sixth amendment is to guarantee effective assistance of counsel, New Jersey argued that a per se reversible standard would not fit within such a reading of the amendment. *Id.* at 608 (citing *Wheat v. United States*, 108 S. Ct. 1692, 1697 (1988)).

The court next attempted to determine whether the right to counsel of choice was more akin to the right to self-representation or the right to effective assistance of counsel. *Id.* While conceding that the effective assistance of counsel mandates a prejudice standard, the court noted that the denial of the right to self-representation is per se reversible. *Id.* Although the Supreme Court in *Wheat* stated in dicta that the right to counsel of choice is not analogous to the right to self-representation, thereby implying that a per se analysis would not apply, the majority instead chose to rely on more concrete Third Circuit precedent that required a per se reversal. *Id.* at 608-09 (citing *United States v. Romano*, 849 F.2d 812 (3d Cir. 1988); *United States v.*

Rankin, 779 F.2d 956 (3d Cir. 1986)). The court stated that only a more definite mandate from the Supreme Court or an en banc opinion from the Third Circuit would necessitate a contrary ruling. *Id.* at 609. Accordingly, the court concluded that a per se reversal standard must be applied when a court arbitrarily denies a criminal defendant his right to counsel of choice. *Id.*

The third portion of the court's opinion addressed whether the state trial court's denial of counsel pro hac vice was arbitrary. The majority initially affirmed the district court ruling that local counsel are not, per se, more knowledgeable than out-of-state counsel and further stated that the use of out-of-state counsel would not necessarily delay criminal proceedings. *Id.* The court next addressed New Jersey's argument that because Fuller's local counsel was competent, his sixth amendment rights were not violated. *Id.* at 610. New Jersey extrapolated this argument from a recent Supreme Court decision wherein the Court stated that the right to effective counsel is the essential aim of the sixth amendment. *Id.* (citing *Wheat v. United States*, 108 S. Ct. 1692, 1697 (1988)). The majority dismissed New Jersey's contentions by ruling that other rights are encompassed within sixth amendment jurisprudence, including the right to select one's preferred attorney. *Id.* (citing *Wheat v. United States*, 108 S. Ct. 1692, 1697 (1988)).

The court proceeded to quote at length from a prior Third Circuit decision which spoke to the importance of a criminal defendant's right to choose his or her own counsel. *Id.* (quoting *United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979)). The court characterized this right as critical and reiterated that the only concerns necessary in such situations are the defendant's right to counsel of choice as well as ensuring that the fair and proper administration of justice is maintained. *Id.* Accordingly, the court concluded that a trial court must not make generalizations that the use of out-of-state counsel will cause delay in a criminal trial. *Id.* at 611. Rather, the court admonished that the trial courts must examine all relevant factors in using their discretion to determine whether out-of-state counsel would frustrate the administration of justice. *Id.*

In a dissenting opinion, Judge Weis argued that the trial court properly used its discretion in denying Fuller's motion for counsel pro hac vice. *Id.* at 612 (Weis, J., dissenting). The dissent also criticized the majority for prematurely addressing constitutional issues in the case. *Id.* The dissent argued that the

right to counsel of choice is not absolute, but rather requires the court to balance whether that right will interfere with the fair and proper administration of justice. *Id.* at 613 (Weis, J., dissenting). After carefully examining the record, Judge Weis asserted that the trial judge had evaluated all the circumstances including flight cancellations, lost baggage, etc., which may contribute to delay of a proceeding when an out-of-state attorney represents a criminal defendant. *Id.* at 614 (Weis, J., dissenting). The dissent thus concluded that the trial judge had not abused his discretion in denying Fuller the representation of out-of-state counsel. *Id.*

The sixth amendment right to counsel includes the right to counsel of choice. As a result, criminal defendants have the right to choose the attorney they believe will best represent their cause, including the right to be represented by out-of-state counsel. This right may only be limited by extraordinary countervailing interests which would severely disrupt a criminal proceeding. Thus, when a trial court denies a criminal defendant's request for counsel of choice, the court must, on a case-by-case basis specifically set forth on the record the reasons for denying such a request. An arbitrary denial is not permitted, and requires per se reversal. The court in *Fuller* correctly recognized that the trial court had not specifically examined the facts of the instant case to determine whether the use of out-of-state counsel would interfere with the proper administration of justice. Blanket generalizations regarding delay in travel, etc., will not suffice. Thus, the court correctly applied a per se reversal standard.

Thomas P. Scrivo

CONSTITUTIONAL LAW—FOURTH AMENDMENT—TESTIMONY OF GOVERNMENT AGENTS IS BARRED WHEN THEIR PRESENCE IS UNNECESSARY DURING INVENTORY SEARCH OF PREMISES INCIDENT TO CIVIL FORFEITURE ACTION—*United States v. Showalter*, 858 F.2d 149 (3d Cir. 1988).

On June 22nd, 1987, the Pennsylvania State Police, acting pursuant to a search warrant seized laboratory equipment, chemicals, methamphetamine, formulae and several firearms from the Myerstown, Pennsylvania premises leased by John Showalter and

his wife. 858 F.2d at 150. Soon thereafter, the Drug Enforcement Agency (DEA) commenced further investigation, and the United States instituted an in rem forfeiture action to seize the Showalter property. The United States obtained an order from the District Court for the Eastern District of Pennsylvania permitting the United States Marshal's Service to conduct an inventory search of the premises subject to forfeiture. Deputy Marshal Gerald Reilly contacted DEA agent Bryan Donga for a "briefing" prior to execution of the order. *Id.* at 151. Agent Donga then arranged for the presence of three DEA agents and two Pennsylvania state police officers who eventually accompanied Deputy Marshal Reilly and his administrative assistant on the videotaped inventory of the Showalters' home.

The marshals asked that the Showalters accompany them during the videotaping of their house and neighboring barn, but at one point Mr. Showalter left them, purportedly to telephone his attorney. However, the DEA agents and state troopers saw him in his yard and interrupted the inventory to return him to the area of the videotaping. Upon his return, Deputy Marshal Reilly noticed briers on Showalter's garments, and an unrecognizable but unusual odor emanating from him. The State Police and DEA agents later identified the smell as methamphetamine, and they consequently procured a search warrant for the premises, based upon the troopers' affidavits. The resultant search yielded additional laboratory equipment, phenyl-2-propanone and other chemicals.

Showalter was arrested and indicted for possession and manufacture of non-narcotic controlled substances under 21 U.S.C. § 841(a)(1) (1988). *Showalter*, 858 F.2d at 151. The defendant pleaded not guilty and his attorneys moved to suppress the evidence. *Id.* The district court suppressed all evidence from the recent search, including the testimony of the agents and troopers regarding the smell of methamphetamine on Showalter's clothing. *Id.* The court's bar of the officials' testimony was the sole portion of the ruling which the United States contested on appeal to the Third Circuit Court of Appeals. *Id.*

The court of appeals first acknowledged the Showalters' reasonable expectation of privacy in their premises, which was reasonable even after the arrest of the forfeitable property. *Id.* (citing *United States v. Ladson*, 774 F.2d 436 (11th Cir. 1985)). District Judge Clarkson Fisher then articulated the central focus of this case: the lawfulness of the presence of the state troopers

and DEA agents during the marshals' authorized inventory search. *See id.* at 152. Beginning its analysis, the bench noted and deferred to the trial court's finding that the presence of the troopers and agents was neither judicially authorized nor reasonably necessary to the marshals' governmental purpose of executing the inventory order. *Id.* This finding served to reject the government's argument that such an inventory order imputes authority upon its executors "to do that which is reasonably necessary to accomplish the purpose of [safe entry]," including appointment of supporting personnel without express judicial authorization. *Id.*

The appellate court also echoed the lower court's discord regarding the prosecution's second, "inventory exception" argument, i.e., court authorization is unnecessary in situations of routine performance of a reasonable intrusion upon residential property incident to an inventory. *Id.* The court stressed that absent exigent circumstances, the inventory exception to the warrant requirement applies only to the special category of automobile inventory searches. *Id.* at 153. The basis for the court's careful distinction between home and vehicle inventories was "the most stringent Fourth-Amendment protection" traditionally afforded to private dwellings. *Id.* (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976)). Despite the demonstrated inapplicability of the inventory exception to the instant scenario, Judge Fisher nevertheless posited that the factors justifying the exception for automobiles were not present in the case at bar. *Id.*

Finally, the court was particularly concerned with the absence of evidence that the supporting personnel were enlisted pursuant to a uniform police procedure for the conduct of inventories. *See id.* at 153-54. In view of the lack of functional need for the supporting personnel, and the prosecution's inability to link the instant inventory scenario to a well-established, standardized police procedure, the *Showalter* court affirmed the trial court's suppression of the "olfactory testimony." *Id.* at 154. The presiding judge was careful to note that the proper rationale was not that the search was overly intrusive to the Showalters' fourth amendment rights, but that the government had failed to advance a legitimate purpose for the intrusion by additional persons. *Id.* at 153 n.4.

The main thrust of the *Showalter* holding is to place reigns upon the potentially unfettered discretion of government officials in their methods of executing intrusive residential searches.

However, the threshold of necessity in such cases remains amorphous, thus compelling continued case-by-case balancing of interests. Nevertheless, the *Showalter* decision is at least a caveat to the enforcer, reminding the official that, though occasionally fraught with iniquity, the home is yet the castle of its inhabitants.

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