



1996

## Right to Counsel

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



Part of the [Constitutional Law Commons](#), [Courts Commons](#), and the [Criminal Law Commons](#)

---

### Recommended Citation

(1996) "Right to Counsel," *Touro Law Review*. Vol. 12 : No. 3 , Article 44.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol12/iss3/44>

This New York State Constitutional Decisions 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).

People v. Glover<sup>40</sup>  
(decided November 30, 1995)

Defendant claimed his right to counsel, guaranteed under both the New York<sup>41</sup> and Federal<sup>42</sup> Constitutions was violated following his conviction for murder in the second degree.<sup>43</sup> In affirming the appellate division's decision, the court of appeals held that the defendant's right to counsel was not violated since "[he] did not unequivocally inform the police that he wanted counsel."<sup>44</sup> Therefore, his statements were admissible as evidence.<sup>45</sup>

Louis Glover was transported to a police station to be questioned regarding a murder investigation.<sup>46</sup> During his interview with police officers, he was shown an incriminating piece of evidence which was recovered in the vicinity of his apartment.<sup>47</sup> At that point, the defendant requested that he be allowed to telephone a friend who, in turn, would get the defendant a lawyer.<sup>48</sup> Prior to the phone call being made, the defendant requested that the police call his mother instead.<sup>49</sup> However, within a short span of time, the defendant announced to the police officer "[h]ang up the telephone. I do not want a

---

40. 87 N.Y.2d 838, 661 N.E.2d 155, 637 N.Y.S.2d 683 (1995).

41. N.Y. CONST. art. I, § 6. Article I, section 6 provides in pertinent part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel . . . ." *Id.*

42. U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense." *Id.*

43. *Glover*, 87 N.Y.2d at 839, 661 N.E.2d at 155, 637 N.Y.S.2d at 684 (1995).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

lawyer. I'll talk to you."<sup>50</sup> The defendant then made various inculpatory statements to the police officers.<sup>51</sup>

Following his conviction for murder in the second degree, the defendant claimed that statements made after his request to phone an attorney were inadmissible as his constitutional right to counsel was violated.<sup>52</sup> The defendant relied on New York case law which has held "that a suspect in custody who requests counsel may not withdraw such request in counsel's absence."<sup>53</sup> In *People v. Cunningham*,<sup>54</sup> the court of appeals concluded that:

[T]he right to counsel in this State includes the right of an accused to have the advice of counsel before making the decision to waive either his privilege against self incrimination or his right to the assistance of an attorney, so that once a defendant in custody invokes his right to counsel, all of the guarantees implicit in that right are brought into play, and a subsequent waiver of rights outside the presence of counsel cannot be given legal effect.<sup>55</sup>

50. *Id.*

51. *Id.* No more than one minute had elapsed from the time the defendant requested to call his friend and the point at which he no longer requested to speak with an attorney. *Id.*

52. *Id.*

53. *People v. Glover*, 208 A.D.2d 475, 617 N.Y.S.2d 643 (1st Dep't 1994), *aff'd*, 87 N.Y.2d 838, 661 N.E.2d 155, 637 N.Y.S.2d 683 (1995). *See People v. Cunningham*, 49 N.Y.2d 203, 205, 400 N.E.2d 360, 361, 424 N.Y.S.2d 421, 422 (1980) (holding that "once a suspect in custody requests the assistance of counsel he may not be questioned further in the absence of an attorney . . . an uncounseled waiver of a constitutional right will not be deemed voluntary if it is made after the right to counsel has been invoked").

54. 49 N.Y.2d 203, 400 N.E.2d 360, 424 N.Y.S.2d 421 (1980). In *Cunningham*, the court of appeals suppressed the defendant's statements which were made nearly three hours after the defendant's request to speak with a lawyer. Furthermore, during the three hour period "[t]he police made no effort to obtain an attorney." *Id.* at 206, 400 N.E.2d at 362, 424 N.Y.S.2d at 422-23.

55. *Id.* at 210, 400 N.E. 2d at 364-65, 424 N.Y.S.2d at 425. *See also People v. Esposito*, 68 N.Y.2d 961, 962, 503 N.E.2d 98, 99, 510 N.Y.S.2d 542, 543 (1986) (holding that "once the defendant invokes his right to counsel guaranteed by the N[ew] Y[ork] Constitution . . . any waiver obtained in the absence of counsel is ineffective") (citation omitted).

In *Glover*, the court, although re-affirming its holdings in *Cunningham*, determined that the defendant's request for an attorney must be unequivocal.<sup>56</sup> The court had previously examined the question of 'unequivocal request for counsel' in *People v. Rowell*.<sup>57</sup> In *Rowell*, the court held that when an individual is in custody and "has expressed the need for counsel, evidence subsequently obtained from him by the police in the absence of counsel and without counsel's consent will be excluded from use upon his trial."<sup>58</sup> However, the court went on to narrow the scope of this constitutional right by holding that "[i]t was not enough to invoke [defendant's] right to counsel under the circumstances that he *suggested* to the police that he *might* consult a lawyer."<sup>59</sup>

The court, in *Glover*, emphasized that there was no bright line test that can be used to determine whether a defendant's request

56. *Glover*, 87 N.Y.2d at 839, 661 N.E.2d at 155, 637 N.Y.S.2d at 684 (stating that "when the defendant's request is not unequivocal, the right to counsel does not attach").

57. 59 N.Y.2d 727, 450 N.E.2d 232, 463 N.Y.S.2d 426 (1983). In *Rowell*, the defendant was being investigated for an incident of sexual abuse in the first degree. *Id.* at 728, 450 N.E.2d at 233, 463 N.Y.S.2d at 427. The defendant advised the police that "he was 'perfectly willing to take [a scheduled polygraph] test' and . . . was going . . . to meet his mother and then to see an attorney." *Id.* at 729, 450 N.E.2d at 233, 463 N.Y.S.2d at 427. Three days later, on the scheduled date of the polygraph test, the defendant advised the police that "he had still not seen an attorney and that he was still willing to take the test." *Id.* During the subsequent polygraph examination, the defendant made several incriminating statements. *Id.*

58. *Id.* at 730, 450 N.E.2d at 233, 463 N.Y.S.2d at 427.

59. *Id.* at 730, 450 N.E.2d at 234, 463 N.Y.S.2d at 428 (emphasis added). See *People v. Hicks*, 69 N.Y.2d 969, 970, 509 N.E.2d 343, 344, 516 N.Y.S.2d 648, 649 (1987). In *Hicks* the defendant, not under arrest and free to leave the police station, merely asked the police if he should talk with an attorney. *Id.* In response to his question "the police [asked] him if he thought he was in trouble." *Id.* The defendant stated he did not, and then made several inculpatory statements. *Id.* The court of appeals held that "[d]efendant's inquiry did not unequivocally inform the police of his intention to retain counsel . . . [and, therefore] his right to counsel did not attach." *Id.* But see *People v. Esposito*, 68 N.Y.2d 961, 962, 503 N.E.2d 98, 510 N.Y.S.2d 542 (1986) (holding that the defendant's statement to police "'I might need a lawyer' constituted a request for counsel").

for counsel is or is not unequivocal.<sup>60</sup> In determining such an issue, the court must consider “the circumstances surrounding the request including: the defendant’s demeanor; manner of expression; and the particular words found to have been used by the defendant.”<sup>61</sup>

The *Glover* court determined that the defendant requested an attorney and negated the request for an attorney, in the very same sentence, and as such, he did not unequivocally invoke his right to counsel.<sup>62</sup> The court held that the incriminating statements made by the defendant were admissible as evidence.<sup>63</sup>

The decisions of the New York Court of Appeals have closely followed those of the United States Supreme Court regarding whether or not a request for counsel must be unequivocal. In *Miranda v. Arizona*,<sup>64</sup> the United States Supreme Court held that if a defendant “indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.”<sup>65</sup> In preventing the police from harassing a defendant into waiving his previously requested right to an attorney, the Court has implemented certain safeguards. For example, the Court has held “when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.”<sup>66</sup>

60. *Glover*, 87 N.Y.2d at 839, 661 N.E.2d at 155, 637 N.Y.S.2d at 684.

61. *Id.*

62. *Id.*

63. *Id.*

64. 384 U.S. 436 (1966).

65. *Id.* at 444-45. The defendant, according to the Court, must be advised of this right to counsel. The Court held:

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. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.

*Id.* at 444.

66. *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990). *See also* *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981) (holding that a defendant who

In *Davis v. United States*,<sup>67</sup> the Court addressed the circumstances surrounding a defendant's ambiguous or equivocal request for counsel.<sup>68</sup> The Court held that "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning."<sup>69</sup> More importantly, the Court stated that:

[T]he suspect must unambiguously request counsel . . . he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, [this Court's precedent] does not require the officers stop questioning the suspect.<sup>70</sup>

Federal and New York case law are consistent in holding that the defendant, who is subject to a custodial interrogation, must be informed of his right to counsel and that upon a request for an attorney, all questioning must cease. Furthermore, a waiver of the right to counsel, subsequent to such a request, must be in the presence and with advice from counsel. However, both federal

---

expresses a "desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until the counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police").

67. 114 S. Ct. 2350 (1994). In *Davis*, the defendant, a member of the United States Navy, waived his right to counsel during an investigation by Naval Investigative Service [hereinafter N.I.S.] agents. *Id.* at 2353. However, shortly after the interview with the agents had commenced the defendant stated "[m]aybe I should talk to a lawyer." *Id.* When the N.I.S. agent asked if he was asking for a lawyer, the defendant answered that he was not. *Id.*

68. *Id.* at 2355. "The . . . 'rigid' . . . rule of *Edwards* requires courts to 'determine whether the accused actually invoked his right to counsel.'" (quoting *Fare v. Michael C.*, 442 U.S. 707, 719 (1979)).

69. *Id.* ("Invocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.'"). *Id.* (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991)).

70. *Id.*

and New York courts agree that a request for counsel must be unambiguous and unequivocal.

People v. Herr<sup>71</sup>  
(decided November 30, 1995)

Defendant Raymond Herr was convicted in the Supreme Court, Erie County<sup>72</sup> of several offenses, including first-degree sodomy and sexual abuse. The Appellate Division, Fourth Department affirmed,<sup>73</sup> and an appeal was permitted. On appeal, the defendant contended that his attorney's role as a part-time village prosecutor created an unacceptable appearance of impropriety in violation of his right to counsel<sup>74</sup> as guaranteed under the Federal and New York State Constitutions.<sup>75</sup> The court of appeals held that, even though the defense counsel was a part-time village prosecutor, the defendant was not deprived of his right to counsel.<sup>76</sup>

Daniel J. Henry, Jr., a part-time village prosecutor for the Village of Blasdell, represented the defendant at trial.<sup>77</sup> As a village prosecutor, Mr. Henry's authority was limited to "the prosecution of all non-misdemeanor traffic violations, violations

71. 86 N.Y.2d 638, 658 N.E.2d 1032, 635 N.Y.S.2d 159 (1995).

72. *People v. Herr*, 158 Misc. 2d 306, 600 N.Y.S.2d 903 (Sup. Ct. Erie County 1993).

73. *People v. Herr*, 203 A.D.2d 927, 611 N.Y.S.2d 389 (4th Dep't 1994).

74. U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Id.*; N.Y. CONST. art. I, § 6. This provision provides in pertinent part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel . . ." *Id.*

75. *Herr*, 86 N.Y.2d at 641, 658 N.E.2d at 1032, 635 N.Y.S.2d at 159-60. The defendant specifically cited to the court's language in *People v. Shinkle*, 51 N.Y.2d 417, 415 N.E.2d 909, 434 N.Y.S.2d 918 (1980), that criminal defendants have "the right to both the fact and appearance of unswerving and exclusive loyalty on the part of attorneys who represent them." *Id.* at 421, 415 N.E.2d at 911, 434 N.Y.S.2d at 920.

76. *Herr*, 86 N.Y.2d at 641, 658 N.E.2d at 1033, 635 N.Y.S.2d at 160.

77. *Id.* at 640, 658 N.E.2d at 1032, 635 N.Y.S.2d at 159.