INTERNAL MEMORANDUM

TO: Patrick Partner, Esq. – Head of Litigation at Dewey, Cheatem and Howe
FROM: Robert Perry, Esq. – Junior Associate
DATE: November 8, 2014
RE: State of New Jersey v. Danny Defendant

On November 6, 2014, you requested research be conducted with respect to the above entitled matter. Specifically, you asked:

1. What arguments can be made on appeal of Danny Defendant's sentence with respect to the Judge's failure to disclose the entirety of the pre-sentence report?

2. What arguments can be made on appeal of Danny Defendant's sentence with respect to the Judge's consideration of Danny Defendant's testimony at trial?

As articulated below, there are several arguments Danny Defendant may raise on appeal.

FACTS OF THE CASE

On July 13, 2013, Danny Defendant was operating a motor vehicle on Route 38, in Mount Laurel, New Jersey. Officer Paul Paininarse conducted a motor vehicle stop, later testifying that Mr. Defendant was operating his motor vehicle ten (10) miles above the posted speed limit. Upon approaching Mr. Defendant's motor vehicle, Officer Paininarse claimed to smell the odor of "burnt marijuana" emanating from Mr. Defendant's motor vehicle. When asked about the odor, Mr. Defendant denied there were any illegal substances in the car.

Officer Paininarse then requested a K-9 Officer respond to the scene. Approximately fifteen (15) minutes later, Officer Hank Handler and his K-9, Sniffles, arrived and inspected the motor vehicle. Sniffles is a qualified law enforcement K-9 trained to detect the odor of controlled dangerous substances. Sniffles immediately gave indication of a controlled dangerous substance in the rear trunk area of the motor vehicle.

Officer Paininarse then applied for a telephonic search warrant, and was granted permission to search the interior of the motor vehicle. Upon searching the trunk, Officer Paininarse discovered three (3) kilos of uncut cocaine in a secret compartment under the spare tire. Mr. Defendant was arrested and charged with Possession of a Controlled Dangerous Substance with Intent to Distribute, a crime of the first degree.

PROCEDURAL HISTORY

Following an unsuccessful motion to suppress the search of his car, Mr. Defendant rejected the Prosecutor's plea offer and requested a trial by jury. On the second day of trail the Prosecutor rested his case and Mr. Defendant took the stand. Mr. Defendant testified that he had lent his car to a friend the night before, and was unaware of the cocaine in the trunk. He further testified, "Look, I've never even tried cocaine. I mean, I've smoked a ton of weed and even tried Molly once or twice, but cocaine just isn't my thing."

The jury returned a guilty verdict and defendant was sentenced approximately one month later. At sentencing, Judge Hardarse, who also presided over the trial, sentenced Mr. Defendant to the maximum sentence of twenty (20) years in New Jersey State Prison. During the Judge's sentencing decision, the Judge stated, "I find particularly disturbing Mr. Defendant's history of domestic violence contained in the supplemental pre-sentence report."

Mr. Defendant's attorney objected, arguing to the court that he had never received a "supplemental pre-sentence report," and had only seen the pre-sentence report created in the ordinary course. The Prosecutor noted that she had not received a "supplemental pre-sentence report," either. The Judge declined to provide this report to either of the parties, stating, "there is sensitive information in this report and I don't want people's lives put in jeopardy!" The Judge went on to state, "I don't really think it would make a difference anyway."

Continuing in his sentencing decision, the Judge stated, "I am also bothered by defendant's ridiculous testimony. There is no way he was unaware of the narcotics in his motor vehicle. He absolutely lied. In addition, I am troubled by defendant's substantial history with drugs.

He testified at trial that he used marijuana extensively and also abused other drugs." The Judge concluded by stating, "Clearly this defendant has no regard for the law and deserves the maximum sentence."

RESEARCH QUESTIONS

1. **What arguments can be made on appeal of Danny Defendant's sentence with respect to the Judge's failure to disclose the entirety of the pre-sentence report?**

A. Legal Authority

While the United States Supreme Court has unequivocally held that, in a capital punishment context, the denial of a information contained in a pre-sentence report to a defendant denies that defendant due process of law, the Court has not declared explicitly if this right extends to non-capital punishment cases. In Gardner v. Florida, 430 U.S. 349 (1977), defendant appealed his death sentence where the Judge refused to disclose portions of the report to the parties. The Court held this practice violated defendant's constitutional right in that life would be taken without due process of law. Thirty years later the Sixth Circuit Court of Appeals noted in United States v. Hamad, 495 F.3d 241 (6th Cir. 2007), that

> While a defendant may not have the constitutional right to confront the witness against him at sentencing, it remains unclear under modern sentencing practices what due process right he has to know who these witnesses are and what they have said, to respond meaningfully to the accusations or otherwise to ensure that the accusations are accurate.

However, that same year the Sixth Circuit questioned, "[h]ow can a due process guarantee against a sentence predicated on misinformation be viable, and not rendered meaningless, if the defendant has no way of determining that the sentencing judge was misadvised?" Stewart v. Erwin, 503 F.3d 488 (6th Cir. 2007).

In determining whether due process invokes a specific procedural safeguard, the Supreme Court has adopted what has become known as "The Matthews Balancing Test." Mathews

v. Eldridge, 424 U.S. 319 (1976). Under this test, there are three factors that are to be considered:

(1) Is there a "private interest" at stake?

(2) Is there a risk that the individual will be deprived erroneously of this private interest under current procedures and the "probative value" of the additional safeguard may avert this erroneous deprivation?

(3) How does the safeguard impact governmental interests.

B. Arguments.

Mr. Defendant may argue that the distinction between capital cases and non-capital cases is irrelevant, and the due process clause is equally applicable in both. The fact that Mr. Defendant is going to prison is a taking of liberty, which explicitly invokes a due process right. The logic of Garnder should be naturally extended to non-capital cases.

Further, under the Mathews balancing test this is clearly a necessary due process safeguard. Here, the private interest is Mr. Defendant's liberty. The weight of this private interest obviously suggests the procedural safeguard of full disclosure of pre-sentence reports. Further, under the second factor of Mathews, the risk is substantial. As the Court in Stewart noted, if a defendant has no mechanism to determine if the Judge has been misinformed, any due process in this respect would become meaningless. Finally, there are minimal government interests impacted by requiring the entirety of the pre-sentence report disclosed to all parties. The procedural safeguard eliminates unfairness and surprise and fully advises the parties of the facts considered by the Court at sentencing.

Defendant should prevail in this argument. While the United States Supreme Court has not specifically extended Gardner to non-capital cases, the logic Gardner is predicated upon naturally extends to non-capital cases. If the Gardner Court held that the withholding of portions of a presentence report constituted taking of life without due process, then is invariably also constitutes taking of

liberty without due process. Both the taking of life or liberty without due process are forbidden by the Fifth Amendment to the United State Constitution.

2. What arguments can be made on appeal of Danny Defendant's sentence with respect to the Judge's consideration of Danny Defendant's testimony at trial?

A. Legal Authority

Generally, the Supreme Court has held that a sentencing Judge may consider a defendant's testimony at trial for sentencing purposes.

In United States v. Grayson, 438 U.S. 41 (1978), defendant was convicted of prison escape. At his trial, he testified that he had escaped out of fear for his safety from other inmates. This was somewhat contradicted by other evidence. At sentencing, the Judge stated, "it is my view that your defense was a complete fabrication... [and] it is proper for me to consider that fact in the sentencing, and I will do so."

Defendant appealed, arguing (1) the consideration of his testimony constituted punishment for a crime (perjury) that he was not convicted of with due process, and (2) a judicial consideration of a defendant's testimony at trial would "chill" defendants from exercising their constitutional right to testify in the future. The Supreme Court rejected both of these arguments. First, the Court held that it was appropriate for a sentencing court to consider a defendant's untruthfulness for the purpose of "illuminating his need for rehabilitation and society's need for protection."

Three justices dissented, stating, "[t]he minimal contribution that the defendant's possibly untruthful testimony might make to an overall assessment of his potential for rehabilitation cannot justify imposing this additional burden on his right to testify on his own behalf."

The Court reaffirmed its holding in Grayson in United States v. Dunnigan, 507 U.S. 87 (1993), ruling

that a court can increase a defendant's offense level if defendant perjured himself at trial.

B. Arguments.

There are two issues with respect to Mr. Defendant's testimony. First, Mr. Defendant testified he was unaware of the cocaine and the Judge found that testimony to be false. Second, Mr. Defendant testified that he had previously (and often) consumed illegal substances, which the Judge considered.

Mr. Defendant may argue, consistent with the dissenting Judges in Grayson, that his testimony was truthful, and that increasing his sentence chills defendants from testifying.

This argument is unlikely to succeed for several reasons. First, the Grayson Court clearly rejected this argument. Despite the dissenting Justices opinion, the majority did not accept this argument and their opinion is binding. Further, the Dunnigan Court reaffirmed the Court's holding on this issue. Second, unlike Grayson, where the jury may have found defendant guilty despite believing his testimony, Mr. Defendant's conviction can only make sense if the jury did not believe his testimony. Therefore, there is an implicit finding by the jury that Mr. Defendant lied. Finally, Mr. Defendant's admission to his drug use is not disputed. It was Mr. Defendant's own assertion that he engaged in this conduct, and the Judge appropriately considered it in his ruling.