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Right to Counsel

of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,'" and who must be accorded 'compulsory process for obtaining witnesses in his favor.'"[41] "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."[42]

SUPREME COURT

KINGS COUNTY

People v. Isaacs[43]
(printed August 1, 1994)

Defendant claimed that under the New York State Constitution[44] his right to counsel attached while he awaited arraignment on older charges that were unrelated to the present charge of murder in the second degree.[45] The defendant asserted that his right to counsel could not be waived once it attached, thus any subsequent inculpatory statements elicited from him by the police should have been suppressed.[46] Supreme Court, Kings County held that the right to counsel did not attach prior to arraignment while the defendant was in police custody.[47] The court found that there had been no significant judicial activity which would have triggered defendant's right to counsel, and that as such, the incriminating statements made by defendant to police should not have been suppressed.[48]

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41. *Id.* at 819.
42. *Id.* at 819-20.
43. N.Y. L.J., Aug. 1, 1994, at 25 (Sup. Ct. Kings County 1994).
44. N.Y. CONST. art. I, § 6 (McKinney 1987). Section 6 provides in pertinent part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel . . . ." *Id.*
45. *Isaacs*, N.Y. L.J., Aug. 1, 1994, at 25.
46. *Id.*
47. *Id.*
48. *Id.*

On July 30, 1992, the defendant was identified as a suspect of a homicide, which had occurred the previous day.[49] The witness had picked the defendant out of a group of six photos shown to him by police.[50]

On August 28, 1992, the detectives investigating the murder learned that the defendant was in police custody, awaiting arraignment on an unrelated charge in criminal court.[51] Prior to the arraignment, the detectives took the defendant for interrogation and advised him of his *Miranda* rights.[52] The defendant waived his rights and subsequently gave the police an unsigned, inculpatory, written statement.[53] Shortly thereafter, the defendant requested an attorney and the interrogation ceased.[54]

The defendant claimed that his right to counsel could not have been waived, since this right automatically attached while he awaited arraignment on the older charge.[55] Thus, the defendant argued, any statements made without the benefit of counsel must be suppressed.[56]

The defendant further contended that there was a purposeful and unnecessary delay in his arraignment, specifically orchestrated so the police could obtain his confession without his

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49. *Id.*

50. *Id.*

51. *Id.*

52. *Id. See* Miranda v. Arizona, 384 U.S. 436 (1966). In *Miranda*, the Supreme Court held that any inculpatory or exculpatory statements obtained from a defendant, during a custodial interrogation, without the defendant having been given full warning of his constitutional rights, are inadmissible as having been obtained in violation of the Fifth Amendment privilege against self-incrimination. *Id.* at 444.

53. *Isaacs*, N.Y. L.J., Aug. 1, 1994, at 25.

54. *Id.* Following the interrogation, the police conducted a line-up in which the defendant was again identified as the subject seen leaving the scene of the Brooklyn homicide. *Id.* This line up identification was made by the same witness who had made the previous photo array identification leading to the arrest in question. *Id.* Later that same day, the defendant was again identified by a second witness from a photo array. *Id.*

55. *Id.*

56. *Id.*

attorney being present.[57] Therefore, the defendant claimed, this delay should have automatically triggered his right to counsel.[58]

The court, in analyzing the defendant's contentions, had to determine at what point in the arrest process the right to counsel attached.[59] In *People v. Rogers*,[60] the New York Court of Appeals acknowledged that a defendant must be protected against the "awesome and sometimes coercive force of the State."[61] Further, the court found that the notification by, or presence of, an attorney "serves to equalize the positions of the accused and sovereign, mitigating the coercive influence of the State and rendering it less overwhelming."[62] The *Rogers* court then concluded that "once an attorney has entered the proceeding . . . a defendant, in custody, may not be further interrogated in the absence of counsel."[63] Thus, after notice has been given by counsel to cease interrogation, any inculpatory statements elicited from the defendant, without the presence of counsel, must be suppressed.[64]

The defendant's right to counsel may also attach, automatically, at some point prior to actual notice being given by an attorney. In *People v. Samuels*,[65] it was acknowledged that

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57. *Id.*

58. *Id.* The defendant also contended that both the line up and the photo array used in his identification were unduly suggestive, and should be suppressed. *Id.*

59. *Id.*

60. 48 N.Y.2d 167, 397 N.E.2d 709, 422 N.Y.S.2d 18 (1979). The defendant in *Rogers*, a youth of limited education, was held in police interrogative custody for six hours in connection with the robbery of a liquor store. *Id.* at 174, 397 N.E.2d at 713, 422 N.Y.S.2d at 22. The defendant had given the police an inculpatory statement on an unrelated matter, following notification by defendant's attorney instructing the police to cease interrogation. *Id.* at 170, 397 N.E.2d at 711, 422 N.Y.S.2d at 20.

61. *Id.* at 173, 397 N.E.2d at 713, 422 N.Y.S.2d at 22.

62. *Id.*

63. *Id.* at 169, 397 N.E.2d at 710-11, 422 N.Y.S.2d at 19.

64. *Id.* at 173, 397 N.E.2d at 713, 422 N.Y.S.2d at 22.

65. 49 N.Y.2d 218, 400 N.E.2d 1344, 424 N.Y.S.2d 892 (1980). The defendant was arrested on a warrant charging him with robbery. *Id.* at 220, 400 N.E.2d at 1345, 424 N.Y.S.2d at 893. Prior to his arraignment, the

defendant's right to counsel attaches at the commencement of a criminal action[66] or at any critical stage of a criminal prosecution, and may also attach when there has been "significant judicial activity."[67] In *Samuels*, the filing of a felony complaint to obtain an arrest warrant was considered by the court to be a significant judicial activity in which the right to counsel attached.[68] Thus, those statements obtained from the defendant in *Samuels*, subsequent to the filing of the criminal complaint, absent counsel, must be suppressed.[69] The New York Court of Appeals has further acknowledged that the filing of an indictment, prior to arraignment, constitutes significant judicial activity in which a defendant's right to counsel attaches.[70]

The *Isaacs* court felt that there had not been any judicial activity in the present case, as defined in *Samuels* or *Settles*.[71] Only routine booking procedures were initiated against Isaacs in both sets of charges.[72] There had been neither an indictment, the

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defendant was questioned without the presence of counsel and gave both oral and written statements implicating himself in the robbery. *Id.*

66. N.Y. CRIM. PROC. LAW § 1.20(17) (McKinney 1992). Section 1.20(17) states in pertinent part: "A criminal action is commenced by the filing of an accusatory instrument against a defendant in a criminal court. . . ." *Id.*

67. *Samuels*, 49 N.Y.2d at 221, 400 N.E.2d at 1345-46, 424 N.Y.S.2d at 894. *See* People v. Coleman, 43 N.Y.2d 222, 371 N.E.2d 819, 401 N.Y.S.2d 57 (1977) (holding a police line-up is a critical stage in which the defendant's right to counsel may be attached).

68. *Samuels*, 49 N.Y.2d at 221, 400 N.E.2d at 1345-46, 424 N.Y.S.2d at 894.

69. *Id.*

70. *See* People v. Settles, 46 N.Y.2d 154, 385 N.E.2d 612, 412 N.Y.S.2d 874 (1978). In *Settles*, the court stated that a "filing of an indictment constitutes the commencement of formal judicial action against the defendant and is equated with the entry of an attorney into the proceeding." *Id.* at 159, 385 N.E.2d at 613-14, 412 N.Y.S.2d at 876. The court then further stated that "a defendant in a postindictment, prearraignment custodial setting, even though not then represented by an attorney, may not in the absence of counsel waive his right to . . . counsel." *Id.*; *see also* People v. Rodriguez, 11 N.Y.2d 279, 183 N.E.2d 651, 229 N.Y.S.2d 353 (1962) (holding that there need be no formal request for counsel following an arraignment or an indictment as such right attaches concurrently with such judicial action).

71. *Isaacs*, N.Y. L.J., August 1, 1995, at 25.

72. *Id.*

filing of an accusatory instrument,[73] nor the issuance of a warrant, all of which would have triggered the defendant's right to counsel.[74]

The court in *Isaacs* was then left to determine if the defendant's right to counsel attached when the defendant was in police custody awaiting arraignment for an unrelated charge. The New York Court of Appeals in *People v. Wilson*,[75] determined that since no accusatory instrument had been prepared or signed, there was no commencement of any criminal action.[76] Thus, the *Wilson* court rejected the defendant's argument that his right to counsel attached simply because he was physically in police custody as he awaited arraignment.[77] In accordance with the *Wilson* decision, the *Isaacs* court held that the right to an attorney does not attach where "[o]nly routine booking procedures

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73. N.Y. CRIM. PROC. LAW § 1.20(1) (McKinney 1992). Section 1.20(1) states in pertinent part: "Accusatory instrument" means an indictment, an information, a simplified information, a prosecutor's information, a superior court information, a misdemeanor complaint or a felony complaint." *Id.*

74. *Isaacs*, N.Y. L.J., Aug. 1, 1994, at 25.

75. 56 N.Y.2d 692, 436 N.E.2d 1321, 451 N.Y.S.2d 719 (1982). Wilson had been booked and processed at the New York Criminal Courts building. *Id.* at 693, 436 N.E.2d at 1321, 451 N.Y.S.2d at 719. Police officers had arrived at the court to sign a complaint against Wilson. *Id.* Prior to the completion of the paperwork, Wilson waived his rights and made inculpatory statements to the officers. *Id.* at 693, 436 N.E.2d at 1322, 451 N.Y.S.2d at 719. Wilson then sought to have those statements suppressed. *Id.*

76. *Id.* at 693-94, 436 N.E.2d at 1322, 451 N.Y.S.2d at 720.

77. *Id.* at 694, 436 N.E.2d at 1322, 451 N.Y.S.2d at 720. *See* People v. Smiley, 100 A.D.2d 294, 475 N.Y.S.2d 533 (3d Dep't 1984) (holding that unless the accused has requested counsel or there has been some significant judicial activity, the right to counsel does not indelibly attach at the completion of the investigatory stage nor the subsequent processing stage of the arrest); People v. Cooper, 101 A.D.2d 1, 475 N.Y.S.2d 660 (4th Dep't 1984). *Cooper* held that there is a constitutional right to counsel when a matter has passed from the investigatory to the prosecutorial stage and a criminal proceeding has commenced. *Id.* at 7, 475 N.Y.S.2d at 665. Such representation is necessary inasmuch as the defendant now "finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Id.*

incidental to a warrantless arrest, which did not involve judicial action, had occurred."[78]

The court then examined defendant's claim that his constitutional right to counsel was triggered by the purposeful and unnecessary delay in his arraignment.[79] The New York State Criminal Procedure Law demands expediency whenever a person has been arrested without a warrant.[80] Any lack of expediency, in filing an accusatory instrument, is prima facie evidence of a suspicious circumstance, which may be deemed to be an unreasonable delay.[81] However, the New York Court of Appeals in *People v. Hopkins*,[82] established that a delay in arraignment is merely one of various factors to consider when evaluating whether or not an automatic right to counsel exists.[83] Where

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78. *Isaacs*, N.Y. L.J., Aug. 1, 1994, at 25. The court continued beyond the facts of *Isaacs*, by discussing the accused's right to counsel during questioning on matters unrelated to the defendant's arrest on a warrant. *Id.* The court noted that "[a] pending unrelated criminal case upon which an arrest warrant has issued does not bar the police from questioning a subject when the suspect does not in fact have counsel on the unrelated charge." *Id.*

79. *Id.*

80. N.Y. CRIM. PROC. LAW 140.20(1) (McKinney 1992). Section 140.20(1) states in pertinent part:

> Upon arresting a person without a warrant, a police officer, after performing without unnecessary delay all recording . . . and other preliminary police duties . . . must . . . without unnecessary delay bring the arrested person . . . before a local criminal court and file therewith an appropriate accusatory instrument charging him with the offense . . . in question.

Id.

81. *Isaacs*, N.Y. L.J., Aug. 1, 1995, at 25. *See* People *ex. rel* Maxian v. Brown, 77 N.Y.2d 422, 570 N.E.2d 223, 568 N.Y.S.2d 575 (1991). The *Brown* court concluded that the prearraignment process should generally be completed within twenty four hours, unless there is a reasonable explanation for the delay. *Id.* at 427, 570 N.E.2d at 225, 568 N.Y.S.2d at 577.

82. 58 N.Y.2d 1079, 449 N.E.2d 419, 462 N.Y.S.2d 639 (1983). The court found that the unexpected discovery of evidence linking Hopkins to two unsolved murders was "more than sufficient justification for postponing the originally scheduled arraignment." *Id.* at 1081, 449 N.E.2d at 420, 462 N.Y.S.2d at 640. The court further stated that "such a delay does not cause the right to counsel to attach automatically." *Id.*

83. *Id.* at 1081, 449 N.E.2d at 420, 462 N.Y.S.2d at 640.

sufficient justification exists to cause a delay of arraignment, the defendant is precluded from invoking his constitutional right to counsel to attach automatically.[84]

The court in *Isaacs* observed that the defendant had presented no evidence showing any such unreasonable or suspicious delay.[85] The court noted that the defendant failed to present any evidence that indicated how much time had lapsed between the first arrest and his initial arraignment.[86] As such, the court denied the motion to suppress the defendant's inculpatory statements.[87]

The New York courts have extended right to counsel protections beyond that of the federal government under the United States Constitution.[88] In *Patterson v. Illinois*,[89] the Supreme Court of the United States held that the existence of a defendant's right to counsel upon indictment need not preclude

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84. *Id. See* People v. Holland, 48 N.Y.2d 861, 863, 400 N.E.2d 293, 294, 424 N.Y.S.2d 351, 352 (1979) (holding that lengthy delay in arraignment, coupled with multiple "periods of prolonged and vigorous interrogation" should lead to suppression of statements made by defendant as they are not made voluntarily).

85. *Isaacs*, N.Y. L.J., Aug. 1, 1994, at 25.

86. *Id.*

87. *Id.* The *Isaacs* court then addressed defendant's claims of undue suggestiveness in the identification process used by the police during their investigation. *Id.* The court subsequently held the defendant had "failed . . . to establish suggestiveness so as to suppress the line up identification[,]" and "the photo array and the line up was more in the nature of a confirmation rather than an identification. . . ." *Id.*

88. The Sixth Amendment of the United States Constitution states in pertinent part: "In 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.

89. 487 U.S. 285 (1988). Following his indictment for murder, and the subsequent voluntary waiving of his *Miranda* rights, Patterson gave statements to the police, without the benefit of counsel, indicating his complicity in the murder. *Id.* at 288. Patterson later sought to have the statements held inadmissible claiming that, although he repeatedly refused to have counsel present, the police were barred from questioning him since his Sixth Amendment right to counsel attached automatically with his indictment. *Id.* at 290.

the police from further interrogation, if the defendant has waived his rights following sufficient *Miranda* warnings.[90]

In conclusion, the New York cases analyzed in *Isaacs* show an expansion of federal rights afforded to defendants in the post indictment phase of prosecution. Specifically, New York provides greater protection than that provided under the Federal Constitution in the sense that according to New York constitutional law, the indelible attachment of right to counsel in post-indictment and post-arraignment settings, the defendant may not, in the absence of representation, waive his right to have counsel present during subsequent phases of the prosecution.

90. *Id.*