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Right to Counsel

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upon whether the defendant has retained counsel for the matter in question, while the federal rule turns upon whether formal proceedings have commenced against the defendant for the particular charge upon which he or she is asked to participate in a line up.

SUPREME COURT

NEW YORK COUNTY

People v. Goldfinger⁷⁶⁴
(decided January 25, 1991)

The defendant, Judith Goldfinger, sought to suppress secretly tape recorded statements made by her to an agent of the New York County District Attorney. Goldfinger claimed that her New York State constitutional right to counsel⁷⁶⁵ was violated because the statements were obtained out of the presence of her attorney who she had previously retained to defend her in federal civil proceedings, the subject matter of which was based upon the same transactions and occurrences as the matter being investigated by the district attorney's office. She claimed that this constitutional violation should result in the suppression of her tape recorded statements. The court held that her statements should be suppressed because, although no formal criminal proceedings had yet begun, her retention of counsel related to all matters concerning the transactions and occurrences in question and, therefore, she could not be questioned about them out of the presence of her attorney.⁷⁶⁶

In 1988, Goldfinger's employer, Cosmos Forms Ltd. (Cosmos), filed a federal civil suit under the Racketeer Influenced and Corrupt Organizations Act (RICO)⁷⁶⁷ against Guardian Life Insurance Co. (Guardian), one of its corporate

764. 149 Misc. 2d 765, 565 N.Y.S.2d 993 (Sup. Ct. New York County 1991).

765. N.Y. CONST. art. I, § 6.

766. *Goldfinger*, 149 Misc. 2d at 771, 565 N.Y.S.2d at 997.

767. 18 U.S.C. § 1961 (Supp. 1990).

customers. Guardian counterclaimed against Cosmos and against Goldfinger personally under the RICO statute, claiming that they had defrauded and conspired against Guardian "by inflating invoices for goods sold and delivered in 1987 and 1988."⁷⁶⁸ Guardian proceeded to bring another separate federal civil suit against Goldfinger and one of her former co-workers based upon the same claims. Goldfinger then obtained counsel to represent her in these matters. One month later, in March of 1989, the New York District Attorney's Office persuaded one of the defendant's alleged co-conspirators, Lorraine Calderazzo, to secretly tape record a conversation with Goldfinger concerning the alleged wrongdoing. During the taped conversation, Calderazzo represented to the defendant that the district attorney had contacted her about the inflated invoices and asked the defendant for advice on how to handle the matter. Defendant made it clear that Calderazzo should not speak to the district attorney's office under any circumstances and advised her to retain a lawyer immediately.⁷⁶⁹ At this time, no formal criminal proceedings had yet begun. Six months later, the district attorney presented these tape recordings to a grand jury, which ultimately indicted Goldfinger.

Goldfinger maintained that because the district attorney's office knew that she was represented by counsel on these matters in federal civil law suits, they were banned from questioning her about these issues without the presence of her attorney. She alleged, therefore, that the tape recorded conversation violated her state constitutional right to counsel. The district attorney argued that because the conversation was merely part of an informal investigation, they should not have been barred from questioning the suspect, who had retained counsel to represent her in separate civil proceedings.

The court noted that in 1990, in *People v. Bing*,⁷⁷⁰ the New York Court of Appeals announced two instances in which one's "right to counsel 'indelibly' attaches and cannot be waived in the

768. *Goldfinger*, 149 Misc. 2d at 766, 565 N.Y.S.2d at 993.

769. *Id.* at 769, 565 N.Y.S.2d at 996.

770. 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990).

absence of counsel⁷⁷¹ In either instance, “[p]olice authorities may not question [the individuals] in the absence of counsel.”⁷⁷²

In *Goldfinger*, the prosecution’s argument relied in part, however, on the fact that at the time of the tape recorded conversation, formal proceedings had not yet begun, and defendant was not in custody during the questioning by the district attorney’s agent.

In addition to the rule established in *Bing*, the *Goldfinger* court relied upon the rule stated by the New York Court of Appeals in *People v. Skinner*.⁷⁷³

[E]ven if the defendant has *not* been formally charged and is *not* in custody, where “a defendant is known to have invoked the right to and obtained the services of counsel *on the matter about which the person is questioned*, the State may not use the statements elicited from that person in the absence of a waiver of counsel made in the presence of the attorney.”⁷⁷⁴

The *Goldfinger* court rejected the prosecution’s argument that *People v. Smith*⁷⁷⁵ controlled and that *Smith* stood for the proposition that the status of having obtained counsel in a civil proceeding does not carry over to a criminal proceeding.⁷⁷⁶ The

771. The right to counsel cannot be waived: 1) once formal proceedings have commenced; and 2) when an uncharged individual in custody has retained or requested an attorney. *Bing*, 76 N.Y.2d at 339, 558 N.E.2d at 1015, 559 N.Y.S.2d at 478.

772. *Goldfinger*, 149 Misc. 2d at 768, 565 N.Y.S.2d at 995 (quoting *Bing*, 76 N.Y.2d at 339, 558 N.E.2d at 1015, 559 N.Y.S.2d at 478) (footnote added and alteration in original).

773. 52 N.Y.2d 24, 417 N.E.2d 501, 436 N.Y.S.2d 207 (1980).

774. *Goldfinger*, 149 Misc. 2d at 769, 565 N.Y.S.2d at 995 (quoting *Skinner*, 52 N.Y.2d at 32, 417 N.E.2d at 505, 436 N.Y.S.2d at 211) (alteration in original).

775. 62 N.Y.2d 306, 465 N.E.2d 336, 476 N.Y.S.2d 797 (1984).

776. In *Smith*, the defendant was charged with third degree assault after being issued a summons in family court for allegedly beating his stepson. While the court of appeals noted that the two proceedings were wholly different in nature, the case actually turned upon the fact that the defendant never invoked his right to counsel in the original civil proceeding. *Id.* at 313, 465 N.E.2d at 340, 476 N.Y.S.2d at 801.

Goldfinger court noted that “the critical factor in the [*Smith*] case was that the defendant had never invoked his right to counsel or in fact retained counsel in the earlier neglect proceeding.”⁷⁷⁷ The *Smith* court actually stated that a defendant may waive his or her right to counsel in the absence of an attorney if 1) the proper *Miranda* warnings are given, and 2) if “the person has not in fact retained counsel in relation to the neglect proceeding.”⁷⁷⁸

Instead of determining whether the right to counsel attached based upon the status of the proceeding or whether the defendant was in custody at the time counsel was requested, as demanded in *Bing*, the *Goldfinger* court determined that the issue should turn upon whether counsel was obtained to aid the defendant on the *subject matter* in question, as established in *Skinner* ten years prior to the *Bing* decision:

[T]he critical factor in the case was that the defendant had never invoked his right to counsel or in fact retained counsel in the earlier neglect proceeding: “When interrogated by police investigating the potential criminal charges, such a person may waive the right to counsel in the absence of counsel, provided that *Miranda* warnings, if required by the circumstances of the interrogation, are properly given *and that the person has not in fact retained counsel in relation to the neglect proceeding.*”⁷⁷⁹

Finally, the court noted that its decision was not meant to “shield [defendant] against future or ongoing crimes, or from other forms of police observations or investigations.”⁷⁸⁰ The only question considered was that of the right to counsel of defendant when questioned on the same subject matter as that for which she had previously retained an attorney. Based on *Skinner*, the court granted *Goldfinger*’s motion to suppress the statements because she could not be questioned about the same subject matter outside of the presence of her attorney.

There is no federal case law directly addressing the issue pre-

777. *Goldfinger*, 149 Misc. 2d at 770, 565 N.Y.S.2d at 996.

778. *Smith*, 62 N.Y.2d at 309, 465 N.E.2d at 337, 476 N.Y.S.2d at 798.

779. *Goldfinger*, 149 Misc. 2d at 770, 565 N.Y.S.2d at 996 (quoting *Smith*, 62 N.Y.2d at 309, 465 N.E.2d at 337, 476 N.Y.S.2d at 789) (alteration in original).

780. *Id.* at 771, 565 N.Y.S.2d at 997.

sented in *Goldfinger*. However, a long line of federal case law suggests that the right to counsel would not attach from a federal civil proceeding to a criminal one, even if the two matters stem from the same set of transactions and occurrences. In *Escobedo v. Illinois*,⁷⁸¹ an unindicted murder suspect was denied his Sixth Amendment⁷⁸² right to speak with his lawyer during an in-custody police interrogation.⁷⁸³ In its analysis, the United States Supreme Court referred to its earlier decision in *Massiah v. United States*,⁷⁸⁴ in which it established the right of an indicted defendant to the aid of counsel under the Sixth Amendment during a police interrogation.⁷⁸⁵ The *Escobedo* Court stated that attachment of the right to counsel is not conditioned upon the absence of an indictment.⁷⁸⁶ There is no pragmatic change in status once a suspect has become an “accused” and the matter has, for all intents and purposes, ceased to become an “unsolved crime.”⁷⁸⁷ However, this broad dicta was essentially rendered meaningless when the Court limited its decision, that defendant’s Sixth Amendment right to counsel had been violated, to the facts of that case.⁷⁸⁸ For this reason, the Court has subsequently declined to rely or expand upon the *Escobedo* decision.⁷⁸⁹

After *Escobedo*, the Court decided a line of cases based upon whether counsel was denied to an accused during a “critical stage” of the adjudicatory process.⁷⁹⁰ The Court has stated that

781. 378 U.S. 478 (1964), *overruled*, *Miranda v. Arizona*, 384 U.S. 436 (1966).

782. U.S. CONST. amend. VI.

783. *Escobedo*, 378 U.S. at 481.

784. 377 U.S. 201 (1964).

785. *Id.* at 206.

786. *Escobedo*, 378 U.S. at 485.

787. *Id.*

788. *Id.* at 492.

789. *See Moran v. Burbine*, 475 U.S. 412, 429 (1986) (stating that “subsequent decisions foreclose any reliance on *Escobedo* and *Miranda* for the proposition that the Sixth Amendment right, in any of its manifestations, applies prior to the initiation of adversary judicial proceedings”); *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (noting that “the court has limited the holding of *Escobedo* to its own facts . . .”).

790. *See, e.g., United States v. Wade*, 388 U.S. 218 (1967).

the Sixth Amendment right to counsel attaches at stages “where the results might well settle the accused’s fate and reduce the trial itself to a mere formality.”⁷⁹¹ Such stages have been held to include arraignment,⁷⁹² preliminary hearings,⁷⁹³ post-indictment line-ups⁷⁹⁴ and pre-indictment corporeal identifications during a judicial proceeding.⁷⁹⁵ At the very least, the Court has held that a defendant’s Sixth Amendment right to counsel attaches “at or after the time that judicial proceedings have been initiated against him”⁷⁹⁶

In *Kirby v. Illinois*,⁷⁹⁷ the Supreme Court noted that all prior case law recognizing the Sixth Amendment right to counsel “involved points of time at or after the initiation of adversary judicial criminal proceedings -- whether by way of formal charge, preliminary hearing, indictment, information or arraignment.”⁷⁹⁸ The Court declined to extend the Sixth Amendment constitutional right to counsel, afforded to a defendant in a post indictment pre-trial line-up,⁷⁹⁹ to a defendant in a pre-indictment police station show up that had occurred before any formal proceedings had commenced:

The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.⁸⁰⁰

The fact that an attorney had not yet been retained by defendant

791. *Id.* at 224.

792. *See* *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961).

793. *See* *White v. Maryland*, 373 U.S. 59, 60 (1963).

794. *See* *Wade*, 388 U.S. at 236-37.

795. *See* *Moore v. Illinois*, 434 U.S. 220, 229 (1977).

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

797. 406 U.S. 682 (1972).

798. *Id.* at 689.

799. *See* *Gilbert v. California*, 388 U.S. 263, 272 (1967).

800. *Kirby*, 682 U.S. at 689.

was inapposite because the Court concluded that the right to have an attorney present does not attach until formal proceedings have commenced.

More recently, in *Maine v. Moulton*,⁸⁰¹ the United States Supreme Court stated that incriminating statements made to an undercover government agent concerning matters upon which the defendant was not formally charged could not be suppressed based upon a violation of the Sixth Amendment.⁸⁰² In *Moulton*, defendant Perley Moulton, and his codefendant Gary Colson, were charged with four counts of theft. Subsequent to their indictments and release on bail, Colson cooperated with police to secretly tape record conversations with Moulton in attempting to elicit incriminating statements concerning unrelated crimes.⁸⁰³ Moulton ultimately made incriminating statements concerning the crimes that he had already been indicted for and statements concerning unrelated crimes.⁸⁰⁴ The Supreme Court held that the statements concerning the crimes for which proceedings had begun were to be suppressed because they were elicited subsequent to the attachment of defendant's Sixth Amendment right to counsel.⁸⁰⁵ However, the Court would not suppress the evidence concerning matters for which formal proceedings had not yet commenced:

[T]o 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. Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, notwithstanding the fact that the police were also investigating other crimes⁸⁰⁶

Further, in *Moran v. Burbine*,⁸⁰⁷ the Supreme Court rejected

801. 474 U.S. 159 (1985).

802. *Id.* at 180.

803. *Id.* at 163.

804. *Id.* at 166.

805. *Id.* at 179-80.

806. *Id.* at 180.

807. 475 U.S. 412 (1986).

defendant's argument that "the Sixth Amendment protects the integrity of the attorney-client relationship regardless of whether the prosecution has in fact commenced 'by way of formal charge, preliminary hearing, indictment, information or arraignment.'"⁸⁰⁸ The defendant's sister, Ms. Munson, retained counsel for him on the breaking and entering charge for which he was being held. The defendant was unaware of his sister's actions. Ms. Munson informed the police that her brother was represented by counsel and, thus, should not be questioned. Ms. Munson was assured that defendant would not be questioned. Despite this assurance, the defendant was interrogated one hour later, albeit not on the breaking and entering charge, but upon a suspicion of murder.⁸⁰⁹ No formal proceedings had yet commenced concerning the murder investigation. The defendant, not knowing that counsel had been retained for him, waived his *Miranda* rights and proceeded to sign written admissions. The defendant later moved to suppress these statements as a violation of his Sixth Amendment right to counsel.⁸¹⁰ The Court stated that the Sixth Amendment only comes into effect after the initiation of formal charges; this is when the government shifts from investigation to accusation.⁸¹¹ Moreover, the Court wrote:

More importantly, the suggestion that the existence of an attorney-client relationship itself triggers the protections of the Sixth Amendment misconceives the underlying purposes of the right to counsel. The Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor. Its purpose, rather, is to assure that in any "criminal prosecutio[n]" . . . the accused shall not be left to his own devices in facing the "prosecutorial forces of organized society."⁸¹²

Once again, the Court stated the rule that the Sixth Amendment

808. *Id.* at 428-29 (quoting *United States v. Gouveia*, 467 U.S. 180, 188 (1984)).

809. *Id.* at 417.

810. *Id.* at 417-18.

811. *Id.* at 430-31.

812. *Id.* at 430 (quoting *Kirby*, 406 U.S. at 689).

attaches only upon the initiation of formal proceedings, even if defendant had retained counsel upon another unrelated criminal charge.

Most recently, the Court reaffirmed its position in *Illinois v. Perkins*.⁸¹³ In *Perkins*, defendant made incriminating statements concerning a murder to an undercover government agent, while incarcerated on unrelated charges. His statements made to the undercover agent were subsequently used as a basis to charge him with murder.⁸¹⁴ The Court concluded that police cannot use undercover agents to circumvent one's Sixth Amendment right to counsel once that person has been charged with a crime. However, because no charges had been filed concerning the murder investigation, the defendant's statements did not have to be suppressed and "Sixth Amendment precedents [were] not applicable."⁸¹⁵

Therefore, an analogy between the New York State constitutional right to counsel and the United States constitutional right to counsel discloses an inconsistency. The *Goldfinger* court illustrates the willingness of New York courts to carryover the right to counsel guaranteed by the New York State Constitution when an attorney has simply been retained on a matter concerning the same transaction and occurrences as the matter in question. However, the United States Supreme Court has made it clear that the federal rule is well established and a defendant's right to counsel under the United States Constitution does not come into effect unless formal charges have been commenced. It is clear that Judith Goldfinger would not be allowed to suppress her tape recorded statements under the federal rule simply because she had previously retained counsel. Further, the fact that no formal proceedings had commenced at the time of the secretly taped conversation also lends itself to the conclusion that her statements could not be suppressed. The only unanswered question concerns the fact that Judith Goldfinger had retained counsel on civil charges that were derived from the same set of

813. 110 S. Ct. 2394 (1990).

814. *Id.* at 2395-96.

815. *Id.* at 2398-99.

transactions and occurrences as the state criminal matter being investigated. The charges were not wholly unrelated. In each of the federal cases discussed above, the Court's decision was based upon the finding that the defendant had previously retained counsel on an unrelated criminal charge.

While this issue has not been directly addressed by the federal courts, the rule seems to be firmly established that the Sixth Amendment right to counsel does not attach under any circumstances unless formal proceedings have commenced. Therefore, it is quite unlikely that Goldfinger would ultimately have been afforded the federal right to counsel under the United States Constitution in these circumstances. Notably, Goldfinger only claimed a violation of her New York State constitutional right to counsel.