The Expanding Right to Counsel in New York

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IN NEW YORK

I. Introduction

The right to counsel in New York has historically provided the accused with broad protection. A series of recent New York Court of Appeals decisions have upheld the right of a criminal suspect to have the assistance of an attorney at every stage of legal proceedings against him. The court's reverence for the right to counsel is based upon the conviction that the presence of an attorney is the most effective means of minimizing the disadvantage at which an accused is placed when he is confronted with the law enforcement power of the state. In order to ensure that an accused will not waive this constitutional right out of ignorance, confusion or fear, the court has held that in certain situations the purported waiver of the right to counsel of a person in custody will not be given legal effect unless it is made in the presence of an attorney.

1. People v. Settles, 46 N.Y.2d 154, 385 N.E.2d 612, 412 N.Y.S.2d 874 (1978) (once a matter is a subject of legal controversy, any discussions relating thereto should be conducted by counsel); People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963) (defendant's confession obtained during interrogation conducted before arraignment and after defendant's lawyer had requested and been denied access to him were excluded); People v. Meyer, 11 N.Y.2d 162, 182 N.E.2d 103, 227 N.Y.S.2d 427 (1962) (voluntary statements of an unrepresented accused made to a police officer after arrest and arraignment but before indictment were excluded); People v. Di Biasi, 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960) (post-indictment interrogation in absence of counsel was a violation of the defendant's constitutional rights).

The statutory bases for this protection was provided by N.Y. CODE OF CRIM. PROC. §§ 8, 188, 308, 699 (McKinney 1881 & Supp. 1959) (current versions at N.Y. CRIM. PROC. LAW §§ 170.10(3)-(4), (6), 210.15(2)-(3), 60.15(2) (McKinney 1971 & Supp. 1980)), which provide a criminal defendant with the right to the assistance of counsel at every stage of the criminal action. For the parallel constitutional bases, see note 4 infra.


3. People v. Arthur, 22 N.Y.2d 325, 339 N.E.2d 537, 292 N.Y.S.2d 663 (1968) (once an attorney has entered the proceeding, the police may not question the defendant in absence of counsel unless there is an affirmative waiver of this right in the attorney's presence). In People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976), the court explains that the rule that "a person in custody may validly waive the right to counsel only in the presence of a lawyer breathes life into the requirement that a waiver of a constitutional right must be competent, intelligent and voluntary." Id. at 484, 348 N.E.2d at 898, 384 N.Y.S.2d at 422.
What began as an attempt to balance the protections of the accused with the state's interest in law enforcement has emerged as a rule weighing heavily in favor of the defendant. The New York ap-

4. Both the Federal and New York State Constitutions provide an accused with protection against self-incrimination and the right to counsel. The fifth amendment to the United States Constitution provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself. . . ." U.S. Const. amend. V. The self-incrimination clause is applicable to the states through the fourteenth amendment. Malloy v. Hogan, 378 U.S. 1, 8 (1964). The sixth amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The sixth amendment is applicable to the states through the fourteenth amendment. Gideon v. Wainwright, 372 U.S. 335, 339-42 (1963). The New York State Constitution provides that "[i]n any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions . . . nor shall he be compelled in any criminal case to be a witness against himself. . . ." N.Y. Const. art. I, § 6.

The right to counsel under the New York State Constitution has been interpreted more expansively by the New York Court of Appeals than it has by the Supreme Court under the fifth and sixth amendments of the United States Constitution. New York currently extends greater protections to criminal defendants during the pre-trial period than is presently required by the Supreme Court's interpretation of the fifth and sixth amendments of the United States Constitution. Galie, State Constitutional Guarantees and Protection of Defendants' Rights: The Case of New York, 1960-1978, 28 Buffalo L. Rev. 157, 178 (1979). Escobedo v. Illinois, 378 U.S. 478 (1964), and Miranda v. Arizona, 384 U.S. 436 (1966), were not revolutionary in New York since the protections afforded to criminal suspects by Donovan had already surpassed the protections afforded by Escobedo and Miranda. People v. Hobson, 39 N.Y.2d at 483-84, 348 N.E.2d at 897-98, 384 N.Y.S.2d at 422. Miranda excludes a confession unless it can be shown that the authorities secured the accused's fifth amendment privilege against self-incrimination through the use of procedural safeguards. Miranda v. Arizona, 384 U.S. at 444. New York's exclusionary rule is broader since it excludes those confessions obtained in absence of counsel after indictment or arraignment or those obtained after counsel had entered the proceeding but before indictment or arraignment. See note 1 supra.

Recent New York decisions have continued to buttress the criminal defendant's right to counsel while Supreme Court decisions after Miranda have placed limitations on defendants' rights. See Edwards v. Arizona, 101 S. Ct. 1880 (1981) (once an accused invokes his right to counsel, he can be subjected to further interrogation if he himself initiates it); Michigan v. Mosley, 423 U.S. 96 (1975) (the police may renew questioning of a suspect who has exercised his right to remain silent when the renewed questioning is about another unrelated crime); United States v. Ash, 413 U.S. 300 (1973) (the right to counsel does not attach at a post-indictment photographic line-up); Kirby v. Illinois, 406 U.S. 682 (1972) (the right to counsel does not attach until indictment or when formal charges are brought against a criminal defendant); Harris v. New York, 401 U.S. 222 (1971) (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).

By restricting the scope of its decisions to state constitutional and statutory provisions, the New York Court of Appeals has isolated itself from federal court review. The Supreme Court's "adequate state grounds" doctrine provides that if there is an adequate and independent ground for a state court decision, then even when the
proach is considered by some to be problematic—imposing onerous burdens on police departments which impede effective law enforcement.5 The most recent decisions of the New York Court of Appeals sacrifice the effective operation of the criminal justice system by restricting the ability of the police to obtain confessions from criminal suspects in the absence of counsel.6 As a result, police efforts to control crime will be hindered, particularly in urban centers where rising levels of crime7 are reflected by large numbers of arrests and a high rate of recidivism.8 This Note discusses the criminal defendant’s pre-trial right to counsel in New York. Section II outlines the historical development of this fundamental right. Judicial expansions of the pre-trial right to counsel, including the People v. Bartolomeo decision, are analyzed in Section III with a view toward their effect on law enforcement. These decisions are divided into three areas of legal inquiry: interrogation regarding unrelated matters, formal commencement of a criminal action, and prior arrest. The Note concludes that the New York Court of Appeals has sacrificed effective law enforcement in its attempt to protect the defendant’s constitutional rights by expanding the pre-trial right to counsel.

II. Historical Development of the Right to Counsel

The right to counsel during custodial interrogation is a guiding principle of New York law and policy. This principle has found expression in two distinct, but parallel, lines of cases which hold that the right to counsel attaches “indelibly”9 so that the right may not be waived outside the presence of the defendant’s attorney.10

state court has also decided a federal question, the Supreme Court will not review the decision. Murdoch v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874).


6. By further increasing the situations in which the right to counsel attaches and by further limiting the conditions for waiver of the right, the court has severely restricted the ability of the police to obtain confessions from criminal suspects.

7. See note 104 infra.

8. See note 105 infra.

9. See People v. Settles, 46 N.Y.2d at 165, 385 N.E.2d at 618, 412 N.Y.S.2d at 881. The court uses the word “indelibly” to describe the point at which the right to counsel has attached to the extent that it can only be waived in the presence of a lawyer.

A. The Di Biasi Cases

Beginning with People v. Di Biasi, the court of appeals held that the right to counsel arises upon the commencement of formal adversary proceedings. In reversing the conviction of a defendant who had made incriminating admissions when interrogated without an attorney present, the Di Biasi court ruled that post-indictment custodial interrogation conducted in the absence of counsel was unconstitutional and any statements thus obtained were inadmissible. The Di Biasi holding was extended in People v. Meyer, where the court of appeals reasoned that arraignment, and not indictment, must be deemed the first stage of a criminal proceeding. Therefore, a post-arraignment statement was held to be within the constitutional protection of the right to counsel. Most recently, the court of appeals in People v. Samuels, held that the filing of a felony complaint triggers the commencement of proceedings within the Di Biasi rule.


12. The controversy which arose in these cases was: at what point does a formal proceeding commence triggering the attachment of the suspect's right to counsel.


14. Id. at 550-51, 166 N.E.2d at 828, 200 N.Y.S.2d at 25. Di Biasi is the progenitor of New York's right to counsel doctrine. The defendant surrendered to the police on his attorney's advice six years after being indicted. The defendant made several incriminating admissions while being interrogated in the absence of his attorney. In reversing his conviction, the court of appeals held that the defendant's constitutional rights were violated by the post-indictment custodial interrogation conducted in absence of counsel and that the statements thus obtained were inadmissible. Id. The "post-indictment rule" adopted in Di Biasi was affirmed in People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961).

15. 11 N.Y.2d 162, 182 N.E.2d 103, 227 N.Y.S.2d 427 (1962). The court held that any statement made by an accused after arraignment but before indictment, without the presence of counsel, is inadmissible.

16. Id. at 164-65, 182 N.E.2d at 104, 227 N.Y.S.2d at 428.


18. Samuels held that the filing of a felony complaint also commences formal criminal proceedings. This expansion of the Di Biasi and Meyer rules which held respectively that the right attaches upon indictment and arraignment renders this line of cases consistent with present statutory law.


The decision in Samuels that once an accusatory instrument is filed the defendant cannot waive his right to counsel in his lawyer's absence, applies with limited retroactive effect to cases that were already on direct review at the time Samuels was decided. People v. Pepper, 53 N.Y.2d 213 (1981).
Once adversary proceedings have commenced and the right to counsel has attached, a defendant cannot make an effective waiver of his right to remain silent and to have the assistance of counsel unless his attorney is present at the time of the waiver. According to the cases which follow Di Biasi, this protection exists even though the suspect has neither requested nor retained counsel.  

B. The Donovan-Arthur Cases

A second line of cases, which resulted in the Donovan-Arthur rule, extends a suspect's "indelible" right to counsel where formal proceedings have not yet commenced, but where a suspect has retained or been assigned counsel to represent him. Under these decisions, once an attorney has become involved in an action, the police may not question the defendant or attempt to secure a waiver of counsel without his attorney being present.

The Donovan-Arthur the cases protect the defendant's right to counsel and right against self-incrimination from the time an attorney enters the proceeding. They afford an even greater degree of protection to criminal defendants than the Di Biasi cases. For example, the Donovan-Arthur rule requires that an attorney be present at a preliminary interrogation where counsel has already become involved, whereas under the Di Biasi rule, the right to counsel does not attach until formal adversary proceedings have commenced.

In People v. Donovan, the defendant was interrogated by the police before he had been arraigned or indicted and his written confession was obtained after an attorney's request to see him was denied. The court excluded the confession, holding that New York's constitutional and statutory provisions which guarantee the privilege against self-incrimination, the right to counsel, and due process required the exclusion of a confession obtained from a suspect in custody

23. Id. at 152, 193 N.E.2d at 629, 243 N.Y.S.2d at 843.
24. Id. at 150-51, 193 N.E.2d at 629, 243 N.Y.S.2d at 842.
after his attorney had requested and been denied access to him.\textsuperscript{25} As a result, it extended the rules prohibiting uncounseled interrogation once criminal proceedings had commenced, to a situation where the defendant was in custody but not indicted or arraigned.

In \textit{People v. Arthur},\textsuperscript{26} the defendant was charged with attempted murder. He signed a confession after his attorney, who was not formally retained on the attempted murder charge but who had represented the defendant on other matters, was prevented from conferring with him by police until after they had finished interrogating him.\textsuperscript{27} The court of appeals held that police may not question a defendant in the absence of counsel once an attorney has entered the proceeding unless there is an affirmative waiver of the right to counsel made in the attorney’s presence.\textsuperscript{28} Furthermore, the court held this to be an automatic right that need not be requested by either the suspect or the attorney.\textsuperscript{29} Therefore, police are obligated to notify a suspect’s attorney and wait for his arrival before interrogating him.

The \textit{Donovan-Arthur} rule that once an attorney becomes involved in an action the police may not question the defendant or attempt to secure a waiver of counsel except in his attorney’s presence was affirmed by the court of appeals in \textit{People v. Hobson}.\textsuperscript{30} The court

\textsuperscript{25} \textit{Id.} at 151, 193 N.E.2d at 629, 243 N.Y.S.2d at 843. In \textit{People v. Failla}, 14 N.Y.2d 178, 199 N.E.2d 366, 250 N.Y.S.2d 267 (1964), decided after \textit{Donovan}, the defendant had made part of his confession when his attorney arrived and was denied access to the defendant. The court held that \textit{Donovan} mandated that the entire confession was inadmissible.

\textsuperscript{26} 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968).

\textsuperscript{27} \textit{Id.} at 327, 239 N.E.2d at 538, 292 N.Y.S.2d at 664-65.

\textit{In Arthur}, the attorney learned of the defendant’s arrest while watching the news on television. Having been the defendant’s attorney on other matters, he went to the police department and requested to see the defendant. He was told to wait until police had completed their questioning of the defendant, but during this time defendant had signed a confession. The attorney then met with the defendant and, after instructing police not to question him further, departed. The defendant was again questioned the next day in absence of counsel and made several incriminating statements. \textit{Id.}

\textsuperscript{28} \textit{Id.} at 329, 239 N.E.2d at 539, 292 N.Y.S.2d at 666. The court held that the signed confession and the oral statements were inadmissible. \textit{Id.} at 330, 239 N.E.2d at 539, 292 N.Y.S.2d at 666-67.

\textsuperscript{29} \textit{Id.} at 329, 239 N.E.2d at 539, 292 N.Y.S.2d at 666. The court also stated that according to the principles derived from \textit{Donovan}, \textit{Failla} and \textit{Gunner}, it was not significant that the defendant’s attorney was not formally retained. Once 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, and this right is not dependent upon the existence of a formal retainer. \textit{Id.}

\textsuperscript{30} 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976). Defendant Hobson, while being held in a county jail on unrelated charges, was placed in a lineup for a
noted that the Donovan and Arthur cases had extended constitutional protections of a defendant under the state constitution beyond those afforded by the federal constitution.\textsuperscript{31} Recognizing that the Miranda pre-interrogation warnings\textsuperscript{32} administered by police officers to a suspect might be sufficient to protect his privilege against self-incrimination, the court declared that the presence of counsel is a more effective safeguard against an involuntary waiver of counsel\textsuperscript{33} than a mere warning in the absence of counsel.\textsuperscript{34}

In Hobson, defendant's confession, made after he signed a waiver of his right to counsel in the absence of his attorney, was found to have been improperly admitted at trial. The court of appeals held that once counsel has been engaged in a criminal proceeding, a defendant

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  \item A lawyer who had been appointed for Hobson prior to his placement in the lineup left after Hobson was positively identified. The defendant then signed a waiver and agreed to speak to detectives about the robbery. Although the detective knew Hobson was represented by counsel, he made no effort to inform the attorney that he intended to interrogate his client. Hobson said he understood the preinterrogation warnings which were read to him, waived his right to counsel, and confessed to the robbery. \textit{Id.} at 482-83, 348 N.E.2d at 896-97, 384 N.Y.S.2d at 420-21.
  \item In contrast to New York's \textit{per se} exclusionary rule for confessions obtained in absence of counsel after indictment or arraignment, or confessions obtained after counsel had entered the proceedings but before indictment or arraignment, \textit{Miranda} excludes a confession unless it can be shown that the authorities secured the accused's fifth amendment privilege against self-incrimination through the use of procedural safeguards. \textit{Miranda v. Arizona}, 384 U.S. at 444.
  \item In \textit{Miranda}, the Court held that when an individual is taken into custody and interrogated, his privilege against self-incrimination is jeopardized. 384 U.S. at 457-58. To protect the privilege, the following procedural safeguards must be employed to assure that the exercise of the right will be scrupulously honored: The person must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. \textit{Id.} at 444.
  \item People v. Hobson, 39 N.Y.2d at 484, 348 N.E.2d at 898, 384 N.Y.S.2d at 422. The court stressed that the defendant's real protection against an abuse of power by the authorities is the advice of his lawyer at every critical stage of the proceedings against him. The right to counsel is more effective than preinterrogation warnings since the warnings often provide "only a feeble opportunity to obtain a lawyer, because the suspect or accused is required to determine his need, unadvised by anyone who has his interests at heart." \textit{Id.} at 485, 348 N.E.2d at 898, 384 N.Y.S.2d at 423.
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may not waive his right to counsel when his lawyer is not present.\textsuperscript{35} The court of appeals stressed the importance of giving a criminal defendant undeniable access to counsel during interrogation to ensure that any waiver of his constitutional rights would be knowing and intelligent.\textsuperscript{36} \textit{Hobson} was significant because it overruled three cases which had challenged the \textit{Arthur} requirement that an effective waiver of counsel had to be made in the presence of an attorney.\textsuperscript{37} In reaffirming \textit{Arthur} and its underlying principles, the majority opinion noted that the rationale used in \textit{Arthur} was based on New York State's constitutional and statutory guarantees of the privilege against self-incrimination, the right to counsel, and due process.\textsuperscript{38} The court stated that, as with all attempts to apply constitutional principles, the \textit{Arthur} case is not absolute, and the fact that a defendant is represented by counsel on a proceeding unrelated to the charges under investigation is not sufficient to invoke the rule. Emphasizing the importance of applying the doctrine of \textit{stare decisis}, the court noted that those

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\item[35.] \textit{Id.} at 484, 348 N.E.2d at 898, 384 N.Y.S.2d at 422.
\item[36.] \textit{Id.}
\textit{Hobson} overruled \textit{Robles}, \textit{Lopez} and \textit{Wooden} but let stand several other cases that had placed limitations on the \textit{Donovan-Arthur} rule. See \textit{People v. Taylor}, 27 N.Y.2d 327, 266 N.E.2d 630, 318 N.Y.S.2d 1 (1971) (the \textit{Donovan-Arthur} rule applies only after police learn that an attorney has entered the proceedings to assist the accused in defending against the specific charges for which he is being held); \textit{People v. Kaye}, 25 N.Y.2d 139, 250 N.E.2d 329, 303 N.Y.S.2d 41 (1969) (unsolicited spontaneous utterances made in counsel's absence were admissible); \textit{People v. McKie}, 25 N.Y.2d 19, 250 N.E.2d 36, 302 N.Y.S.2d 534 (1969) (the right to counsel does not attach during non-custodial interrogation).
\item[38.] \textit{People v. Hobson}, 39 N.Y.2d at 483, 348 N.E.2d at 897, 384 N.Y.S.2d at 421.
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who must enforce the prevailing law should be able to rely on its stability.\textsuperscript{39} In \textit{Hobson}, the court of appeals attempted to delineate the situations in which custodial interrogation was prohibited, thereby giving police clear guidelines to follow. The court reasoned that after an attorney enters a proceeding to defend the suspect against the specific charges on which he is being held, uncounseled interrogation should be prohibited.\textsuperscript{40}

\section*{III. The Recent Expansion of the Right to Counsel}

As the rule evolved in New York, the indelible right to counsel attached only if the defendant’s attorney had been secured to assist the accused in defending against the specific charges for which he was held.\textsuperscript{41} For instance, in \textit{People v. Taylor},\textsuperscript{42} the defendants, represented by an attorney on a robbery charge, made incriminating statements about a murder in the absence of counsel. The court held that these statements were admissible because the attorney’s involvement related to a separate charge of robbery.\textsuperscript{43} Therefore, for a period of time, a defendant in custody who was represented by counsel on one charge could still be interrogated in the absence of counsel about other unrelated charges.\textsuperscript{44} This gave the police a means of circumventing

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\item \textsuperscript{39} \textit{Id.} at 489, 348 N.E.2d at 901, 384 N.Y.S.2d at 425-26. The court also noted two other exceptions to the rule. The rule does not render inadmissible a defendant’s spontaneously uttered statement, nor does it apply to non-custodial interrogation. \textit{Id.} at 483, 348 N.E.2d at 897, 384 N.Y.S.2d at 422. \textit{Contra}, \textit{People v. Skinner}, 52 N.Y.2d 24, 417 N.E.2d 501, 436 N.Y.S.2d 207 (1980); \textit{see} notes 58-60 \textit{infra} and accompanying text.
\item \textsuperscript{40} 39 N.Y.2d at 481, 348 N.E.2d at 896, 384 N.Y.S.2d at 420.
\item A similar exception exists in the \textit{Di Biasi} line of cases, so that a defendant who has been arraigned or indicted on one charge can still be questioned as to unrelated crimes in the absence of counsel. \textit{People v. Stanley}, 15 N.Y.2d 30, 203 N.E.2d 475, 255 N.Y.S.2d 74 (1964), \textit{cert. dismissed}, 382 U.S. 802 (1965). However, a lower court has interpreted \textit{People v. Rogers}, 48 N.Y.2d 167, 397 N.E.2d 709, 422 N.Y.S.2d 18 (1979), to have overruled \textit{Stanley}. \textit{See People v. Miller}, 76 A.D.2d 576, 430 N.Y.S.2d 865 (2d Dep’t 1980), discussed in note 66 \textit{infra} and accompanying text.
\item \textsuperscript{42} 27 N.Y.2d 327, 266 N.E.2d 630, 318 N.Y.S.2d 1 (1971).
\item \textsuperscript{43} \textit{Id.} at 332, 266 N.E.2d at 633, 318 N.Y.S.2d at 5. The court established the rule that the prohibition against interrogating a suspect who is represented by counsel does not apply unless the attorney has been secured to assist the accused in defending against the specific charges for which he is held. \textit{Id.}
\item \textsuperscript{44} \textit{See People v. Miller}, 76 A.D.2d 576, 581, 430 N.Y.S.2d 865, 869 (2d Dep’t 1980).
\end{itemize}
the rule that interrogation must cease once an attorney has entered the proceedings: police could legally continue to interrogate a suspect about unrelated matters after an attorney became involved in the pending charge in the hope of eliciting a confession to the crime for which the attorney was retained. This exception which permitted interrogation about unrelated charges was gradually narrowed because the court found it difficult to apply the exception consistently with the underlying principles of Hobson.45

A. Interrogation Regarding Unrelated Matters

In the landmark decision of People v. Rogers,46 the court of appeals changed the existing law in the area of custodial interrogation. Repudiating the rule allowing interrogation of a defendant about unrelated matters, the court held that once a suspect's right to counsel has attached, all police questioning must cease. The court stated that "once a defendant is represented by an attorney, the police may not elicit from him any statements, except those necessary for processing or his physical needs. Nor may they seek a waiver of this right, except in the presence of counsel."47

In Rogers, the defendant was arrested for robbery.48 The interrogation at issue occurred after police were instructed by the defendant's attorney to cease further questioning. The police continued to question the defendant after obtaining a purported waiver about activities unrelated to the robbery charge. After questioning ceased, the defendant made incriminating statements relating to the robbery.49 The

45. In People v. Ramos, 40 N.Y.2d 610, 357 N.E.2d 955, 389 N.Y.S.2d 299 (1976), defendant was represented by an attorney on a drug charge. The attorney advised defendant not to make any statements about unrelated robbery and murder charges. This advice was deemed sufficient to trigger the Arthur rule and the statements about the robbery and murder charges were suppressed. Id. at 618, 357 N.E.2d at 961, 389 N.Y.S.2d at 304. In People v. Carl, 46 N.Y.2d 806, 386 N.E.2d 828, 413 N.Y.S.2d 916 (1978), defendant was questioned about a crime different than the one for which he was in custody. Notwithstanding the fact that separate crimes were involved, the court determined that the charges were sufficiently related to preclude interrogation in the absence of counsel. In People v. Ermo, 47 N.Y.2d 863, 392 N.E.2d 1248, 419 N.Y.S.2d 65 (1979), defendant was questioned in the absence of counsel about an assault and a homicide committed seven months apart. Although conceding that questioning about the homicide alone would have been permissible, the court suppressed statements concerning the homicide stating that police exploited concededly impermissible questioning about the assault for the purpose of obtaining statements relating to the homicide. Id. at 865, 392 N.E.2d at 1249, 419 N.Y.S.2d at 66.

47. Id. at 173, 397 N.E.2d at 713, 422 N.Y.S.2d at 22.
48. Id. at 170, 397 N.E.2d at 711, 422 N.Y.S.2d at 20.
49. Id. In Rogers, defendant was arrested on suspicion of robbery, and Miranda warnings were administered. Id. Defendant told the police that although he had an
court held that any inculpatory statements made by the defendant in custody after he was questioned by police officers about unrelated activities were inadmissible. The underlying reason for the court's holding was its belief that an attorney's presence serves to maintain a balance between the rights of the suspect and the interests of the state. The court declared that the fundamental right to counsel guaranteed by the New York State Constitution is more important than the state's interest in investigating and prosecuting criminal conduct: "We may not blithely override the importance of the attorney's entry by permitting interrogation of an accused with respect to matters which some may perceive to be unrelated."

The practical effect of the Rogers decision on law enforcement is illustrated by the dissenting opinion in that case. Judge Jasen noted:

pursuant to the majority's position, law enforcement officers will be precluded from questioning a defendant charged with driving a motor vehicle while intoxicated about a brutal murder unless they first contact the defendant's attorney representing him on the driving while intoxicated charge and secure his presence at the questioning. This is so even if the defendant was an innocent bystander who witnessed the murder and voluntarily agreed to co-operate with the police. Surely, the right to counsel was never intended to prevent a defendant from voluntarily co-operating with the police concerning matters unrelated to the crime for which he is charged. To hold to the contrary defies both constitutional principles and common sense.

Since interrogation is a valuable source of information for police and an important part of police investigation this decision is a major impediment to law enforcement.

attorney, he was willing to speak to police in the absence of counsel. Id. After two hours of interrogation during which defendant denied complicity in the crime, the police received word from defendant's attorney instructing them to cease further questioning. Id. Under a purported waiver, police thereafter continued to question defendant for an additional four hours about unrelated activities. Id. After questioning ceased and the police were processing paperwork, the defendant uttered an inculpatory statement which was overheard by one of the officers. Id.

50. Id. at 174, 397 N.E.2d at 714, 422 N.Y.S.2d at 23.
51. The court stated: "The presence of counsel confers no undue advantage to the accused. Rather, the attorney's presence serves to equalize the positions of the accused and the sovereign, mitigating the coercive influence of the State and rendering it less overwhelming." Id. at 173, 397 N.E.2d at 713, 422 N.Y.S.2d at 22.
52. Id. at 169, 397 N.E.2d at 711, 422 N.Y.S.2d at 19.
53. Id. at 176-77, 397 N.E.2d at 715, 422 N.Y.S.2d at 24 (Jasen, J., dissenting).
The right to counsel in the pre-trial stages has since been extended to apply to a defendant in custody, not yet represented by counsel, from the time he requests legal representation. In the case of People v. Cunningham, for example, the accused's right to counsel was held to include the right to have the benefit of the advice of counsel before making the decision to waive either the privilege against self-incrimination or the right to the assistance of counsel. Therefore, once a suspect in custody invokes his right to counsel by asking for an attorney, a subsequent waiver of rights in the absence of counsel cannot be given legal effect.

The right to counsel has recently been expanded to protect a suspect not in custody. In People v. Skinner, the defendant sought to suppress incriminating statements made to police officers after he voluntarily agreed to talk to them when the officers came to his home to serve him with an order to show cause. Upholding the suppression of the statements, the court held that where a "defendant is known to have invoked the right to and obtained the services of counsel on the matter about which the person is questioned, the state may not use statements elicited from that person in the absence of a waiver of counsel made in the presence of the attorney." As a result of this

56. Id. at 210, 400 N.E.2d at 364-65, 424 N.Y.S.2d at 425. The court explained that when an unrepresented individual held in custody invokes his right to counsel, he is, in effect, expressing his view that he is not competent to deal effectively with the state without legal advice. Such an individual has no less need for the protections afforded by counsel than does an individual who has previously secured the services of an attorney. To hold that an uncounseled waiver of a represented suspect is ineffective while the waiver of a suspect who, although not represented, had requested the services of an attorney, is an informed and voluntary decision, would make little sense. Such a rule would be unfair to those suspects who either are not affluent enough to have had regular dealings with an attorney or have not had previous occasions to enjoy the services of appointed counsel in an unrelated criminal matter. Id. at 209-10, 400 N.E.2d at 364-65, 424 N.Y.S.2d at 425.
57. Id. at 210, 400 N.E.2d at 364-65, 424 N.Y.S.2d at 425. The court has interpreted broadly the entry of an attorney into a proceeding signaling the attachment of the defendant's right to counsel. For example, the defendant's "indelible" right to counsel has been held to attach if a defendant consults with an attorney to seek his assistance for the limited purpose of arranging for his surrender. People v. Marrero, 51 N.Y.2d 56, 409 N.E.2d 980, 431 N.Y.S.2d 508 (1980). The court also held that although the legal representation was terminated by agreement before the defendant was questioned, the defendant's waiver was deemed ineffective and his murder confession was held to have been improperly admitted at trial. Id. at 59, 409 N.E.2d at 981, 431 N.Y.S.2d at 509.
59. Id. at 27-28, 417 N.E.2d at 502, 436 N.Y.S.2d at 208.
60. Id. at 32, 417 N.E.2d at 505, 436 N.Y.S.2d at 211. Relying on two prior decisions, the court held that whether or not a person is in custody at the time of
decision, one who is suspected of a crime may insure that any statements he makes to the police aware of his representation will not be used against him. Under these circumstances, a suspect who is not in custody and has not been arraigned, indicted or even formally accused may not be questioned in absence of counsel.

B. Formal Commencement of a Criminal Action

The Donovan-Arthur and Di Biasi cases have converged. The filing of an accusatory instrument which constitutes the commencement of a formal judicial action against the defendant is now equated with the entry of an attorney into the proceeding. Therefore, once a felony complaint has been filed, a defendant, who is not then represented by an attorney, may not in the absence of counsel waive his right to counsel. Consequently, any uncounseled admissions will be inadmissible at trial.

In Rogers, the appearance of an attorney in an action was held to prevent police interrogation about unrelated, as well as related, matters. Therefore, it would seem that once an action is commenced against a defendant, no uncounseled interrogation may be conducted...

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interrogation is not controlling when an attorney represents that person on the matter about which he is questioned. In People v. Townes, 41 N.Y.2d 97, 359 N.E.2d 402, 390 N.Y.S.2d 893 (1976), the court ordered statements suppressed without reference to the custodial settings. In People v. Roberson, 41 N.Y.2d 106, 359 N.E.2d 408, 390 N.Y.S.2d 900 (1976), the court also treated the fact of custody as irrelevant. The Skinner court also noted that People v. McKie, which held that unsolicited spontaneous utterances made in counsel’s absence were admissible, does not compel a different result and declared that the broad statements concerning a requirement that an individual be in custody before the non-waiver rule becomes operative have since been discredited by Townes and Roberson. 52 N.Y.2d at 31, 417 N.E.2d at 504, 436 N.Y.S.2d at 210.

61. People v. Settles, 46 N.Y.2d at 159, 385 N.E.2d at 613-14, 412 N.Y.S.2d at 876.

62. Settles held that the filing of an indictment is equated with the entry of an attorney into the proceeding. Hence, a defendant in a post-indictment, prearraignment custodial setting, even though not represented by an attorney, may not in absence of counsel waive his right to have counsel appear at a corporeal identification. Id. at 159, 385 N.E.2d at 614, 412 N.Y.S.2d at 876. People v. Samuels, 49 N.Y.2d 218, 400 N.E.2d 1344, 424 N.Y.S.2d 892 (1980), has refined this holding to render it consistent with N.Y. CRIM. PROC. LAW §§ 1.20(1), (8), (17) (McKinney 1971 & Supp. 1980). For a discussion of when formal proceedings are held to commence, see note 18 supra. See also People v. Miller, 76 A.D.2d at 584, 430 N.Y.S.2d at 871.


even if an attorney has not yet appeared. Similarly, the prohibition against the police obtaining a waiver of the defendant’s right to remain silent and right to counsel should apply in a situation where formal proceedings have commenced even though no attorney has appeared. In People v. Kazmarick, however, the court of appeals did not take this approach. The court held that a pending, unrelated criminal case upon which an arrest warrant has been issued does not bar the police from questioning a suspect on a new matter when the suspect is not, in fact, represented by counsel on the unrelated charge. Departing from its prior holding which equated the commencement of a criminal action with the entry of an attorney into the proceeding, the court in Kazmarick stated that the right to counsel and actual representation are not the same thing. The majority opinion treated the Di Biasi and Donovan-Arthur cases as two distinct rules and applied the Rogers prohibition against interrogation about unrelated charges only to the Donovan-Arthur situation where the defendant actually has an attorney. Therefore, the issue of whether the right to counsel attaches upon the filing of an accusatory instrument, as it does upon the entry of an attorney into the proceeding, awaits clarification.

65. People v. Kazmarick, 52 N.Y.2d at 331, 420 N.E.2d at 50, 438 N.Y.S.2d at 252 (Cooke, J., dissenting); People v. Miller, 76 A.D.2d at 584-85, 430 N.Y.S.2d at 871-72.

66. People v. Miller, 76 A.D.2d at 584-85, 430 N.Y.S.2d at 871-72, quoting People v. Rogers, 48 N.Y.2d at 173, 397 N.E.2d at 713, 422 N.Y.S.2d at 21. Using this reasoning, the second department questioned People v. Stanley, 15 N.Y.2d 30, 203 N.E.2d 475, 255 N.Y.S.2d 374 (1964), cert. dismissed, 382 U.S. 802 (1965), which had authorized custodial interrogation on matters unrelated to a pending criminal action. The exception allowing interrogation concerning unrelated matters was reaffirmed in People v. Taylor, 27 N.Y.2d at 329-30, 266 N.E.2d at 631, 318 N.Y.S.2d at 3. Rogers, overruling the Taylor exception, held that once a defendant is represented by counsel he may not be questioned about any matters, related or unrelated. The court seemingly left standing the rule that a defendant who has been arraigned or indicted may be questioned about unrelated matters. But the second department in People v. Miller, 76 A.D.2d at 585, 430 N.Y.S.2d at 872, interprets Rogers and Settles as overruling Stanley as well as Taylor. Contra, People v. Kazmarick, 52 N.Y.2d 322, 420 N.E.2d 45, 438 N.Y.S.2d 247 (1981).


68. Id. at 322-23, 420 N.E.2d at 46, 438 N.Y.S.2d at 248.


70. People v. Kazmarick, 52 N.Y.2d at 328, 420 N.E.2d at 48, 438 N.Y.S.2d at 250. The court stated “[t]he fact that defendant Kazmarick may have been entitled to counsel on the shoplifting charge [upon which formal action has been commenced] does not require, automatically and in all events, acting as though he was in fact represented by counsel and, therefore, protected even as to an unrelated charge.”

71. Id. at 327-28, 420 N.E.2d at 48, 438 N.Y.S.2d at 250.
C. Prior Arrest

In accord with the Donovan-Arthur rule, the court of appeals in People v. Bartolomeo\textsuperscript{72} extended the non-waivable pre-trial right to counsel to the initial investigatory stages of the law enforcement process. Under Bartolomeo, legal representation on a charge for which a suspect is arrested and released precludes the uncounseled interrogation of the suspect in subsequent investigations of unrelated crimes. This decision represents the broadest interpretation of the pre-trial right to counsel in the progression of New York case law in this area.

The defendant was arrested for arson and represented by counsel during arraignment.\textsuperscript{73} He was released\textsuperscript{74} and nine days later apprehended by officers of the same law enforcement agency in connection with an unrelated murder investigation.\textsuperscript{75} The homicide detectives knew of the defendant's recent arrest,\textsuperscript{76} but did not know whether or to what extent he was represented by counsel.\textsuperscript{77} In response to questions from the detectives and without mention of the fact that he already had an attorney on the arson charge, the defendant purportedly waived his right to counsel and made several incriminating statements.\textsuperscript{78} The interrogation stopped when an attorney, who had been contacted by the lawyer involved in the arson charge, called the station and informed the police he was representing the defendant and wanted the interrogation to cease.\textsuperscript{79}

\textsuperscript{73} Id. at 230, 423 N.E.2d at 374, 440 N.Y.S.2d at 897.
\textsuperscript{74} The reasons for defendant's release do not appear in the record.
\textsuperscript{75} Id.
\textsuperscript{76} Id. The defendant was convicted after a jury trial of felony murder in connection with a burglary in which defendant fired several shots, one of which fatally wounded an occupant of the house. A canvass of the neighborhood disclosed that the defendant's vehicle had been sighted at the time of the crime. A police alert was issued which later resulted in a sighting of the vehicle near the defendant's apartment. While the investigation continued, defendant and an accomplice were arrested and released in connection with another burglary involving arson. Thus, at the time defendant was brought into custody for questioning on the felony murder charge, the police knew that defendant had been arrested and released approximately nine days before. Id. at 236-37, 423 N.E.2d at 377, 440 N.Y.S.2d at 900-01 (Wachtler, J., dissenting).
\textsuperscript{77} Neither the defendant nor his father, who accompanied his son to the police station, ever mentioned the fact that defendant had a lawyer. Id. at 230, 423 N.E.2d at 374, 40 N.Y.S.2d at 897.
\textsuperscript{78} Id. The defendant was properly advised of his constitutional pre-interrogation rights before he was questioned and when informed that he was under arrest for the murder, agreed to talk to the officers. The interrogating detective related to defendant the details of a statement given by an accomplice which implicated the defendant. The defendant then made the inculpating statement which he later sought to suppress. Id.
\textsuperscript{79} Id. at 231, 423 N.E.2d at 374, 440 N.Y.S.2d at 897.
The defendant contended that his incriminating statements should have been suppressed because the waiver was legally ineffective.\textsuperscript{80} A 4-3 majority reversed his murder conviction and ruled that the incriminating statements had been obtained in violation of his right to counsel.\textsuperscript{81} Specifically, the court held that interrogation is precluded where an officer knows that the suspect has been arrested by the same law enforcement agency nine days previously on an unrelated charge, if in fact, the suspect is represented by an attorney on that unrelated charge.\textsuperscript{82} Such representation prevents interrogation even though the fact of representation on the prior charge is unknown to the officer. The knowledge of a prior arrest renders ineffective any purported waiver of the right to counsel on a subsequent charge in the absence of legal representation.\textsuperscript{83} Therefore, the presence of counsel in an unrelated proceeding virtually immunizes a defendant from interrogation regarding a crime subsequently committed.

The implications of the court's holding on the operation of the criminal justice system result in a rule benefitting the repeat offender and restricting effective law enforcement. First, the court equates knowledge of a suspect's arrest with knowledge of representation. Second, the decision provides greater protection to a recidivist than to a one-time offender. Third, the court of appeals interpreted the New York State Constitution to provide more protection to criminal defendants than was previously deemed necessary.

In holding that the knowledge on the part of the police officers that the suspect has been previously arrested precludes uncounseled interrogation, if in fact the defendant was represented on the prior charge, the court equated knowledge of an arrest with knowledge of representation. The court reasoned that "[t]his [knowledge of representation] follows naturally on the awareness on the part of law enforcement personnel of judicial concern for, and protection of, a criminal defendant's right to the aid of counsel at every critical stage of proceedings against him."\textsuperscript{84} Actual knowledge of the existing arson charge

\textsuperscript{80} Id.
\textsuperscript{81} Id. The court cited People v. Miller, 54 N.Y.2d 616, 425 N.E.2d 879, 442 N.Y.S.2d 491 (1980), and People v. Rogers, 48 N.Y.2d 167, 397 N.E.2d 709, 422 N.Y.S.2d 18 (1979), as support for this conclusion.
\textsuperscript{82} 53 N.Y.2d at 231, 423 N.E.2d at 374, 440 N.Y.S.2d at 897. The court stated: "Knowledge that one in custody is represented by counsel, albeit on a separate, unrelated charge, precludes interrogation in the absence of counsel and renders ineffective any purported waiver of the assistance of counsel when such waiver occurs out of the presence of the attorney." Id. (citations omitted).
\textsuperscript{83} Id.
\textsuperscript{84} Id. The dissent argued that although the defendant may have reached the critical stage in the arson charge, where despite his consent to uncounseled interroga-
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against the defendant created an obligation in the interrogating officers to make affirmative inquiries as to whether he was represented by an attorney on the arson charge.\textsuperscript{85} Although no inquiry was made, knowledge of the defendant's legal representation was imputed to the police\textsuperscript{86} and the court found that it was improper to question him or accept his waiver of the right to counsel in the absence of an attorney.\textsuperscript{87}

The majority in \textit{Bartolomeo} extended the \textit{Rogers} rule\textsuperscript{88} against questioning a defendant in custody about unrelated matters to prevent the indelible right to counsel nonetheless applies as a matter of law, it does not follow that because defendant has a right to counsel in the critical stages of one proceeding that an equally critical phase has been reached in all subsequent unrelated investigations. \textit{Id.} at 238-39, 423 N.E.2d at 378-79, 440 N.Y.S.2d at 901-02 (Wachtler, J., dissenting).

\textsuperscript{85} \textit{Id.} at 231-32, 423 N.E.2d at 375, 440 N.Y.S.2d at 898.

\textsuperscript{86} \textit{Id.}

\textsuperscript{87} It is clear, however, that if the defendant did not have representation on the prior charge, uncounseled interrogation concerning a subsequent charge would be proper. In \textit{People v. Kazmarick}, 52 N.Y.2d 322, 420 N.E.2d 45, 438 N.Y.S.2d 247 (1981), the court held that a pending five-month old unrelated criminal case upon which an arrest warrant had been issued did not bar the police from questioning a suspect on a new matter when the suspect did not have counsel on the unrelated charge. In what seems to be a withdrawal from the court's historically steadfast refusal to dilute the fundamental right to an attorney, the majority overrides the defendant's right to counsel so as not to "unrealistically limit police interrogation procedures." \textit{Id.} at 328, 420 N.E.2d at 48, 438 N.Y.S.2d at 250.

\textsuperscript{88} \textit{People v. Bartolomeo}, 53 N.Y.2d 225, 423 N.E.2d 371, 440 N.Y.S.2d 894 (1981). \textit{People v. Miller}, 54 N.Y.2d 616, 425 N.E.2d 505, 442 N.Y.S.2d 491 (1980), decided along with \textit{Bartolomeo} was also cited for this proposition. In \textit{Miller}, the court found that defendant's right to counsel had been violated by the admission at trial of statements he had made during uncounseled interrogation. In August, 1977, "Ms. McE." reported that she had been raped. The district attorney sought orders directing defendant to appear for a corporeal lineup in connection with the investigation of the matter. For the purpose of opposing the orders, defendant was represented by an attorney. In August, 1978, "Ms. P." reported that she had been raped by a man in a car, which police learned had been stolen. The victim provided police with the license plate number and defendant was arrested, advised of his constitutional rights and arraigned on the charge of criminal possession of stolen property. During interrogation about the theft and the rapes, defendant made incriminating statements with respect to all three offenses.

The court affirmed the appellate division's order suppressing all three statements. The court held that the statements relating to the stolen car were improperly obtained based on the fact that the defendant had been arraigned on that charge, his right to counsel had indelibly attached and he could not be interrogated concerning that charge in counsel's absence. It was held further that the statements relating to the 1977 rape were improperly obtained because the defendant was represented by counsel in that matter, a fact of which the police were aware. Because counsel had entered the proceeding, the defendant could not waive his right to counsel in the absence of an attorney, and thus the uncounseled admission relating to the 1977 rape was suppressed.

Regarding the statements relating to the 1978 rape, the court affirmed the lower court's finding that the post-arraignment interrogation was an integrated whole in which the impermissible questioning as to the criminal possession of the stolen vehicle
the interrogation of a suspect who has a pending charge and is suspected of having committed another crime. In Rogers, there was no second charge under investigation and, therefore, no need to consider the effect that prohibiting interrogation would have on the police investigation of a second charge.\textsuperscript{89} By applying the prohibition in Bartolomeo, where the defendant is actually under suspicion for two unrelated crimes, representation on the first charge acts to insulate the defendant from questioning about the second, thereby impeding the police investigation of the subsequent criminal act. Continuing New York's trend in liberalizing the pre-trial right to counsel, the court was "so inter-related and intertwined" with and not fairly separable from the questioning on the 1978 rape that suppression of the latter was required.

The court also found another basis which rendered the questioning impermissible. Citing Rogers for support, the court stated that since the defendant was known to be represented by counsel in connection with the 1977 rape charge, questioning on other matters was precluded.

The court used the Rogers prohibition against interrogation on unrelated matters after an attorney has entered the proceeding as support for suppressing the defendant's statement about the 1978 rape when they could have relied solely upon the \textit{per se} exclusionary rule. This rule, long accepted in New York, is based on the principle that once a defendant is arraigned all questioning about matters related to the charge must cease. Since the court accepted that the 1978 rape was interrelated with the stolen property charge on which defendant was arraigned, any statements obtained about the 1978 rape charge in absence of counsel were properly suppressed in accordance with the post-arraignment rule. The application of the Rogers rationale to the facts of the instant case represents a significant extension of the pre-trial right to counsel.

Judge Wachtler concurred with the majority's result, but preferred to suppress the statement about the 1978 rape on the rationale that because the right to counsel had formally attached on the stolen property charge and because the courts below properly found the rape of "Ms. P." to be interrelated with that charge, no questioning was permissible. Judge Wachtler was reluctant to extend the protection afforded by representation on the first rape to bar questioning about the second rape which occurred a year later. This reluctance is explained in his strongly worded dissent in Bartolomeo. 53 N.Y.2d at 236, 423 N.E.2d at 377, 440 N.Y.S.2d at 900.

89. The Rogers court did acknowledge the state's interest in investigating and prosecuting criminal conduct but stated in a footnote that their holding creates no undue impediment to the investigation of criminal conduct unrelated to the pending charge. An accused represented by counsel may still be questioned about such matters; we hold simply that information obtained through that questioning in the absence of counsel may not be used against him. Thus, the police may continue to obtain information from a defendant who is a mere witness to unrelated events.

People v. Rogers, 48 N.Y.2d at 173 n.2, 397 N.E.2d at 713 n.2, 422 N.Y.S.2d at 22 n.2. The court did not consider the potential impediment to law enforcement that this rule would impose if the defendant happens to be a suspect in another crime unrelated to the pending charge. In Miller and Bartolomeo, the court did uphold the prohibition against interrogation of a suspect about a crime in counsel's absence if the suspect has had representation on another unrelated charge.
further shifts the balance in favor of the defendant and places added limitations on police efforts to control crime.\textsuperscript{90}

The Bartolomeo court, by holding that the attachment of the right to counsel in one case precludes uncounseled interrogation about an unrelated charge on which the right to counsel would not independently attach, protects the recidivist from uncounseled interrogation concerning a crime subsequently committed. The recidivist’s right to counsel is held to have attached in the case still pending and carry over to the second unrelated charge; therefore, any waiver outside the presence of an attorney is rendered ineffective. A one-time offender’s uncounseled waiver, however, would be given legal effect. Furthermore, a defendant need not assert his right to counsel nor inform the officers of representation on the prior charge. Even if he denies that he has a lawyer and is willing to talk, he is nonetheless insulated from uncounseled interrogation.

The Bartolomeo decision favors the recidivist because, as a practical matter, it is the career criminal, not the first-time offender, who will most likely have retained an attorney on a charge still pending which provides him with virtual immunity from questioning about his latest criminal acts.\textsuperscript{91} Historically, New York’s right to counsel doctrine was developed to protect a suspect from police abuses by guaranteeing his constitutional privilege against self-incrimination and his constitu-

\textsuperscript{90} The Rogers court stated that their extension of the defendant’s protection in prohibiting uncounseled interrogation about unrelated matters represents no great quantitative change in the protection they have extended in the past. 48 N.Y.2d 167, 173, 397 N.E.2d 709, 713, 422 N.Y.S.2d 18, 22.

However, extending the prohibition against uncounseled interrogation to second offenders with pending charges does represent a quantitative change in an urban setting where defendants are often rearrested during the pendancy of a prior charge. Studies of defendants in New York City reflect high percentages of defendants arrested with cases pending. According to a 1979 survey of cases in the New York County Supreme Court and Criminal Court, the percent of defendants with open cases pending at the time of arrest was 60\% in supreme court and 57\% in criminal court. Report of the District Attorney, County of New York, Robert Morgenthau, District Attorney, Table 1, page 10 (1979).

The court of appeals itself recognized the impracticality of providing criminal defendants with counsel at every stage of investigation when they said, “Crimes, arrests, and detentions of alleged wrongdoers often occur in the context of violence, flight, pursuit, apprehension, and urgencies involving danger to life and limb… There is trenchant need for quick verification of identity, cause for arrest and detention, and the desirability of even or even immediate release of those falsely accused….” People v. Blake, 35 N.Y.2d 331, 336, 320 N.E.2d 625, 629, 361 N.Y.S.2d 881, 888 (1974).

\textsuperscript{91} 53 N.Y.2d at 239, 423 N.E.2d at 379, 440 N.Y.S.2d at 902 (Wachtler, J., dissenting).
tional right to the assistance of counsel. Recognizing the imbalance that occurs when an accused in custody is faced with the coercive power of the state, the court of appeals held that the non-waivable right to counsel attaches, as a matter of law, as a means of equalizing the positions of the parties and of insuring that any waiver is made voluntarily and intelligently.

The historic reasons which compelled the court to expand the New York right to counsel doctrine do not compel the result reached in Bartolomeo. Bartolomeo prevents a defendant from voluntarily confessing to a crime in the absence of an attorney if he had representation on a prior charge. A confession given under such circumstances is excluded even if there is no evidence of coercive influences. The expansion of the non-waivable right to counsel rule by Bartolomeo is unnecessary to protect the defendant from the coercive power of the state. According to the principles expressed in prior case law, any indication that a statement was not voluntarily given would be sufficient to suppress the statement. Bartolomeo's flat prohibition against uncoutseled interrogation of the recidivist with prior representation on an unrelated charge will prevent the prosecutor from obtaining a conviction based on the defendant's voluntary confession.

The Bartolomeo decision leaves several questions unanswered. The court specifically refused to rule on what the consequences would be in the case in which the defendant's prior arrest is remote in time or place or is made by officers of another law enforcement agency. If the court holds in future opinions that interrogation is precluded by virtue of a prior arrest that is remote in time or place or has been made by officers of another police department, then the arrest for which the accused sought legal representation could insulate him from uncountseled interrogation on all subsequent charges.

93. See text accompanying note 48 supra.
94. The reason for the requirement of counsel's presence at a waiver was to insure that the person relinquishing his right to counsel was doing so voluntarily and not as a result of coercive influences. People v. Hobson, 39 N.Y.2d at 484, 348 N.E.2d at 898, 384 N.Y.S.2d at 422.
95. Under federal law, a voluntary confession is admissible. Recognizing that confessions are a proper element in law enforcement, the Supreme Court stated "[a]ny statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." Miranda v. Arizona, 384 U.S. at 478. See also Johnson v. Zerbst, 304 U.S. 458 (1938).
97. Since the court has not denied that future holdings would go in this direction, a strict liability approach must be considered a possibility.
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The court did not take the opportunity to define "knowledge" on the part of the police officer of a suspect's prior arrest. When faced with this issue again in People v. Servidio and People v. Smith, the court of appeals held that if the interrogating officer was not aware of the defendant's pending charge on which he was represented by counsel, knowledge of prior representation would not be imputed. However, if the interrogating officer knows that the defendant has been arrested before, he is "under an obligation to inquire whether defendant was represented by an attorney on the earlier charge." The dissent in Smith argued that the Bartolomeo rule prohibiting the police from questioning the defendant in the absence of counsel should not be extended to situations where mere knowledge of the existence of some prior charge can be said to give rise to a series of possibilities or probabilities of various degrees that the charge may still be outstanding, that the defendant was represented by counsel in the past and that an attorney may still be representing him. Under such an approach a repeat offender or professional criminal will be immune indefinitely from police questioning because with creative hindsight it may be shown that there was some possibility that one of his prior charges was still outstanding.

The prohibition against uncounseled interrogation, as a matter of law, during the investigatory stages of the law enforcement process will impede police efforts to control crime in New York. In response to Bartolomeo, procedural precautions have been implemented in the form of a warning: the New York City Police Department now re-

100. The Servidio court reasoned that since the interrogating officer was not aware of defendant's pending charge on which he was represented by counsel there was no basis for inferring knowledge of the prior representation. People v. Servidio, 54 N.Y.2d at 953, 429 N.E.2d at 822, 445 N.Y.S.2d at 144.
102. Id. at 956, 429 N.E.2d at 824, 445 N.Y.S.2d at 146 (Wachtler, J., dissenting). A constructive notice approach which imputes the knowledge of a suspect's prior arrest by a law enforcement agency to all its officers is impractical particularly in large cities where individual police officers often do not have personal knowledge of arrests made by fellow officers. The New York City Police Department, for instance, employs over 20,000 officers and serves the five counties of New York City which span over three hundred square miles. It is unlikely that an officer in one county will have knowledge of an arrest made in another until he acquires the suspect's arrest and conviction record. Letter from Thomas J. Flanagan, Director, Legal Bureau, Police Department, New York, New York, to author (Aug. 5, 1981).
quires an interrogating officer to ask a suspect if he is represented by
counsel on another charge if the officer knows that the suspect has
been previously arrested. New York’s urban centers are character-
ized by rising levels of crime, reflected in large numbers of arrests
and a high rate of recidivism. As a result, they will be adversely
affected by the impediment to law enforcement imposed by Bartolo-
mez.

IV. Conclusion

Since the criminal defendant’s constitutional rights and the state’s
responsibility to enforce the law exist in a balance, expansion of one
limits the other. In a series of decisions, the New York Court of
Appeals has continuously expanded the defendant’s non-waivable
right to counsel. By extending this right to the investigatory stage of
the law enforcement process, the court has severely restricted the
ability of the police to interrogate a defendant. With this expansion of
the defendant’s pre-trial right to counsel, the court has placed yet
another hurdle in the path of effective law enforcement.

Debra M. Zverins

103. "[W]here a New York City Police Officer makes an arrest, and he is aware of
a recent arrest by a police officer of another police agency in New York State, he
must ask the arrested person if he is represented by counsel before any waiver of the
right to counsel may take place." Legal Bureau Bulletin prepared by Office of the
Deputy Commissioner of Legal Matters, New York City Police Department, Vol. 11,
No. 6 (July 30, 1981).

104. N.Y. Times, August 25, 1981, at B3, col. 1. Police statistics show that in the
first six months of 1981 serious crime in New York City rose 5.6% while robberies, a
violent crime that indicates the extent of predatory street crime, rose by 14.6%. Id.

105. Seventy-seven percent of 200 defendants studied in New York Supreme Court
proceedings have had prior arrests. On the average, the defendants had been arrested
eight times before. Report of the District Attorney, County of New York, Robert
Morgenthaler, District Attorney, Table 1, page 10 (1979). Although no official anal-
yses have been made by the Probation Department, probation officers in New York
City estimate that as many as half the people who are now on probation are
eventually rearrested for new crimes. N.Y. Times, August 3, 1981, at A1, col. 3. See
generally Fishman, An Evaluation of Criminal Recidivism in Projects Providing
Rehabilitation and Diversion Services in New York City, 68 J. of CRIM. LAW &
CRIMINOLOGY 283 (1977) (in a sample of 2,860 males who had arrest records for
serious crimes, more than 90% had at least one prior arrest). Id. at 289. See also
Roesch and Corrado, The Policy Implications of Evaluation Research: Some Issues
Raised by the Fishman Study of Rehabilitation and Diversion Services, 70 J. of CRIM.
LAW & CRIMINOLOGY 530 (1979).