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Right to Counsel

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interrogation.”⁹³⁶

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.⁹³⁷

More recently, the United States Supreme Court reinforced its decisions in *Minnick v. Mississippi*.⁹³⁸ 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”⁹³⁹ 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. Bing⁹⁴⁰
(decided July 2, 1990)

Three defendants were prosecuted separately for crimes unre-

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).

lated to prior pending charges for which they had been represented. On appeal, each contended that interpretation of article I, section 6 of the New York State Constitution, as evidenced by *People v. Bartolomeo*,⁹⁴¹ required suppression of incriminating statements about the current charge despite voluntary waiver of the right to counsel with respect to that charge. In contrast to the state court interpretation of the right to counsel,⁹⁴² United States Supreme Court interpretation of the federal right to counsel does not go so far as to impute an earlier request for counsel to a subsequent, separate arrest on an unrelated charge when the defendant voluntarily waives the right to counsel on that charge.⁹⁴³ As a result, the defendants in the case at hand relied

941. 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 a new, unrelated charge in the context of a separate arrest).

942. N.Y. CONST. art. I, § 6 ("In any trial in any court whatever the person accused shall be allowed to appear and defend in person *and with counsel* as in civil actions . . .") (emphasis added).

Additionally, New York State courts protect defendants during the investigatory stage of criminal proceedings by not only forbidding further questioning once an accused requests or retains counsel but by finding that any waiver in the absence of counsel at this point is invalid. *See, e.g., People v. Cunningham*, 49 N.Y.2d 203, 400 N.E.2d 360, 424 N.Y.S.2d 421 (1980) (a request for counsel as well as retention of counsel bars further interrogation in the absence of counsel) (emphasis added); *People v. Rogers*, 48 N.Y.2d 167, 397 N.E.2d 709, 422 N.Y.S.2d 18 (1979) (once a defendant retains an attorney, he may not be questioned in the absence of counsel about the initial crime or any other unrelated matters); *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 he 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 will be suppressed that are obtained after an attorney's request to see his client has been denied or a client's request to see his attorney has been denied).

943. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.").

The Supreme Court created a fifth amendment right to counsel during custodial interrogation in an effort to protect the right against compelled self-incrimination. *See Miranda v. Arizona*, 384 U.S. 436, 440-44 (1966).

If an accused requests counsel during custodial interrogation, all questioning, including questioning about unrelated matters, must cease. *See Edwards v.*

solely on the expansive state guarantee.

Upon consolidated appeals,⁹⁴⁴ the New York Court of Appeals expressly overruled *Bartolomeo*.⁹⁴⁵ It held that the defendants who had each been represented by counsel on prior pending unrelated charges were not deprived of rights to counsel under the state constitution.⁹⁴⁶ This was true because in the absence of counsel, defendants waived their *Miranda* rights⁹⁴⁷ and voluntarily responded to police interrogation concerning matters unrelated to the prior pending charge.⁹⁴⁸

Defendant Bing was suspected of a New York burglary. Although police were aware of a pending charge in Ohio, they failed to inquire about representation on that charge. However, defendant voluntarily waived his right to counsel on the New York charge and thereafter made incriminating statements about that crime.⁹⁴⁹

Relying on *Bartolomeo*, the defendant moved to suppress the statements claiming that the earlier representation on the pending charge barred waiver of the right to counsel in the absence of

Arizona, 451 U.S. 477 (1981). However, questioning may be continued in the absence of counsel if the accused initiates further communication with police. *Id.* at 484-85.

944. The court of appeals consolidated *People v. Cawley*, 150 A.D.2d 994, 542 N.Y.S.2d 1003 (1st Dep't 1989), *rev'd*, 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990), *People v. Medina*, 146 A.D.2d 344, 541 N.Y.S.2d 355 (1st Dep't 1989), *aff'd*, 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990), and *People v. Bing*, 146 A.D.2d 178, 540 N.Y.S.2d 247, (2d Dep't 1989), *aff'd*, 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990).

945. *Bing*, 76 N.Y.2d at 337, 558 N.E.2d at 1014, 559 N.Y.S.2d at 477. See *People v. Bartolomeo*, 53 N.Y.2d 225, 423 N.E.2d 371, 440 N.Y.S.2d 894 (1981).

946. *Bing*, 76 N.Y.2d at 349-50, 558 N.E.2d at 1022, 559 N.Y.S.2d at 485.

947. See *Miranda v. Arizona*, 384 U.S. 436 (1966). The Supreme 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.

948. *Bing*, 76 N.Y.2d at 351, 558 N.E.2d at 1022, 559 N.Y.S.2d at 485.

949. *Id.* at 335, 558 N.E.2d at 1012-13, 559 N.Y.S.2d at 475-76.

counsel.⁹⁵⁰ Both courts below, however, agreed with the prosecution's insistence on recognition of an out-of-state limitation to the *Bartolomeo* rule and denied suppression.⁹⁵¹

Defendant Cawley was arraigned for a New York robbery and was released on bail pending trial. He thereafter jumped bail but was returned six months later on a bench warrant. Upon interrogation by police officers who were unaware of his prior representation, defendant voluntarily made inculpatory statements about new, unrelated criminal conduct.⁹⁵²

The trial court suppressed the statements finding that the earlier representation barred waiver of the right to counsel in the absence of counsel. Similarly, the appellate division rejected the prosecutor's position calling for an exception to the *Bartolomeo* rule where the prior attorney-client relationship is tenuous at best.⁹⁵³

In defendant Medina's case, an investigating homicide detective spoke to the defendant about two murders which had been committed in the defendant's neighborhood. During the conversation, the detective learned that the defendant had recently been released from jail after having been held on an assault charge. When the detective inquired about the disposition of that charge, the defendant replied he had been "let go" because the complaining witnesses had failed to appear on four occasions.⁹⁵⁴ The detective assumed the prior case had been dismissed, and proceeded to arrest the defendant on suspicion of committing the neighborhood murders. Later at the police station, the defendant voluntarily waived his *Miranda* rights and uttered inculpatory statements.

The defendant made a pre-trial motion to suppress such statements claiming that because of his prior representation on the pending charge, waiver of his right to counsel on the new unre-

950. *Id.* at 335, 558 N.E.2d at 1013, 559 N.Y.S.2d at 476. Under *Bartolomeo* the right to counsel attaches indelibly upon representation on the prior pending charge. This right cannot then be waived in the absence of counsel. *Id.*

951. *Id.*

952. *Id.* at 336, 558 N.E.2d at 1013, 559 N.Y.S.2d at 476.

953. *Id.*

954. *Id.*

lated charge was impermissible absent an attorney's presence.⁹⁵⁵ The trial court denied his motion to suppress, finding it was reasonable to believe the prior charge had been dismissed.⁹⁵⁶ On appeal, the appellate division affirmed.⁹⁵⁷ The district attorney urged the court of appeals to overrule *Bartolomeo*.⁹⁵⁸

The court found it necessary to overrule *Bartolomeo* despite the compelling concerns of *stare decisis*.⁹⁵⁹ It was determined that the appeals before the court aptly demonstrated the "unworkability" of the *Bartolomeo* rule and the unacceptable burden it placed on law enforcement.⁹⁶⁰ Additionally, the court found that recognition of further exceptions to the rule would undermine its rationale.⁹⁶¹

The first section of the court's decision explained the principle and emphasized the importance of *stare decisis* in our legal system.⁹⁶² However, it also advocated the necessity of overruling prior decisions when persuaded by the "lessons of experience and the force of better reasoning."⁹⁶³ The court concluded that the overruling of *Bartolomeo* "was consistent with these principles and required as a matter of sound policy."⁹⁶⁴

The second section of the decision provides an analysis of the right to counsel in New York as it existed prior to the *Bartolomeo* decision.⁹⁶⁵ The court identified two well-defined situations in

955. *Id.*

956. *Id.* The trial court "also denied the defendant's trial motion to submit the issue of voluntariness of his statements to the jury." *Id.*

957. *Id.* at 337, 558 N.E.2d at 1013, 559 N.Y.S.2d at 476. *See* *People v. Medina*, 146 A.D.2d 344, 541 N.Y.S.2d 355 (1st Dep't 1989) (two justices dissented finding that the voluntariness of the statements would have been submitted to the jury).

958. *Bing*, 76 N.Y.2d at 337, 558 N.E.2d at 1013, 559 N.Y.S.2d at 476.

959. *Id.* at 337, 558 N.E.2d at 1014, 559 N.Y.S.2d at 477.

960. *Id.*

961. *Id.*

962. *Id.* at 337-38, 558 N.E.2d at 1014, 559 N.Y.S.2d at 477.

963. *Id.* at 338, 558 N.E.2d at 1014, 559 N.Y.S.2d at 477 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting)).

964. *Id.*

965. "There are two well-defined situations in which the right to counsel is said to attach indelibly . . . and a waiver, notwithstanding the client's right to

which the right to counsel attaches indelibly under the state constitution thereby making a waiver in the absence of counsel impermissible. The first situation relates to elicitation of waivers after commencement of formal proceeding.⁹⁶⁶ The second situation relates to custodial interrogation of uncharged individuals in custody who have retained or requested counsel.⁹⁶⁷

The court explicitly recognized the importance of attorney representation in the area of waiver of the right to counsel as a shield against the coercive nature of the state mechanism.⁹⁶⁸ However,

waive generally, will not be recognized unless made in the presence of counsel." *Id.* at 339, 558 N.E.2d at 1015, 559 N.Y.S.2d at 478.

Both the federal court and the state court interpret the right to counsel to attach indelibly after the commencement of formal proceedings. *See Kirby v. Illinois*, 406 U.S. 682 (1972) (interpreting the sixth amendment right to counsel to be commenced at indictment); *People v. Samuels*, 49 N.Y.2d 218, 400 N.E.2d 1344, 424 N.Y.S.2d 892 (1980) (court held 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) (court held that statements made after arraignment yet before indictment should be granted the same protection as post-indictment statements).

However, only the New York courts have recognized a per se rule barring interrogation of uncharged individuals in custody or waiver of the right to counsel by these individuals in the absence counsel. *Compare Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (waiver would be allowed as long as it is found to be knowing and intelligent) *and Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981) (a request for counsel bars further interrogation unless the accused initiates further communication with the police) *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).

966. *Bing*, 76 N.Y.2d at 339, 558 N.E.2d at 1015, 559 N.Y.S.2d at 478 (citing, *inter alia*, *People v. Samuels*, 49 N.Y.2d 218, 400 N.E.2d 1344, 424 N.Y.S.2d 892 (1980)).

967. *Id.* (citing, *inter alia*, *People v. Hobson*, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976)).

968. *Id.* at 339-40, 558 N.E.2d at 1015, 559 N.Y.S.2d at 478. The court stated:

Underlying all these considerations is a recognition of the imbalance between a suspect and the agents of the State, the coercive influences the State may bring to bear on one suspected of a crime and acknowledgment that a party who has expressed the inability to deal

the court also emphasized that, in the past, such protection did not necessarily extend to "exclusion of statements made to police . . . about crimes unrelated to those on which the suspect had representation."⁹⁶⁹ Additionally, they noted that a prior pending criminal case in which the defendant's right to counsel had attached did not bar the police from questioning the defendant unless he was actually represented on the prior charge.⁹⁷⁰

The third section of the opinion provides an overview of the *Bartolomeo* rule and the problems it created for the courts. The rule required that police refrain from questioning a suspect about the pending charge on which the right to counsel had attached and also about a new, unrelated charge for which the defendant waived his right to counsel.⁹⁷¹ The court framed a number of questions which were left unanswered by the *Bartolomeo* decision.⁹⁷² It concluded that such failure subsequently led to uneven application of the rule and "destabiliz[ation]. . . [of] the right to

with those forces without legal help is entitled to have help available without State interference.

Id. (citing *People v. Rogers*, 48 N.Y.2d 167, 173, 397 N.E.2d 709, 713, 422 N.Y.S.2d 18, 22 (1979)).

969. *Id.* at 340, 558 N.E.2d at 1015, 559 N.Y.S.2d at 478. (citing, *inter alia*, *People v. Taylor*, 27 N.Y.2d 327, 266 N.E.2d 630, 318 N.Y.S.2d 1 (1971) (limiting the scope of the attorney's representation to the specific matters for which he was retained).

970 *See, e.g.*, *People v. Kazmarick*, 52 N.Y.2d 322, 420 N.E.2d 45, 438 N.Y.S.2d 247 (1981) (defendant's right to counsel was not violated by subjecting him to a lie detector test to which he consented since he was not in fact represented on the prior charge).

971. *Bartolomeo*, 53 N.Y.2d at 229, 423 N.E.2d at 373, 440 N.Y.S.2d at 897.

972. *Bing*, 76 N.Y.2d at 341-42, 558 N.E.2d at 1016-17, 559 N.Y.S.2d at 479. The court stated that:

If the rule created a remedy to protect only rights in the pending case and not on the new charge, why was not exclusion solely in the pending case adequate protection? Conversely, if exclusion was required to protect an independent right to counsel with respect to the new crime, there was not explanation of why *Rogers* should be expanded so dramatically to protect a suspect against self-incrimination on the new crime unrelated to the matter upon which defendant actually obtained representation.

Id.

counsel in general.”⁹⁷³ Accordingly, the court noted, subsequent court decisions were aimed at limiting the scope of the rule in order to restore the necessary balance between law enforcement and defendant protection.⁹⁷⁴

In the fourth section of the opinion, the court once again turned to the cases at hand, and rejected the practicability of recognizing the exceptions to *Bartolomeo* that were presented.⁹⁷⁵ In all three cases, the defendants had counsel on the prior pending charges. However, despite police knowledge of the pending charge, no inquiry as to representation was made.⁹⁷⁶ It was noted that such cases would fall squarely within the *Bartolomeo* rubric.⁹⁷⁷

While the court seemed sympathetic to the practical difficulties of ascertaining out-of-state representation as enunciated in *Bing*, it found it insufficient as a ground for limiting a defendant’s constitutional rights.⁹⁷⁸ Similarly, the court rejected an exception

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

974. *See, e.g.,* *People v. Bertolo*, 65 N.Y.2d 111, 480 N.E.2d 61, 490 N.Y.S.2d at 475 (1985) (constructive knowledge of prior representation on a pending charge as required by *Bartolomeo* would only apply if police have actual knowledge of a recent arrest on a serious charge).

975. *See* *People v. Cawley*, 150 A.D.2d 994, 542 N.Y.S.2d 1003 (1st Dep’t 1989) (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 the attorney-client relationship), *rev’d*, 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990); *People v. Medina*, 146 A.D.2d 344, 541 N.Y.S.2d 355 (1st Dep’t 1989) (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), *aff’d*, 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990); *People v. Bing*, 146 A.D.2d 178, 540 N.Y.S.2d 247 (2d Dep’t 1989) (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*), *aff’d*, 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990).

976. In *Medina*, the question related to the failure to *adequately* inquire about prior representation. *People v. Medina*, 146 A.D.2d 344, 345, 541 N.Y.S.2d 355, 355 (1st Dep’t 1989).

977. *Bing*, 76 N.Y.2d at 344, 558 N.E.2d at 1018, 559 N.Y.S.2d at 481.

978. *Id.* at 345, 558 N.E.2d at 1019, 559 N.Y.S.2d at 482. The Court stated: “As real as [the] practical difficulties [of out-of-state application] may be, they are hardly a principled basis for denying a constitutional right.” *Id.*

based on the attenuation of the attorney-client relationship as was urged in *Cawley*.⁹⁷⁹ The court reasoned that since it was impossible for the defendant to expressly waive his right to counsel in the absence of his attorney, it would follow that he could not impliedly waive it either.⁹⁸⁰ Thus, the court concluded, recognition of these exceptions would swallow the rule as a whole.⁹⁸¹

Finally, in the last section, the court focused on the reasons for abandoning the rule. In the framework of out-of-state representation as demonstrated in *Bing*, it noted the likely obstruction to effective law enforcement due to state variation in substantive and procedural law.⁹⁸² As for *Cawley*, the court found that since he had unquestionably, voluntarily, and knowingly waived his rights with respect to the unrelated charge, it would press reason to its limit to afford him an indelible right to counsel on a superficial prior attorney-client relationship.⁹⁸³

While the court recognized the need to protect individuals from police harassment, it found the *Bartolomeo* rule, not only unjustifiable in its social cost,⁹⁸⁴ but unconnected to any principled basis.⁹⁸⁵ In sum, the *Bartolomeo* rule is based on a fictional attorney-client relationship which assumes that the attorney would not refuse to represent his client on the subsequent unrelated charge.⁹⁸⁶ The court refuted this premise by noting that the deci-

979. *Id.* at 346, 558 N.E.2d at 1020, 559 N.Y.S.2d at 483. "If a defendant cannot expressly reject counsel, there seems to be little legal basis for a judicial inquiry to determine whether he has impliedly done so." *Id.*

980. *Id.*

981. *Id.* As for *Medina*, the court concluded it was bound by the factual finding below that the police acted reasonably. However, with respect to the question of whether the voluntariness of the defendants statements should be submitted to the jury pursuant to CPL sections 60.45 and 710.70, the court found that the voluntariness of the statements would not be an issue under the *Bartolomeo* rule. *Id.* at 346-47, 558 N.E.2d at 1020, 559 N.Y.S.2d at 483.

982. *Id.* at 347, 558 N.E.2d at 1020, 559 N.Y.S.2d at 483.

983. *Id.*

984. *Id.* at 348, 558 N.E.2d at 1021, 559 N.Y.S.2d at 484 (pointing to *Bartolomeo*'s troublesome effect on our jurisprudence evidenced by sharply divided differences on how and when to apply it).

985. *Id.* at 348-49, 558 N.E.2d at 1021, 559 N.Y.S.2d at 484.

986. *Id.* at 349, 558 N.E.2d at 1021, 559 N.Y.S.2d at 484.

sion to retain counsel rests with the client, not the attorney, and since the *Bartolomeo* defendants waived their right to counsel on the unrelated charge, it is tantamount to not hiring a lawyer.⁹⁸⁷

The court also refuted the argument that the *Bartolomeo* rule is based on the necessity of attorney presence on the second charge in order to determine whether the interrogation is indeed unrelated to the prior charge.⁹⁸⁸ First, it noted the lack of identification of such a basis in the *Bartolomeo* decision.⁹⁸⁹ Second, it classified the decision in *People v. Rogers*⁹⁹⁰ as the correct demarcation of a bright-line rule which serves this basis.⁹⁹¹

Finally, the court emphasized that the decision to permit questioning on unrelated crimes does not violate the state constitution or ethical principles.⁹⁹² In overruling *Bartolomeo*, however, the court clearly distinguished the *Rogers* decision, leaving it intact.⁹⁹³ As such, the court affirmed the orders of the appellate di-

987. *Id.*

988. Judge Kaye relied on this premise in her opinion. *See id.* at 353-54, 558 N.E.2d at 1024-25, 559 N.Y.S.2d at 487-88 (Kaye, J., concurring as to result in *Bing* and *Medina*, and dissenting as to *Cawley*) (citing *People v. Rogers*, 48 N.Y.2d 167, 173, 397 N.E.2d 709, 713, 422 N.Y.S.2d 18, 22 (1979)).

989. *Bing*, 76 N.Y.2d at 349, 558 N.E.2d at 1021, 559 N.Y.S.2d at 484.

990. 48 N.Y.2d 167, 397 N.E.2d 709, 422 N.Y.S.2d 18 (1979).

991. *Bing*, 76 N.Y.2d at 349, 558 N.E.2d at 1021-22, 559 N.Y.S.2d at 484-85. The court reasoned that since the constitution refers to representation by counsel as in civil matters, then it follows that since in a civil case an attorney is not precluded from speaking to an adverse party about an unrelated matter for which the party does not have representation, law enforcement officers should not be precluded from doing so in a criminal case. *Id.*

992. *Id.* at 349-50, 558 N.E.2d at 1022, 559 N.Y.S.2d at 489.

993. *Id.* 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:

[A]lthough *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 [O]ur decision today should not be understood as retreating from the stated holding of *Rogers*.

vision with respect to *People v. Bing* and *People v. Medina*. The order of the appellate division with respect to *People v. Cawley* was reversed.

Judge Kaye wrote a separate opinion concurring with the results as to *Bing* and *Medina* and dissenting as to *Cawley*. The opinion commences with recognition of New York's carefully planned legal development of the right to counsel based on the perception that an attorney is the most effective safeguard against "the awesome law enforcement machinery possessed by the State."⁹⁹⁴

The first section refutes the majority's characterization of the *Bartolomeo* decision as an aberrant decision marked by uncertainty as to its rationale and fitness in our jurisprudence.⁹⁹⁵ It carefully traces the development of right to counsel cases in New York during custodial interrogation.⁹⁹⁶ The principle forwarded by the courts in these cases was that the "attorney's presence is the most effective means of minimizing the inherent imbalance . . . [of the] accused subject to the coercive power of the

Id.

994. *Bing*, 76 N.Y.2d at 351, 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*) (quoting *People v. Cunningham*, 49 N.Y.2d 203, 207, 400 N.E.2d 360, 363, 424 N.Y.S.2d 421, 424 (1980)).

995 *Id.* 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*).

996. See, e.g., *People v. Cunningham*, 49 N.Y.2d 203, 205, 400 N.E.2d 360, 361, 424 N.Y.S.2d 421, 422 (1980) (defendant's specific request for counsel during custodial interrogation invokes his indelible right to counsel); *People v. Hobson*, 39 N.Y.2d 479, 481, 348 N.E.2d 894, 896, 384 N.Y.S.2d 419, 420 (1976) (extending the "once-an-attorney" rule by focusing more closely on the protection the attorney provides rather than on police awareness of the attorney's entrance into the case); *People v. Donovan*, 13 N.Y.2d 148, 154, 193 N.E.2d 628, 631, 243 N.Y.S.2d 841, 845 (1963) (statements obtained after an attorney request to see his client has been denied or a client request to see his attorney has been ignored will be suppressed); *People v. Arthur*, 22 N.Y.2d 325, 330, 239 N.E.2d 537, 539, 292 N.Y.S.2d 663, 666-67 (1968) (once an attorney enters a proceeding, police may not question the defendant in the absence of counsel unless the defendant waives his right in front of counsel).

State.”⁹⁹⁷

Judge Kaye continued by analyzing the decision in *People v. Taylor*⁹⁹⁸ which allowed interrogation of uncounseled defendants on unrelated charges without an attorney’s presence.⁹⁹⁹ This exception led to the occasion to subvert the right to counsel rules. As such, Judge Kaye identified the *Rogers* decision as a judicial solution to the problems created by the *Taylor* exception.¹⁰⁰⁰

The *Rogers* decision established that the “relatedness” of pending charges would be determined by “the attorneys who were actually representing the defendants.”¹⁰⁰¹ Furthermore, *Bartolomeo* was simply a natural continuation of this principle. In situations where the police have actual knowledge of the existence of unrelated charges, there exists a duty to inquire about representation as to those charges.¹⁰⁰² It was noted that such a duty does not extend to situations where the police could not be reasonably charged with knowledge that the defendant had a lawyer on the unrelated matter.

In the second section of her opinion, Judge Kaye focused on the specific facts of the appeals at hand in an effort to demonstrate that overruling *Bartolomeo* was unnecessary. Her conclusion was that the situations presented in *Bing* and *Medina* were outside the scope of the *Bartolomeo* rule. As for *Bing*, she noted that the facts could easily be distinguished from the *Bartolomeo* facts.¹⁰⁰³ In conclusion, she advanced the notion that based on common sense and fairness the *Bartolomeo* rule should

997. *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*) (citations omitted).

998. 27 N.Y.2d 327, 266 N.E.2d 630, 318 N.Y.S.2d 1 (1971).

999. *Id.* at 331-32, 266 N.E.2d at 632-33, 318 N.Y.S.2d at 4-5.

1000. *Bing*, 76 N.Y.2d at 353, 558 N.E.2d at 1024, 559 N.Y.S.2d at 487.

1001. *Id.* at 354, 558 N.E.2d at 1025, 559 N.Y.S.2d at 488.

1002. *People v. Bartolomeo*, 53 N.Y.2d 225, 231-32, 423 N.E.2d 371, 375, 440 N.Y.S.2d 894, 897 (1981).

1003. *Bing*, 76 N.Y.2d at 356-58, 558 N.E.2d at 1026-27, 559 N.Y.S.2d at 489-90. *Bartolomeo* dealt with a prior pending charge in the same county. In such a situation, police ascertainment of prior pending representation is relatively easy. *Bing* deals with a Nassau County burglary and the prior pending charge is in Ohio. *Id.*

be drawn at state lines. Her justification was based on the facts that New York law enforcement would not have as much incentive for investigating out of state charges and that geographical differences create a natural separation that makes inadvertent questioning on out of state charges less likely.¹⁰⁰⁴

As for *Medina*, she found that the facts of the case were not so unusual as to necessitate the overruling of an important precedent. Her analysis characterized *Medina* as a simple application of the rule that a “confession elicited from a suspect represented by counsel on unrelated charges” is allowed if the police reasonably believed those “charges were no longer pending and they did not act in bad faith.”¹⁰⁰⁵

Finally, Judge Kaye turned to *Cawley*. While she agreed with the majority’s position that inquiry into the substantiality of the defendant’s relationship with his lawyer would be inappropriate, Judge Kaye focused on the fact that the police interrogated the defendant until he confessed even though they were told to discontinue the inquiry.¹⁰⁰⁶ As such, *Cawley* simply demonstrates deliberate ignorance of the rule by law enforcement, not the “unworkability” of the rule.

In the final section, Judge Kaye noted that the majority arguments were not novel and were addressed appropriately in *Bartolomeo*.¹⁰⁰⁷ Specifically, the *Bartolomeo* majority held that the “rule was justified as a matter of policy, was reasonable, and did not impose an unacceptable burden on law enforcement agencies.”¹⁰⁰⁸ In sum, the decision to overrule a case should not be dependent upon final accumulation of a majority of votes.¹⁰⁰⁹

1004. *Id.* at 357-58, 558 N.E.2d at 1027, 559 N.Y.S.2d at 490.

1005. *Id.* at 358, 558 N.E.2d at 1027, 559 N.Y.S.2d at 490 (citing *People v. Bertolo*, 65 N.Y.2d 111, 120-21, 480 N.E.2d 61, 68, 490 N.Y.S.2d 475, 482 (1985)).

1006. *Id.* at 359, 558 N.E.2d at 1028, 559 N.Y.S.2d at 491.

1007. *Id.* at 360, 558 N.E.2d at 1029, 559 N.Y.S.2d at 492.

1008. *Id.* at 360, 558 N.E.2d at 1028, 559 N.Y.S.2d at 491.

1009. Judge Jones authored the *Bartolomeo* decision in which Chief Judge Cooke and Judges Fuchsberg and Meyers concurred. *Bartolomeo*, 53 N.Y.2d at 240, 423 N.E.2d at 379, 371 N.Y.S.2d at 902. Judge Wachtler wrote a dissenting opinion in which Judges Jasen and Gabrielli concurred. *Id.*

The *Bing* decision was authored by Judge Simons; Chief Judge Wachtler and

Additionally, the recurrence of *Bartolomeo* issues was not a signal of demise but a natural progression of the judicial process which constantly refines recent precedents.¹⁰¹⁰ As for majority claims of “destabilization,” Judge Kaye concluded that it was more likely that destabilization will be caused by nonadherence to the doctrine of stare decisis.¹⁰¹¹

In reaching their respective decisions, both the majority and the dissent relied entirely on interpretation of the right to counsel as guaranteed by the state constitution. However, both mentioned the less expansive protection offered by the Federal Constitution in similar settings.¹⁰¹²

The fifth and sixth amendments guarantee an accused the right to counsel. The sixth amendment serves to ensure fairness throughout the criminal process by expressly providing for the right to counsel.¹⁰¹³ Additionally, Supreme Court interpretation of the fifth amendment has developed a right to counsel specifically aimed at protecting the right against compulsory self-incrimination.¹⁰¹⁴

During custodial interrogation, judicial interpretation of the fifth amendment requires the police to cease all questioning, including questioning with respect to unrelated matters, once the accused has requested counsel. Similarly in New York, further communication with the accused is forbidden once he has requested or retained counsel. However, in such a situation, the Supreme Court allows waiver in the absence of counsel subsequent to attorney request or retention if the accused voluntarily

Judges Hancock and Bellacosa concurred. *Bing*, 76 N.Y.2d at 361, 558 N.E.2d at 1029, 559 N.Y.S.2d at 492. Judge Kaye concurred in result and authored a separate opinion in which Judges Alexander and Titone concurred. *Id.*

1010. *Bing*, 76 N.Y.2d at 360, 558 N.E.2d at 1028-29, 559 N.Y.S.2d at 491-92.

1011. *Id.* at 360, 558 N.E.2d at 1029, 559 N.Y.S.2d at 429.

1012. *Bing*, 76 N.Y.2d at 338-39, 351, 558 N.E.2d at 1014-15, 1023, 559 N.Y.S.2d at 477-78, 486.

1013. See Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 Iowa L. Rev. 975, 980-82 (1986).

1014. *Id.* at 988 n.50.

initiates further communication with police.¹⁰¹⁵ In contrast, New York has instituted a per se rule based on its own state constitution which forbids further questioning *and* elicitation of voluntary waiver of the right to counsel in the absence of counsel. Therefore, an individual cannot freely choose to waive the right to counsel without his or her attorney's presence subsequent to an earlier request or retention of counsel.

Bartolomeo further expanded such protection by imputing a request or retention of counsel with respect to an earlier pending charge to a subsequent arrest on an unrelated charge. As a result, although the *Bing* decision has negated this recent expansion, New York continues to provide greater protection for the uncharged individual subject to custodial interrogation in the context of a single arrest.

SUPREME COURT, APPELLATE DIVISION

SECOND DEPARTMENT

People v. Margan¹⁰¹⁶
(decided April 23, 1990)

A criminal defendant contended that his constitutional right to the presence of counsel was violated during trial when the court proceeded with the direct examination of a state witness in the absence of defense counsel. The court held that proceeding with the direct examination of a witness, in the absence of defense counsel, may not be considered harmless error under either the federal¹⁰¹⁷ or state¹⁰¹⁸ constitutions.¹⁰¹⁹

1015. See *Edwards v. Arizona*, 451 U.S. 477 (1981). "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.* at 484-85 (emphasis added).

1016. 157 A.D.2d 64, 554 N.Y.S.2d 676 (2d Dep't 1990).

1017. U.S. CONST. amend. VI.

1018. N.Y. CONST. art. I, § 6.

1019. *Margan*, 157 A.D.2d at 69, 554 N.Y.S.2d at 679.