

March 2013

The Sanctity of the Attorney-Client Relationship – Undermined by the Federal Interpretation of the Right to Counsel - People v. Borukhova

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Recommended Citation

Laterza, Tara (2013) "The Sanctity of the Attorney-Client Relationship – Undermined by the Federal Interpretation of the Right to Counsel - People v. Borukhova," *Touro Law Review*: Vol. 28: No. 3, Article 35.
Available at: <http://digitalcommons.tourolaw.edu/lawreview/vol28/iss3/35>

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The Sanctity of the Attorney-Client Relationship – Undermined by the Federal Interpretation of the Right to Counsel - People v. Borukhova

Cover Page Footnote

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**THE SANCTITY OF THE ATTORNEY-CLIENT
RELATIONSHIP – UNDERMINED BY THE FEDERAL
INTERPRETATION OF THE RIGHT TO COUNSEL**

**SUPREME COURT OF NEW YORK
APPELLATE DIVISION, SECOND DEPARTMENT**

People v. Borukhova¹
(decided October 25, 2011)

The right to be free from self-incrimination is a fundamental constitutional protection afforded to all criminal defendants.² This protection is found in the United States Constitution’s Sixth Amendment right to counsel, the Fifth and Fourteenth Amendment due process clauses, the Fifth Amendment’s express self-incrimination provision, and has further been expanded by the procedural safeguards famously provided by *Miranda v. Arizona*.³ While the constitutional protections found in the Fifth and Fourteenth Amendments, and their subsequent expansion by *Miranda* have been adopted in New York as consistent with the State Constitution,⁴ New York’s interpretation of the Sixth Amendment right to counsel goes well

¹ 931 N.Y.S.2d 349 (App. Div. 2d Dep’t 2011).

² *Miranda v. Arizona*, 384 U.S. 436, 442 (1966).

³ 384 U.S. 436 (1966). The Fifth Amendment due process and privilege against self-incrimination provisions state that “[n]o person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]” U.S. CONST. amend. V. The Sixth Amendment right to counsel provision provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defense.” U.S. CONST. amend. VI. Both the Fifth and Sixth Amendment provisions originally applied only to the Federal Government, but later were deemed fundamental rights, essential to ensure a fair trial, and “thus [were] made obligatory on the States by the Fourteenth Amendment.” *Pointer v. Texas*, 380 U.S. 400, 403 (1965). The Fourteenth Amendment due process clause provides that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[.]” U.S. CONST. amend. XIV, § 1.

⁴ *People v. Paulman*, 833 N.E.2d 239, 244 (N.Y. 2005).

beyond that of the federal courts.⁵ Federal courts narrowly construe the Sixth Amendment right to counsel to attach only after the commencement of a formal prosecution, while New York boastfully expands the application, and maintains that the right may attach well before the commencement of judicial proceedings.⁶ New York recognizes that pre-indictment and pre-arraignment questioning can be just as detrimental to a criminal defendant as questioning after the initiation of a formal proceeding.⁷ Accordingly, through reasoning reminiscent of the *Miranda* principles, New York extends an indelible right to counsel to all criminal defendants even prior to the commencement of judicial proceedings.⁸

The recent decision of the New York Appellate Division in *People v. Borukhova*⁹ predominately focused on two issues involving the admissibility of self-incriminating statements made by a suspect to police officers, prior to the initiation of a formal criminal proceeding.¹⁰ The first asked whether the defendant's statements made to the police were the products of custodial interrogations, conducted without the proper administration of *Miranda* warnings.¹¹ The second asked whether the statements obtained by the police after an attorney called the precinct on the defendant's behalf and requested that she not be questioned were obtained in violation of her right to counsel.¹²

In *Borukhova*, the Appellate Division held that the defendant was not subjected to custodial interrogation, and as such the police officer's obligation to Mirandize the defendant was never triggered.¹³ On the other hand, the Appellate Division found that when the defendant's attorney contacted the precinct, under New York law, her indelible right to counsel attached and could not be waived absent the presence of counsel.¹⁴ Therefore, the defendant's statements made to the police subsequent to her attorney's involvement were obtained in

⁵ *Borukhova*, 931 N.Y.S.2d at 364.

⁶ *Matter of Robert O.*, 439 N.Y.S.2d 994, 1003 (Fam. Ct. 1981).

⁷ *People v. Donovan*, 193 N.E.2d 628, 630 (N.Y. 2003).

⁸ *Robert O.*, 439 N.Y.S.2d at 1003.

⁹ 931 N.Y.S.2d 349 (App. Div. 2d Dep't 2011).

¹⁰ *Id.* at 362.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 363.

¹⁴ *Borukhova*, 931 N.Y.S.2d at 365.

violation of her right to counsel.¹⁵

This case note takes the position that the federal interpretation of when and how the right to counsel attaches, both undermines the sanctity of the attorney-client relationship and leaves a criminal defendant unprotected against self-incrimination at vital stages of a criminal prosecution. Unlike the federal interpretation, this case note advocates for New York's expansive approach to the right to counsel, as it properly protects a criminal defendant during all pre-trial stages, including pre-arraignment, at which time an accused's fate may be sealed.

This case note will review the federal application of the Fifth and Fourteenth Amendment due processes clauses, the Fifth Amendment's express privilege against self-incrimination, and *Miranda* protections, as fundamental and procedural safeguards against self-incrimination. In addition, this case note will review the different applications of the federal Sixth Amendment right to counsel and its expansion under New York State law. Section I of this case note discusses the facts and decision of the recent New York Appellate Division case of *People v. Borukhova*. Section II discusses the federal protections against self-incrimination afforded to all criminal defendants by the Fifth and Fourteenth Amendments of the Constitution and their expansion under *Miranda*. Section III addresses the federal requirements for a valid waiver of the Fifth and Fourteenth Amendment protections and *Miranda*. Section IV discusses the federal application of the Sixth Amendment right to counsel, and Section V addresses the federal requirements for a valid waiver of this right. Section VI discusses New York's adoption and expansion of the federal protections against self-incrimination, largely with respect to when and how the right to counsel attaches, as well as the implications that arise from the attachment of this right. Section VII discusses the *Borukhova* decision through the scope of both the federal court's narrow interpretation of the right to counsel and the New York court's expansive interpretation, and further, the relationship between these two interpretations and the attorney-client privilege. Finally, Section VII concludes this case note.

¹⁵ *Id.*

I. FACTUAL AND PROCEDURAL BACKGROUND OF *PEOPLE V. BORUKHOVA*

On Sunday, October 28, 2007, the victim, Daniel Malakov, was shot to death outside a park in Queens, New York.¹⁶ On the morning of his death, the victim brought his four-year-old daughter to the park to meet the defendant, Mazoltuv Borukhova, with whom he was involved in a bitter divorce and custody battle.¹⁷ From the time that the divorce action commenced, the victim and the defendant were involved in extensive litigation with respect to custody and visitation rights of their daughter.¹⁸ Initially, the defendant was granted temporary custody, until roughly three weeks prior to the shooting when, unexpectedly, temporary custody was awarded to the victim.¹⁹ Three days after the unexpected custody transfer, the defendant and her sister made threats on the victim's life to both his father and his uncle.²⁰

On the morning of his death, while waiting for the defendant at the park, the victim was murdered "by a man wielding a gun equipped with a makeshift silencer fashioned out of a bleach bottle and duct tape."²¹ The fingerprints found on the silencer were identified as those of the co-defendant, Mikhail Mallyayev.²² In addition, several eyewitnesses to the shooting gave similar descriptions of both the incident and the shooter.²³ After hearing "shots fired[,]," the first officer responded to the scene where he briefly spoke to an eyewitness, and then at the defendant's request, helped administer CPR to the victim.²⁴

¹⁶ *Id.* at 353.

¹⁷ *Id.* The victim commenced the divorce action in 2005 "which proved to be so acrimonious that his father was later to describe it as 'a completely unfriendly and uncivilized divorce.'" *Id.* at 354.

¹⁸ *Borukhova*, 931 N.Y.S.2d at 354. The custody battle over the daughter was so extensive that an attorney had to be appointed on the child's behalf. *Id.*

¹⁹ *Id.* at 353.

²⁰ *Id.* at 355. In one of the threats made to the victim's father by the defendant's sister, she specifically stated "[you] are going to lose your son on . . . Sunday." *Id.* The following Sunday morning, the victim was killed. *Borukhova*, 931 N.Y.S.2d at 355.

²¹ *Id.* at 353. Earlier that morning, the victim expressed to his father his intent to give his daughter to her mother that day. *Id.* at 355.

²² *Id.* at 353.

²³ *Id.* at 355-57.

²⁴ *Borukhova*, 931 N.Y.S.2d at 357. The defendant, who was present at the scene, identi-

The defendant, accompanied by an officer, was then transported to the hospital “to make sure she was okay.”²⁵ It was not until approximately one hour later that a detective arrived to question the defendant about the shooting.²⁶ The detective asked the defendant a variety of allegedly investigative questions, over the course of fifteen to twenty minutes, during which time the defendant was not restrained, and appeared calm.²⁷ The interview ended when the defendant stated “[s]he wanted to think about the events and she will talk to the police at a later time when she feels a little bit better.”²⁸ Then, after the defendant was released from the hospital, she voluntarily accompanied the detective to the precinct to continue to speak with the police.²⁹

Prior to arriving at the police precinct, the defendant’s sister, on the defendant’s behalf, contacted an attorney who agreed to represent her.³⁰ At 1:17 P.M. the defendant’s attorney “called the 112th Precinct and told the person who answered the phone that he was the defendant’s counsel, that he wanted to speak to her, and that he did not want her to be questioned until he had an opportunity to speak to her.”³¹ Before questioning began, a sergeant at the precinct provided the defendant with the attorney’s information and asked if she either knew him or retained him.³² In reply to the sergeant’s questions, “[t]he defendant responded that she had not called an attorney, and didn’t know the attorney who had called.”³³

Over the course of the next three hours, beginning at 1:45 P.M., the defendant was subjected to three separate interviews, during which the defendant was neither physically restrained, nor under constant supervision.³⁴ The detectives concluded their questioning upon the arrival of the defendant’s attorney at the precinct, and upon

fied herself to the officer as a doctor. *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 357-58.

²⁸ *Borukhova*, 931 N.Y.S.2d at 358.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Borukhova*, 931 N.Y.S.2d at 358.

³⁴ *Id.*

his request that the police refrain from questioning the defendant any further.³⁵ Interestingly, the defendant's counsel waited at the precinct for more than an hour before he was able to speak to his client.³⁶

During the course of the investigation of the shooting, the police uncovered copious amounts of evidence linking the defendant and co-defendant.³⁷ As such, on February 7, 2008, both the defendant and co-defendant were indicted on charges of murder and conspiracy.³⁸

At the pre-trial *Huntley* hearing,³⁹ the defendant moved to suppress the statements made to the police both at the hospital and at the precinct.⁴⁰ The defendant argued that both statements were the products of custodial interrogations, and were obtained in violation of her *Miranda* rights because she was not given the requisite warnings.⁴¹ The defendant also argued that the statements she made at the precinct were obtained in violation of her right to counsel.⁴² In response to the defendant's first argument, the court found the defendant "was not in custody when interviewed by the police because a reasonable person innocent of any crime, would have believed she was being interviewed as a witness to the shooting."⁴³ In response to the defendant's second argument, the court found that "the defendant's right to counsel did not attach when [the attorney] called the precinct because the defendant unequivocally stated that she did not know who he was, and that he was not her lawyer."⁴⁴ As such, the defendant's applications were denied, and the court allowed for the statements obtained, both at the hospital and the precinct, to be intro-

³⁵ *Id.* at 359.

³⁶ *Id.*

³⁷ *Id.* Some of the evidence linking the defendant and the co-defendant included: a familial relationship by marriage, an exponential increase in the number of phone calls exchanged between the two in the months leading up to the shooting, and large cash deposits made at several Queens bank branches into the co-defendant's accounts. *Borukhova*, 931 N.Y.S.2d at 359.

³⁸ *Id.* at 360.

³⁹ *People v. Huntley*, 204 N.E.2d 179 (N.Y. 1965). Prior to submission to the jury, the Judge must independently, through express findings, make a determination about the voluntariness of a confession. *Id.* at 183.

⁴⁰ *Borukhova*, 931 N.Y.S.2d at 360.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 360-61.

⁴⁴ *Id.* at 361.

duced at trial.⁴⁵

The joint trial of the defendant and co-defendant began on January 26, 2009 and lasted roughly six weeks.⁴⁶ On March 10, 2009, after one day of deliberations, the jury found both the defendant and co-defendant guilty of first degree murder, and second degree conspiracy, and the defendant was sentenced to life in prison without parole.⁴⁷

The defendant appealed the conviction and challenged the suppression ruling on the same grounds—namely that the defendant’s statements were obtained during custodial interrogations, without *Miranda* warnings, and the statements made at the precinct were obtained in violation of the defendant’s right to counsel.⁴⁸ On the first issue, the Appellate Division ruled, consistent with the *Huntley* hearing, that the defendant was not “in custody” when her statements were made both at the hospital and at the precinct.⁴⁹ Therefore, the court held that “the duty to administer *Miranda* warnings was not triggered.”⁵⁰ The court explained that the defendant was accompanied to the hospital by an officer for her own wellbeing, and that the later questioning at the hospital, conducted by the detective, was brief and investigative in nature rather than accusatory.⁵¹ The defendant then voluntarily went to the precinct where questioning continued intermittently over several hours, again for alleged investigatory purposes, and during which time the defendant was frequently left unsupervised and unrestrained.⁵²

With respect to the second issue, regarding whether the defendant’s statements obtained at the precinct were in violation of her right to counsel, the Appellate Division reversed the trial court’s ruling and found in favor of the defendant.⁵³ The Appellate Division found the defendant’s right to counsel, regardless of the fact that the defendant’s sister retained the attorney, attached when the attorney

⁴⁵ *Borukhova*, 931 N.Y.S.2d at 360-61.

⁴⁶ *Id.* at 361.

⁴⁷ *Id.* at 362.

⁴⁸ *Id.*

⁴⁹ *Id.* at 363.

⁵⁰ *Borukhova*, 931 N.Y.S.2d at 363.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

“called the 112th Precinct, identified himself as the defendant’s attorney, asked to speak to her, and requested that she not be questioned until he had an opportunity to speak to her.”⁵⁴ In light of this ruling, the court reasonably concluded that the defendant could not have properly waived her right to counsel absent the presence of her attorney, and therefore, the trial court should have suppressed the statements obtained at the Precinct.⁵⁵ Despite the Appellate Division’s ruling that the defendant’s statements made at the precinct should have been suppressed, the improper admission was found to be a harmless error in light of the overwhelming evidence against her, and the conviction was upheld.⁵⁶

II. THE FIFTH AND FOURTEENTH AMENDMENTS: CONSTITUTIONAL PROTECTIONS AGAINST SELF- INCRIMINATION AND *MIRANDA*’S PROCEDURAL SAFEGUARDS

The Fifth and Fourteenth Amendments of the United States Constitution bear fundamental safeguards to protect individuals against self-incrimination.⁵⁷ The Fourteenth Amendment declares that a state shall not “deprive any person of life, liberty, or property,

⁵⁴ *Id.* at 365.

⁵⁵ *Borukhova*, 931 N.Y.S.2d at 365.

⁵⁶ *Id.* at 368-69. The defendant appealed her conviction on several other grounds outside the scope of this analysis. First, the defendant appealed the actions of the trial court in “admitting into evidence a series of ‘extraordinarily prejudicial’ hearsay statements” one of which included the victim’s father’s testimony regarding the threatening statements made by the defendant’s sister, on the victim’s life. *Id.* at 367. Second, the defendant appealed the introduction of the testimony of the victim’s father, in which he stated that his son expressed a plan to bring his daughter to the park to drop her off with the defendant on the morning of the shooting. *Id.* at 369. Third, the defendant appealed the use of Justice Strauss’s decision from the child’s temporary custody hearing. *Id.* at 370. Fourth, the defendant appealed on grounds that the trial court violated her right to testify and present a defense by sustaining objections that would allow her to explain some of her actions more fully. *Borukhova*, 931 N.Y.S.2d at 370. Fifth, the defendant appealed based on the contention that she was “deprived of a fair trial, and deprived of effective assistance of counsel, because her attorney was required to deliver his summation without adequate preparation time.” *Id.* at 371. Finally, the defendant sought to raise several other issues on appeal, but her failure to raise timely objections did not preserve these issues for review. *Id.* at 372-73.

⁵⁷ *Kirby v. Illinois*, 406 U.S. 682, 688 (1972).

without due process of law”⁵⁸ Likewise, the Fifth Amendment also contains a due process clause, but it further affords an explicit privilege against self-incrimination.⁵⁹ It provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law”⁶⁰

Based exclusively on the “Fifth and Fourteenth Amendment privilege against compulsory self incrimination, [and] upon the theory that custodial *interrogation* is inherently coercive”⁶¹ *Miranda* added procedural safeguards to these constitutional liberties in 1966.⁶² The Court in *Miranda* formulated the substance of the requisite warnings deserving of all suspects before being questioned in a custodial interrogation.⁶³ The requirements of the warnings were stated as follows:

He 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.⁶⁴

Even though the rights set out in *Miranda* are procedural measures that are “not themselves rights protected by the Constitution[,]”⁶⁵ they create vital safeguards required to preserve the undisputed rights of an accused to remain silent and free from interrogation absent the opportunity to consult with a lawyer.⁶⁶ Thus, should an accused exercise her right to remain silent or to have an attorney present, in any manner and at any time prior to or during questioning, the police must respect this decision and “the interrogation ‘must

⁵⁸ U.S. CONST. amend. XIV, § 1.

⁵⁹ U.S. CONST. amend. V.

⁶⁰ *Id.*

⁶¹ *Kirby*, 406 U.S. at 688.

⁶² *Miranda*, 384 U.S. at 436.

⁶³ *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2259 (2010).

⁶⁴ *Miranda*, 384 U.S. at 479.

⁶⁵ *Davis v. United States*, 512 U.S. 452, 457 (1994).

⁶⁶ *Edwards v. Arizona*, 451 U.S. 477, 485 (1981).

cease.’⁶⁷ Further, absent the proper administration of *Miranda* warnings, statements obtained in a custodial interrogation, “whether exculpatory or inculpatory,” would violate the “procedural safeguards effective to secure the privilege against self-incrimination[.]” and therefore, may not be used in a criminal prosecution.⁶⁸

The obligation to *Mirandize* a suspect does not attach until she is rendered both in custody and subject to interrogation.⁶⁹ According to the Supreme Court, an individual is in custody for the purpose of *Miranda*, either when there has been a formal arrest or a “restraint on freedom of movement of the degree associated with a formal arrest.”⁷⁰ In *Yarborough v. Alvarado*,⁷¹ the Court set out a two-inquiry test for *Miranda* custody.⁷² First, “[c]ourts must examine ‘all of the circumstances surrounding the interrogation’ ” and second, “determine ‘how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action.’ ”⁷³ As such, the test for whether there is a restraint on the freedom of movement of an accused is an objective inquiry, and not based on the subjective views of either the interrogator or the individual subject to questioning.⁷⁴ While an officer’s subjective view of the potential culpability of the accused is relevant, the officer’s views are only a factor in assessing custody if they were both revealed to the accused and if the revelation of those views would have affected a reasonable person’s perception of her ability to leave.⁷⁵

The Court in *Miranda* narrowly construed its procedural protections to apply to “police interrogation practices that involve express questioning of a defendant while in custody.”⁷⁶ However, the

⁶⁷ *Berghuis*, 130 S. Ct. at 2268 (Sotomayor, J., dissenting) (quoting *Miranda*, 384 U.S. at 473-74).

⁶⁸ *Rhode Island v. Innis*, 446 U.S. 291, 297 (1980). Exculpatory statements are generally statements that tend to exonerate an accused, while inculpatory statements tend to implicate her. Andrew R. Keller, *Inculpatory Statements Against Penal Interest and the Confrontation Clause*, 83 COLUM. L. REV. 159, 159 (1983).

⁶⁹ *Innis*, 446 U.S. at 300.

⁷⁰ *Stansbury v. California*, 511 U.S. 318, 322 (1994).

⁷¹ 541 U.S. 652 (2004).

⁷² *Id.* at 663.

⁷³ *Id.* (quoting *Stansbury*, 511 U.S. at 322, 325).

⁷⁴ *Stansbury*, 511 U.S. at 323.

⁷⁵ *Id.* at 324-25.

⁷⁶ *Innis*, 446 U.S. at 298.

Court in *Rhode Island v. Innis*,⁷⁷ expanded this view to include circumstances that do not involve express questioning in order to protect against “the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the plain mandate of *Miranda*.”⁷⁸ The broader application of “the term ‘interrogation’ under *Miranda* refers not only to express questioning, but also to any words or action on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.”⁷⁹ While the intent of the police during questioning is not irrelevant, the purpose of the *Miranda* safeguards are reflected in the fact that the determination of whether the questioning constituted an “interrogation” focuses on the perceptions of the individual in custody.⁸⁰

The main purpose of *Miranda* was to ensure proper safeguards were placed on custodial interrogations to combat the “inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.”⁸¹ The atmosphere of custodial interrogations can quickly overbear the will of an accused who has been informed of her rights.⁸² As such, *Miranda* established the importance of the right, not only to consult with an attorney prior to questioning, but also the right to the presence of an attorney during questioning, as “indispensable to the protection of the Fifth Amendment privilege[.]”⁸³

⁷⁷ 446 U.S. 291 (1980).

⁷⁸ *Id.* at 299 n.3.

⁷⁹ *Id.* at 301. An “incriminating response” constitutes “any response—whether inculpatory or exculpatory—that the prosecution may seek to introduce at trial.” *Id.* at 301 n.5 (emphasis omitted).

⁸⁰ *Id.* at 301. The intent of the police may be relevant to show that the police officers should have known that their words or actions were “reasonably likely to elicit an incriminating response.” *Innis*, 446 U.S. at 301 n.7. For instance, where the police have knowledge of the defendant’s unusual susceptibility “to a particular form of persuasion” this might be a factor in determining whether or not the suspect was subject to an “interrogation.” *Id.* at 301 n.8.

⁸¹ *Miranda*, 384 U.S. at 467.

⁸² *Id.* at 369.

⁸³ *Id.* at 469. The Court in *Miranda* further provided several important functions served by the presence of counsel during an interrogation, namely: to “mitigate the dangers of untrustworthiness” should the accused decide to speak to the interrogators; reduce the likelihood of coercive police practices and testify in court should the police actually exercise coercive practices; and guarantee that any statements given by the accused are full and accurate, and further ensure they are properly reported if used at trial. *Id.* at 470.

III. FEDERAL WAIVER OF CONSTITUTIONAL DUE PROCESS PROTECTIONS AND *MIRANDA* RIGHTS

Miranda created a rigid rule—a detained suspect must be advised of her rights prior to a custodial interrogation, and that if a suspect indicates that she would like to remain silent, or if she requests the presence of an attorney, the interrogation must cease until an attorney is provided.⁸⁴ After a proper administration of the requisite warnings, a suspect may choose to waive her *Miranda* rights including the right to counsel.⁸⁵ The law is clear and the burden is high that where a suspect wishes to waive her rights under *Miranda*, the waiver must be both knowing and voluntary.⁸⁶ As the Court stated in *Edwards v. Arizona*,⁸⁷ “waivers of counsel must not only be voluntary but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege[.]”⁸⁸ It should be noted “that courts indulge in every reasonable presumption against waiver,” and that this strong presumption against waiver applies equally both at trial and to pretrial proceedings.⁸⁹

A valid waiver of *Miranda* must be “ ‘voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception’ and ‘made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.’ ”⁹⁰ A determination of whether a suspect’s waiver was voluntary, as well as knowing and intelligent, is premised upon the particular facts and circumstances of the case, considering the suspect’s background, experience, and conduct.⁹¹ When a suspect has invoked her right to counsel that right is not deemed waived simply by showing that the suspect responded to police-initiated questioning.⁹² That is, once the right to counsel is invoked, police must refrain from routine questioning until legal coun-

⁸⁴ *Maryland v. Shatzer*, 130 S. Ct. 1213, 1219 (2010).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ 451 U.S. 477 (1981).

⁸⁸ *Id.* at 482.

⁸⁹ *Brewer*, 430 U.S. at 404.

⁹⁰ *Berghuis*, 130 S. Ct. at 2260 (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)).

⁹¹ *Edwards*, 451 U.S. at 482.

⁹² *Id.* at 484.

sel is made available or the accused voluntarily “initiates further communication, exchanges, or conversations with the police.”⁹³

The Court in *Edwards* stated that “an accused’s request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease[.]” until an attorney has been provided.⁹⁴ Corresponding to the rights recognized in *Miranda*, the Court in *Edwards* held that although the Constitution does not prohibit further questioning, this right is inherent in constitutional jurisprudence and necessary to protect against badgering a suspect to waive her previously asserted *Miranda* rights.⁹⁵ Thus, the proper application of the *Edwards* rule requires the court to determine whether a suspect actually exercised her right to counsel.⁹⁶ However, if a statement does not “meet the requisite level of clarity” or a suspect appears indecisive about requesting counsel, officers may evade the traditional requirement to end the interrogation.⁹⁷

The case of *Moran v. Burbine*⁹⁸ illustrates the issue of waiver of Fifth Amendment protections and *Miranda*.⁹⁹ In *Moran*, the police properly administered *Miranda* warnings prior to questioning the defendant, and obtained an express written waiver of those rights.¹⁰⁰ Even though an attorney was not requested by the defendant prior to questioning, unbeknownst to him, the defendant’s sister had contacted an attorney on his behalf.¹⁰¹ Upon retention, the attorney contacted the police to notify them of her representation.¹⁰² However, the police never informed the defendant about his representation, and proceeded to elicit a confession.¹⁰³ The Supreme Court found that despite the defendant’s lack of knowledge of counsel, his waiver of rights was both knowing and voluntary, and therefore constituted a valid waiver.¹⁰⁴ The Court admitted:

⁹³ *Id.* at 484-85.

⁹⁴ *Id.* at 485.

⁹⁵ *Davis*, 512 U.S. at 458.

⁹⁶ *Id.*

⁹⁷ *Id.* at 459.

⁹⁸ 475 U.S. 412 (1986).

⁹⁹ *Id.* at 421.

¹⁰⁰ *Id.* at 420-21.

¹⁰¹ *Id.* at 416-17.

¹⁰² *Id.*

¹⁰³ *Moran*, 475 U.S. at 417, 421.

¹⁰⁴ *Id.* at 422.

[n]o doubt that the additional information would have been useful to [defendant]; perhaps even might have affected his decision to confess. But we have never read the Constitution to require that police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.¹⁰⁵

The Court further explained that the objective of *Miranda* warnings “is not to mold police conduct for its own sake[,]” but rather to protect against the inherently compulsory nature of custodial interrogations and in effect, against violations of the accused’s constitutional rights.¹⁰⁶ The Court further stated “a rule that focuses on how the police treat an attorney-conduct that has no relevance at all to the degree of compulsion experienced by the defendant during interrogation would ignore both *Miranda*’s mission and its only source of legitimacy.”¹⁰⁷ The Court in *Moran* expressly refused to expand *Miranda* protections and maintained that the police were not required to inform the accused when an attorney had made efforts to contact him.¹⁰⁸ The Court in *Moran* further argued that allowing this expansion of *Miranda* would upset the balance between the purpose of custodial interrogations, as it would undermine the clarity of what is required by police conducting an interrogation, and the protective nature of *Miranda* warnings against the coercive nature of interrogations.¹⁰⁹

IV. THE SIXTH AMENDMENT RIGHT TO COUNSEL: PROTECTIONS AGAINST SELF-INCRIMINATION UNAVAILABLE UNTIL THE COMMENCEMENT OF FORMAL JUDICIAL PROCEEDINGS

The right to counsel is expressly afforded by the Sixth

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 424-25.

¹⁰⁷ *Id.* at 425.

¹⁰⁸ *Moran*, 475 U.S. at 425. This case will be revisited in the context of the Sixth Amendment right to counsel. See *infra* notes 127, 129-31.

¹⁰⁹ *Moran*, 475 U.S. at 424.

Amendment of the Constitution, which states “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”¹¹⁰ Protections under the Sixth Amendment’s right to counsel are automatically triggered once judicial proceedings are initiated against a criminal defendant, but not a minute before.¹¹¹ Judicial proceedings can be initiated against a defendant “by way of formal charge, preliminary hearing, indictment, information, or arraignment.”¹¹²

The constitutional right to counsel, once triggered, must be provided to the accused regardless of whether the request is made by the defendant, as this right is not predicated on the defendant’s personal request.¹¹³ Further, once attached, “the police may not interfere with the efforts of a defendant’s attorney to act as a ‘medium’ between [the suspect] and the State’ during the interrogation.”¹¹⁴ Therefore, the commencement of adversary proceedings forecloses the government’s ability to interrogate a defendant without the presence of legal representation.¹¹⁵ Sixth Amendment protections, absent waiver, unquestionably attach after “the first formal charging proceeding,” but not before, even where an attorney-client relationship is triggered.¹¹⁶ Regardless of whether counsel is retained by a suspect, or a member of the suspect’s family, prior to interrogation, the existence of an attorney-client relationship does not itself trigger Sixth

¹¹⁰ U.S. CONST. amend. VI.

¹¹¹ *Brewer v. Williams*, 430 U.S. 387, 398 (1977).

¹¹² *Id.*

The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the ‘criminal prosecutions’ to which alone the explicit guarantees of the Sixth Amendment are applicable.

Kirby, 406 U.S. at 689-90.

¹¹³ *Carnely v. H.G. Cochran, Jr.*, 369 U.S. 506, 513 (1962).

¹¹⁴ *Moran*, 475 U.S. at 428 (quoting *Maine v. Moulton*, 474 U.S. 159, 176 (1985)) (alteration in original).

¹¹⁵ *Brewer*, 430 U.S. at 401.

¹¹⁶ *Moran*, 475 U.S. at 428-29.

Amendment protections.¹¹⁷

The purpose of the Sixth Amendment is to provide the defendant with assistance, by an individual who is well versed in the law, to ensure meaningful representation in the adversarial system.¹¹⁸ On the other hand, the intended function of the Sixth Amendment, “is not to wrap a protective cloak around the attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor.”¹¹⁹

Escobedo v. State of Illinois,¹²⁰ represents the one case that deviated from the Supreme Court’s long running and continued decisional trend that Sixth Amendment protections are not triggered by a suspect’s retention of counsel.¹²¹ In *Escobedo*, an interrogation of the defendant was conducted prior to a formal indictment, during which the defendant was not adequately warned of his “absolute constitutional right to remain silent,” and was denied requests to speak with his attorney.¹²² Without fully understanding the consequences of his self-incrimination, the defendant was urged by police to make statements, and did, out of fear that his silence would equate to guilt.¹²³

The Court found that despite the fact that the interrogation was conducted before a formal indictment, the investigation was no longer “a general investigation of ‘an unsolved crime[,]’ [p]etitioner had become the accused, and the purpose of the interrogation was to ‘get him’ to confess his guilt despite his constitutional right not to do so.”¹²⁴ As such, the Court held that the defendant should have had

¹¹⁷ *Id.* at 430. In *Moran*, the Court held the suspect’s Sixth Amendment protections were not triggered by an attorney-client privilege, where the suspect’s sister contacted an attorney on his behalf, and the attorney contacted the precinct regarding his representation, because it was prior to commencement of the case. *Id.* at 416, 432.

¹¹⁸ *Id.* at 430.

¹¹⁹ *Id.*

¹²⁰ 378 U.S. 478 (1964).

¹²¹ *Kirby*, 496 U.S. at 689.

¹²² *Escobedo*, 378 U.S. at 490-91.

¹²³ *Id.* at 485-86.

¹²⁴ *Id.* at 485. “One can imagine a cynical prosecutor saying: ‘Let them have the most illustrious counsel, now. They can’t escape the noose. There is nothing that counsel can do for them at trial.’” *Id.* at 488 (quoting *Ex Parte Sullivan*, 107 F. Supp. 514, 517-18 (D.U.T. 1952)). As the Court whimsically stated “[w]e have learned the lesson of history, ancient and modern, that a system of criminal law enforcement[] which comes to depend on the ‘confession’ will, in the long run, be less reliable and more subject to abuses than any system which depends on extrinsic evidence independently secured through skillful investigation.” *Id.* at

the opportunity to consult with his lawyer and that the denied requests for consultation of both the defendant and his attorney violated the defendant's Sixth Amendment right to counsel.¹²⁵ The Court explained, "only when the process shifts from investigatory to accusatory – when its focus is on the accused and its purpose is to elicit a confession – our adversary system begins to operate, and . . . the accused must be permitted to consult with his lawyer."¹²⁶

The Supreme Court later reconciled *Escobedo* in *Moran* by claiming that the primary purpose of the *Escobedo* decision was not to vindicate the Sixth Amendment right to counsel, but rather to "guarantee full effectuation of the privilege against self-incrimination[.]"¹²⁷ In *Moran*, previously discussed with respect to waiver of *Miranda* rights,¹²⁸ the defendant argued, relying largely on *Escobedo*, that his Sixth Amendment right to counsel had been violated when police continued his interrogation, after, unbeknownst to him, counsel had been retained on his behalf.¹²⁹ The defendant claimed that interrogation, much like formal proceedings, should trigger the attorney-client privilege since it represents a critical stage in adversarial proceedings, during which time "police questioning often seal[s] a suspect's fate[.]"¹³⁰ The Court in *Moran*, however, dismissed the defendant's argument as both "practically and theoretically unsound[.]" and aside from *Escobedo*, ruled consistent with precedent, that the Sixth Amendment protections do not attach until the initiation of judicial proceedings.¹³¹

488-89.

¹²⁵ *Escobedo*, 378 U.S. at 490-91.

¹²⁶ *Id.* at 492. The Court discussed that history "shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence" to solidify a conviction. *Id.* at 490. History has also shown that the criminal justice system cannot, nor should it, survive "if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. *Id.* Where the effectiveness of a system is based on preventing an accused from consulting with an attorney in order to keep her from becoming fully aware of her constitutional rights, this is a system that is not worth preserving. *Id.*

¹²⁷ *Moran*, 475 U.S. at 429.

¹²⁸ See *supra* notes 98-109.

¹²⁹ *Moran*, 475 U.S. at 428-30.

¹³⁰ *Id.* at 428-29, 431.

¹³¹ *Id.* at 430.

V. WAIVER OF THE SIXTH AMENDMENT RIGHT TO COUNSEL

Similar to the requirements for a valid waiver of a suspect's Fifth Amendment right to counsel, a proper waiver of a suspect's Sixth Amendment right to counsel requires an intentional relinquishment and a full awareness of the nature and consequences of the waiver of that right.¹³²

[W]hen a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick, even though the *Miranda* rights purportedly have their source in the *Fifth* Amendment: "As a general matter . . . an accused who is admonished with the warnings prescribed by this Court in *Miranda* . . . has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one."¹³³

The Court in *Patterson v. Illinois*¹³⁴ provided the inquiry as follows: "[w]as the accused, who waived his Sixth Amendment rights during postindictment questioning, made sufficiently aware of his right to have counsel present during the questioning, and of the possible consequences of a decision to forego the aid of counsel?"¹³⁵ The Court in *Patterson* rejected the defendant's argument that "the [S]ixth [A]mendment right [to counsel] is far superior to that of the [F]ifth [A]mendment right[.]" with which a greater potential for loss could result from a finding of valid waiver.¹³⁶ As such, the defendant argued the Sixth Amendment is deserving of a more stringent standard to effectuate valid waiver than that of the Fifth Amendment.¹³⁷ While

¹³² *Patterson v. Illinois*, 487 U.S. 285, 292-93 (1988). A "defendant may waive the right whether or not he is already represented by counsel; [and] the decision to waive need not itself be counseled." *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009).

¹³³ *Montejo*, 556 U.S. at 786-87 (quoting *Patterson*, 487 U.S. at 296).

¹³⁴ 487 U.S. 285 (1988).

¹³⁵ *Id.* at 292-93.

¹³⁶ *Id.* at 297.

¹³⁷ *Id.*

the Court has “recognized a difference between the Fifth Amendment and Sixth Amendment rights to counsel, and the policies behind these constitutional guarantees, [they] have never suggested that one right is superior or greater than the other.”¹³⁸ Further, the Court found no support for the defendant’s argument “that because a Sixth Amendment right may be involved, it is more difficult to waive than the Fifth Amendment counterpart.”¹³⁹

The Court in *Patterson* instead, applied a pragmatic approach to resolve the issue of waiver of the Sixth Amendment right to counsel that considers “the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel.”¹⁴⁰ Under this pragmatic analysis, a knowing and voluntary waiver, as required to waive a Fifth Amendment right is also sufficient to waive a Sixth Amendment right to counsel.¹⁴¹ The Court reasoned that postindictment questioning “does not substantially increase the value of counsel to the accused at questioning or expand the limited purposes that an attorney serves when the accused is questioned by authorities.”¹⁴²

VI. NEW YORK’S EXPANSION OF THE SIXTH AMENDMENT RIGHT TO COUNSEL THROUGH REASONING REMINISCENT OF *MIRANDA*

Miranda has been fully adopted by New York courts as it is consistent with article I § 6 of the New York Constitution.¹⁴³ How-

¹³⁸ *Id.* (internal quotation marks omitted).

¹³⁹ *Patterson*, 487 U.S. at 297-98.

¹⁴⁰ *Id.* at 298.

¹⁴¹ *Id.* at 300.

¹⁴² *Id.* at 298-99.

¹⁴³ *Paulman*, 833 N.E.2d at 244. Applicable parts of the New York State Constitution reads: “No person shall . . . be compelled in any criminal case to be a witness against himself or herself . . . [n]o person shall be deprived of life, liberty, or property without due process of law.” N.Y. CONST. art. 1, § 6. *Miranda* “protects the privilege against self-incrimination and ‘because the privilege applies only when an accused is “compelled” to testify, the safeguards required by *Miranda* are not triggered unless a suspect is subject to “custodial interrogation.”’ ” *Paulman*, 833 N.E.2d at 243 (quoting *People v. Berg*, 708 N.E.2d 979, 981 (N.Y. 1999)). New York courts adopted the objective test, of “whether a reasonable person innocent of any wrongdoing would have believed that he or she was not free to leave” to determine an individual’s custodial status. *Id.* New York further follows, under *Miranda*, that

ever, the New York Court of Appeals has “recognized that the State Constitution may provide rights broader than those guaranteed under the Fifth Amendment.”¹⁴⁴ Specifically, with respect to the right to counsel, New York views this right “as a cherished and valuable protection that must be guarded with the utmost vigilance.”¹⁴⁵ Accordingly, the New York Court of Appeals “construe[s] the right to counsel coupled with the privilege against self-incrimination and due process under the state constitution more liberally than the Supreme Court of the United States has interpreted parallel provisions of the federal constitution.”¹⁴⁶ New York’s constitutional right to counsel not only extends well beyond that of the Sixth Amendment of the United States Constitution, it also affords the most extensive protection against self-incrimination than any other jurisdiction in the country.¹⁴⁷

New York considers the right to counsel “indelible[.]”¹⁴⁸ Once the right attaches, a suspect may not be questioned unless the right is affirmatively waived in the presence of her attorney.¹⁴⁹ Af-

the term “interrogation” is not limited to refer strictly to express questioning, but also refers to “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response[.]” *Id.* at 244.

¹⁴⁴ *Id.* New York recognizes broader rights than those protected under the Fifth Amendment “[i]n cases involving successive interrogations where a Mirandized statement was preceded by an improper, unwarned admission . . .” *Id.*

¹⁴⁵ *People v. Lopez*, 947 N.E.2d 1155, 1158 (N.Y. 2011).

¹⁴⁶ N.Y. CRIM. PRACTICE 2-23 § 23.05. “[W]e live in a federal system where the States remain free, as a matter of policy or state constitutional law, to raise the floor of individual rights that the U.S. Constitution sets.” Brooks Holland, *A Relational Sixth Amendment During Interrogation*, 99 CRIM. L. CRIMINOLOGY 381, 428 (2009) (citing *Oregon v. Hass*, 420 U.S. 714, 719 (1975)). The United States Supreme Court’s decisions interpreting the United States Constitution “are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law.” William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

¹⁴⁷ N.Y. CRIM. PRACTICE 2-23 § 23.05. See Peter J. Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 SYRACUSE L. REV. 731, 764 (1982) (discussing New York’s expansive view on the right to counsel which “constitute[s] the strongest protection of [the] right to counsel anywhere in the country”).

¹⁴⁸ *Borukhova*, 931 N.Y.S.2d at 364. See *People v. Grice*, 794 N.E.2d 9, 10 (N.Y. 2003) (noting that the “indelible right to counsel arises from the provision of the State Constitution that guarantees due process of law, the right to effective assistance of counsel and the privilege against compulsory self-incrimination”).

¹⁴⁹ *Borukhova*, 931 N.Y.S.2d at 364. Once this indelible right attaches, “New York law protects the attorney-client relationship assiduously.” Holland, *supra* note 146, at 430.

fording “an indelible right to counsel to an individual facing the prospect of police questioning once an attorney has entered the case serves the important function of ensuring that any waiver of the right is truly knowing and intelligent.”¹⁵⁰ This requirement further ensures, at the bare minimum, that the defendant has received the advice of counsel before making the determination to surrender her legal rights.¹⁵¹

Under the New York Constitution, the indelible right to counsel can attach in two ways.¹⁵² First, similar to the federal interpretation of the Sixth Amendment, the right will automatically attach at the commencement of a criminal proceeding, namely when an accusatory instrument is filed against the defendant, regardless of whether an attorney has been retained or requested.¹⁵³ This means of attachment parallels the federal application of the Sixth Amendment, recognizing that “when formal judicial proceedings commence, ‘the character of the police function shifts from investigatory to accusatory’ and the assistance of counsel becomes ‘indispensable[.]’”¹⁵⁴

Under the second and more controversial means, “[t]he right to counsel can also attach prior to the commencement of formal proceedings when a person in custody asks to speak to an attorney, or when an attorney enters the case to represent an uncharged individual.”¹⁵⁵ Beginning with the landmark case of *People v. Donovan*,¹⁵⁶ New York’s expansive interpretation of the right to counsel emerged in response to the growing need to protect criminal suspects from police abuse during pre-arraignment and pre-indictment questioning.¹⁵⁷

In *Donovan*, the police elicited a written confession from the accused after refusing to allow him to confer with the attorney retained on his behalf and who was physically present at the police station.¹⁵⁸ In this pre-*Miranda* decision, the Court in *Donovan*, “looking to the privilege against self-incrimination and the right to due

¹⁵⁰ *Borukhova*, 931 N.Y.S.2d at 366.

¹⁵¹ N.Y. CRIM. PRACTICE 2-23 § 23.05.

¹⁵² *Lopez*, 947 N.E.2d at 1158.

¹⁵³ *Borukhova*, 931 N.Y.S.2d at 364.

¹⁵⁴ *People v. Claudio*, 447 N.Y.S.2d 972, 978 (App. Div. 2d Dep’t 1982).

¹⁵⁵ *Borukhova*, 931 N.Y.S.2d at 364.

¹⁵⁶ 193 N.E.2d 628 (N.Y. 2003).

¹⁵⁷ *Claudio*, 447 N.Y.S.2d at 979.

¹⁵⁸ *Donovan*, 193 N.E.2d at 629.

process, held that a person in custody and represented by an attorney cannot waive his rights outside the presence of his attorney, despite the fact that no judicial proceedings had taken place.”¹⁵⁹ The Court in *Donovan* further condemned the continued interrogation of the accused as contravening “the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime.”¹⁶⁰

Therefore, New York follows the rule that once the police have actual or constructive knowledge that either “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[.]”¹⁶¹ There is no requirement that an attorney who contacts the police department to give notice of her representation speak with an actual police officer, even a civilian phone operator is sufficient to put the police on notice of the attorney’s representation.¹⁶² However, absent such communication, as seen in instances where third party individuals, family, friend, or otherwise, inform an officer of an attorney’s involvement, there is no obligation on the part of the questioning officer to discontinue, or refrain from conducting an interrogation.¹⁶³

Further, the status of attorney representation is not based on who retained the representation, as an attorney can be retained by the

¹⁵⁹ *Claudio*, 447 N.Y.S.2d at 979.

¹⁶⁰ *Donovan*, 193 N.E.2d at 630.

“The predicates for [the second] branch of the counsel rule,” the Court of Appeals emphasized in . . . language strikingly reminiscent of *Miranda* “are fundamental fairness, the belief that an attorney’s presence is the most effective means of minimizing the disadvantage of the accused person in custody, and the recognition that an unrepresented defendant in custody, who has requested an attorney has indicated his own belief that without legal advice he is not competent to deal with those in whose custody he is being held.”

Robert O., 439 N.Y.S.2d at 1003 (quoting *People v. Kazmarick*, 420 N.E.2d 45, 48 (N.Y. 1981)).

¹⁶¹ *People v. Arthur*, 239 N.E.2d 537, 539 (N.Y. 1968). For New York’s indelible right to attach, an attorney can enter the case “by actually appearing or directly communicating with the police by telephone.” *Borukhova*, 931 N.Y.S.2d at 364. Direct communication can also be made by a professional associate of the attorney speaking on the attorney’s behalf. *Grice*, 794 N.E.2d at 13.

¹⁶² *People v. Pinzon*, 377 N.E.2d 721, 724-25 (N.Y. 1978).

¹⁶³ *Grice*, 794 N.E.2d at 13.

suspect herself or by the suspect's family.¹⁶⁴ It is a common practice for family members to retain counsel on behalf of the accused, and absent an unequivocal rejection of the representation, the court impliedly assumes the existence of an attorney-client relationship.¹⁶⁵ In addition, the attachment of the right to counsel does not require the defendant to sign a formal retainer with her attorney, such a requirement has been held to be nothing more than arbitrary and mechanical.¹⁶⁶

Regardless of whether the individual is in police custody, once there is marked attorney involvement in a case on behalf of the suspect, all police questioning on that matter must cease.¹⁶⁷ The cessation of questioning should be automatic and does not require the suspect's attorney to explicitly request that the police discontinue the questioning of her client.¹⁶⁸ New York has expanded the right to counsel so far that even where an accused is represented by an attorney on an unrelated matter, as seen in *People v. Rogers*¹⁶⁹ the court has held, the police may not question the accused or attempt to elicit statements beyond what is required for processing.¹⁷⁰

New York's expansive interpretation of the right to counsel was illustrated in *Borukhova*. Despite finding that the defendant's statements were not obtained in violation of her *Miranda* rights since she was not formally subjected to custodial interrogation, and thereby never triggered the police's obligation to Mirandize, the Appellate Division found that the statements obtained at the police precinct were in violation of her right to counsel.¹⁷¹ The defendant's sister contacted an attorney on the defendant's behalf, and despite not signing a formal retainer, once the attorney contacted the police precinct and advised the telephone operator of his representation, under New York law, the right to counsel attached.¹⁷² Accordingly, the court held that even though the defendant stated that she did not know the

¹⁶⁴ *Borukhova*, 931 N.Y.S.2d at 364.

¹⁶⁵ *Id.* at 366.

¹⁶⁶ *Grice*, 794 N.E.2d at 11.

¹⁶⁷ *Lopez*, 947 N.E.2d at 1158.

¹⁶⁸ *People v. Garofolo*, 389 N.E.2d 123, 126 (N.Y. 1979).

¹⁶⁹ 397 N.E.2d 709 (N.Y. 1979).

¹⁷⁰ *Id.* at 713.

¹⁷¹ *See supra* notes 48-55.

¹⁷² *See supra* note 54.

attorney nor personally retain him, any waiver of her indelible right to counsel, subsequent to the attorney entering the case, must be made in the presence of such counsel.¹⁷³

VII. PEOPLE V. BORUKHOVA THROUGH THE SCOPE OF NEW YORK'S EXPANSIVE VIEW OF THE RIGHT TO COUNSEL AS COMPARED TO THE FEDERAL COURT'S NARROW VIEW WHICH SERVES TO UNDERMINE THE ATTORNEY-CLIENT PRIVILEGE

The right to the presence of counsel during interrogation is rooted in the constitutional protections found in the Fifth and Sixth Amendments.¹⁷⁴ However, the right to counsel found in the Fifth and Sixth Amendments protect a criminal defendant “at separate stages of the criminal process.”¹⁷⁵ The Fifth Amendment protections apply at any stage of a criminal proceeding, whether pre-or-post indictment, where the individual is subjected to custodial interrogation, and are intended to protect against the inherently compulsory and coercive nature of those interrogations.¹⁷⁶ Whereas the Sixth Amendment protections only apply after an individual has been formally charged, and is intended to protect “an accused’s right to have legal representation when the government communicates with her.”¹⁷⁷

The Court has recognized that the Sixth Amendment right to counsel automatically attaches at the initiation of a criminal proceeding against an accused to ensure a fair trial, including at the “critical” pretrial stages.¹⁷⁸ This extension of the right to pre-trial stages focuses on the fact that “the accused is confronted, just as at trial, by his expert adversary in a situation where the results of the confrontation may settle the accused’s fate and reduce the trial to a mere formali-

¹⁷³ See *supra* notes 33, 54-55.

¹⁷⁴ Daniel C. Nester, *Distinguishing Fifth and Sixth Amendment Rights to Counsel During Police Questioning*, 16 S. ILL. U. L.J. 101, 102 (1991). Both the Fifth and Sixth Amendments are applicable to state proceedings through the Fourteenth Amendment. *Id.* at n.15, 16.

¹⁷⁵ *Id.* at 102.

¹⁷⁶ *Id.* at 102-03.

¹⁷⁷ *Id.* “The Sixth Amendment right to counsel, therefore, preserves an accused’s choice to communicate with police only through counsel.” Nester, *supra* note 174, at 103-04.

¹⁷⁸ *Id.* at 102-03, 108.

ty.”¹⁷⁹ In *Escobedo*, although the Court essentially took an ad hoc approach in deciding this case, the majority recognized that “most confessions are obtained during the period between arrest and indictment” and therefore “this period points up its critical nature as a ‘stage when legal aid and advice’ are surely needed.”¹⁸⁰ Despite this revelation, the Court maintains that the Sixth Amendment right to counsel does not attach absent overtly accusatorial pre-trial stages, namely the filing of a formal criminal charge.¹⁸¹

As such, under the federal interpretation of the right to counsel, an individual who is not clearly subject to custodial interrogation, nor faced with a formal criminal charge, may be left without protection during police questioning. In *Borukhova*, consistent with both New York State and federal laws, the court found the defendant was not subject to custodial interrogation and thus, her Fifth Amendment rights were not triggered.¹⁸² However, unlike New York law, if *Borukhova* was decided under federal law, the court would likely find that the defendant’s Sixth Amendment right to counsel was not triggered either. As such, under federal law, even though counsel was obtained on the defendant’s behalf prior to interrogation, assumedly because the defendant’s sister saw a need for representation, the defendant would have likely been left without any constitutional protections against self-incrimination. This fact is especially unsettling because even though the defendant’s questioning did not formally constitute custodial interrogation, one could infer from the totality of the circumstances surrounding the questioning that at the precinct, the police questioning transformed from investigatory to accusatory.

As Justice Marshall has personally recognized, “in certain situations an individual’s right to counsel is triggered before the formal

¹⁷⁹ *Id.* at 108. Where the Sixth Amendment traditionally only applied to the trial stages of a proceeding in order to protect an accused’s procedural rights, the Court extended the application to pretrial stages to protect an accused’s substantive rights. *Id.*

¹⁸⁰ *Escobedo*, 378 U.S. at 488 (quoting *Massiah v. United States*, 377 U.S. 201, 204 (1964)). As the Court whimsically stated in *Escobedo*, “[w]e have learned the lesson of history, ancient and modern, that a system of criminal law enforcement[] which comes to depend on the ‘confession’ will, in the long run, be less reliable and more subject to abuses than any system which depends on extrinsic evidence independently secured through skillful investigation.” *Id.* at 488-89.

¹⁸¹ Nester, *supra* note 174, at 109.

¹⁸² See *supra* notes 49-50.

initiation of adversary judicial proceedings.”¹⁸³ He continued, “[t]his recognition has stemmed from an appreciation that the government can transform an individual into an ‘accused’ without officially designating him as such through the ritual of arraignment.”¹⁸⁴ To protect the defendant from potentially harmful questioning, consistent with *Escobedo*, an attorney-client relationship should trigger a defendant’s Sixth Amendment right to counsel to protect the defendant from self-incrimination.¹⁸⁵

While the purpose of the Sixth Amendment right to counsel is not to “wrap a protective cloak around the attorney-client relationship” the government disregarding an existing attorney-client relationship would undermine the sanctity of the relationship itself.¹⁸⁶ The Court has recognized that “[o]nce an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect,”¹⁸⁷ and yet, the federal interpretation of the Sixth Amendment right to counsel, in effect somewhat ironically “undermine[s] the practical import of the right to counsel in the interrogation context by undervaluing the attorney-relationship itself.”¹⁸⁸ If the State is allowed to interrogate an accused without counsel, “there is no denying the fact that [this] largely negates the benefits of the constitutional guaranty of the right to assistance of counsel.”¹⁸⁹

The Sixth Amendment protections are intended to ensure a criminal defendant receives a fair trial, and yet more than ninety per-

¹⁸³ United States v. Gouveia, 467 U.S. 180, 199 (1984) (Marshall, J., dissenting).

¹⁸⁴ *Id.*

¹⁸⁵ Our system is accusatorial, not inquisitorial in nature. *Moran*, 475 U.S. at 434 (Stevens, J., dissenting). Under this system, the burden is on society to prove “its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation.” *Id.* at n.1. Further, “protracted, systematic and uncontrolled subjection of an accused to interrogation by the police for the purpose of eliciting disclosure or confession is subversive of the accusatorial system.” *Id.* See also *Escobedo*, 378 U.S. at 488-89 (stating that a system “which comes to depend on the ‘confession’ will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.”)

¹⁸⁶ See *supra* note 119.

¹⁸⁷ *Texas v. Cobb*, 532 U.S. 162, 181 (2001) (Breyer, J., dissenting).

¹⁸⁸ Holland, *supra* note 146, at 381.

¹⁸⁹ *Moran*, 475 U.S. at 436 n.5.

cent of criminal cases are resolved without ever being tried.¹⁹⁰ Because criminal defendants “rarely face their accusers during traditional courtroom proceedings that pit skilled trial lawyers against each other[.]” most clients’ fates are determined through their defense attorneys “telephone calls, meetings, and investigations, and by advising a client effectively on how properly to limit the scope or strength of a prosecution[.]”¹⁹¹ The defendant’s obvious goal in mind is “to achieve the best disposition possible.”¹⁹² “Perhaps in no pretrial context can th[e] advise of counsel matter more than during an interrogation, where cases and deals often can be won or lost.”¹⁹³ To deny an individual the right to the presence of an attorney during interrogation could in effect “make the trial no more than an appeal from the interrogation; and the right to use counsel at the formal trial [] a very hollow thing.”¹⁹⁴ Still, “the [United States] Supreme Court’s current right to counsel jurisprudence profoundly minimizes the importance of the attorney-client relationship during [] pretrial interrogation.”¹⁹⁵

Further, because the Sixth Amendment right to counsel is not self-actuating, once triggered, even by way of a formal charge, it can be waived without the presence of counsel.¹⁹⁶ As such, by “improperly gaug[ing] Sixth Amendment problems by a counter-textual freewill theory of client decision-making imported from Fifth Amendment *Miranda* jurisprudence[.]” it is clear the Court undervalues the defense attorney’s role during interrogations.¹⁹⁷ “Further, the Supreme Court largely gutted the notion that counsel’s constitutional value to a client extends beyond the four corners of the charging instrument when the Court declared that the right to counsel is offense specific, with *offense* defined narrowly[.]”¹⁹⁸ This interpretation has the practical effect of allowing for law enforcement to work around any pre-existing attorney-client relationship so they can “question a charged defendant about nearly anything, up to and including the

¹⁹⁰ Holland, *supra* note 146, at 381-82.

¹⁹¹ *Id.* at 382.

¹⁹² *Id.*

¹⁹³ *Id.* at 384.

¹⁹⁴ *Escobedo*, 378 U.S. at 487.

¹⁹⁵ Holland, *supra* note 146, at 384.

¹⁹⁶ *Id.* at 385.

¹⁹⁷ *Id.* at 386.

¹⁹⁸ *Id.* at 385.

precise factual subject of filed charges.”¹⁹⁹ Yet, despite all of this, with the one exception of *Escobedo*, the Supreme Court has consistently read that the Sixth Amendment right to counsel is not triggered prior to the initiation of formal criminal proceedings even by an existing attorney-client relationship.²⁰⁰

On the other hand, New York’s expansive interpretation of the right to counsel provides vital safeguards to protect a criminal defendant or accused from self-incrimination. New York, based on principles that closely mirror the fundamental considerations for the adoption of *Miranda* rights, recognizes the need for additional protections even prior to the commencement of formal proceedings.²⁰¹ The New York interpretation of the right to counsel protections recognizes that statements elicited by police, even prior to a formal arraignment or indictment, could seal a defendant’s fate and essentially render the federal court’s application of the right to counsel protections useless.²⁰² In the case of *Borukhova*, the Appellate Division upheld the defendant’s conviction, finding that her statements made at the police precinct should have been suppressed, but nevertheless constituted harmless error in light of the overwhelming evidence against her.²⁰³ But that is not to say that had the evidentiary factors of *Borukhova* been different, the statements the defendant made to the police could have alone been enough to seal her fate.

VIII. CONCLUSION

The federal interpretation of the right to counsel leaves a criminal defendant without protections against self-incrimination at vital pre-trial stages of a prosecution. Prior to the formal commencement of judicial proceedings, the government may be able to evade an individual’s constitutional rights, and elicit self-incriminating statements that turn the actual trial into nothing more than a formality. New York’s application of the right to counsel, as

¹⁹⁹ *Id.*

²⁰⁰ *See supra* notes 115-16.

²⁰¹ *See supra* notes 154-59.

²⁰² *See supra* notes 154-56, 177-79.

²⁰³ *See supra* notes 53-56.

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an indelible right of the highest importance, better represents the needs of a criminal defendant for protection against the system. An individual's right against self-incrimination, would be best served if all courts followed New York's approach and extended an indelible right to counsel to all accused, even if prior to the formal commencement of criminal proceedings.

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