



**TOURO UNIVERSITY**  
JACOB D. FUCHSBERG LAW CENTER  
*Where Knowledge and Values Meet*

**Touro Law Review**

---

Volume 8 | Number 1

Article 6

---

1991

## Interaction Between State and Federal Right to Counsel: The Overruling of Bartolomeounsel: The Overruling Of Bartolomeo

Joseph D. Sullivan

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Constitutional Law Commons](#), [Criminal Procedure Commons](#), [Jurisprudence Commons](#), [Law Enforcement and Corrections Commons](#), [State and Local Government Law Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Sullivan, Joseph D. (1991) "Interaction Between State and Federal Right to Counsel: The Overruling of Bartolomeounsel: The Overruling Of Bartolomeo," *Touro Law Review*. Vol. 8: No. 1, Article 6.  
Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol8/iss1/6>

This Notes and Comments is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact [lross@tourolaw.edu](mailto:lross@tourolaw.edu).

## INTERACTION BETWEEN STATE AND FEDERAL RIGHT TO COUNSEL: THE OVERRULING OF *BARTOLOMEO*

### INTRODUCTION

Before the United States Supreme Court gave protection to defendants during the 1960's, New York courts led the country in providing individuals protection by liberally interpreting its own state constitution.<sup>1</sup> However, the recent New York Court of Appeals decision overruling *People v. Bartolomeo*<sup>2</sup> evidences a retreat from expansive defendant protection in New York State.

By its decision, the court of appeals has realigned its interpretation of the state constitution with that of the Supreme Court's interpretation of the Federal Constitution with respect to the right to counsel and its application to the investigation of separate unrelated crimes.<sup>3</sup> In contrast, New York judicial interpretation

---

1. See Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 SYRACUSE L. REV. 731, 764 (1982) [hereinafter *Judicial Activism*]; see also Galie, *State Constitutional Guarantees And Protection of Defendants' Rights: The Case of New York, 1960-1978*, 28 BUFFALO L. REV. 157, 158 (1979).

2. 53 N.Y.2d 225, 423 N.E.2d 371, 440 N.Y.S.2d 894 (1981) (holding that a suspect, represented by counsel on a prior pending charge, may not waive his rights in the absence of counsel and answer questions on new, unrelated charges), *overruled by*, *People v. Bing*, 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990).

3. *Compare* *Edwards v. Arizona*, 451 U.S. 477 (1981) (once an individual requests an attorney during custodial interrogation, all questioning must cease until an attorney is present) *and* *Arizona v. Roberson*, 486 U.S. 675 (1988) (once a suspect requests counsel, police are also prevented from interrogating the individual with respect to separate unrelated crimes) *with* *People v. Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963) (once an individual's request for an attorney has been ignored, any statements obtained by the police would be inadmissible) *and* *People v. Arthur*, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968) (police may not question an individual once an attorney enters the proceedings unless the individual waives his right to counsel in front of his attorney) *and* *People v. Rogers*, 48 N.Y.2d 167, 397 N.E.2d 709, 422 N.Y.S.2d 18 (1979) (once an attorney enters the proceeding the individual may not be questioned about

of the right to counsel in single charge situations continues to offer more protection than its sixth amendment counterpart.<sup>4</sup> Although both courts interpret the attachment of counsel at similar stages,<sup>5</sup> the federal court offers less protection because it finds the right to counsel conditioned upon request<sup>6</sup> during the post-indictment stage. In New York State, the right to counsel automatically attaches at later stages in the criminal prosecution regardless of request.<sup>7</sup> Once the right to counsel has attached, it cannot be waived outside of the attorney's presence.<sup>8</sup>

---

unrelated matters) *and* *People v. Cunningham*, 49 N.Y.2d 203, 400 N.E.2d 360, 424 N.Y.S.2d 421 (1980) (defendant's specific request for counsel also invokes his indelible right to counsel).

4. The sixth amendment to the United States Constitution expressly provides for the right to counsel by stating: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

The New York State Constitution states: "In 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 . . ." N.Y. CONST. art. I, § 6 (emphasis added).

5. *Compare* *Massiah v. United States*, 377 U.S. 201, 206 (1964) (extending right to counsel to pre-trial proceedings) *and* *Michigan v. Jackson*, 475 U.S. 625, 636 (1986) (police prohibited from questioning uncounseled defendant after indictment) *with* *People v. Di Biasi*, 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960) (holding indictment is the critical stage at which the assistance of counsel is indispensable).

6. *Compare* *Michigan v. Jackson*, 475 U.S. 625, 636 (1986) (where the Court limited its holding to situations in which the accused actually requested counsel) *and* *Patterson v. Illinois*, 487 U.S. 285, 290-91 (1988) (sixth amendment could only be activated if the accused expressly exercises his right to have counsel present during post-indictment interrogation) *with* *People v. Rowell*, 59 N.Y.2d 727, 730, 450 N.E.2d 232, 233, 463 N.Y.S.2d 426, 427 (1983) (once a critical stage of the criminal proceeding is reached, the indelible right to counsel attaches regardless of whether the defendant has requested counsel).

7. *See, e.g.,* *People v. Rowell*, 59 N.Y.2d 727, 730, 450 N.E.2d 232, 233, 463 N.Y.S.2d 426, 427 (1983). Once the "critical stage" of a criminal proceeding is reached, the indelible right to counsel attaches regardless of whether the defendant has requested counsel, and the police may then no longer question the defendant unless he waives counsel in his attorney's presence. *Id.*

8. *Id.*; *see also* *People v. Arthur*, 22 N.Y.2d 325, 329, 239 N.E.2d 537, 539, 292 N.Y.S.2d 663, 666 (1968) (once an attorney enters the proceeding,

Moreover, New York also provides greater protection for the uncharged individual subject to custodial interrogation. In contrast to federal interpretation of the fifth amendment, once the accused has requested or retained counsel in New York, there can be no elicitation of waiver of the right to counsel in the absence of counsel.<sup>9</sup>

Part I of this Comment looks at the Supreme Court's decisions involving the right to counsel with respect to the fifth and sixth amendment. A separate analysis of single charge situations and unrelated separate charge situations is also provided.<sup>10</sup> Part II

---

police may not question the individual unless he waives his right to counsel in front of his attorney); *People v. Cunningham*, 49 N.Y.2d 203, 210, 400 N.E.2d 360, 364-65, 424 N.Y.S.2d 421, 425 (1980) (defendant's specific request for counsel invokes his indelible right to counsel).

9. Compare *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (waiver of counsel subsequent to attorney entrance is allowed as long as the defendant knowingly and intelligently waives the right) and *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981) (A request for counsel bars further interrogation "unless the accused himself initiates further communications, exchanges or conversations with the police.") (emphasis added) with *People v. Arthur*, 22 N.Y.2d 325, 329, 239 N.E.2d 537, 539, 292 N.Y.S.2d 663, 666 (1968) (once an attorney enters the proceeding an individual may not be questioned outside the attorney's presence unless the individual waives his right in front of his attorney) and *People v. Cunningham*, 49 N.Y.2d 203, 205, 400 N.E.2d 360, 361, 424 N.Y.S.2d 421, 422 (1980) (protection extended to situations where individual specifically requests counsel).

In addition, the Supreme Court has liberally interpreted waiver. See, e.g., *Connecticut v. Barret*, 479 U.S. 523, 529 (1987) (where the Court found the defendant's right to counsel limited by its terms to the making of written statements and did not prohibit police from obtaining oral statements); *Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983) (where the Court found the defendant's comment of "[w]ell, what's going to happen to me now?," constituted an initiation of communication equivalent to waiver).

10. The author uses the term "single charge" to generally refer to the situation where the defendant's attorney attempts to suppress or objects to the use of incriminating statements, obtained after the defendant has been arrested on a particular charge and is questioned about that charge in the absence of an attorney subsequent to the attachment of the right to counsel. See, e.g., *Edwards v. Arizona*, 451 U.S. 477 (1981) (where defendant was subjected to continued interrogation in the absence of counsel in spite of his request for counsel); *People v. Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963) (where it was held that statements obtained by police

traces the history of the right to counsel in New York by analyzing the *Rogers-Bartolomeo* rule<sup>11</sup> and the problems it created for the courts.<sup>12</sup> Part III discusses the recent overruling

---

after defendant's attorney called and requested to see him were obtained in violation of the state constitution).

"Unrelated charge or matter" refers to the situation where the defendant has been arrested on a particular charge and subsequent to the attachment of the right to counsel in the context of a single arrest, the police shift focus and question the defendant about an unrelated matter or charge, thereby eliciting incriminating statements. *See, e.g., Arizona v. Roberson*, 486 U.S. 675 (1988) (where defendant was arrested for burglary, requested an attorney but made incriminating statements about the burglary after being questioned about an unrelated matter three days later while he was still in custody); *People v. Rogers*, 48 N.Y.2d 167, 397 N.E.2d 709, 422 N.Y.S.2d 18 (1979) (where defendant in custody was represented by counsel on robbery but after continued questioning about an unrelated matter made incriminating statements about the robbery).

"Separate unrelated charge" refers to the situation where a defendant has invoked the right to counsel and is released while that matter is pending, usually after indictment. Subsequently, defendant is arrested and questioned about a new and different crime. That is, the questioning about the unrelated crime occurs in the context of a separate arrest. *See, e.g., Maine v. Moulton*, 474 U.S. 159 (1985) (where defendant was indicted for theft, released and placed under electronic surveillance for murder which revealed incriminating statements about the theft); *People v. Bartolomeo*, 53 N.Y.2d 225, 423 N.E.2d 371, 440 N.Y.S.2d 894 (1981) (where defendant was represented on a pending arson charge but was re-arrested and questioned about an unrelated homicide subsequent to a waiver of his right to counsel on the homicide).

11. *People v. Rogers*, 48 N.Y.2d 167, 397 N.E.2d 709, 422 N.Y.S.2d 18 (1979); *People v. Bartolomeo*, 53 N.Y.2d 225, 423 N.Y.2d 371, 440 N.Y.S.2d 894 (1981). The holdings of these two cases are collectively referred to as the *Rogers-Bartolomeo* rule. *See, e.g., People v. Bertolo*, 65 N.Y.2d 111, 116, 480 N.E.2d 61, 64, 490 N.Y.S.2d 475, 478-79 (1985) (rule recognized as "so-called indelible right to counsel as enunciated by this court in *People v. Rogers* . . . and *People v. Bartolomeo*.").

12. *See People v. Bing*, 76 N.Y.2d 331, 350, 558 N.E.2d 1011, 1022, 559 N.Y.S.2d 474, 485 (1990). The court in describing the *Bartolomeo* rule stated: "[T]here is little to be said for a rule which is not firmly grounded on prior case law, cannot be applied uniformly, favors recidivists over first time arrestees, and exacts such a heavy cost from the public." *Id.* *See also Abramovsky, The Right To Counsel: Part I*, N.Y.L.J., Aug. 30, 1990, at 3, col. 4.

of *Bartolomeo* by the court of appeals in *People v. Bing*.<sup>13</sup> It concludes with a factual comparison of New York<sup>14</sup> and federal treatment of the right to counsel,<sup>15</sup> which illustrates the use of divergent paths to similar positions with respect to the right to counsel and its application to police questioning about unrelated matters.<sup>16</sup>

---

13. 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990).

14. While the fifth and sixth amendments were made applicable to the states under the fourteenth amendment in *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) and *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963), New York State courts have not only gone beyond such requirements, but have explicitly based its decisions on the state constitution. See, e.g., *People v. Rodriguez*, 11 N.Y.2d 279, 284, 183 N.E.2d 651, 652, 229 N.Y.S.2d 353, 355 (1962) (where the court described the state constitutional ground for the ruling by citing article I, section 6 of the New York State Constitution); *People v. Waterman*, 9 N.Y.2d 561, 565, 175 N.E.2d 445, 447, 216 N.Y.S.2d 70, 74 (1961) (where the court referred to article I, section 6 of the New York State Constitution). See also Galie, *State Constitutional Guarantees and Protection of Defendants' Rights: The Case of New York, 1960-1978*, 28 BUFFALO L. REV. 157 (1979). The New York State Constitution appears to combine the fifth and sixth amendments into one article, stating: "In 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.

15. See Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975 (1986). *Miranda* warnings were created judicially to protect a suspect's fifth amendment right against compulsory self-incrimination. *Id.* at 988 n.50. This is distinguishable from the express sixth amendment right to counsel, which serves to ensure fairness to the defendant throughout the criminal process. See *id.* at 980-82.

16. New York courts have abruptly retreated from providing expansive protection to defendants in custodial settings with the overturn of *Bartolomeo*. Meanwhile, slowly evolving federal interpretation of the fifth amendment has decreased the liberties of law enforcement officers during custodial interrogation.

## I. THE SUPREME COURT AND THE RIGHT TO COUNSEL

### A. *The Fifth Amendment*

#### 1. Single Charges

The fifth and sixth amendments guarantee an accused the right to counsel.<sup>17</sup> The language of the fifth amendment does not specifically establish a right to counsel. However, the Supreme Court in *Miranda v. Arizona*<sup>18</sup> established that the defendant should be entitled to counsel during custodial interrogation to ensure adequate protection of his right against self-incrimination.<sup>19</sup>

The Court thereby provided clear guidelines for judicial interpretation of law enforcement activity. If an individual is not informed of his *Miranda* rights<sup>20</sup> then statements subsequently

17. The fifth amendment to the United States Constitution states: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V. The sixth amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

In *Miranda v. Arizona*, the United States Supreme Court created a fifth amendment right to counsel during custodial interrogation in an effort to protect the right against compelled self-incrimination. 384 U.S. 436, 440-44 (1966). The Court based this rule on the perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the fifth amendment right of a client undergoing custodial interrogation. *Id.* at 470.

18. 384 U.S. 436 (1966).

19. *Id.* at 469-70 (discussing mitigating effects of counsel's presence). The Court established a set of procedural safeguards to protect the individual during custodial interrogation by stating: "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444.

20. The Court in *Miranda* presumed that interrogation during custodial situations was inherently coercive. *Id.* at 445-58 (1966). Consequently, the Court held that statements made during custodial interrogation are inadmissible

obtained cannot be used against him as evidence.<sup>21</sup> *Miranda's* bright line rule was buttressed further in a subsequent fifth amendment case, *Edwards v. Arizona*.<sup>22</sup> In *Edwards*, the defendant was read his *Miranda* rights; then he requested an attorney.<sup>23</sup> However, the police continued to question him and finally obtained incriminating statements.<sup>24</sup>

The Court held that once an individual requests an attorney, all questioning must cease until an attorney is present.<sup>25</sup> This landmark ruling became known as the *Edwards* rule<sup>26</sup> and provided additional guidelines for the courts and police. Not only must the individual be told he can have an attorney present, but once he requests an attorney the police must cease questioning.<sup>27</sup>

---

unless the suspect is informed of his *Miranda* rights and voluntarily waives his rights. See *New York v. Quarles*, 467 U.S. 649, 654 (1984) (recognizing the rationale of *Miranda* warnings but creating a public safety exception).

21. In *Miranda*, the Court concluded that the individuals' written confessions did not approach the knowing and intelligent waiver required to relinquish constitutional rights. *Miranda*, 384 U.S. at 492-93 (1966).

22. 451 U.S. 477 (1981).

23. *Id.* at 478-79.

24. After his arrest, Edwards was informed of his *Miranda* rights and questioned by police. However, after being told that an accomplice in custody had implicated him, he requested an attorney, at which point questioning ceased. However, the next morning police officers asked to question Edwards again and read him his *Miranda* rights. After listening to the tape-recorded statements of his accomplice, Edwards said, "I'll tell you anything you want to know, but I don't want it on tape." He thereupon implicated himself in the crime. *Id.* at 479.

25. *Id.* at 484-85. "An accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.*

26. See, e.g., *Michigan v. Jackson*, 475 U.S. 625, 630 (1986); *Smith v. Illinois*, 469 U.S. 91, 98 (1984); *Solem v. Stumes*, 465 U.S. 638, 646 (1984); *Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983). See also Comment, *Reinforcing Miranda -- Restricting Interrogation After A Request For Counsel*, 48 BROOKLYN L. REV. 593, 605-11 (1983) [hereinafter *Reinforcing Miranda*].

27. See *Edwards*, 451 U.S. at 484-85; *Miranda*, 384 U.S. at 474; see also *Arizona v. Roberson*, 486 U.S. 675, 680 (1987) (where the Court stated: "The rule of the *Edwards* case came as a corollary to *Miranda's* admonition that '[i]f the individual states that he wants an attorney, the interrogation must cease



## 2. Separate Unrelated Charges

The Court utilized the *Edwards* rule in subsequent cases<sup>28</sup> but limited the scope of its protection.<sup>29</sup> However, in the recent case of *Arizona v. Roberson*,<sup>30</sup> the Court has not only restored the protection given in *Edwards*, but has gone even further by providing protection in situations involving unrelated crimes.

In *Roberson*, the defendant was arrested at the scene of a crime for burglary and after being read his *Miranda* rights, requested an attorney.<sup>31</sup> As a result, police interrogation was discontinued. Three days later, while the defendant was still in custody, a different officer interrogated him about a different crime that had occurred one day prior to the crime for which the defendant had been arrested.<sup>32</sup> After waiving his rights to have an attorney present, the defendant made incriminating statements regarding the earlier crime.<sup>33</sup> The trial court suppressed the statements in the defendant's subsequent trial.<sup>34</sup> The issue before the Supreme

---

until an attorney is present.'") (quoting *Miranda v. Arizona*, 384 U.S. 436, 474 (1966)).

28. See, e.g., *Michigan v. Jackson*, 475 U.S. 625, 629 (1986) (Court extended the *Edwards* rule to sixth amendment claims); *Smith v. Illinois*, 469 U.S. 91, 100 (1984) (per curiam) (Court ruled that waiver was invalid under the *Edwards* rule).

29. See *People v. Rodriguez*, 11 N.Y.2d 279, 284, 183 N.E.2d 651, 652, 229 N.Y.S.2d 353, 355 (1962) (where the court described the state constitutional ground for the ruling by citing article I, section 6 of the New York State Constitution); *New York v. Quarles*, 467 U.S. 649, 653 (1984) (*Miranda* warnings are not needed in situation where there was paramount concern for public safety); *Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983) (Court found respondent "initiated" further conversation in the sense in which that word was used in *Edwards* by asking: "Well, what's going to happen to me now?"); see also Note, *Arizona v. Roberson: The Supreme Court Expands Suspects' Rights In The Custodial Interrogation Setting*, 22 J. MARSHALL L. REV. 685, 695 n.66 (1989) [hereinafter *Supreme Court Expands Suspects' Rights*].

30. 486 U.S. 675 (1988).

31. *Id.* at 678.

32. *Id.*

33. *Id.* (statements made in relation to a different burglary crime for which defendant had not yet been arrested).

34. *Id.* (statement was suppressed in the trial for unrelated offense).

Court was whether the *Edwards* rule should extend to prohibit police interrogation regarding an unrelated matter.<sup>35</sup> The Court held that the *Edwards* rule does apply and once a suspect requests counsel, the police are prevented from interrogating the individual with respect, not only to the initial crime, but also to any unrelated investigation.<sup>36</sup> Interestingly, however, had the suspect not requested counsel on the first robbery and decided simply to remain silent, the second interrogation and subsequent statement most likely would have been admissible.<sup>37</sup>

---

35. *See id.* at 679-80 n.3. (Court granted *certiorari* to resolve a conflict with certain state court decisions).

36. *Edwards*, 451 U.S. at 682-88. However, the Court said the fifth amendment right to counsel is not absolute in that authorities have the right not to provide counsel in a reasonable period of time as long as they do not question the suspect during that time. *Id.* at 688 n.6 (quoting *Miranda v. Arizona*, 384 U.S. 436, 474 (1966)).

37. The Supreme Court, in *Miranda*, eluded to the distinction between the protection afforded by the fifth and sixth amendments. The Court stated, "when the right to remain silent is invoked, interrogation must cease." *Miranda*, 384 U.S. at 474. If the suspect asked for an attorney, interrogation must cease until an attorney is present. *Id.*

It was not until *Michigan v. Mosley* that the distinction was defined more thoroughly. 423 U.S. 96, 101 (1975). In *Mosley*, the defendant refused to answer questions about a suspected robbery and the police ceased questioning. Several hours later, however, a different officer questioned him about an unrelated crime. The defendant then made incriminating statements. *Id.* at 97. The Court allowed the statements, holding that when a suspect asserts his right to remain silent, the police may re-interrogate the suspect later if his request was "scrupulously honored." *Id.* at 104. The decision in *Mosley* did not deal with the suspect's right to counsel, since he did not request an attorney. *Id.* at 101 n.7. The Court diminished the suspect's rights when there is a request to remain silent, since police can re-interrogate after the passage of time. *Id.* at 104. However, the police cannot re-interrogate at all if the suspect requests counsel. *Id.* at 103.

The *Roberson* Court refused to apply *Mosley's* "scrupulously honored" test to *Roberson's* request for counsel because such a request acts as a complete ban on interrogation. *Arizona v. Roberson*, 486 U.S. 675, 682-83 (1988). As such, they have implicitly decided that a suspect's right to counsel is more significant than the right to remain silent. *See Supreme Court Expands Suspects' Rights*, *supra* note 29, at 698-99; *but see Patterson v. Illinois*, 487 U.S. 285, 297-98 (1988) (where Court rejected petitioner's argument that because sixth amendment right to counsel is far superior than the fifth

The *Roberson* case seems to extend the judicially created fifth amendment right to counsel to its extreme. It provides complete independent protection to a defendant during custodial interrogation. Despite a voluntary waiver with respect to the second charge, the Court imputes the earlier request for counsel to the defendant thus insulating him against interrogation. The right to counsel provided under the constitutionally created sixth amendment does not provide such prophylactic protection in this area.

### *B. The Sixth Amendment*

#### 1. Single Charges

The sixth amendment specifically provides that "in all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense."<sup>38</sup> The right to counsel historically was limited to trial proceedings only.<sup>39</sup>

*Massiah v. United States*<sup>40</sup> extended the constitutional right beyond trial proceedings to post-indictment police activity.<sup>41</sup> Once the right to counsel has attached, the sixth amendment prohibits law enforcement officials from using incriminating statements deliberately elicited from the accused without the presence of counsel.<sup>42</sup> The Court considered the period from arraignment to trial to be a critical stage at which defendants are as much entitled to counsel as at the trial itself.<sup>43</sup> However, some

---

amendment right to remain silent, it should be more difficult to waive).

38. U.S. CONST. amend. VI.

39. See Comment, *Patterson v. Illinois: Applying Miranda Waivers to the Sixth Amendment Right to Counsel*, 74 IOWA L. REV. 1261, 1270 (1989) [hereinafter *Applying Miranda Waivers*].

40. 377 U.S. 201 (1964).

41. *Id.* at 206.

42. *Id.* at 205-06.

43. See *id.* at 206. The Court noted that this view of the right to counsel: no more than reflects a constitutional principle established as long ago as *Powell v. Alabama*, where the Court noted that 'during perhaps the most critical period of the proceedings . . . from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing [sic] investigation and preparation [are] vitally

confusion remained with respect to whether the sixth amendment right to counsel is automatically invoked at critical stages or whether it is contingent upon a request for representation by the accused. This question was raised in *Michigan v. Jackson*.<sup>44</sup>

In *Jackson*, the Court applied the *Edwards* rule to the sixth amendment. The case involved police questioning of indicted defendants who had requested but had not yet received counsel.<sup>45</sup> The Court held that once an accused activates the right to counsel at a critical stage, further police interrogation must cease.<sup>46</sup> It affirmed the attachment of the sixth amendment right to counsel at critical stages in adversarial proceedings.<sup>47</sup> There was disagreement, however, about whether the sixth amendment right to counsel was automatically activated in critical stages<sup>48</sup> or was contingent upon affirmative invocation.<sup>49</sup> Consequently, the Court limited its holding to situations in which an accused actually requested counsel.<sup>50</sup>

The Court addressed the question of automatic invocation when it decided *Patterson v. Illinois*.<sup>51</sup> In that case, a defendant's statements were allowed to be used against him even though such

---

important, the defendants . . . [are] as much entitled to such aid [of counsel] . . . as at the trial itself.'

*Id.* at 205 (quoting *Powell v. Alabama*, 287 U.S. 45, 57 (1932)).

44. 475 U.S. 625 (1986).

45. In *Jackson*, the defendants requested counsel during arraignment. Between the time of request and the arrival of counsel, police obtained incriminating statements. *Id.* at 626-28.

46. *Id.* at 636.

47. *See id.* at 630-31; *see also* *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (critical stages include indictment, filing of an information, arraignment, and preliminary hearings); *Applying Miranda Waivers, supra* note 39, at 1271.

48. *Jackson*, 475 U.S. at 638. Justice Steven's majority opinion indicates automatic activation, stating "[w]e presume that the defendant requests the lawyer's services at every critical stage of the prosecution." *Id.*

49. *Id.* at 640 (Rehnquist, J., dissenting) (refused to accept a per se rule barring any police interrogation after indictment absent express invocation).

50. *Id.* at 636 (Court could limit its holding to situations where there is an actual request because the specific facts of *Jackson* included defendants who had requested counsel).

51. 487 U.S. 285 (1988).

statements were obtained after indictment and in the absence of counsel.<sup>52</sup> The notion that the sixth amendment was invoked automatically upon the initiation of formal adversarial proceedings was rejected.<sup>53</sup> The Court determined that the sixth amendment could be activated only if an accused expressly exercises the right to have counsel present during post-indictment interrogation.<sup>54</sup>

Judicial erosion of the sixth amendment was not limited to the question of invocation. The Court also addressed the issue of waiver in deciding whether the use of a pre-indictment *Miranda* waiver form could waive sixth amendment rights as well.<sup>55</sup> The Court concluded that there was no difference between the fifth and sixth amendments with respect to waiver of counsel,<sup>56</sup> therefore the *Miranda* warnings served to provide an accused with enough information to waive the right to counsel knowingly and intelligently for the purposes of post-indictment interrogation.<sup>57</sup> How this conclusion was reached in light of *Roberson* is unclear.<sup>58</sup>

---

52. *Id.* at 300.

53. *Id.* (petitioner contended that his sixth amendment right to counsel arose with his indictment, therefore police should be barred from questioning him until an attorney had been obtained).

54. *Id.* at 290-91. The Court found that even though defendant had a sixth amendment right to counsel during questioning after indictment, he must choose to exercise it in order to stop further questioning. *Id.* The Court reasoned that such a scenario is not distinguishable from the pre-indictment interrogatee who, under *Edwards*, 451 U.S. 477 (1981), must assert his fifth amendment right to counsel in order to bar further interrogation. *Patterson*, 487 U.S. at 290.

55. *See id.* at 289-90 (noting that the Court had previously left the issue open).

56. *Id.* at 297-98. The Court reasoned that since there is no substantial difference between the usefulness of the lawyer to the suspect during custodial interrogation and his value to the accused in post-indictment questioning, the sixth amendment right to counsel is not superior to the fifth amendment right with respect to waiver. *Id.* at 299.

57. *Id.* at 299-300. The Court stated that "[s]o long as the accused is made aware of the 'dangers and disadvantages of self-representation' during post-indictment questioning, by use of *Miranda* warnings, his waiver of his sixth amendment right to counsel at such questioning is 'knowing and intelligent.'" *Id.*

58. The *Roberson* court added legitimacy to the distinction between the

## 2. Separate Unrelated Charges

If the defendant in *Roberson* was indicted during his three day stay, the Court, applying *Maine v. Moulton*,<sup>59</sup> would have found that the right to counsel would not have attached to the unrelated investigation and the statements regarding the unrelated crime could be used against him in court.

In *Moulton*, the issue was whether the police violated the defendant's right to counsel under the sixth amendment.<sup>60</sup> In that case, the defendant was indicted and while awaiting trial, he suggested to his co-defendant the possibility of killing a state witness.<sup>61</sup> At a meeting to discuss the upcoming trial, the co-defendant wore a transmitter to reveal statements about the possible murder.<sup>62</sup> During the meeting, however, Moulton made incriminating statements with respect to the theft, not the murder, and these statements were admitted as evidence during his trial.<sup>63</sup> The Court held that the defendant's right to counsel was violated by the admission of such statements.<sup>64</sup>

Whether the information obtained with respect to the unrelated charge could be used against him in his trial for the primary charge was addressed in a footnote,<sup>65</sup> where the Court stated "[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not attached, are, of

---

two rights by refusing to allow re-interrogation after some passage of time in a situation where defendant requests counsel even though this is the approved technique when the defendant asserts his fifth amendment right to remain silent. 486 U.S. 675, 683 (1988).

In *Patterson*, the Court refused to find the sixth amendment right superior to the fifth amendment right and minimized the differences between them. 487 U.S. 285, 297 (1988). As such, the Court found that a fifth amendment waiver form could be used to waive sixth amendment rights as well. *Id.*

59. 474 U.S. 159 (1985).

60. *Id.* at 161.

61. *Id.* at 162.

62. *Id.* at 163-65 (the meeting took place in a restaurant).

63. *Id.* at 165-67.

64. *Id.* at 180.

65. *Id.* at 180 n.16.

course, admissible at a trial of those offenses.”<sup>66</sup> The Court reasoned that “to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public’s interest in the investigation of criminal activities.”<sup>67</sup>

It is unclear whether the Supreme Court realizes the dichotomy it has created between the fifth and sixth amendments. In contrast to the *Moulton* rationale mentioned above, the dissent in *Roberson*, in a fifth amendment unrelated charge analysis noted that:

By prohibiting the police from questioning the suspect regarding a separate investigation, the Court chooses to presume that a suspect has made the decision that he does not wish to talk about that investigation without counsel present, although the decision was made when the suspect was unaware of even the existence of a separate investigation.<sup>68</sup>

Currently, the Court will *not* allow evidence obtained which is unrelated to an initial crime, if the defendant requested counsel for the first crime.<sup>69</sup> The Court *will*, however, allow evidence even if an attorney is representing the defendant if the evidence is unrelated to the initial charge and the defendant does *not* request

---

66. *Id.*

67. *Id.* at 180. The language in *Moulton* was later applied in *Moran v. Burbine*, 475 U.S. 412, 432 (1985). In *Burbine*, the Court allowed the defendant’s statement to be used against him at trial, even though his attorney had called and was told no questioning would continue. *Id.* at 415. The Court found the sixth amendment was not triggered because the events that led to the inculpatory statements preceded formal initiation of adversary judicial proceedings. *Id.* at 432. *But see* *People v. Rogers*, 48 N.Y.2d 167, 397 N.E.2d 709, 422 N.Y.S.2d 18 (1979) (holding that once an attorney has entered the proceeding, a defendant in custody may not be further interrogated in the absence of counsel).

68. *Arizona v. Roberson*, 486 U.S. 675, 691-92 (1988) (Kennedy, J., dissenting).

69. *Id.* at 682 (Court unpersuaded by petitioner’s contention that the *Edwards* rule should not apply when police initiated interrogation of suspect in custody involves investigation of a separate crime).

an attorney.<sup>70</sup> In both instances the defendant has an attorney. Yet, under the custodial setting of the fifth amendment, the defendant's statements regarding the unrelated crime will be suppressed while under the sixth amendment scenario the statements will be allowed.<sup>71</sup>

It is clear that during the past decade the right to counsel has strengthened under the fifth amendment and weakened under the sixth amendment. If an accused requests an attorney during a fifth amendment custodial interrogation setting, then the *Edwards* rule, as expanded by *Roberson*, protects the accused from any statements made, even if they do not relate to the initial charge.<sup>72</sup> If the individual is indicted (thus reaching a critical stage), under *Moulton-Burbine*,<sup>73</sup> the statements unrelated to the pending charge can be used against him. Finally, under *Patterson*, the defendant now must request an attorney during the post-indictment stage in order to trigger the sixth amendment right to counsel.<sup>74</sup>

---

70. See *Moran v. Burbine*, 755 U.S. 412 (1985); *Michigan v. Mosley*, 423 U.S. 96 (1975); see *supra* note 54 and accompanying text.

71. See *Roberson*, 486 U.S. at 682. In *Roberson*, the petitioner argued that *Mosley* should apply in that once *Roberson* asserted his right to stop questioning, police should be able to come back after a period of time and re-question. *Id.* However, the Court distinguished *Mosley* by pointing out that *Roberson* exercised his right to counsel and not merely his right against self-incrimination. *Id.* at 683. Noting the differences between the fifth amendment right against self-incrimination and the right to counsel, the Court held *Roberson's* statements were properly excluded. *Id.* at 695.

72. See *supra* notes 28-36 and accompanying text; *Supreme Court Expands Suspects' Rights*, *supra* note 29, at 688-89.

73. In *Maine v. Moulton*, the Court made clear that evidence pertaining to other crimes, as to which the sixth amendment right has not yet attached, are admissible at a trial of those offenses. 474 U.S. 159, 180 and n.16 (1985). In *Moran v. Burbine*, the Supreme Court held that neither the defendant's sixth amendment rights nor due process rights were violated when police elicited confessions. This was so despite the fact that the police failed to inform the defendant that his unsolicited retained counsel had called the police station and was falsely assured that the defendant would not be interrogated. 475 U.S. 412, 417-18 (1986).

74. See *supra* notes 51-54 and accompanying text.



## II. NEW YORK STATE'S RIGHT TO COUNSEL

### A. *Pre-Rogers-Bartolomeo*

The right to counsel in New York is rooted in much older case law than that of the relatively recent interpretations by the Supreme Court.<sup>75</sup> The New York right to counsel developed independently from the federal right and as a result an individual is provided greater protection under the state constitution<sup>76</sup> than under the Federal Constitution. The New York courts identified the attachment of the right to counsel at the commencement of formal adversarial proceedings in *People v. Di Biasi*.<sup>77</sup> The court

---

75. Four years before the Supreme Court ruled that the fifth amendment is applicable to state prosecutions, *Malloy v. Hogan*, 378 U.S. 1 (1964), the New York Court of Appeals had already ruled that a post-indictment interrogation in the absence of a defendant's retained counsel violated the state's constitutional privilege against self-incrimination. See *People v. Di Biasi*, 7 N.Y.2d 544, 550-51, 166 N.E.2d 825, 828, 200 N.Y.S.2d 21, 25 (1960). The Court extended self-incrimination rights to non-capital crimes whether or not counsel had actually been retained. *People v. Waterman*, 9 N.Y.2d 561, 565, 175 N.E.2d 445, 447, 216 N.Y.S.2d 70, 74 (1961). The *Waterman* court suggested that in the absence of indictment, a suspect who became the focus of investigation was entitled to protection against self-incrimination during interrogation. *Id.* at 564, 175 N.E.2d at 446, 216 N.Y.S.2d at 73. In other states, where defendants have raised New York cases in their defense, the courts have expressly declined to follow them. See, e.g., *People v. Garner*, 57 Cal. 2d 135, 144, 366 P.2d 680, 689-90, 18 Cal. Rptr. 40, 49-50 (1961); *State v. Kristich*, 226 Or. 240, 243, 359 P.2d 1106, 1110 (1961). See also *Judicial Activism*, *supra* note 1. The article examines the state courts' ability to use its own history and "unique characteristics to justify taking positions independent of and more demanding than federal constitutional law." *Id.* at 764.

76. See *supra* note 75; see also *People v. Settles*, 46 N.Y.2d 154, 161, 385 N.E.2d 612, 615, 412 N.Y.S.2d 874, 877 (1978). The New York State Constitution appears to combine the fifth and sixth amendments into one article stating: "In 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.

77. 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960).

determined that indictment was the critical stage<sup>78</sup> at which the right to counsel attaches.<sup>79</sup> In subsequent cases, the court lowered the threshold so that the commencement of a criminal action occurs at the filing of an accusatory instrument.<sup>80</sup> As such, once adversarial proceedings are commenced, the right to counsel attaches and subsequent statements made outside the presence of counsel will be suppressed.<sup>81</sup>

The determinations of adversarial proceedings are periods similar to those the Supreme Court utilizes in applying the sixth amendment.<sup>82</sup> The main difference between New York State and federal interpretation of the right to counsel falls in the area of waiver.<sup>83</sup>

---

78. Once the "critical stage" of a criminal proceeding is reached, the indelible right to counsel attaches regardless of whether the defendant has requested counsel, and the police may then no longer question the defendant unless he waives counsel in his attorney's presence. *People v. Rowell*, 59 N.Y.2d 727, 730, 450 N.E.2d 232, 233, 463 N.Y.S.2d 426, 427 (1983).

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

80. *See People v. Samuels*, 49 N.Y.2d 218, 400 N.E.2d 1344, 424 N.Y.S.2d 892 (1980) (holding the filing of a felony complaint commenced formal proceedings); *People v. Meyer*, 11 N.Y.2d 162, 182 N.E.2d 103, 227 N.Y.S.2d 427 (1962) (holding that statements made after arraignment yet before indictment should be granted the same protection as post-indictment statements).

81. *Di Biasi*, 7 N.Y.2d at 550-51, 166 N.E.2d at 828, 200 N.Y.S.2d at 25. The court further provided that the right to counsel attached after arraignment. *People v. Meyer*, 11 N.Y.2d 162, 165, 182 N.E.2d 103, 104, 227 N.Y.S.2d 427, 428 (1962). *See The Expanding Right to Counsel in New York*, 10 FORDHAM URB. L.J. 351, 354 (1982) [hereinafter *Expanding Right to Counsel*].

82. *See supra* note 5.

83. The Supreme Court decisions allow waiver of counsel in the absence of counsel subsequent to attorney entrance into a proceeding as long as the defendant knowingly and intelligently waives the right. *See Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

After a request for counsel in New York, police are prohibited from further interrogation or elicitation of waiver of counsel in the absence of counsel. *See People v. Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963) (once an individual's request for an attorney has been ignored, any statements obtained by police will be inadmissible); *People v. Arthur*, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968) (police may not

The New York State courts have developed a novel doctrine to protect defendants during the custodial stage of criminal proceedings, which is known as the *Donovan-Arthur* rule.<sup>84</sup> In *People v. Donovan*,<sup>85</sup> the New York Court of Appeals ruled that statements obtained by police after the defendant's attorney called and requested to see him were obtained in violation of the state constitution.<sup>86</sup> This holding established the *Donovan* rule which states that once an individual's request for an attorney has been ignored or an attorney's request to see his client has been denied, any statements obtained by police would be inadmissible.<sup>87</sup>

After *Donovan*, the court of appeals decided *People v. Arthur*,<sup>88</sup> which provided even greater protection for defendants. The court held that the police may not question an individual

---

question an individual absent attorney presence once an attorney enters the proceeding unless the individual waives his right in front of his attorney); *People v. Rogers*, 48 N.Y.2d 167, 397 N.E.2d 709, 422 N.Y.S.2d 18 (1979) (if an individual is represented by counsel, incriminating statements about unrelated matters obtained in the absence of counsel will be suppressed despite a voluntary waiver with respect to such matters); *People v. Cunningham*, 49 N.Y.2d 203, 400 N.E.2d 360, 424 N.Y.S.2d 421 (1980) (indelible right to counsel is invoked by a specific request for counsel).

84. See *People v. Arthur*, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968) (once an attorney enters a proceeding, police may not question the defendant in the absence of counsel unless the defendant waives his right to counsel with his attorney present); *People v. Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963) (statements obtained after an attorney request to see his client has been denied or a client request to see his attorney has been denied will be suppressed).

85. 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963).

86. The court's reasoning relied exclusively on New York law. Judge Fuld, writing for the majority, stated:

[W]e find it unnecessary to consider whether or not the Supreme Court of the United States would regard use [of the confessions] a violation of the defendant's rights under the Federal Constitution . . . [Q]uite apart from the Due Process Clause of the Fourteenth Amendment, this State's constitutional and statutory provisions pertaining to the privilege against self incrimination and the right to counsel . . . require the exclusion of [this] confession . . .

*Id.* at 151, 193 N.E.2d at 629, 243 N.Y.S.2d at 842.

87. *Id.* at 150-51, 193 N.E.2d at 629, 243 N.Y.S.2d at 842-43.

88. 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968).

once an attorney enters the proceeding unless the individual waives his right to counsel in front of his attorney.<sup>89</sup> Years later, the *Donovan-Arthur* rule was confirmed in *People v. Hobson*.<sup>90</sup>

The court in *Hobson* extended the "once-an-attorney" rule<sup>91</sup> by focusing more closely on the protection the attorney provides rather than on the police officer's awareness of the attorney's entry into the case.<sup>92</sup> The court declared that the presence of counsel is a more effective safeguard against involuntary waiver of counsel than a mere warning in the absence of counsel.<sup>93</sup>

89. *Id.* at 329, 239 N.E.2d at 539, 292 N.Y.S.2d at 666. This is known as the "once-an-attorney" rule. See Note, *Prior Representation and the Duty to Inquire: Breaching New York's "Once-an-Attorney" Rule*, 10 CARDOZO L. REV. 269 (1988) [hereinafter *Prior Representation*].

Unlike the cases decided by the Supreme Court involving the fifth amendment, see *supra* notes 12-44, the court of appeals only allowed the rule to apply if counsel was present or involved. The question as to what would occur if the individual requested counsel, as in *Edwards*, was determined twelve years later in *People v. Cunningham*, 49 N.Y.2d 203, 400 N.E.2d 360, 424 N.Y.S.2d 421 (1980). If there is no request for counsel and no representation, the individual can waive his right to counsel in the absence of an attorney. In this case, any statement can be used during his trial. *Id.* at 209, 400 N.E.2d at 364, 424 N.Y.S.2d at 425 (1980).

90. 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 robbery. *Id.* at 482, 348 N.E.2d at 896, 384 N.Y.S.2d at 421 (1976). A lawyer who had been appointed for Hobson prior to his placement in the lineup left after Hobson was positively identified. *Id.* The defendant then signed a waiver and agreed to speak to detectives about the robbery. *Id.* Although the detective knew Hobson was represented by counsel, he made no effort to inform the attorney that he intended to interrogate his client. *Id.* Hobson said he understood the pre-interrogation warnings which were read to him, waived his right to counsel, and confessed to the robbery. *Id.* at 482-83, 384 N.E.2d at 896-97, 384 N.Y.S.2d at 420-21.

91. A waiver is invalid if the defendant is represented by counsel and counsel is not present during the waiver by the defendant. See *People v. Arthur*, 22 N.Y.2d 325, 329, 239 N.E.2d 537, 539, 292 N.Y.S.2d 663, 666 (1968).

92. See *Hobson*, 39 N.Y.2d at 484, 348 N.E.2d at 898, 384 N.Y.S.2d at 422.

93. *Id.* 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

Therefore, an individual in police custody in New York may not waive his right to counsel even if the police are not aware of the attorney's entrance into the proceedings.<sup>94</sup>

In sum, the right to counsel in New York indelibly<sup>95</sup> attaches and cannot be waived without an attorney's presence when 1) an attorney has already entered the proceeding,<sup>96</sup> 2) an attorney has been requested,<sup>97</sup> or 3) at the commencement of judicial proceedings.<sup>98</sup>

### *B. The Era of Rogers-Bartolomeo*

In New York, the right to counsel was extended from single charges to inclusion of separate unrelated matters. In the landmark case of *People v. Rogers*,<sup>99</sup> the court of appeals held that if an individual was represented by counsel, and the police

---

against him. *Id.* at 485, 348 N.E.2d at 899, 384 N.Y.S.2d at 423.

94. The court said: "There is no requirement that the attorney or the defendant request the police to respect this right of the defendant." *Id.* at 483, 348 N.E.2d at 897, 384 N.Y.S.2d at 421 (quoting *People v. Arthur*, 22 N.Y.2d 325, 329, 239 N.E.2d 537, 539, 292 N.Y.S.2d 663, 666 (1968)).

95. See *People v. Settles*, 46 N.Y.2d 154, 165, 385 N.E.2d 612, 618, 412 N.Y.S.2d 874, 881 (1978). 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. *Id.*

96. See *People v. Hobson*, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976); *People v. Arthur*, 22 N.Y.2d at 329, 239 N.E.2d at 537, 292 N.Y.S.2d at 666. See *Prior Representation*, *supra* note 89, at 268-69 nn.45-50.

97. See, e.g., *People v. Cunningham*, 49 N.Y.2d 203, 210, 400 N.E.2d 360, 364-65, 424 N.Y.S.2d 421, 425 (1980) (defendant's specific request for counsel invoked his indelible right to counsel).

98. The courts view the commencement of judicial proceedings to be established when there is a filing of an accusatory instrument, such as a felony complaint. In order for the right to counsel to indelibly attach, there must be significant judicial activity. See *People v. Coleman*, 43 N.Y.2d 222, 371 N.E.2d 819, 401 N.Y.S.2d 57 (1977) (criminal proceeding was initiated for right to counsel purposes by issuance of removal order to secure presence of defendant at lineup on charge unrelated to that for which he was incarcerated); *People v. Samuels*, 49 N.Y.2d 218, 400 N.E.2d 1344, 424 N.Y.S.2d 892 (1980) (right to counsel is triggered in New York by the filing of an accusatory instrument or felony complaint).

99. 48 N.Y.2d 167, 397 N.E.2d 709, 422 N.Y.S.2d 18 (1979).

question him about unrelated matters in the absence of counsel, any statements obtained would be suppressed.<sup>100</sup> The rule was expanded in *People v. Bartolomeo*,<sup>101</sup> where the court held that in cases where police have actual knowledge of a pending charge, there exists an affirmative duty to inquire as to representation by counsel on that charge.<sup>102</sup>

In order to understand the rationale of the court in creating the unrelated charge expansions framed in *Rogers* and *Bartolomeo*, it is necessary to examine the law as it existed before such decisions. Prior to *Rogers*, a defendant in custody who was represented by counsel on one charge could still be interrogated in the absence of counsel about other unrelated matters.<sup>103</sup> Consequently, law enforcement personnel utilized continued interrogation about unrelated matters as a mechanism to obtain

---

100. *Id.* The court of appeals modified *People v. Taylor*, which limited the scope of an attorney's representation to the specific matters for which the attorney was retained. 27 N.Y.2d 327, 266 N.E.2d 630, 318 N.Y.S.2d 1 (1971). It extended the *Donovan-Arthur* doctrine that once an attorney enters the proceeding, all interrogation including those related to waiver of counsel must cease until an attorney is present. *See supra* note 89. The doctrine now encompasses those defendants who were represented either on the current charge or on a prior, unrelated charge. *Rogers*, 48 N.Y.2d at 173, 397 N.E.2d at 713, 422 N.Y.S.2d at 22. *See also* Abramovsky, *The Right to Counsel: Part I*, N.Y.L.J., Aug. 30, 1990 at 7, col. 3. Subsequently, the New York Court of Appeals has recognized a specific request for counsel as an invocation of the indelible right to counsel as well. *People v. Cunningham*, 49 N.Y.2d 203, 210, 400 N.E.2d 360, 364, 424 N.Y.S.2d 421, 425 (1980).

The Supreme Court adopted a similar position eleven years later. *See Arizona v. Roberson*, 486 U.S. 675 (1988) (where defendant's request for counsel barred police unrelated crime interrogation of defendant who remained in custody).

101. 53 N.Y.2d 225, 423 N.E.2d 371, 440 N.Y.S.2d 894 (1981), *overruled by*, *People v. Bing*, 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990).

102. *Id.* at 231-32, 423 N.E.2d at 375, 440 N.Y.S.2d at 897.

103. *See, e.g., Taylor*, 27 N.Y.2d 327, 266 N.E.2d 630, 318 N.Y.S.2d 1 (1971). In *Taylor*, the defendant was represented on a robbery charge but made incriminating statements about a murder in the absence of counsel. The court held the statements were admissible because the attorney's involvement related to the separate charge of robbery. *Id.* at 332, 266 N.E.2d at 633, 318 N.Y.S.2d at 5.

confessions with respect to the present charge for which an attorney had been retained.<sup>104</sup> Accordingly, the *Rogers* court framed its decision to prevent state infringement of the individual's right to counsel based on the state constitution.<sup>105</sup> The court balanced the fundamental privilege against self-incrimination and the right to counsel against the significant interest of the state in investigating and prosecuting criminal conduct.<sup>106</sup>

By holding that not only were police to cease questioning once counsel has appeared, but the police were now forbidden to elicit any statements from the defendant including waiver of the right to counsel in the absence of counsel,<sup>107</sup> the court repudiated the rule that allowed interrogation of a defendant about unrelated matters.<sup>108</sup>

In *Rogers*, the defendant was arrested as a suspect in a liquor store robbery. Although represented by an attorney, the defendant waived his *Miranda* rights without his attorney's knowledge or presence and denied involvement in the crime.<sup>109</sup> After continued interrogation, his attorney called and demanded that all interrogation cease.<sup>110</sup> At this point, the police merely shifted focus and for the next four hours questioned the defendant about an unrelated event.<sup>111</sup> This failed to produce any further information. However, as the interrogating detective was filling

104. See *Expanding Right to Counsel*, *supra* note 81, at 359-60.

105. See *Rogers*, 48 N.Y.2d at 170, 397 N.E.2d at 710-11, 422 N.Y.S.2d at 19. It was stated that "[t]his court has jealously guarded the individual's privilege against self incrimination and right to counsel, demanding that these fundamental rights be accorded the highest degree of respect by those representing the State . . . ." *Id.* "Although the State has a significant interest in investigating and prosecuting criminal conduct, that interest cannot override the fundamental right to an attorney guaranteed by our State Constitution." *Id.* at 173, 397 N.E.2d at 713, 422 N.Y.S.2d at 22.

106. *Id.*

107. *Rogers*, 48 N.Y.2d at 173, 397 N.E.2d at 713, 422 N.Y.S.2d at 22.

108. See *People v. Taylor*, 27 N.Y.2d 327, 266 N.E.2d 630, 318 N.Y.S.2d 1 (1971); see also *supra* notes 103 and 104.

109. *Id.* at 170, 397 N.E.2d at 711, 422 N.Y.S.2d at 20.

110. *Id.*

111. *Id.*

out some paperwork, he overheard the defendant make an incriminating statement.<sup>112</sup> Such evidence was admitted at the trial and the defendant was convicted of the robbery in question.<sup>113</sup>

The court, in concluding such statements inadmissible, reasoned "we may not blithely override the importance of the attorney-client relationship by permitting interrogation of an accused with respect to matters which some may perceive to be unrelated."<sup>114</sup> The *Rogers* decision was viewed as a bar to police interrogation regarding present or pending charges absent attorney presence once an attorney has entered the proceedings.<sup>115</sup> Nonetheless, a question remained concerning those situations in which the police claimed they were unaware that a defendant was represented by an attorney.

In *People v. Bartolomeo*,<sup>116</sup> the court held that once the police know a person in custody has a pending criminal charge, they must first "inquire whether [the] defendant was represented by an attorney on that charge"<sup>117</sup> before proceeding to interrogate him

112. *Id.*

113. *Id.* at 169, 397 N.E.2d at 711, 422 N.Y.S.2d at 19.

114. *Id.*

115. However, in *Rogers*, the court did acknowledge the state's interest in investigations and stated that its "holding creates no undue impediment to the investigation of criminal conduct unrelated to the pending charge. An accused individual 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." *Id.* at 173 n.2, 397 N.E.2d at 713 n.2, 422 N.Y.S.2d at 22 n.2. In reality, the *Rogers* decision continues to bar the use of post-request statements related to the original charge for which the defendant was arrested and post-request statements about the unrelated conduct. *But see* *Maine v. Moulton*, 474 U.S. 159 (1985) (where the Court used the same reasoning to bar the use of statements made in relation to the original charge for which the defendant had been indicted and allowed statements made in relation to the new, unrelated charge for which the defendant had waived his right to counsel). *See supra* notes 59-67 and accompanying text; *infra* notes 205-08 and accompanying text.

116. 53 N.Y.2d 225, 423 N.E.2d 371, 440 N.Y.S.2d 894 (1981), *overruled by*, *People v. Bing*, 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990).

117. *Id.* at 231, 423 N.E.2d at 375, 440 N.Y.S.2d at 897.



about a different crime.<sup>118</sup> In this case, the defendant waived his *Miranda* rights<sup>119</sup> and never informed the police that he was represented by counsel on an unrelated charge.<sup>120</sup> He subsequently made several incriminating statements about the second charge.<sup>121</sup> Here, the interrogating detectives had actual knowledge of the pending charge.<sup>122</sup>

The court found that there existed an obligation to inquire whether defendant was represented by an attorney on that charge.<sup>123</sup> Having failed to make such an inquiry, the officers were chargeable with the knowledge that such an inquiry would have disclosed.<sup>124</sup> Therefore, knowledge of defendant's prior legal representation was imputed to the police. Thus, interrogation or waiver of counsel was foreclosed absent the attorney's presence.<sup>125</sup>

### *C. Subsequent Problems with Rogers-Bartolomeo*

This derivative right to counsel soon became known as the *Rogers-Bartolomeo* rule.<sup>126</sup> However, rather than strengthen the doctrine, the courts were faced with the problem of how and when to impute knowledge to the police that there was in fact a

118. *Id.*

119. The protection the defendant enjoys under the Federal Constitution, as interpreted in the *Miranda* decision, is that his confession will be excluded unless it can be shown that the authorities secured the fifth amendment privilege against self-incrimination of the accused through procedural safeguards. *Miranda v. Arizona*, 384 U.S. 436, 457-58 (1966).

120. *Bartolomeo*, 53 N.Y.2d 225, 230, 423 N.E.2d 371, 374, 440 N.Y.S.2d 894, 897 (1981). The defendant was represented by counsel for an arson charge when he was questioned by detectives concerning an unrelated murder investigation. Although homicide detectives knew of the pending charge, they did not know and did not ask if the defendant had retained counsel. *Id.*

121. *Id.*

122. *Id.* at 231, 423 N.E.2d at 374, 440 N.Y.S.2d at 897.

123. *Id.* at 231-32, 423 N.E.2d at 375, 440 N.Y.S.2d at 897.

124. *Id.*

125. *Id.*

126. See Abramovsky, *The Right to Counsel: Part II*, N.Y.L.J., Oct. 30, 1990, at 3, col.1.

charge pending against the defendant to which the right to counsel had attached.<sup>127</sup> The debate centered on three areas:<sup>128</sup> the situs of the prior charge,<sup>129</sup> the duty of inquiry following the

127. Charging the police with a "duty to inquire" as to whether the defendant had a pending charge created a good deal of confusion within the court system, and lower courts have denied suppression where interrogation should not have been permitted. *See, e.g.,* *People v. Steele*, 135 A.D.2d 673, 522 N.Y.S.2d 248 (2d Dep't 1987) (conviction affirmed when defendant failed to prove representation existed at the time of interrogation), *appeal denied*, 70 N.Y.2d 1011, 521 N.E.2d 1089, 526 N.Y.S.2d 946 (1988); *People v. Brennan*, 129 A.D.2d 892, 514 N.Y.S.2d 528 (3d Dep't 1987) (conviction affirmed although police knew of pending charges but failed to inquire about representation); *People v. Ryans*, 118 A.D.2d 741, 500 N.Y.S.2d 74 (2d Dep't 1986) (knowledge of pending charge does not preclude questioning on new charge).

To respond to this confusion, the New York courts delineated four factors to take into consideration when faced with whether to impute the knowledge of pending charge to the police. Those factors were: 1) whether the previous charge was recent or remote in time; 2) whether the prior offense was a minor offense or a serious crime; 3) whether the prior charge was pending in the same jurisdiction; and 4) whether the police were acting in good faith. *See Prior Representationn, supra* note 89, at 273 nn.73-76.

In *People v. Lucarano*, the court addressed the problem of the extent of police inquiry required under *Bartolomeo*. 61 N.Y.2d 138, 141-42, 460 N.E.2d 1328, 1329, 472 N.Y.S.2d 894, 895 (1984). The court concluded that the police need only ask whether the defendant has an attorney on an unrelated pending charge. *Id.* at 148, 460 N.E.2d at 1333, 472 N.Y.S.2d at 898.

128. *See Abramovsky, The Right to Counsel: Part II*, N.Y.L.J., Oct. 30, 1990, at 3, col.1.

129. In *Bartolomeo*, the prior arrest occurred within the same precinct. 53 N.Y.2d 225, 423 N.E.2d 371, 440 N.Y.S.2d 894 (1981) (on May 27, 1978, defendant was arraigned for arson and on June 5, 1978, defendant was apprehended by the same law enforcement agency for an unrelated homicide). *See People v. Torres*, 137 Misc. 2d 29, 59 N.Y.S.2d 613 (1987), *rev'd*, 165 A.D.2d 771, 560 N.Y.S.2d 281 (1st Dep't 1990) (constructive knowledge imposed); *People v. Mehan*, 112 A.D.2d 482, 490 N.Y.S.2d 897 (3d Dep't), *appeal denied*, 66 N.Y.2d 1041, 489 N.E.2d 1311, 499 N.Y.S.2d 1039 (1985) (where constructive knowledge imposed for New Jersey charge); *People v. Patterson*, 85 A.D.2d 698, 445 N.Y.S.2d 474 (2d Dep't 1981) (where Nassau County police officers were charged with constructive knowledge of Brooklyn arrest). *But see People v. Bing*, 146 A.D.2d 178, 540 N.Y.S.2d 247 (2d Dep't 1989) (where court agreed a geographical limit to the derivative right to counsel should be recognized where defendant arrested in New York had a pending Ohio warrant for burglary), *aff'd*, 76 N.Y.2d 331,

defendant's assertion that he was without counsel,<sup>130</sup> and the necessary quality of ties between the defendant and his counsel.<sup>131</sup>

In *People v. Torres*,<sup>132</sup> the first department addressed the problem of extra-territorial application of the derivative right to counsel. In that case, the question was whether police knowledge should be imputed even if the prior arrest occurred in New Jersey.<sup>133</sup> The court concluded that the defendant represented on the unrelated pending charge in New Jersey is entitled to the same protection as a similarly situated individual with a local pending charge.<sup>134</sup> The third department had previously taken the same position.<sup>135</sup> However, the second department, sensitive to

---

558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990).

130. See *People v. Medina*, 146 A.D.2d 344, 541 N.Y.S.2d 355 (1st Dep't 1989) (where court affirmed trial court denial of motion to suppress based on finding that although police knew of unrelated charge, they reasonably believed it had been dismissed), *aff'd sub nom*, *People v. Bing*, 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990); *People v. Bertolo*, 65 N.Y.2d 111, 480 N.E.2d 61, 490 N.Y.S.2d 475 (1985) (where court held constructive knowledge would be imputed only if the police had actual knowledge of recent arrest on a serious charge); *People v. Lucarano*, 61 N.Y.2d 138, 460 N.E.2d 1328, 472 N.Y.S.2d 894 (1984) (where court held *Bartolomeo* did not apply when defendant denied representation on prior arrests because they stemmed from family court matters and law enforcement belief was reasonable).

131. See *People v. Cawley*, 150 A.D.2d 994, 542 N.Y.S.2d 1003 (1st Dep't 1989) (where court affirmed an order of the trial court suppressing inculpatory statements even though the defendant on prior charge for which he had counsel jumped bail and remained a fugitive for six months), *rev'd sub nom*, *People v. Bing*, 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990).

132. 137 Misc. 2d 29, 59 N.Y.S.2d 613 (1987), *rev'd*, 165 A.D.2d 771, 560 N.Y.S.2d 281 (1st Dep't 1990).

133. *Id.*

134. *Id.* at 33, 59 N.Y.S.2d at 617. In *Torres*, the defendant was represented in New Jersey on an unrelated charge and the court concluded that "it would be inappropriate to hold that, merely because his other case was in a foreign jurisdiction, the defendant should be entitled to any less protection." *Id.*

135. See *People v. Mehan*, 112 A.D.2d 482, 490 N.Y.S.2d 897 (3d Dep't), *appeal denied*, 66 N.Y.2d 1041, 489 N.E.2d 1311, 499 N.Y.S.2d 1039 (1985). This case, decided in the appellate division, third department, involved

extra-territorial application as an encumbrance to effective law enforcement, rejected this position.<sup>136</sup>

The second area of confusion regarding the *Rogers-Bartolomeo* rule concerned the situation where defendant denies prior representation.<sup>137</sup> For example, in *People v. Lucarano*,<sup>138</sup> the defendant was arrested in connection with an assault.<sup>139</sup> The detectives knew he had prior arrests.<sup>140</sup> However, the defendant denied he had attorney representation because the prior arrests were family court matters.<sup>141</sup> Defendant then waived his right to counsel and eventually confessed.<sup>142</sup>

The court of appeals found that *Rogers-Bartolomeo* did not apply because law enforcement belief in the defendant's denial was reasonable.<sup>143</sup> Subsequently, the court held that constructive knowledge would only apply if police had actual knowledge of a

---

a defendant in New Jersey with an unrelated charge. See *Mehan*, 112 A.D.2d at 484, 490 N.Y.S.2d at 899. The court came to the same conclusion as the appellate division, first department and applied the *Rogers-Bartolomeo* rule to suppress the statement. *Id.*

136. In *Bing*, Justice Brown wrote the opinion for the second department and stated that the *Rogers-Bartolomeo* rule provides only derivative and indirect sixth amendment protection. *Bing*, 146 A.D.2d at 183-184, 540 N.Y.S.2d at 250-251. The court adopted the reasoning of *People v. Robles*, 72 N.Y.2d 689, 533 N.E.2d 240, 536 N.Y.S.2d 401 (1988), when stating that "*Rogers* established a derivative, and accordingly limited right with respect to unrelated charges in order to protect the direct and full fledged right to counsel in the pending proceeding." *Id.* at 183, 540 N.Y.S.2d at 250. The court established that "any interest that this State may have in protecting a defendant's right to counsel vis-a-vis a charge pending in a foreign jurisdiction is outweighed by its legitimate interest in the enforcement of its criminal statutes and, thus, an extension of the *Rogers-Bartolomeo* rule is not justified." *Id.* at 184, 540 N.Y.S.2d at 251.

137. See *supra* note 130.

138. 61 N.Y.2d 138, 460 N.E.2d 1328, 472 N.Y.S.2d 894 (1984).

139. *Id.*

140. *Id.* (a check through Suffolk County records revealed that defendant had several prior arrests, the last of which occurred only about two weeks previously).

141. *Id.* at 143, 460 N.E.2d at 1330, 472 N.Y.S.2d at 896 (defendant was in fact represented by court appointed counsel on several outstanding charges).

142. *Id.*

143. *Id.* at 148, 460 N.E.2d at 1333, 472 N.Y.S.2d at 898.

recent arrest on a serious charge.<sup>144</sup>

Finally, prosecutors challenged the application of *Bartolomeo* to situations of tentative prior attorney-client relations.<sup>145</sup> Such a situation became the third prong of attack which led to the eventual overturn of *Bartolomeo*.<sup>146</sup>

### III. THE OVERRULING OF *BARTOLOMEO*

#### A. *People v. Bing*

In the spring of 1990 the court of appeals reviewed *People v. Bing*.<sup>147</sup> It was faced with the decision of whether to extend the *Rogers-Bartolomeo* rule to foreign jurisdictions or limit the application of the rule solely based on the situs of the attorney-client relationship.<sup>148</sup> During such time, the court took the opportunity to address two other cases.<sup>149</sup> Rather than go along with precedent or follow its prior decisions, the court refused to extend or create more exceptions to the prior rule and simply overruled *Bartolomeo*.<sup>150</sup>

After nine years of unsolicited protection, the court broke with the doctrine of *stare decisis*.<sup>151</sup> It reasoned that to apply the rule

144. *People v. Bertolo*, 65 N.Y.2d 111, 480 N.E.2d 61, 490 N.Y.S.2d 475 (1985).

145. *See supra* note 131.

146. *See People v. Bing*, 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990).

147. 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990).

148. *Id.* at 337, 558 N.E.2d at 1014, 559 N.Y.S.2d at 477 (1990).

149. *People v. Cawley*, 150 A.D.2d 994, 542 N.Y.S.2d 1003 (1st Dep't 1989); *People v. Medina*, 146 A.D.2d 344, 541 N.Y.S.2d 986 (1st Dep't 1989).

150. *Bing*, 76 N.Y.2d at 337, 558 N.E.2d at 1014, 559 N.Y.S.2d at 477.

151. The court discussed the doctrine of *stare decisis* and stated: "Although a court should be slow to overrule its precedents, there is little reason to avoid doing so when persuaded by the 'lessons of experience and the force of better reasoning.'" *Id.* at 338, 558 N.E.2d at 1014, 559 N.Y.S.2d at 477 (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407-408 (1932) (Brandeis, J., dissenting)).

to each case before it<sup>152</sup> would have resulted in the placement of "unacceptable burdens on law enforcement."<sup>153</sup> The court also noted that to create another exception would undermine the rule's rationale.<sup>154</sup> It stated that the policy and basis behind the *Bartolomeo* rule was weak<sup>155</sup> and noted that it was not until *People v. Robles*,<sup>156</sup> that a rationale for the rule was established.<sup>157</sup>

The court in *Bing* came to the realization that the right to counsel under *Bartolomeo* was an aberrant extension<sup>158</sup> of *Rogers*.<sup>159</sup>

152. *People v. Bing*, 146 A.D.2d 178, 540 N.Y.S.2d 247 (2d Dep't 1989) (where defendant had been represented in Ohio for burglary, and was subsequently arrested in New York for robbery and the court was asked to recognize a geographical exception to *Bartolomeo*); *People v. Cawley*, 150 A.D.2d 994, 542 N.Y.S.2d 1003 (1st Dep't 1989) (where defendant was briefly represented on a prior charge but jumped bail remaining a fugitive for six months and the court was asked to recognize an exception based on the quality of attorney-client relationship); *People v. Medina*, 146 A.D.2d 344, 541 N.Y.S.2d 986 (1st Dep't 1989) (where defendant informed police he had been "let go" on other crimes and lower court found that police belief in his statement was reasonable and motion to suppress was denied).

153. *People v. Bing*, 76 N.Y.2d at 337, 558 N.E.2d at 1014, 559 N.Y.S.2d at 477.

154. *Id.*

155. *Id.* at 348-349, 558 N.E.2d at 1021, 559 N.Y.S.2d at 484. The court stated:

The right to assistance of counsel is one of the most important means of protection against police harassment afforded individuals. But the right recognized must rest on some principled basis which justifies its social cost. *Bartolomeo* has no such basis. It rests on a fictional attorney-client relationship derived from a prior charge and premised on the belief that a lawyer would not refuse to aid his newly charged client.

*Id.*

156. 72 N.Y.2d 689, 533 N.E.2d 240, 536 N.Y.S.2d 401 (1988).

157. *Bing*, 76 N.Y.2d at 343-44, 588 N.E.2d at 1018, 559 N.Y.S.2d at 481. *Robles*, decided seven years after *Bartolomeo*, explained that the right to counsel on the new charge was derived from representation on the prior pending charge and when the prior charge has been disposed of by dismissal or conviction, the indelible right to counsel disappears. *Robles*, 72 N.Y.2d 689, 698, 533 N.E.2d 240, 244, 536 N.Y.S.2d 401, 405 (1988).

158. The dissent stated: "The court's opinion portrays *Bartolomeo* as an aberrant decision not worthy of precedential respect, a decision without a principled basis or even a rationale until it was invested with one seven years

*Rogers* was designed to protect against police use of unrelated interrogation as a tool for unfairly obtaining confessions.<sup>160</sup> It applied only to situations where the defendant was taken into custody and clearly asserted his right to counsel.<sup>161</sup> Accordingly, the court, in justifying its reason for overruling *Bartolomeo*, weighed many factors in coming to its decision.<sup>162</sup>

The court noted that the "failure to elaborate the basis for the [*Bartolomeo*] rule . . . cause[d] considerable difficulty in subsequent cases . . . ."<sup>163</sup> Decisions after *Bartolomeo* limited the rule by creating exceptions.<sup>164</sup> It was a judicial "effort[. . .] [at] balanc[ing] the benefits of evenhanded administration of the criminal law with the cost the rule exacted from effective law enforcement."<sup>165</sup> However, the court noted that recognition of the

---

later." *Bing*, 76 N.Y.2d at 352, 558 N.E.2d at 1023, 559 N.Y.S.2d at 486 (Kaye, J., concurring as to result in *Bing* and *Medina*, and dissenting as to *Cawley*) (emphasis added).

159. *Bing*, 76 N.Y.2d at 350, 558 N.E.2d at 1022, 559 N.Y.S.2d at 485. The court, in closing, emphasized that:

although *Rogers* and *Bartolomeo* are frequently linked in legal literature . . . the two holdings are quite different. In *People v. Rogers*, the right to counsel had been invoked on the charges on which the defendant was taken into custody and he and his counsel clearly asserted it . . . In *People v. Bartolomeo*, however, defendant was taken into custody for questioning on a new, unrelated charge. He was not represented on that charge and freely waived his right to counsel . . . .

*Id.* (citations omitted).

160. "As in *Rogers*, the court confronted what was perceived as a means of circumventing defendant's constitutional rights through questioning on 'unrelated' matters." *Bing*, 76 N.Y.2d at 354, 558 N.E.2d at 1025, 559 N.Y.S.2d at 488 (Kaye, J., concurring as to result in *Bing* and *Medina*, and dissenting as to *Cawley*).

161. *See supra* note 159.

162. *Id.* at 349-50, 558 N.E.2d at 1022, 559 N.Y.S.2d at 485 (the fact that so many exceptions were developed because of the rule; the overruling of the rule would not violate the state constitution or ethical principles; the rule protected recidivists over first time offenders; and the fact that the rule exacted heavy costs to society).

163. *Id.* at 342, 558 N.E.2d at 1017, 559 N.Y.S.2d at 480.

164. *Id.* at 343, 558 N.E.2d at 1017, 559 N.Y.S.2d at 480.

165. *Id.* at 342-43, 558 N.E.2d at 1017, 559 N.Y.S.2d at 480.

exceptions to the rule urged in the cases at hand<sup>166</sup> would effectively undermine “the jurisprudential basis on which it rests.”<sup>167</sup>

Additionally, the court reasoned that permitting questioning about unrelated crimes would not violate the state constitution or ethical principles.<sup>168</sup> The state constitution relates the right to counsel in criminal proceedings to the application of the right to counsel in civil actions.<sup>169</sup> Consequently, the court found no ethical reason against application of the civil setting, where an attorney is not foreclosed from speaking to an adverse party about an unrelated matter for which there is no representation, to state criminal procedure.<sup>170</sup>

Finally, the court noted that the rule favored recidivists over first-time offenders because a first-time arrestee, with no criminal experience may waive his rights and be questioned without the presence of counsel.<sup>171</sup> Conversely, the “second-time offender, who presumably has received prior advice on how to deal with the authorities and has voluntarily chosen a different course of action on the new charge, [is] foreclosed from waiving rights on the matter for which he was detained.”<sup>172</sup>

### *B. Post-Bing Protection v. Current Federal Guarantees*

In order to effectively compare federal protection of the right to counsel with New York protection, it is necessary to examine several hypothetical situations, all of which presuppose the proper

---

166. “The People . . . would have us add new exceptions in *Bing*, for pending charges in other States, and in *Cawley*, for defendants who implicitly relinquish the attorney-client relationship by absconding.” *Id.* at 344, 558 N.E.2d at 1018, 559 N.Y.S.2d at 481.

167. *Id.* at 346, 558 N.E.2d at 1020, 559 N.Y.S.2d at 483.

168. *Id.* at 349-350, 558 N.E.2d at 1022, 559 N.Y.S.2d at 485.

169. The New York State Constitution states: “In 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 . . . .” N.Y. CONST. art. I, § 6 (emphasis added).

170. *Bing* at 349-50, 558 N.E.2d at 1022, 559 N.Y.S.2d at 485.

171. *Id.* at 342, 558 N.E.2d at 1017, 559 N.Y.S.2d at 480.

172. *Id.*



administration of *Miranda* warnings.<sup>173</sup>

The first hypothetical scenario involves a defendant who is arrested on charge "A" and requests counsel. Police virtually ignore the request and continue questioning the defendant without representation. The defendant finally confesses.<sup>174</sup>

Under federal interpretation of the fifth amendment right to counsel, such a confession would be suppressed<sup>175</sup> unless it is found that the accused initiated further communication with the police.<sup>176</sup> Absent such conduct, however, once an individual requests counsel, all questioning must cease until an attorney is present.<sup>177</sup>

In New York, the request or presence of counsel is an absolute bar to further interrogation or solicitation of waiver in the absence of counsel.<sup>178</sup> Therefore, despite a seemingly voluntary

173. *Miranda v. Arizona*, 384 U.S. 436 (1966). The Court established a set of procedural safeguards to protect individuals during custodial interrogation by stating: "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed." *Id.* at 444.

174. *See Edwards v. Arizona*, 451 U.S. 477 (1981); *see also People v. Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963); *People v. Arthur*, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968); *People v. Cunningham*, 49 N.Y.2d 203, 400 N.E.2d 360, 424 N.Y.S.2d 421 (1980); *supra* notes 20-22, 82-86.

175. *See supra* note 25.

176. *See supra* notes 24-26.

177. *See Edwards*, 451 U.S. 477 (1981). *But see Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (waiver of counsel subsequent to attorney entrance is permitted in the absence of counsel as long as the defendant knowingly and intelligently waives the right).

178. *See People v. Arthur*, 22 N.Y.2d 325, 329, 239 N.E.2d 537, 539, 292 N.Y.S.2d 663, 666 (1968). In *Arthur*, the court held that a waiver is invalid if the defendant is represented by counsel and counsel is not present. *Id.* Unlike the Supreme Court, however, the court of appeals only allowed the rule to apply if counsel was present or involved. *Id.* The question as to what would occur if the individual requested counsel was decided twelve years later in *People v. Cunningham*, 49 N.Y.2d 203, 400 N.E.2d 360, 424 N.Y.S.2d 421 (1980). In *Cunningham*, the court found defendant's specific request for counsel invoked his indelible right to counsel. *Id.* at 205, 400 N.E.2d at 361, 424 N.Y.S.2d at 422.

waiver in the absence of counsel, such statements would be suppressed.<sup>179</sup>

The second situation involves a defendant who is arrested on charge "A" and requests counsel. Police shift focus and question defendant about an unrelated crime "B" in the absence of counsel while the defendant is still in custody. Defendant waives the right to counsel on "B" and makes incriminating statements with respect to "B".<sup>180</sup>

Under federal interpretation of the fifth amendment right to counsel, such statements would be suppressed.<sup>181</sup> Once a suspect requests counsel, the police are prevented from interrogating the individual with respect not only to the initial charge but also to any unrelated investigation.<sup>182</sup>

The New York State judiciary has indirectly provided the same protection.<sup>183</sup> Although originally limited to situations where the

179. See, e.g., *Arthur*, 22 N.Y.2d at 329, 239 N.E.2d at 539, 292 N.Y.S.2d at 666 (1968) (individual must waive his right to counsel in front of his attorney).

180. See *Arizona v. Roberson*, 486 U.S. 675 (1988); *People v. Rogers*, 48 N.Y.2d 167, 397 N.E.2d 709, 422 N.Y.S.2d 18 (1979); see *supra* notes 28-34, 106-12 and accompanying text.

181. See *supra* notes 31-35 (discussing facts of *Roberson*).

182. *Roberson*, 486 U.S. at 682-88.

183. The rule evolved to its present state through several cases. See *People v. Donovan*, 13 N.Y.2d 148, 150-51, 193 N.E.2d 628, 629, 243 N.Y.S.2d 841, 842 (1963) (once an individual's request for an attorney has been ignored, any statements obtained by police will be ignored); *People v. Arthur*, 22 N.Y.2d 325, 329, 239 N.E.2d 537, 539, 292 N.Y.S.2d 663, 666 (1968) (police may not question an individual in the absence of counsel once an attorney enters the proceeding unless the individual waives his right to counsel in front of his attorney); *People v. Taylor*, 27 N.Y.2d 327, 331-32, 266 N.E.2d 630, 632-33, 318 N.Y.S.2d 1, 5 (1971) (interrogation about unrelated matters is allowed because right to counsel did not attach to those matters); *People v. Rogers*, 48 N.Y.2d 167, 173, 397 N.E.2d 709, 713, 422 N.Y.S.2d 18, 22 (1979) (modified *Taylor* rule and bars all questioning in the absence of counsel including those "unrelated" to the initial arrest); *People v. Bartolomeo*, 53 N.Y.2d 225, 231-32, 423 N.E.2d 371, 374-75, 440 N.Y.S.2d 894, 897 (1981) (interprets *Rogers* as extending right to counsel invoked on previous pending charge to unrelated arrest); *People v. Bing*, 76 N.Y.2d 331, 338, 558 N.E.2d 1011, 1014, 559 N.Y.S.2d 474, 477 (1990) (overruled *Bartolomeo* but kept *Rogers* rule intact).

attorney had actually entered the proceedings,<sup>184</sup> New York now recognizes a specific request for counsel as an invocation of the indelible right to counsel.<sup>185</sup> Therefore, once an attorney has entered or been requested, any statements elicited will be suppressed.<sup>186</sup> Such a bar extends to interrogation about unrelated matters because it is the responsibility of the retained or requested counsel to determine what constitutes an "unrelated" matter.<sup>187</sup>

In the above situation, under both federal and state interpretation, *all* statements obtained in custodial interrogation subsequent to a request for counsel will be suppressed.<sup>188</sup> Therefore, it is irrelevant whether the incriminating statement relates to charge "A" or charge "B" if the request or retention of counsel has been ignored in a custodial setting.<sup>189</sup>

The third situation involves a defendant who is arrested on charge "A", retains counsel and is indicted. Defendant is later arrested on charge "B", waives his right to counsel and makes incriminating statements with respect to "B".<sup>190</sup>

184. *See* *People v. Cunningham*, 49 N.Y.2d 203, 400 N.E.2d 360, 424 N.Y.S.2d 421 (1980) (defendant's specific request for counsel invokes his indelible right to counsel).

185. *See Cunningham*, 49 N.Y.2d at 210, 400 N.E.2d at 364-65, 424 N.Y.S.2d at 425.

186. *See supra* notes 96-97.

187. *Rogers*, 48 N.Y.2d at 173, 397 N.E.2d at 713, 422 N.Y.S.2d at 22.

188. *Compare Arizona v. Roberson*, 486 U.S. 675, 683 (1988) (where suppression of statements made with respect to the unrelated crime at trial for that crime was upheld); *and Edwards v. Arizona*, 451 U.S. 477, 485 (1981) (where statements made with respect to crime for which defendant was arrested, made after continuous interrogation subsequent to request for counsel were suppressed at trial for that crime) *with Rogers*, 48 N.Y.2d 167, 397 N.E.2d 709, 422 N.Y.S.2d 18 (1979). A defendant was arrested on an initial charge and questioned. *Id.* at 170, 397 N.E.2d at 711, 422 N.Y.S.2d at 20. When the defendant invoked the right to counsel, the police merely shifted focus and questioned the defendant about unrelated matters. *Id.* Defendant's incriminating statements relating to the initial crime were erroneously admitted in a trial for that offense. *Id.* at 169, 397 N.E.2d at 711, 422 N.Y.S.2d at 19. In addition, the Court banned the use of statements made with respect to the unrelated crime in a trial for that crime as well. *Id.* at 173 n.2., 397 N.E.2d at 713 n.2., 422 N.Y.S.2d at 22 n.2.

189. *Id.*

190. *See supra* note 60-67 and accompanying text.

Under federal interpretation of the sixth amendment right to counsel, such statements would be admissible at a trial for the "B" charge.<sup>191</sup> Evidence pertaining to other crimes to which the sixth amendment right to counsel has not yet attached, are admissible at a trial for those offenses.<sup>192</sup> Since the defendant voluntarily waived counsel with respect to "B" and was not yet indicted for that crime, the right to counsel did not attach and the statements would be allowed. This is distinguishable from a fifth amendment right to counsel interpretation which would be applicable if the questioning relating to "B" occurred in the context of a single arrest prior to indictment.<sup>193</sup>

In New York, prior to the decision overruling *Bartolomeo*, such statements would likely have been suppressed.<sup>194</sup> In such a scenario, the police involved in the "B" arrest had an affirmative duty to find out whether defendant was represented by counsel on the prior pending charge.<sup>195</sup> If they failed to do this, they were held accountable for the fact that the defendant had prior pending representation.<sup>196</sup> Such prior representation would be imputed to the second arrest, despite the voluntary waiver of counsel.<sup>197</sup> This was true even if questioning about "B" occurred in the context of a separate arrest.<sup>198</sup>

In the aftermath of *Bartolomeo*, it was possible to urge judicial recognition of an exception to the rule depending upon the specific facts of the case and the judicial department.<sup>199</sup> Indeed,

---

191. See *Maine v. Moulton*, 474 U.S. 159 (1985).

192. *Id.* at 180 n.16.

193. See *supra* notes 28-37, 180-89 and accompanying text.

194. See *supra* note 115 and accompanying text.

195. *People v. Bartolomeo*, 53 N.Y.2d 225, 231-32, 423 N.E.2d 371, 374, 440 N.Y.S.2d 894, 897 (1981).

196. *Id.*

197. *Id.*

198. *Id.*

199. See, e.g., *People v. Lucarano*, 61 N.Y.2d 138, 460 N.E.2d 1328, 472 N.Y.S.2d 894 (1984) (suspect denial of representation releases police from obligation of further inquiry if such denial is reasonable); *People v. Kazmarick*, 52 N.Y.2d 322, 420 N.E.2d 45, 438 N.Y.S.2d 247 (1981) (despite police failure of inquiry, the right to counsel does not attach on a separate unrelated charge if there was in fact no representation on the prior

Judge Kaye's separate opinion in the *Bing* decision specifically advocated the creation of exceptions in order to preserve the doctrine of *stare decisis*.<sup>200</sup> Now that *Bartolomeo* is overruled, the statements made in the third scenario will be admissible. The *Bing* court distinguished between questioning with respect to unrelated matters in the context of a single arrest and questioning

---

pending charge); *see also* *People v. Mullins*, 103 A.D.2d 994, 479 N.Y.S.2d 820 (3d Dep't 1984) (spontaneous and voluntary inculpatory statements acknowledged as exception to right to counsel rules); *supra* notes 128-46 and accompanying text.

200. *People v. Bing*, 76 N.Y.2d 331, 351-61, 558 N.E.2d 1011, 1023-29, 559 N.Y.S.2d 474, 486-92 (1990) (Kaye, J., concurring as to result in *Bing* and *Medina*, and dissenting as to *Cawley*). It was noted that *Bartolomeo* was an integral part of right-to-counsel cases which weighed the interests of both defendants and law enforcement. *Id.* at 352, 558 N.E.2d at 1023, 559 N.Y.S.2d at 486. Therefore, there is a rationale for the rule. *Id.* at 355, 558 N.E.2d at 1026, 559 N.Y.S.2d at 489. Judge Kaye also found that the three appeals could be sensibly resolved without undercutting the rationale of the rule. *Id.* at 355-56, 558 N.E.2d at 1026, 559 N.Y.S.2d at 489.

In *Bing*, the People urged recognition of a territorial limitation to the *Bartolomeo* rule. *Id.* at 335, 558 N.E.2d at 1013, 559 N.Y.S.2d at 476. Noting the difficulties of inter-state application of the rule and the decreased incentive for interrogation by New York authorities on an out-of-state matter, Judge Kaye found the facts of *Bing* to be outside the *Bartolomeo* rule and therefore statements elicited in such a situation were admissible. *Id.* at 358, 558 N.E.2d at 1027, 559 N.Y.S.2d at 490.

Additionally, Judge Kaye found the facts of *Medina* to be outside the scope of application of the *Bartolomeo* rule. *Id.* The defendant had told police that he had been "let go" on the prior pending charge. *Id.* at 336, 558 N.E.2d at 1013, 559 N.Y.S.2d at 476. Judge Kaye considered this to be a straight application of *People v. Bertolo*, 65 N.Y.2d 111, 480 N.E.2d 61, 490 N.Y.S.2d 475 (1985), which allows the use of incriminating statements about unrelated charges as long as the police reasonably believed those charges are no longer pending, and they do not act in bad faith. *Bing*, 76 N.Y.2d at 358, 558 N.E.2d at 1027, 559 N.Y.S.2d at 490.

Finally, with respect to *Cawley*, the People asked the court to consider whether an outstanding bench warrant should be treated as a pending unrelated charge. *Id.* at 359, 558 N.E.2d at 1028, 559 N.Y.S.2d at 491. This question, Judge Kaye stated, was avoided by overruling *Bartolomeo*. *Id.* However, if it were answered in the affirmative, any inquiry into the substantiality of the defendant's relationship with his lawyer would be inappropriate and the statements would be suppressed. *Id.*

about unrelated matters in the context of a separate arrest.<sup>201</sup> Since the defendant in the above scenario was specifically taken into custody for the new unrelated charge and he freely waived his right to counsel with respect to that charge, such statements would be admissible.<sup>202</sup>

It seems the New York Court of Appeals has used a longer road to come to the same conclusion as the Supreme Court in situations of unrelated, prior pending charge situations. In *People v. Rogers*, the court reasoned that no impediment to the investigation of criminal conduct unrelated to the pending charge was created because the bar extends only to the use of those incriminating statements and not the actual questioning.<sup>203</sup> Therefore, if the defendant is questioned subsequent to invocation of the right to counsel about unrelated matters during custody on the initial charge, all subsequent statements will be suppressed (both "A" and "B").<sup>204</sup>

In *People v. Bartolomeo*, the court extended the bar to situations involving incriminating statements about prior, pending charges obtained in the context of a separate arrest where the right to counsel had previously attached.<sup>205</sup> Although this fact pattern is similar to *Maine v. Moulton*,<sup>206</sup> the New York result under *Bartolomeo* required suppression of statements relating to the initial charge *and* the new, unrelated charge.<sup>207</sup> In contrast, the federal result allows statements about the new, unrelated charge to be used.<sup>208</sup>

---

201. See *supra* note 159.

202. *Id.*

203. 48 N.Y.2d 167, 173 n.2, 397 N.E.2d 709, 713 n.2, 422 N.Y.S.2d 18, 22 n.2 (1979).

204. *Id.*

205. 53 N.Y.2d 225, 423 N.E.2d 371, 440 N.Y.S.2d 894 (1981).

206. 474 U.S. 159 (1985) (where the defendant was indicted for theft and was subject to electronic surveillance to reveal statements about a possible murder but the revealed statements concerned the theft).

207. See *supra* note 115.

208. *Maine v. Moulton*, 474 U.S. 159, 180 n.16 (1985). The court stated "incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not attached, are, of course, admissible at a trial of those offenses." *Id.*

This distinction seems borne out of the issue of waiver. Since the Supreme Court allows waiver in the absence of counsel as long as it is knowing and intelligent,<sup>209</sup> a waiver on the unrelated charge can be independently assessed. Conversely, since New York has adopted a per se rule banning waiver in the absence of counsel once the right to counsel has attached,<sup>210</sup> the court was compelled to extend the protection to new, unrelated charges.

However, the *Bing* decision has consciously realigned state treatment of the right to counsel in new, unrelated charge situations with the federal interpretation evidenced in *Maine v. Moulton*. Although the court has kept the *Rogers* rule intact,<sup>211</sup> it seemingly has limited that holding to the context of a single arrest.<sup>212</sup> That is, a waiver with respect to the unrelated questioning is invalid in the absence of counsel in the context of a single arrest if preceded by invocation of the right to counsel.<sup>213</sup> The *Bing* court has purposefully distinguished this from unrelated questioning in the context of a separate, unrelated arrest.<sup>214</sup> Like the federal court, New York courts will now allow waiver with respect to a separate, unrelated charge despite previous attachment of the right to counsel.<sup>215</sup>

Therefore, in such a setting, under both the federal rule and the state rule, incriminating statements obtained with respect to the prior pending charge cannot be used if obtained subsequent to a waiver for the new, unrelated charge.<sup>216</sup> However, statements

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

210. *See supra* notes 84-98 and accompanying text.

211. *See People v. Bing*, 76 N.Y.2d 331, 350, 558 N.E.2d 1011, 1022, 559 N.Y.S.2d 474, 485 (1990) ("[O]ur decision today should not be understood as retreating from the stated holding of *Rogers*."

212. *See id.* at 341-42, 558 N.E.2d at 1017, 559 N.Y.S.2d at 480.

213. *See id.* at 350, 558 N.E.2d at 1022, 559 N.Y.S.2d at 485.

214. *See supra* notes 159-60 and accompanying text.

215. *See Bing*, 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990).

216. *Compare Maine v. Moulton*, 474 U.S. 159 (1985) (defendant's constitutional rights were violated when the court allowed incriminating statements about theft charge for which the defendant had previously been indicted obtained by electronic surveillance conducted for the purpose of obtaining statements about a homicide) *with People v. Rogers*, 48 N.Y.2d

made with respect to the unrelated charge will be admissible in such a scenario.

## CONCLUSION

As shown, recent Supreme Court decisions have effectively weakened the sixth amendment guarantee of counsel applicable during adversarial proceedings.<sup>217</sup> The attachment of such a right during post-indictment proceedings is dependant upon affirmative request for counsel by the defendant.<sup>218</sup> Additionally, the Court will not impute a pre-indictment invocation of the right to counsel to post-indictment questioning about unrelated matters if there has been a voluntary waiver of counsel with respect to those matters.<sup>219</sup>

Conversely, New York courts have consistently strengthened the right to counsel applicable during later stages of criminal prosecution by applying and interpreting its own state constitution.<sup>220</sup> In New York, an affirmative request for counsel is not a prerequisite to the attachment of the right to counsel during adversarial proceedings. Instead, the state judiciary has determined that the right to counsel *indelibly* attaches at the commencement of formal proceedings with or without a specific request.<sup>221</sup>

---

167, 397 N.E.2d 709, 422 N.Y.S.2d 18 (1979) (where court found any statements obtained after a request for counsel in the context of a separate investigation in a single arrest would be suppressed) and *People v. Bartolomeo*, 53 N.Y.2d 225, 423 N.E.2d 371, 440 N.Y.S.2d 894 (1981) (where court found any statements obtained after the attachment of the right to counsel on a prior, pending charge will be suppressed), *overruled by*, *People v. Bing*, 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990) (which left the *Rogers* rule intact but refused to extend protection of the right to counsel to incriminating statements about new, unrelated charges in the context of a separate arrest).

217. See *supra* notes 6-7, 48-58 and accompanying text.

218. See *Patterson v. Illinois*, 487 U.S. 285 (1988); see also notes 6, 37, 51-54 and accompanying text.

219. See *supra* notes 59-71 and accompanying text.

220. See *Judicial Activism*, *supra* note 1, at 764.

221. See *People v. Rowell*, 59 N.Y.2d 727, 730, 450 N.E.2d 232, 233, 463 N.Y.S.2d 426, 427 (1983).



In addition, instead of case-by-case judicial interpretation of the elements of a knowing and intelligent waiver, New York courts have adopted a *per se* rule which emphasizes the role of counsel.<sup>222</sup> Under the state constitution, a defendant cannot waive his right to counsel after 1) an attorney has been requested,<sup>223</sup> 2) an attorney has entered the proceeding<sup>224</sup> or 3) judicial proceedings have commenced.<sup>225</sup>

However, the New York Court of Appeals has retreated from expansive protection in the area of the right to counsel and its application to investigation of separate, unrelated charges. The result has been a convergence with federal interpretation of sixth amendment separate unrelated charge situations. It is clear that both courts will suppress statements obtained in the context of a separate unrelated charge investigation if those statements relate to the prior pending charge. Similarly, it is clear that the Supreme Court will allow statements obtained in the context of a separate unrelated charge investigation if those statements relate to the unrelated charge and defendant has voluntarily waived his right to counsel. It is also likely, in light of *People v. Bing*, that in such a situation the New York Court of Appeals will also allow statements with respect to the unrelated charge if there has been a voluntary waiver of counsel.<sup>226</sup>

In sum, both the federal and state courts use similar guidelines to determine the attachment of the express right to counsel.<sup>227</sup> However, the invocation and permanence of such attachment is better protected under the auspices of the state constitution in the area of single charge situations. In contrast, New York's retreat

---

222. *See, e.g.*, *People v. Hobson*, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976).

223. *See People v. Cunningham*, 49 N.Y.2d 203, 400 N.E.2d 360, 424 N.Y.S.2d 421 (1980) (expanded "once-an-attorney" rule to include defendant's specific request for counsel).

224. *See supra* note 96.

225. *See supra* note 98.

226. *See supra* notes 205-14.

227. *See supra* note 5.

1991]

*OVERRULING OF BARTOLOMEO*

231

in the area of separate unrelated charge investigations has left the New York defendant with no protection beyond that which is provided by the Federal Constitution.

*Joseph D. Sullivan*

