Table of Contents:

Table of Contents

A FEW OBSERVATIONS ON THE RIGHT TO COUNSEL

Thomas P. Franczyk

Deputy for Legal Education

Assigned Counsel Program

November 24th, 2021

INTRODUCTION:

When criminal defense lawyers move to suppress statements made by their clients to law enforcement or their agents, they commonly do so on the grounds that such statements were involuntarily made because the police subjected the defendant to custodial interrogation without administering Miranda rights or obtaining a knowing, voluntary, and intelligent waiver before asking questions. (See Miranda v Arizona, 384 US 436 [1966], People v Yukl, 25 NY2d 585 [1969]).

Alternatively, when the statement obtained is the result of an unlawful arrest or seizure of the defendant without probable cause, counsel may well argue that it should be suppressed as the fruit of the poisonous tree. (Wong Sun v U.S. 371 US 471 [1963], Dunaway v New York, 442 U.S. 200 [1979]).

A somewhat less frequent but equally important basis for suppressing statements is a violation of the defendant's (or suspect's) RIGHT TO COUNSEL which is embedded in the Miranda rights along with the defendant's Fifth Amendment right against self-incrimination. The litany of rights, whether given from memory or read from a rights card, states:

1. YOU HAVE THE RIGHT TO REMAIN SILENT.
2. ANYTHING YOU SAY CAN AND WILL BE USED AGAINST YOU IN A COURT OF LAW.
3. YOU HAVE THE RIGHT TO AN ATTORNEY PRESENT BEFORE ANY QUESTIONING.
4. IF YOU CANNOT AFFORD AN ATTORNEY, ONE WILL BE PROVIDED TO YOU FREE OF CHARGE.

After administering the warnings, (whether perfunctorily, rapidly, or slowly enough to be comprehended), the officer will then attempt to obtain a WAIVER by asking:

1. DO YOU UNDERSTAND THESE RIGHTS?
2. HAVING BEEN GIVEN YOUR RIGHTS, ARE YOU WILLING TO WAIVE THESE RIGHTS AND ANSWER QUESTIONS?
3. ARE YOU SATISFIED THAT YOUR WAIVER IS KNOWING, VOLUNTARY AND INTELLIGENT?

If the rights have been read from a card, the interrogating officer may have the defendant initial it after each numbered right, and after the statements of understanding and waiver. He/she may also be asked to sign the card which will also likely be dated and timed.

MOTIONS TO SUPPRESS STATEMENTS: GROUNDS

CPL 710.20(3) states that upon motion of the defendant who is AGGRIEVED BY UNLAWFUL OR IMPROPER ACQUISITION OF EVIDENCE and has reasonable cause to believe that such evidence will be offered against him/her in a criminal action, a court may order that such evidence be SUPPRESSED OR EXCLUDED on the grounds that it CONSISTS OF A RECORD OR POTENTIAL TESTIMONY RECITING OR DESCRIBING A STATEMENT OF SUCH DEFENDANT INVOLUNTARILY MADE WITHIN THE MEANING OF CPL 60.45.

Subdivision 2(b)(ii) of section 60.45 states that a CONFESSION, ADMISSON OR OTHER STATEMENT is involuntarily made when it is obtained from a defendant IN VIOLATION OF SUCH RIGHTS AS HE/SHE MAY DERIVE FROM THE CONSTITUTION OF THIS STATE OR OF THE U.S. CONSTITUTION.

RIGHT TO COUNSEL:

The right to counsel which has been described as a CHERISHED RIGHT deserving of the HIGHEST DEGREE OF JUDICIAL VIGILANCE (People v Harris, 77 NY2d 434 [1991]) derives from the Sixth Amendment of the U.S. Constitution and, on the state side, from Article 1, Section 6 of the New York State Constitution which has been deemed by the courts to provide even broader protections to the accused than its federal counterpart. (People v Settles 46 NY 154 [1978]).

WHEN AND HOW DOES THE RIGHT ATTACH?

The right to counsel attaches when a criminal action is FORMALLY COMMENCED by the FILING OF AN ACCUSATORY INSTRUMENT IN COURT WHICH CHARGES THE DEFENDANT WITH A CRIME(S). (People v DiBiasi, 7 NY2d 544 [1960], People v Ramos, 99 NY2d 27 [2002]).

The right does NOT attach by the mere signing of a complaint by an officer or complainant but, rather, when it is FILED in court. (People v Lane, 64 NY2d 1047 [1985]). Also, the issuance of an arrest warrant upon the filing of a FEDERAL complaint, does NOT trigger the state right to counsel in a matter which has not yet been commenced by filing of state charges. (People v Ridgeway, 64 NY2d 952 [1985]).

In this context, the RIGHT TO COUNSEL ATTACHES WHETHER OR NOT THE ACCUSED HAS RETAINED A LAWYER OR REQUESTED THAT COUNSEL BE ASSIGNED. (People v Samuels 49 NY2d 218 [1980], People v DiBiasi, *supra)*.

The rationale for this rule is that once formal proceedings have begun, the nature of the matter changes from INVESTIGATORY TO ACCUSATORY and counsel is needed to PROTECT THE ACCUSED FROM THE COERCIVE POWER OF THE STATE. (People v Settles, *supra* at p.163).

Once the right has attached, it is deemed to be INDELIBLE insofar as it CANNOT BE WAIVED IN THE ABSENCE OF COUNSEL. (People v Arthur, 22 NY2d 325 [1968], People v Robles, 72 NY2d 89 [1988]). It is hard to imagine any lawyer advising his/her client to give up his/her only real source of legal protection without first obtaining either a promise of immunity (from the prosecution) or some equivalent offer that the client could not possibly refuse.

THE RIGHT TO COUNSEL BEFORE CHARGES ARE FILED:

The right to counsel also attaches when an UNCHARGED INDIVIDUAL (i.e., a suspect) has ACTUALLY RETAINED COUNSEL in the matter under investigation or, while in CUSTODY, has requested legal representation. (People v Cunningham, 49 NY2d 203 [1980], People v Skinner, 52 NY2d 24 [1980], People v West, 81 NY2d 370 [1993]). Although the case may still be in the INVESTIGATORY STAGE, the suspect, by asking for a lawyer, is alerting the police that he/she needs legal representation to EQUALIZE THE BALANCE OF POWER between him/her and the authorities. (*Id* at pp 29-32).

Unlike the post-charging scenario described above, in this context, the right to counsel becomes indelible by virtue of ACTUAL REPRESENTATION by a lawyer (People v Hobson, 39 NY2d 470 [1976]) as manifested by the lawyer's appearance, communication (or ATTEMPT to communicate) with police that he/she represents the suspect (see, for example, People v Donovan, 13 NY2d 148 [1963], People v Gunner, 15 NY2d 226 [1965], People v Arthur, 22 NY2d at p.329).

It is NOT ENOUGH, however, to preclude questioning of the suspect in the absence of counsel, that a family member tells police that a lawyer is on the way (People v Grice, 100 NY2d 218 [2003]), since the law requires actual involvement by the lawyer (rather than a third party promise of future engagement) as demonstrated by communication from or personal appearance by the lawyer. (People v Schaeffer, 56 NY2d 448 [1982], People v Pinzon, [1978]).

In People v Schaeffer, *supra,* the defendant took the police to his mother's house to retrieve the murder weapon and while there, the mother told the police, "I have a lawyer on the phone." The detective refused to speak to the lawyer and deferred any conversation to a later meeting at the police station. The defendant gave an incriminating statement at the station in the absence of counsel. The Court of Appeals suppressed the statement, reasoning that the right to counsel had attached when the police were informed that a lawyer was on the phone and wanted to speak to them.

POLICE STRATEGEMS TO PREVENT PESKY LAWYERS FROM PROHIBITING FURTHER QUESTIONING:

It is not surprising that police would prefer that suspects not invoke their right to counsel (and sometimes may even put off the filing of charges) so that they can complete their investigation (preferably by locating incriminating physical evidence and obtaining damning admissions) without legal interruption or interference.

In People v Ramos, 99 NY2d 77 (2002), the Court of Appeals held that while the police may have delayed the defendant's statutory right to prompt arraignment, (CPL 140.20[1]), such delay did not trigger the right to counsel (prior to the filing of the charges) to warrant suppression of his inculpatory statements made to a detective several hours after the arrest.

Since, in the Court's view, the defendant raised a statutory claim which was unpreserved, rather than a constitutional right to counsel claim which can be raised for the first time on appeal (People v Atkins, 273 AD2d 12 [1st Dept. 2000]), there was no basis for the Court to consider the argument.

In Ramos, the police first interviewed the defendant, whom they suspected of shooting his former girlfriend in her bathtub, at his place of work. After providing inconsistent versions of his whereabouts the night before, the defendant was asked to come to police headquarters for further questioning.

The defendant was given Miranda warnings which he said he understood. He also said that he did not want a lawyer. After two hours of interrogation, he admitted that he had gone to his girlfriend's apartment and found her dead in the bathtub. (His current girlfriend had informed the police that the defendant had told her earlier that me had "messed up" and that his ex-girlfriend was "gone."). The police also observed apparent blood stains on the defendant's shoes.

The police arrested the defendant shortly after midnight but the detective on duty stopped the booking process and waited several hours for the arrival of a more seasoned officer to pick up the interview of the defendant. At 1:00 PM the same day, the defendant again waived his right to counsel and the new detective obtained a full confession from him. Booking was then completed at 3:30pm and the defendant was taken to court for arraignment.

The defendant moved to suppress his confession, arguing only that it was involuntarily made. He later argued to the Appellate Division that the purposeful delay in his arraignment to give a more experienced detective a crack at him violated his right to counsel. The court held that while such claim could be raised for the first time on appeal, the record was insufficient for appellate review. (282 AD2d 623 [2d Dept. 2001]).

COURT OF APPEALS AFFIRMS FOR LACK OF VIOLATION OF THE RIGHT TO COUNSEL:

The Court held that this case did NOT fall into either of the two scenarios (commencement of formal proceeding or actual entry by/request for counsel by a suspect) giving rise to a state constitutional right to counsel. When the defendant had confessed, judicial proceedings had not yet begun nor had the defendant ever requested counsel. In fact, he had declined legal representation more than once.

As for the delay in arraignment, the Court held that it does NOT cause the right to counsel to attach (People v Hopkins, 58 NY2d 1079 [1983]), but only is a factor to be considered when evaluating the VOLUNTARINESS of a confession. (People v Holland, 48 NY2d 861 [1979]). Under such circumstances, a defendant subject to custodial interrogation is entitled to the protection of Miranda warnings, (People v Cunningham, *supra* at p. 205), and any remedy for claimed undue delay in arraignment is to be found in CPL 140.20 and not the State Constitution.

A REQUEST FOR COUNSEL MUST BE UNEQUIVOCAL:

In a pre-charging situation, in order to trigger the right to counsel (which cannot be waived in the absence of counsel, the individual's invocation of such right must be CLEAR AND UNEQUIVOCAL.

In People v Porter, 9 NY3d 966 (2007), for example, the defendant's statement, "I think I need a lawyer," coupled with a notation in a police report that the defendant was "asking for a lawyer" was deemed to be sufficiently definitive to give rise to the right to counsel. See also People v Higgins, 124 AD3d 929 (3d Dept. 2015), where the defendant's request to be allowed to call a lawyer was enough to invoke the right to counsel.

In contrast, see People v Thompson, 277 AD2d 555 (2d Dept. 2000): "should I call my lawyer?"; People v Hurd, 279 AD2d 892 (3d Dept. 2001): inquiry whether or not to call an attorney, and People v Wade, 296

AD2d 720 (3d Dept. 2002): “maybe I better call somebody,” after which defendant made incriminating statements were all found to be EQUIVOCAL.

SPONTANEOUS STATEMENTS MADE AFTER RIGHT TO COUNSEL ATTACHES:

Sometimes, a defendant whose right to counsel has attached, may nevertheless become foisted on the petard of his/her own unbridled verbosity by making admissions unprompted by police interrogation or its functional equivalent. (People v Harris, 57 NY2d 35 [1982]).

The test is whether the defendant spoke with genuine spontaneity rather than from an inducement, provocation, or encouragement by law enforcement, however subtly employed. (People v Landon, 55 NY2d 711 [1981]). Police questioning that is preliminary and investigatory in nature (i.e., intended to clarify an uncertain situation) does not necessarily qualify as interrogation. (People v Valderas, 7 AD3d 265 [1st Dept. 2000): officer’s inquiry “where’s all the blood coming from,” upon observing blood at the scene and on defendant’s shoes after he said he was shot was not considered to be interrogation).

In People v Bowen 2021 NY Slip Op 03685 (4th Dept. 6/11/21), the Fourth Department affirmed the trial court’s denial of suppression of the defendant’s inculpatory statements (made after he invoked his right to counsel) even though there was some continued verbal engagement by detectives who had earlier urged him to “do the right thing” by showing remorse (for placing a propane tank in an oven which exploded and killed his former house-mate).

It was undisputed that the defendant had invoked his right to counsel during a videotaped interview. After that process ended, a detective began to ask the defendant pedigree questions for purposes of booking. At that time, the defendant asked how the deceased victim’s girlfriend was doing. The detective replied, “she’s hurting. She keeps saying how she lost the person she loved the most in this life.”

The detective then offered a cup of coffee to the defendant who started crying. The detective remarked, “that’s a good response. You’re showing remorse.”

Another detective came in and inquired about his colleague’s lunch plans. The first detective asked the defendant if he was hungry. The defendant said yes and then exclaimed, “it wasn’t supposed to happen like that. I didn’t mean for any of that to happen.” The detective replied, “I understand,” to which the defendant said, “I just wanted to prank them.” The detective then stated, “remorse is what we wanted to see. We didn’t think you intended to kill anyone.” The defendant replied, “I should have just stuck around. Maybe I could have done something.”

In rejecting suppression, the AD noted that statements made by a defendant who has invoked his right to counsel may nevertheless be admissible if they are made spontaneously and are not the result of express questioning or its functional equivalent. (Citing People v Harris, *supra)*.

In the AD’s view, notwithstanding the detective’s comment about “remorse,” it was the defendant’s own feelings about the victim’s surviving girlfriend that prompted his statement. After the remorse comment, there was an interruption by another detective who changed the subject (to lunch) after which the defendant made his second comment. As such, they were deemed to have been properly admitted as spontaneous. (Citing People v Lynes, 49 NY2d 295 [1980]).

The admission of the third statement, “I should’ve stuck around and done something” was found to be error, (albeit harmless) because it was prompted by the detective’s comments about the desired showing of remorse and the claimed belief that the defendant did not intend to kill anyone.

The dissenting justice, (Hon. Stephen K. Lindley), considered the statements in question (other than the defendant’s inquiry about the victim’s girlfriend) to be anything but spontaneous. Noting that while the police have no duty to stifle a talkative person in custody from incriminating himself, (People v Rivers, 56 N2d 476 [1982]), they should not try to draw out a defendant (whose initial request for a lawyer was met with, “do you need a lawyer to help you decide whether to confess?”), and then subtly exploit his apparent remorse (after initially urging him to show some remorse and do the right thing). (Citing People v Stoesser, 53 NY2d 648 [1981])

In the dissenter’s view, the only possible object of the detective’s comments was to elicit an incriminating statement from the defendant. (People v Ferro, 63 NY2d 23 [1984]). As such, it should have reasonably been expected to elicit an incriminating response. (People v Lynes supra at p.296). Consequently, all the statements made after the invocation of the right to counsel, in the dissenter’s estimation, should have been suppressed and a new trial ordered.

DURATION OF THE RIGHT TO COUNSEL:

In People v West, 81 NY2d 370 (1993), the defendant, an alleged drug dealer, and two brothers were involved in the fatal shooting of an individual who occupied the parking space from which the defendant sold drugs. Four months after the killing, the defendant, who had retained counsel, was ordered to stand in a line-up in which no positive identification was made. The defendant’s attorney instructed the police not to question his client in his absence.

Thereafter, the case went cold for about three years until one of the brothers got arrested on an unrelated charge and flipped on the defendant in exchange for lenience from the People. Over the course of a month’s time, the cooperating witness made several surreptitious, controlled phone calls to the defendant who incriminated himself in the shooting.

Even though the witness was acting as an agent of law enforcement, the police made no effort to determine whether the defendant was still represented by counsel, some three years after the inconclusive line-up when they were admonished not to speak to the defendant in counsel’s absence.

The defendant moved to suppress his admissions to the turncoat on the grounds that they were obtained in violation of his right to counsel which had indelibly attached at the line-up. The lower court denied the motion and the Second Department affirmed, holding that the investigation had terminated at the line-up and that the recent statements were obtained as part of a new (as opposed to renewed) investigation as to which the right to counsel had not attached.

No charges had been filed and the defendant did not request a lawyer while speaking to his fellow drug dealer. Then again, why would he when he had no reason to know that his erstwhile friend was now a foe working with the police by secretly taping their conversations?

THE ISSUE:

The issue was whether the entry of the lawyer three years earlier which triggered the indelible right to counsel continued through the time of the phone calls such that the defendant could not be questioned by the police (or their cooperating agent) in the absence of counsel?

The People argued that the police had no reason to believe that the defendant's legal representation continued, and the defendant failed to allege in his moving papers that he was still represented at the time of the taped conversations.

The Court of Appeals noted that while the right to counsel based on counsel's appearance in the matter typically arises in the context of custodial interrogations, it can also arise in non-custodial situations where a suspect either states that he has a lawyer, requests one, or a lawyer, as in this case, enters the picture.

In People v Skinner, 52 NY2d 24 (1980), for example, the police repeatedly questioned the defendant about a murder in which he was a suspect. He retained a lawyer who instructed the police not to talk to his client. Two years later, the police served the lawyer with an order compelling the defendant to stand in a line-up. The lawyer again told the police not to speak to the defendant without him being present. Nevertheless, the police asked the defendant outside the lawyer's presence whether he had anything to say whereupon he proceeded to implicate himself in the homicide.

The Court suppressed the statement, finding that even in a NON-CUSTODIAL SETTING, by retaining a lawyer in response to POLICE-INITIATED CONTACTS about a particular matter, the defendant conveyed that he NEEDED LEGAL ASSISTANCE to meet the coercive power of the State which could not defeat that right by interrogating him in the absence of counsel. (*Id* at p.32). (See also People v Knapp, 52 NY2d 161 [1982]: use of informant to obtain uncounseled statements from a represented suspect not allowed even if the suspect did not know he was communicating (indirectly) with law enforcement.

COURT OF APPEALS IN PEOPLE V WEST REVERSES:

The Court held that by obtaining representation in the matter under investigation, the defendant ACTIVATED his constitutional and indelible right to counsel and, in so doing, undertook NO BURDEN to keep the police informed of his legal representation status when they chose to question him (through an informant) ON THE SAME MATTER for which the defendant had previously retained counsel.

Rather, in the Court's view, it is LAW ENFORCEMENT'S OBLIGATION, once the right to counsel has attached, to determine whether the representation is continuing. (Citing People v Marrero, 51 NY2d 56 [1980]). In Marrero, counsel was retained for the limited purpose of facilitating the defendant's surrender to police and did not participate in the police questioning of the defendant. Nevertheless, the Court found that the defendant's right to counsel had indelibly attached and suppressed the statements.

The Court observed that "once a lawyer has appeared on the defendant's behalf, …the police may not rely on ambiguities in the attorney-client relationship in order to justify…questioning of the defendant without the attorney present…If the police are uncertain as to the scope of the representation, the defendant should NOT be questioned … (B)ecause of the limited and unusual arrangement that the lawyer had made with the defendant, that representation MAY ACTUALLY HAVE BEEN TERMINATED prior to the questioning. BUT there was no finding that the police were aware of that particular arrangement." (*Id* at p.159).

The Court of Appeals in West also addressed the concept of a DERIVATIVE right to counsel based on a suspect's representation by counsel in matters other than the one currently under investigation. Citing, *inter alia*, People v Rogers, 48 NY2d 167 (1979), the Court explained that the right to a lawyer in a matter in which the defendant is NOT represented arises, in the first instance, only because of the defendant's actual representation in another matter. Hence, if the representation in the other matter ended before questioning on the new matter under investigation, the right to counsel would NOT attach. (Citing People v Robles, 72 NY2d at p. 698).

The Court also noted that after Rogers, a broader rule evolved that prohibited police questioning whenever a defendant had a lawyer in another, unrelated matter even if the police were unaware of such representation. (People v Bartolomeo, 53 NY2d 225 [1981]). Under that rule, the police were obliged to inquire whether the defendant was represented in any unrelated matter about which they had knowledge. Absent such inquiry, they would be deemed bound by whatever such inquiry would have revealed.

That rule was subsequently modified to require the police to inquire about legal representation only where they had ACTUAL KNOWLEDGE of a prior pending charge. Upon such inquiry, the police could accept the defendant's answer at face value. (People v Lucarano 61 NY2d 138 [1984]). In such cases, the burden of establishing the existence of the right to counsel (derived solely from representation in another matter) belonged to the defendant.

The Bartolomeo rule was ultimately overruled in People v Bing, 76 NY2d 331 (1990) because it was deemed unworkable and unfair to law enforcement.

In West, however, the Court was not dealing with any derivative right to counsel but an actual one inasmuch as counsel had entered a murder investigation which stalled and then resumed three years later. In the Court's estimation, the police (unlike People v Skinner *supra*), sidestepped the defendant's right to counsel by failing to inquire whether that relationship still existed.

The People argued that they were justified in assuming that the lawyer-client relationship had ceased for three years had passed. The Court held however that MERE PASSAGE OF TIME DOES NOT ERADICATE THE DEFENDAT'S INDELIBLE RIGHT TO COUNSEL. In the court's view, absent some indication that the representation had ceased, the police could not just go ahead and question the defendant about the VERY MATTER about which they knew he was represented by counsel.

The police were not, in the Court's analysis, free to disregard the lawyer's instruction (not to speak the defendant without him), and before subjecting him to further inquiry (with the help of a cooperating informant), they should have first determined whether the defendant was still represented by counsel. (Of course, any such inquiry would most likely have alerted the defendant that the murder investigation was not over after all and that further services of counsel would be required.

DISSENT:

The dissenting justice, (Hon. Richard D. Simons), took the position that absent some evidence that the defendant was represented by counsel AT THE TIME OF QUESTIONING (rather than at some remote point in time after which the investigation went dormant), the once indelible right to counsel should not be misconstrued as being indefinite in duration.

Moreover, in the dissenter's view, it is not asking too much to place the burden of establishing the continued existence of the attorney-client relationship on the person who is in the best position to know

whether it still exists (i.e., the defendant). (Citing*, inter alia* People v Rosa, 65 NY2d 380 [1985], People v Kazmarick, 52 NY2d 322 1981]).

A FEW MORE CASES:

In People v Young 2020 NY Slip Op 01825 (4th Dept. 3/13/20), the Fourth Department affirmed County Court's order suppressing statements made by the defendant to Pennsylvania (PA) State Police in the presence of Jamestown police detectives who sat silently and observed as the defendant implicated himself in a string of arson fires in Jamestown.

The local officers had interviewed the defendant about those fires several months earlier after which the defendant left for PA where he promptly got arrested for Arson. At his arraignment there, the defendant had requested assignment of counsel.

When Jamestown officers arrived, they asked the PA troopers whether the defendant was represented by counsel on the PA charges. Though requested by the defendant, counsel had not yet entered the picture.

Following the defendant's admissions, he was indicted for the Jamestown fires. The hearing court suppressed those statements, however, because they were obtained in violation of the defendant's right to counsel which attached upon the defendant's request for legal representation at the arraignment on the PA charges.

As the AD observed, it is well settled that once a defendant in custody on a particular matter is REPRESENTED BY COUNSEL OR REQUESTS COUNSEL, CUSTODIAL INTERROGATION ON ANY SUBJECT MUST CEASE MUST CEASE." (Citing People v Steward, 88 NY2d 1018 [1996], People v Lopez, 16 NY3d 375 [2011]).

The Court also determined that the Jamestown PD did not make a reasonable inquiry into the defendant's legal counsel status by asking whether the defendant had a lawyer when the proper question was whether he had asked for one. Moreover, the fact that the Jamestown officers sat in silence was of no moment since the PA troopers were, for all intents and purposes, acting as their surrogates when they inquired about the Jamestown fires. (Citing People v Bing, *supra)*. The Court of Appeals denied the People's application for leave to appeal.

FAMILY COURT PROCEEDINGS DO NOT CREATE A RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS:

In People v Smith, 62 NY2d 306 (1984), the Court of Appeals held while a respondent has a right to counsel in Family Court abuse/neglect proceedings (which are CIVIL in nature), that does NOT trigger a corresponding right to counsel with respect to criminal charges arising from the same conduct. Consequently, a defendant may waive his right to counsel in the absence of counsel. (See also People v Lewie, 17 NY3d 348 [2011]).

And see People v Jackson, 4 AD3d 848 (4th Dept. 2004): the filing of CHILD ABUSE PETITION does NOT trigger the right to counsel and, therefore, a caseworker is not required to Mirandize the respondent before questioning him/her.

RIGHT TO COUNSEL DOES NOT ATTACH AT PRE-SENTENCE INTERVIEW WITH PROBATION DEPARTMENT:

While counsel is ALWAYS WELL ADVISED to accompany the client to the pre-sentence interview (PSI) to make sure that the client avoids the perils and pitfalls of answering questions in a manner that casts him/her in a bad light with the interviewing officer (and, by extension, with the court), for purposes of sentencing (e.g., "the defendant: minimized the offense, blamed the victim, made excuses, takes no responsibility for his conduct"), the PSI is NOT considered to be a CRITICAL STAGE of the proceedings where the right to counsel applies in the constitutional sense. (See People v Bogart, 148 Misc. 2d 327 (Sup Ct NY County, 1996).

Moreover, the probation officer is not considered to a be a member of law enforcement but rather is viewed (however inaccurately in some cases), as a neutral information gatherer who provides pertinent facts (and may make a non-binding sentence RECOMMENDATION) to the judge who retains the ultimate discretion to decide what sentence to impose. (People v White, 43 AD2d 20 [1st Dept. 1973]. People v Perry, 36 NY2d 114 [1975]).

IN SUM:

In New York, the right to counsel indelibly attaches upon 1. a request for counsel while in custody, 2. entry of counsel into the matter and 3. commencement of a criminal matter by filing of an accusatory instrument.

The New York rule, which is broader than the Federal rule derives from the State's constitutional and statutory guarantees against self-incrimination, the right to the assistance of counsel and due process.

In New York, a person in custody on a criminal matter in which an attorney has entered the picture may not waive the right to counsel with respect to that matter unless he/he has first conferred with counsel. Further, such person may not be interrogated in the absence of counsel with respect to any unrelated matter. (People v Rogers *supra)*.

Also, if an officer reasonably suspects that an attorney may have entered a custodial matter, the officer must inquire into the status of the defendant's representation and will be charged with the knowledge that such inquiry would have revealed. (People v Lopez, 16 NY3d 375 [2011]).

FINAL THOUGHT:

Ideally, defendants who are in custody and advised of their rights by law enforcement will take the officers up on their offer and say, "I wish to exercise my right to remain silent and yes, I would like to have an attorney before deciding whether I wish to speak to you at all." The reality, however, is usually quite different. Many defendants, whether out of nervousness, a false sense of security or a misguided belief that they can talk their way out of trouble, often just dig their own graves by making admissions or factual representations that are later proven to be false.

Assuming there is sufficient evidence of a crime to corroborate the defendant's admissions (CPL 60.50), the defendant's own words can provide the nails that seal his/her fate. Perhaps every client should be advised that if the police want to interrogate them in any future matters, they should respectfully

decline to answer any questions in the absence of an attorney. If only peoples' memories worked so well.