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Criminal Law - Right to Counsel - Custodial Criminal Defendant May Not Waive Right to Counsel in the Absence of His Court-Appointed Attorney

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CRIMINAL LAW—Right to Counsel—Custodial Criminal Defendant May Not Waive Right To Counsel In The Absence of His Court-Appointed Attorney. *People v. Hobson,* 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976).

Counsel was appointed for defendant Henry C. Hobson prior to his placement in a lineup for a robbery unrelated to the charge on which he was being held.[1] After Hobson was positively identified in the lineup, his counsel left.[2] The defendant then signed an undescribed form of waiver,[3] and agreed to speak to a detective investigating the robbery.[4] Despite the detective's admitted knowledge that defendant was represented by counsel, the detective made no effort to inform counsel that he intended to speak to the client.[5] The detective read Hobson the standard pre-interrogation warnings[6] and asked him if he understood his rights.[7] Defendant replied that he did, and in response to the detective's inquiries, verbally waived his right to counsel and agreed to talk to the detective.[8] He then confessed to the robbery in response to questioning, and was told that he had been identified at the lineup.

Hobson was convicted, after a guilty plea, of robbery in the third degree,[9] following the denial of a motion to suppress his incriminating statements.[10] The appellate division[11] affirmed the conviction. The New York Court of Appeals reversed, holding that once counsel has been engaged in a criminal proceeding a defendant may not waive his right to counsel when his lawyer is not present.[12] The court

1. People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976).
2. The right to counsel during lineup was secured by the following cases: United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967).
3. Johnson v. Zerbst, 304 U.S. 458 (1938) (a knowing and intelligent waiver is required).
4. 39 N.Y.2d at 482, 348 N.E.2d at 896, 384 N.Y.S.2d at 421.
5. *Id.*
6. Miranda v. Arizona, 384 U.S. 436, 444 (1966), requires that a criminal defendant in custody receive a four-fold warning of his rights:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.

7. 39 N.Y.2d at 482, 348 N.E.2d at 896, 384 N.Y.S.2d at 421.
8. *Id.* at 482, 348 N.E.2d at 896-97, 384 N.Y.S.2d at 421.
9. N.Y. PENAL LAW § 160.05 (McKinney 1975).
10. 39 N.Y.2d at 481, 348 N.E.2d at 896, 384 N.Y.S.2d at 420.
11. 47 App. Div. 2d 716 (2d Dep't 1975) (mem.).
12. 39 N.Y.2d at 481, 348 N.E.2d at 896, 384 N.Y.S.2d at 420.

of appeals especially emphasized the importance of a criminal defendant's having undeniable access to counsel during interrogation to ensure that any waiver of his rights will be truly knowing and intelligent:[13]

> Th[is] rule . . . breathes life into the requirement that a waiver of a constitutional right must be competent, intelligent and voluntary . . . . Indeed, it may be said that a right too easily waived is no right at all.

By so holding the court affirmed *People v. Arthur*,[14] the result of eight years of strengthening the criminal defendant's right to counsel, and reversed two cases that had challenged *Arthur's* import and spirit.[15]

In *Arthur*, counsel, who was representing defendant in another matter, learned of defendant's arrest while watching the news on television. Counsel went to the police station, identified himself, and asked to speak to his client who was being questioned. Counsel was told he could see defendant after the questioning was over. The questioning resulted in a written, signed confession. After conferring with defendant, counsel told police to "leave him alone" and left. The next morning defendant was interrogated again in the absence of counsel; and without waiving his right to counsel's presence, made incriminating statements.[16]

The court ruled that once an attorney enters the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver of this right in the attorney's presence. The court also noted that there is no requirement that defendant or his attorney request the police to respect this right.[17] Thus, as a result of *Arthur* the police found themselves forced to inform the attorney of an accused whenever they intended to interrogate his client, and to wait until the attorney arrived before commencing interrogation. The opinion seems to imply that if the attorney does not wish to go to the station the police are helpless,

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13. *Id.* at 484, 348 N.E.2d at 898, 384 N.Y.S.2d at 422 (citations omitted).

14. 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968).

15. 39 N.Y.2d at 490, 348 N.E.2d at 902, 384 N.Y.S.2d at 426. The two cases are People v. Lopez, 28 N.Y.2d 23, 268 N.E.2d 628, 319 N.Y.S.2d 825 (1971), *cert. denied sub nom.* Lopez v. New York, 404 U.S. 840 (1971), and People v. Robles, 27 N.Y.2d 155, 263 N.E.2d 304, 314 N.Y.S.2d 793 (1970), *cert. denied sub nom.* Robles v. New York 401 U.S. 945 (1971). *See* text accompanying notes 54-71 *infra*.

16. 22 N.Y.2d at 327, 239 N.E.2d at 537-38, 292 N.Y.S.2d at 664-65.

17. *Id.* at 329, 239 N.E.2d at 539, 292 N.Y.S.2d at 666.

thereby putting the police at the whim and mercy of the defense counsel.[18] Although its opinion was surprisingly terse, the *Arthur* court concluded that the necessity of requiring an intelligent and voluntary waiver of the fundamental right to counsel was more important than the probable inconveniences and possible damages that might affect the police and law enforcement. *Hobson's* author, Chief Judge Charles Breitel, clearly explained *Arthur's* rationale in his earlier dissent in *People v. Lopez*:[19]

> It seems elementary that in the protection of individuals (even in civil matters, let alone in criminal matters) waivers obtained in a pending action in the absence of counsel are, in truth, a denial of the right to counsel in that action. The denial is the more egregious where counsel is already retained or assigned, but the frustration of the right may be as grave if the waiver comes on the very eve of the inevitable retainer or assignment of counsel as is now the case in criminal actions. Lip service is paid to the right, to be sure, and counsel will be provided, but not until persons, already defendants in criminal actions, have first confessed under the most transparently manipulated "voluntary" waivers of "known rights."

In affirming *Arthur*, the *Hobson* court focused on three major points: that a waiver must be truly intelligent; that the *Miranda* warnings are a feeble protection to the individual who is left alone and unadvised to determine his needs;[20] and that the principle of stare decisis is "eminently desirable and essential."[21]

The precedent upon which *Arthur* and *Hobson* were originally constructed, and the progenitor of the New York right to counsel during custodial interrogation, is *People v. DiBiasi*,[22] in which the

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18. Neither *Arthur* nor *Hobson* dealt with the possibility of a defense lawyer who might intentionally stay away from the police station. The court of appeals also has not addressed such issues as the type of deterrent measures that could, or should be invoked to prevent such conduct. Since this is concerned with pre-trial conduct the court could not declare a mistrial to remedy any injustice the client might suffer. The court of appeals has also failed to indicate what might result if the police interrogated the defendant anyway when defense counsel intentionally has not appeared, and how much time counsel should be given to appear after he has been notified that the police wish to interrogate further his client.

19. 28 N.Y.2d 23, 29, 268 N.E.2d 628, 631, 319 N.Y.S.2d 825, 830 (1971).

20. 39 N.Y.2d at 485, 348 N.E.2d at 899, 384 N.Y.S.2d at 423. By this statement the *Hobson* court was merely affirming the Supreme Court's intent as stated in *Miranda v. Arizona*. *Id.* The Supreme Court stated that *Miranda* was not intended to set maximum guidelines to ensure the criminal defendant's rights but only minimum standards, and that the states may individually provide more if they wish. 384 U.S. 436, 490 (1966).

21. 39 N.Y.2d at 487, 348 N.E.2d at 900, 384 N.Y.S.2d at 424.

22. 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960).

defendant surrendered to the police on his attorney's advice six years after he was indicted, and was thereupon questioned by the District Attorney and the police in the absence of his attorney.[23] Basing its decision upon the two concurring opinions of four United States Supreme Court Justices in *Spano v. New York,*[24] the court of appeals held that this questioning after indictment and surrender for arraignment was a violation of the defendant's constitutional rights and was so gross an error as to require reversal of his conviction.[25]

The next milestone was reached in 1961 with *People v. Waterman,*[26] in which an incriminating statement was excluded even though the accused, questioned after the indictment and before arraignment, had not retained counsel. Although the court emphasized that this holding was restricted to the post-indictment situation,[27] it unequivocally stated that the criminal defendant was entitled to the presence of counsel during any "secret interrogation."[28]

DiBiasi was extended significantly by *People v. Meyer,*[29] in which the court excluded a voluntary, unsolicited statement of an unrepresented accused to a police officer after arrest and arraignment but before his indictment. The court reasoned that the arraignment (and not the indictment) after arrest must be deemed the first stage of a criminal proceeding and held therefore that a post-arraignment statement "[i]n reason and logic" should not be treated any differ-

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23. 7 N.Y.2d at 549, 166 N.E.2d at 827, 200 N.Y.S.2d at 24.

24. 360 U.S. 315, 324-27 (1959). The Supreme Court held that the police overbore the defendant's will and that therefore the confession was involuntary and not admissible. *Id.* at 324-27.

25. 7 N.Y.2d at 550-51, 166 N.E.2d at 828, 200 N.Y.S.2d at 25.

26. 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961).

27. An indictment is "the formal commencement of the criminal action against the defendant . . . [and] presumably imports that the People have legally sufficient evidence of the defendant's guilt of the crime charged . . . ." 9 N.Y.2d at 565, 175 N.E.2d at 447, 216 N.Y.S.2d at 74.

28. 9 N.Y.2d at 565, 175 N.E.2d at 448, 216 N.Y.S.2d at 75; People v. Friedlander, 16 N.Y.2d 248, 212 N.E.2d 533, 265 N.Y.S.2d 97 (1965); People v. Robinson, 13 N.Y.2d 296, 196 N.E.2d 261, 246 N.Y.S.2d 623 (1963).

29. 11 N.Y.2d 162, 182 N.E.2d 103, 227 N.Y.S.2d 427 (1962). *See also* People v. Davis, 13 N.Y.2d 690, 691, 191 N.E.2d 674, 675, 241 N.Y.S.2d 172, 173 (1963). *Meyer* in turn was extended by People v. Richardson, 25 App. Div. 2d 221, 224, 268 N.Y.S.2d 419, 422 (1966), to pre-arraignment statements, holding that the judicial process had begun and that therefore the right to counsel attached.

ently than a post-indictment statement.[30] The court concluded that any statement made by an accused after arraignment or indictment, not in the presence of counsel, is inadmissable.[31]

In *People v. Donovan*[32] the court, in a landmark decision, declared that the state's constitutional[33] and statutory[34] provisions require the exclusion of a defendant's confession that was obtained when he was being interrogated while awaiting his arraignment, after his lawyer had requested and been denied access to him.[35] However, while *Donovan* extended the court's protection of the criminal defendant to new lengths, indications of discontent with this direction, which eventually resulted in the *People v. Robles*[36] decision, were manifested. In a strongly worded, lengthy dissent, Judge Adrian D. Burke argued:[37]

> Absent a clear violation of due process, the rule concerning the admissability of confessions has always been treated by this court according to principles of evidence, and not as a tool for the accomplishment of collateral purposes, such as control of police procedures.

After the *Arthur* decision, the United States Supreme Court handed down the landmark decisions of *Escobedo v. Illinois*[38] and *Miranda v. Arizona*[39] which buttressed the criminal defendant's constitutional right to counsel and his right not to incriminate himself.

In New York, these decisions were not revolutionary, for the court of appeals in *Donovan* had already, explicitly extended the criminal defendant's right to counsel beyond *Escobedo* and *Miranda*.[40] Dur-

30. 11 N.Y.2d at 164, 182 N.E.2d at 104, 227 N.Y.S.2d at 428. *See also* E. FISCH, FISCH ON NEW YORK EVIDENCE 324 (1975-76 Cumulative Supp.).

31. 11 N.Y.2d at 165, 182 N.E.2d at 104, 227 N.Y.S.2d at 428.

32. 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963).

33. N.Y. CONST. art. I, § 6.

34. N.Y. CRIM. PROC. LAW §§ 170.10 (3), 170.10 (4)(a), 170.10 (6), 180.10 (3)-(5), 210.15 (2)-(3), 210.15 (5) (McKinney Supp. 1976) (relating to the privilege against self-incrimination and the right to counsel).

35. 13 N.Y.2d at 151, 193 N.E.2d at 629, 243 N.Y.S.2d at 843. *See also* People v. McKie, 25 N.Y.2d 19, 250 N.E.2d 36, 302 N.Y.S.2d 534 (1969); People v. Sanchez, 15 N.Y.2d 387, 207 N.E.2d 356, 259 N.Y.S.2d 409 (1965); People v. Failla, 14 N.Y.2d 178, 199 N.E.2d 366, 250 N.Y.S.2d 267 (1964).

36. 27 N.Y.2d 155, 263 N.E.2d 304, 314 N.Y.S.2d 793 (1970).

37. 13 N.Y.2d at 155, 193 N.E.2d at 632, 243 N.Y.S.2d at 846 (Burke, J., dissenting).

38. 378 U.S. 478 (1964).

39. 384 U.S. 436 (1966).

40. 39 N.Y.2d at 483-84, 348 N.E.2d at 897-98, 384 N.Y.S.2d at 422. *See* People v. Dono-

ing the next seven years the New York *DiBiasi-Meyer* and *Donovan-Arthur* rules were modified and molded as the court sought to apply the *Miranda* and *Escobedo* requirements.

People v. Rodney P.[41] held, pursuant to *Miranda,* that only a significant restraint under circumstances likely to affect the individual's will substantially requires that *Miranda* warnings be given. Less than one month later, *People v. Vella,*[42] which the court of appeals used as the basis for the *Arthur* decision,[43] held that the incriminating statements made by defendant were inadmissible because his attorney from another, related criminal proceeding[44] was not present.[45]

In *People v. McKie*[46] the court held defendant's incriminating statements made on the street in the absence of his attorney to be admissible although the police knew defendant was represented by counsel. The crucial factor was that defendant was not in a custodial surrounding.[47] Apparently *Rodney P.* and *Miranda* were deemed more relevant than *Vella* or *Arthur.*[48] *People v. Kaye,*[49] relying on *Miranda's* holding that volunteered statements of any kind are not barred by the fifth amendment,[50] accepted a voluntary con-

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van, 13 N.Y.2d 148, 151, 193 N.E.2d 628, 629, 243 N.Y.S.2d 841, 842 (1963). It has also been suggested that *Donovan* is the "seed from which sprang" *Miranda* and *Escobedo.* People v. McKie, 25 N.Y.2d 19, 24, 250 N.E.2d 36, 38, 302 N.Y.S.2d 534, 537 (1969).

41. 21 N.Y.2d 1, 233 N.E.2d 255, 286 N.Y.S.2d 225 (1967). In *Rodney P.* defendant confessed in a non-custodial setting before he was arrested and given his *Miranda* warnings, and later in the police station signed a written statement. *Id.* at 2-3, 233 N.E.2d at 256, 286 N.Y.S.2d at 226-27.

42. 21 N.Y.2d 249, 234 N.E.2d 422, 287 N.Y.S.2d 369 (1967).

43. 22 N.Y.2d at 329, 239 N.E.2d at 539, 292 N.Y.S.2d at 666.

44. Although the crimes were related, they were, as Judge Kenneth Keating noted in his concurring opinion, technically separate, distinct offenses. 21 N.Y.2d at 251, 234 N.E.2d at 423, 287 N.Y.S.2d at 370.

45. *Id.* at 251, 234 N.E.2d at 422, 287 N.Y.S.2d at 370.

46. 25 N.Y.2d 19, 250 N.E.2d 36, 302 N.Y.S.2d 534 (1969).

47. *Id.* at 26-28, 250 N.E.2d at 39-40, 302 N.Y.S.2d at 538-40.

48. The *McKie* court stated that although the police knew the defendant was represented by counsel, this fact was not significant. *Id.* at 28, 250 N.E.2d at 41, 302 N.Y.S.2d at 541. The court in *Arthur* in interpreting New York's pre-*Miranda* cases came to the opposite conclusion: "[O]nce the police know or have been apprised of the fact that the defendant is represented by counsel or that an attorney has communicated with the police for the purpose of representing the defendant, the accused's right to counsel attaches. . . ." 22 N.Y.2d at 329, 239 N.E.2d at 539, 292 N.Y.S.2d at 666. It is this right to counsel that the *Arthur* waiver rule was based upon.

49. 25 N.Y.2d 139, 250 N.E.2d 329, 303 N.Y.S.2d 41 (1969).

50. 25 N.Y.2d at 144, 250 N.E.2d at 331, 303 N.Y.S.2d at 45. However, Judge Burke, in

fession made in the absence of defendant's retained lawyer.[51]

Then, even as the court of appeals seemed to be molding the *Donovan-Arthur* doctrine into a clear and well-defined form, the court handed down *People v. Robles,*[52] one of the two cases which *Hobson* overrules. *Robles* marked a turning point since it seemed to signal that the court would be less technical and less protective of the criminal defendant's right. Defense counsel, after talking with his client, in the police station, requested a detective to watch his client.[53] In response to two sympathic questions asked by the detective, who had known the defendant previously, the defendant confessed while his attorney was in another part of the building.[54]

Robles decided that *Arthur* did not render the confession inadmissible, describing *Arthur*'s holding as "merely a theoretical statement" and a "dogmatic claim."[55] Relying on *Rodney P.*'s holding that admissions are inadmissible only when made under circumstances that will substantially affect the defendant's free will,[56] the *Robles* court decided that a suspect's earlier representation by counsel should not give him a special privilege over one not represented,[57] and thus the *Arthur* rule should not be applicable unless, as in *Vella,* there is evidence of conduct which would indicate an intention to victimize the defendant or outwit his attorney.[58] The court, over a strong dissent,[59] decided that there was no such evidence,

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his dissenting opinion in *McKie*, propounded that "[s]uch reasoning confuses the Fifth with the Sixth Amendments and, by so doing, distorts prior decisions of this court." 25 N.Y.2d at 31, 250 N.E.2d at 42, 302 N.Y.S.2d at 543. (Burke, J. dissenting).

51. *Hobson* recognized the validity of *McKie* and *Kaye* and used them as examples to show that the *Arthur* rule is not an absolute. 39 N.Y.2d at 483, 384 N.Y.S.2d at 421-22.

52. 27 N.Y.2d 155, 263 N.E.2d 304, 314 N.Y.S.2d 793 (1970).

53. *Id.* at 157, 263 N.E.2d at 305, 314 N.Y.S.2d at 794.

54. *Id.* at 158, 263 N.E.2d at 305, 314 N.Y.S.2d at 794-95. *See also* note 59 *infra.*

55. 27 N.Y.2d at 158, 263 N.E.2d at 305, 314 N.Y.S.2d at 795.

56. *Id.* at 158-59, 263 N.E.2d at 305, 314 N.Y.S.2d at 795.

57. *Id.* at 159, 263 N.E.2d at 305, 314 N.Y.S.2d at 795. The point that a suspect's earlier representation by counsel should not give him a special privilege had been one of the major grounds upon which the rationale of the *Arthur* rule had been attacked. *See* People v. McKie, 25 N.Y.2d at 26-27, 250 N.E.2d at 40, 302 N.Y.S.2d at 539-40. *Arthur* did note this dissatisfaction, however, and rebutted, "while it is true that the defendants in *Donovan, Gunner,* and *Failla* were represented by retained counsel, the holdings . . . were not dependent upon that factor." 22 N.Y.2d at 328, 239 N.E.2d at 538, 292 N.Y.S.2d at 665.

58. 27 N.Y.2d at 159, 263 N.E.2d at 305, 314 N.Y.S.2d at 795.

59. Judge Breitel's dissent characterized the defendant's confessions not as an "impetuous unbosoming" of defendant's guilt as did the majority, 27 N.Y.2d at 159, 263 N.E.2d at 305, 314 N.Y.S.2d at 796, but rather as an extraction by "systematic questioning

concluded that the confession was spontaneous and voluntary, and affirmed defendant's conviction on two counts of murder.[60]

The *Robles* decision found quick, if not overwhelming judicial support.[61] Within the next two years one court of appeals case supported,[62] and two cases effectively affirmed[63] *Robles*, thereby increasing its influence and essentially emasculating the *DiBiasi-*

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following an initial sympathetic comment designed to invite an outpouring of [guilt] . . . ." *Id.* at 160, 263 N.E.2d at 306, 314 N.Y.S.2d at 796 (Breitel, J., dissenting). Actually, the policeman's question to the defendant seems essentially rhetorical: "[D]id you ever think it would wind up like this?" *Id.* at 158, 263 N.E.2d at 305, 314 N.Y.S.2d at 794. Since it was posed in a basically low pressure, non-interrogatory setting to consider it to be a deprivation of defendant's constitutional rights seems to be utilizing a rather extreme form of a domino theory, *viz.*, that once you allow a policeman to express a sentiment to the prisoner you are infringing, or laying the groundwork for the infringement of the prisoner's rights.

Even if Judge Breitel was over-eager in attempting to preserve the constitutional rights of criminal defendants, he was correct in noting that the defendant's statements were made in his counsel's absence, regardless of how close they were to each other (about 18 feet apart in one instance). He also noted that the *Arthur* rule was not accorded the basic privilege of the stare decisis doctrine by the majority. *See* text accompanying notes 20-26 *supra*. Finally, Judge Breitel concluded that the majority seemed to be downgrading misguidedly the right to counsel by relying solely on the right against self-incrimination. 27 N.Y.2d at 161, 263 N.E.2d at 307, 314 N.Y.S.2d at 797. *See* note 52 *supra*.

60. 27 N.Y.2d at 159-60, 263 N.E.2d at 306, 314 N.Y.S.2d at 795-96. *Robles* was not immediately understood:

> What is the precise basis for the holding in the Robles case? Is it simply a case where the defendant's statements were regarded as having been voluntarily made and not the product of custodial interrogation? See People v. Pellicano, 40 App. Div. 2d 169, 175, 338 N.Y.S.2d 831, 837. Or is it a holding that once a defendant has consulted with his counsel, he may thereafter, in the absence of counsel, waive his Donovan-Arthur rights and speak of his guilt? People v. Pellicano, *supra*, 40 App. Div.2d at 171, 338 N.Y.S.2d at 833-34. Or does the fact that the attorney, after consulting the defendant, was physically present in the same building at all relevant times deprive the defendant of his Donovan-Arthur rights? Or is it a combination of all these factors which lies at the basis of the Robles decision?

RICHARDSON ON EVIDENCE § 545, at 548 (10th ed. J. Prince 1973).

61. However, commentators did not regard the decision with such esteem. The decision was described as "supercilious" and "sophistic" by one, who predicted that the ruling would lead only to abuse. Lewin, *Criminal Procedure*, 22 Syracuse L. Rev. 381, 400 (1971). It has also been propounded that when *Robles* distinguished itself from *Arthur* it overlooked the existence of the second, oral statement which was the basis for the *Arthur* decision. 20 BUFFALO L. REV. 704, 710 (1971). Although in *Arthur* counsel was denied access to his client for the first, written statement, counsel had already been granted access for the later statement.

62. People v. Taylor, 27 N.Y.2d 327, 266 N.E.2d 630, 318 N.Y.S.2d 1 (1971).

63. People v. Wooden, 31 N.Y.2d 753, 290 N.E.2d 436, 338 N.Y.S.2d 434, *cert. denied*, 410 U.S. 987 (1973); People v. Lopez, 28 N.Y.2d 23, 268 N.E.2d 628, 319 N.Y.S.2d 825, *cert. denied sub nom.* Lopez v. New York, 404 U.S. 840 (1971).

Arthur line of cases. *People v. Taylor*[64] limited *Vella* by holding that the latter comes into play only when the police or prosecutor learn that an attorney has been secured to assist the accused in defending against the "*specific charges*" for which he is held.[65] *People v. Lopez*,[66] ignored *Arthur*[67] and declared that the right to counsel and the right to remain silent may be validly waived after the defendant has been indicted. In addition the court held that the failure to inform the defendant that he had been indicted was neither willful concealment nor prejudicial.[68] The third case, *People v. Wooden*,[69] affirmed without opinion a conviction based on incriminating post-indictment statements made in the absence of counsel.

Robles, Lopez and *Wooden* seemed to have put to rest the entire *DiBiasi-Meyer* rule that excluded post-indictment or post-arraignment incriminating statements made in the absence of counsel, and the *Donovan-Arthur* rule that forbade the waiving of the right to counsel, except in counsel's presence, after counsel has been retained.

Thus *Hobson*'s impact is enormous. It resurrects these two rules, overrules *Robles* and *Lopez*,[70] and reaffirms *Vella*. Equally important is its emphasis on the necessity of observing the doctrine of stare decisis. *Hopson* attempts to ensure that three similar cases, one without opinion and all decided by the closest of margins, could never again overturn an established, consciously evolved doctrine and outlook.

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64. 27 N.Y.2d 327, 266 N.E.2d 630, 318 N.Y.S.2d 1 (1971).

65. *Id.* at 332, 266 N.E.2d at 633, 318 N.Y.S.2d at 5.

66. 28 N.Y.2d 23, 268 N.E.2d 628, 319 N.Y.S.2d 825 (1971).

67. The *Lopez* court said that People v. Bodie, 16 N.Y.2d 275, 213 N.E.2d 441, 266 N.Y.S.2d 104 (1965), which allowed oral waiver of these rights, was controlling. 28 N.Y.2d at 25, 268 N.E.2d at 629, 319 N.Y.S.2d at 826. It might be argued, as *Lopez* does, that *Arthur* is not controlling because in that case counsel had already arrived, before the incriminating statements were made, whereas in *Lopez* counsel had not arrived. However, Judge Breitel's dissent noted that by permitting a defendant to waive counsel while held incommunicado the right to counsel is debased and negated, thereby significantly affecting *Arthur*'s rule. 28 N.Y.2d at 29, 268 N.E.2d at 631, 319 N.Y.S.2d at 830. *See* note 72 *infra*.

68. 28 N.Y.2d at 26, 268 N.E.2d at 629, 319 N.Y.S.2d at 827. Defendant later brought his case to federal court, where his conviction was reversed. United States *ex rel* Lopez v. Zelker, 344 F. Supp. 1050 (S.D.N.Y.), *aff'd without opinion*, 465 F.2d 1405 (2d Cir.), *cert. denied* 409 U.S. 1049 (1972). The district court excluded defendant's incriminatory statements made in the absence of his counsel and stated that the state failed to carry its burden of showing harmlessness in not telling defendant he was indicted. 344 F. Supp. at 1055.

69. 31 N.Y.2d 753, 290 N.E.2d 436, 338 N.Y.S.2d 434 (1972).

70. 39 N.Y.2d at 490, 348 N.E.2d at 902, 384 N.Y.S.2d at 426.

Devoting nearly half of its opinion to a discussion of stare decisis, the *Hobson* court took care to distinguish between a mechanical adherence to precedent and the respect that each court should give to it. Chief Judge Breitel stated the court must be certain of error before it overturns a precedent[71] that is the result of painstaking and reasoned analysis[72] and involves statutory or constitutional interpretation.

Hobson's re-emphasis on fortifying the criminal defendant's right to counsel was corroborated six months later by *People v. Ramos*,[73] wherein the court ruled that an affirmative action by a defendant's lawyer[74] would invoke the protections of the *Donovan-Arthur-Hobson* rule.[75] In *Ramos* defendant's retained counsel for an unrelated drug charge simply advised defendant not to make any statements to the police concerning the robbery and murder charges, which were the subject of the case.[76]

New York's trend towards buttressing the criminal defendant's protections is especially noteworthy in view of the United States Supreme Court's recent limitations on defendant's rights. The Supreme Court seems to be intent on withdrawing, or at least construing as strictly as possible, the protective devices that many felt the *Miranda* and *Escobedo* decisions demanded or augured.

Thus in recent years the Court has ruled that even though a criminal defendant has neither received nor effectively waived counsel, his statements made in custody may be used to impeach his credibility at trial.[77]

The Court has also ruled that a criminal prosecution does not begin until indictment or formal charges are brought and therefore

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71. *Id.* at 489, 348 N.E.2d at 901, 384 N.Y.S.2d at 426.

72. *Id.* at 490, 348 N.E.2d at 902, 384 N.Y.S.2d at 426.

73. 40 N.Y.2d 610, 357 N.E.2d 955, 389 N.Y.S.2d 299 (1976).

74. *Id.* at 612, 357 N.E.2d at 957, 389 N.Y.S.2d at 301. The lawyer's affirmative action consisted of telling both a police detective and defendant that he advised defendant not to make any statements to the police. *Id.*

75. *Id.* at 614, 357 N.E.2d at 958, 389 N.Y.S.2d at 302. Defendant was presented with an outstanding arrest warrant by a police detective just as his arraignment for an unrelated drug charge had been concluded.

76. *Id.* at 612, 357 N.E.2d at 957, 389 N.Y.S.2d at 301. As the prosecution contended, this was the lawyer's only connection with the second charge. *Id.* at 617, 357 N.E.2d at 960, 389 N.Y.S.2d at 304. Defendant's guilty plea to manslaughter one was vacated, and the case was restored to its pre-pleading status. *Id.* at 619, 357 N.E.2d at 962, 389 N.Y.S.2d at 306.

77. Harris v. New York, 401 U.S. 222 (1971).

the right to counsel does not attach until that point.[78] In a separate case, the Court ruled that the right to counsel does not attach at a post-indictment "photographic lineup."[79] Most recently the Court has held that the police may renew the questioning of a suspect who has exercised his right to remain silent when the renewed questioning is about another, unrelated crime.[80]

Despite the Supreme Court's apparent tilt in the other direction, and pressures created by an overloaded judicial system and the increase of crime, *Hobson* seems to indicate that the New York Court of Appeals will continue to protect the criminal defendant's right to counsel.

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78. Kirby v. Illinois, 406 U.S. 682, 688 (1972) (plurality opinion). *Kirby* saw itself as the latest in a long line of cases that began with Powell v. Alabama, 287 U.S. 45 (1932), and ended with Coleman v. Alabama, 399 U.S. 1 (1970). *Id.*

79. United States v. Ash, 413 U.S. 300 (1973).

80. Michigan v. Mosley, 423 U.S. 96 (1975).