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### Right to Counsel

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## RIGHT TO COUNSEL

*N.Y. CONST. art. I, § 6:*

*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 . . . .*

*U.S. CONST. amend. VI:*

*In all criminal prosecutions, the accused shall have the Assistance of Counsel for his defense.*

## COURT OF APPEALS

People v. Davis<sup>914</sup>  
(decided February 15, 1990)

Defendant contended that her incriminating statements made to sheriff's deputies should be suppressed, despite an oral and written waiver of her constitutional right to obtain counsel,<sup>915</sup> because she had invoked her right to an attorney the previous day. She also contended that her prior request for legal assistance rendered her legally incapable of waiving her *Miranda* rights, including her right to counsel.

The county court denied defendant's motion to suppress the statements made subsequent to the waiver, because the waiver was given almost one full day after her request for legal assistance. This meant that the defendant had fifteen hours to secure such assistance if she so desired. The appellate division reversed and suppressed the statements made by the defendant, holding that a suspect who invokes a right to counsel cannot effectively waive it thereafter in the absence of an attorney, even when not continuously being detained by the police.<sup>916</sup> The court of appeals reversed and held that the defendant could withdraw her

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914. 75 N.Y.2d 517, 553 N.E.2d 1008, 554 N.Y.S.2d 460 (1990).

915. See N.Y. CONST. art. I, § 6; U.S. CONST. amend. VI.

916. *Davis*, 75 N.Y.2d at 519, 553 N.E.2d at 1009, 554 N.Y.S.2d at 461.

earlier request for counsel and effectively waive that right "before an attorney enters the case if proceedings have not begun."<sup>917</sup>

The defendant was indicted for two counts of aggravated sexual assault and two counts of second degree murder. On August 25, 1985, the defendant had been questioned by sheriff's deputies, in her home, after receiving her *Miranda* warnings. At this time, the defendant was in a non-custodial setting. When the questioning began, the defendant informed the deputies that she wanted an attorney. The defendant then made several inculpatory statements and expressed a desire to continue talking with the deputies the next day. The following day, the defendant voluntarily accompanied the deputies to the sheriff's office to continue the questioning.<sup>918</sup> It is undisputed that the defendant, at this time, was in custody. During this session the defendant waived her constitutional rights, orally and in writing, after being advised of them several times. The defendant then gave a detailed audio taped, video taped and written confession.<sup>919</sup>

Both the federal<sup>920</sup> and state<sup>921</sup> constitutions guarantee the right to counsel in criminal proceedings. Generally, this right is a personal right and may be waived by the defendant without notice to his or her counsel. In New York, however, the right extends beyond the right afforded by the sixth amendment of the United States Constitution because it is "grounded on this State's constitutional and statutory guarantees."<sup>922</sup> In two situations the right attaches indelibly and a waiver will not be recognized unless expressed in the presence of counsel.<sup>923</sup> The first situation occurs after formal proceedings have begun and the second situation "relates to uncharged individuals in custody who have retained or

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917. *Id.* at 519, 523-24, 553 N.E.2d at 1010, 1012-13, 554 N.Y.S.2d at 462, 464-65.

918. *Id.* at 518-19, 553 N.E.2d at 1009, 554 N.Y.S.2d at 461.

919. *Id.* at 520, 553 N.E.2d at 1010, 554 N.Y.S.2d at 462.

920. U.S. CONST. amend. VI.

921. N.Y. CONST. art. I, § 6.

922. *Davis*, 75 N.Y.2d at 521, 553 N.E.2d at 1010, 554 N.Y.S.2d at 462.

923. *Id.* at 521, 553 N.E.2d at 1011, 554 N.Y.S.2d at 463.

requested an attorney.”<sup>924</sup> Although the plaintiff was in custody during the second interrogation, the county court held “that defendant’s request for counsel had lost its legal significance and that the subsequent waiver was valid”<sup>925</sup> because there was a significant time lapse between the invocation of her right to counsel and her waiver during the interrogation the following day. During this time lapse, the defendant had ample opportunity to secure legal assistance but failed to do so. The defendant was also willing to talk to the deputies further. She expressed this to the deputies on August 25th, before they left her home. In addition, the defendant voluntarily accompanied the deputies to the sheriff’s office on August 26th.<sup>926</sup> This fact was instrumental when the court considered whether the defendant’s waiver was potentially valid. The court remanded the matter to the appellate division for further consideration to determine whether the defendant intended to waive her right to counsel.<sup>927</sup>

The court determined that in non-custodial interviews, the coercion and influence of the state is limited because the defendant can refuse to respond or can walk away. At this early stage of the process, the court noted, “there is no legal requirement that an attorney be present before the witness changes an earlier decision to remain silent and talk[] to the authorities. The right may be invoked or waived at will before proceedings have commenced.”<sup>928</sup> Further, the court stated that the People have the burden of proving that there was a knowing and voluntary waiver. An express withdrawal of a previous request for counsel is preferred. However, a hearing court is also justified in finding a waiver based upon such circumstances as whether the defendant was read her constitutional rights before the waiver, whether the defendant initiated further communication with the police, and whether “there ha[d] been a break in the interrogation after the defendant ha[d] asserted the need for counsel with a reasonable

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924. *Id.*

925. *Id.* at 524, 553 N.E.2d at 1013, 554 N.Y.S.2d at 465.

926. *Id.*

927. *Id.*

928. *Id.* at 522-23, 553 N.E.2d at 1012, 554 N.Y.S.2d at 464 (citing *People v. Gary*, 31 N.Y.2d 68, 286 N.E.2d 263, 334 N.Y.S.2d 883 (1972)).

opportunity during the break for the suspect to contact an attorney.”<sup>929</sup> In this case, the defendant had fifteen hours to procure legal assistance and failed to do so. Therefore, the court held that the defendant was free to waive her right to counsel even though she did so while in a custodial setting. The case was remanded for further consideration to determine whether she actually intended to validly waive her rights.<sup>930</sup>

On the federal level, in *Edwards v. Arizona*,<sup>931</sup> the United States Supreme Court established that while a suspect may no longer be interrogated without the presence of counsel, once the suspect has invoked his or her right to counsel, the suspect may effectively waive that previously invoked right by initiating the communication with officials and by volunteering information.<sup>932</sup> Thus, once an accused has invoked the right to counsel, further interrogation by officials is prohibited “*unless* the accused himself initiates further communication, exchanges, or conversations with the police.”<sup>933</sup>

The Supreme Court further clarified this rule in *Oregon v. Bradshaw*.<sup>934</sup> In *Bradshaw*, the Court explained that the *Edwards* rule “was in effect a prophylactic rule, designed to protect an accused in police custody from being badgered by police officers . . . .”<sup>935</sup> Further, the Court explained that if such further interrogation occurs upon the accused’s initiative, after he has invoked his right to counsel, “the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the

929. *Id.* at 523, 553 N.E.2d at 1012, 554 N.Y.S.2d at 464 (citation omitted).

930. *Id.* at 523-24, 553 N.E.2d at 1012-13, 554 N.Y.S.2d at 464-65. On remand, the appellate division held that “defendant validly waived her right to counsel prior to confessing to Sheriff’s deputies on August 26, 1985.” *People v. Davis*, 162 A.D.2d 943, 559 N.Y.S.2d 192 (4th Dep’t), *appeal denied*, 76 N.Y.2d 892, 562 N.E.2d 879, 561 N.Y.S.2d 554 (1990) (citation omitted).

931. 451 U.S. 477 (1981).

932. *Id.* at 485.

933. *Id.* at 484-85 (emphasis added).

934. 462 U.S. 1039 (1983).

935. *Id.* at 1044.

interrogation.”<sup>936</sup>

Based upon these decisions, the United States Court of Appeals for the Tenth Circuit held that a defendant who reinitiated a conversation with police only minutes after he invoked his right to counsel, by stating that he was aware of his rights but wished to proceed with the interrogation without counsel, effectively waived his right to the assistance of counsel.<sup>937</sup>

More recently, the United States Supreme Court reinforced its decisions in *Minnick v. Mississippi*.<sup>938</sup> In *Minnick*, the Court stated that, “*Edwards* does not foreclose finding a waiver of Fifth Amendment protections after counsel has been requested, provided the accused has initiated the conversation or discussions with the authorities . . . .”<sup>939</sup> Thus, on the federal level, a defendant is capable of waiving the right to counsel subsequent to his or her invocation of the right if she or he initiates further communication.

While the federal rule allows for waiver of the right to counsel when initiated by the defendant, such initiation will only be a factor on the state level in determining whether a defendant actually intended to waive the right to counsel. Provided the defendant does intend to waive his or her right to counsel, an attorney has not yet entered the case, and proceedings have not begun, the defendant does have the power, on the state level, to revoke his or her prior request and waive the right to counsel. Therefore, it is clear that a criminal suspect does have the power on the federal and state level to waive his or her right to counsel.

People v. Bing<sup>940</sup>  
(decided July 2, 1990)

Three defendants were prosecuted separately for crimes unre-

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936. *Id.*

937. *United States v. Comosona*, 848 F.2d 1110, 1113 (10th Cir. 1988).

938. 111 S. Ct. 486 (1990).

939. *Id.* at 492.

940. 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990); see Comment, *Interaction Between State and Federal Right to Counsel: The Overruling of Bartolomeo*, 8 TOURO L. REV. 191 (1991).