IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. Jesus R. Prieto-Rubio, Defendant-Appellant, Respondent on Review,	Washington County Circuit Court Case No. C11693CR; C112523CR CA A152030 (Control); A152033 SC S062344

BRIEF ON THE MERITS OF *AMICI CURIAE* OREGON JUSTICE RESOURCE CENTER

On Review of the Decision of the Court of Appeals
On Appeal from a Judgment of the Circuit Court for Washington County
Honorable THOMAS KOHL, Judge

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Before: Duncan, P.J., Garrett, J., and Schuman, J.

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TABLE OF CONTENTS

Page

INTRODUCTION 1

QUESTION PRESENTED AND PROPOSED RULE OF LAW.....2

SUMMARY OF ARGUMENT.....3

ARGUMENT.....4

I. Oregon's test for determining whether an individual's right to counsel protects the individual from interrogation must both protect the right to counsel and clearly guide the police. 4

A. Oregon's current rule neither adequately protects the rights of the individual nor adequately guides the police.....5

B. Mr. Prieto-Rubio's case exemplifies why a different rule is needed.....7

II. The New York rule properly balances protecting suspects from the power of the state with clear guidance to the police. 9

A. The New York rule emerged to protect an individual's right to counsel and right against self-incrimination 10

B. The New York rule also evolved to help give the police clear guidance 12

C. The New York rule has proved workable 14

III. Both prosecutors and the police should be barred from communicating with an individual once the state knows that the person is represented on criminal matters**.**.....15

A. Oregon ethical rules prohibit communication with represented individuals outside the presence of counsel. 16

B. Statements obtained in violation of the no-contact rule should be suppressed as they are in other jurisdictions. 20

C. Once represented, the right to counsel cannot be waived except in the presence of counsel 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Cases

Berkemer v. McCarty,
468 US 420, 104 SCt 3138 (1984) 7

In re Burrows,
291 Or 135, 629 P2d 820 (1981) 17, 18, 20

In re Conduct of Knappenberger,
338 Or 341, 108 P3d 1161 (2005) 16

In re Newell,
348 Or 396, 234 P3d 967 (2010) 17

Patterson v. Illinois,
487 US 285, 108 S Ct 2389 (1988) 19

People v. Arthur,
22 NY2d 325, 239 NE2d 537 (1968) 11

People v. Burdo,
91 NY2d 146, 690 NE2d 854, 856 (1997) 13, 14

People v. Ermo,
47 NY2d 863, 392 NE2d 1248 (1979) 13

People v. Hobson,
39 NY2d 479, 348 NE2d 894 (1976) 12

People v. Lopez,
16 NY3d 375, 947 N.E.2d 1155 (2011) 9, 10, 13, 14

People v. Rogers,
48 NY2d 167, 397 NE2d 709 (1979) 4, 8, 9, 10, 11, 12, 13, 21

People v. Ruff,
81 NY2d 330, 615 NE2d 611 (1993) 11

People v. Taylor,
27 NY2d 327, 266 NE2d 630 (1971) 12

Shoney's, Inc. v. Lewis,
875 SW 2d 514 (Ky 1994) 21

State v. Brown,
301 Or 268, 721 P2d 1357 (1986) 6

State v. Buchholz,
97 Or App 221, 775 P2d 896 (1989) 17

State v. Clark,
738 N W 2d 316 (Minn 2007) 20

State v. Davis,
350 Or 440, 470, 256 P3d 1075 (2011) 15

State v. Haynes,
288 Or 59, 602 P2d 272 (1979) 22, 23

State v. Kristich,
226 Or 240, 359 P2d 1106 (1961) 8

State v. Lefthand,
488 NW 2d 799 (Minn 1992) 20

State v. Prieto-Rubio,
262 Or App 149, 324 P3d 543 (2014) 7

State v. Roberti,
293 Or 59, 644 P2d 1104 (1982) 6

State v. Shannon,
241 Or 450, 405 P2d 837 (1965) 5

State v. Simonsen,
319 Or 510, 878 P2d 409 (1994) 22

State v. Sparklin,
296 Or 85, 672 P2d 1182 (1983) 4, 6, 8, 15, 16

State v. Spencer,
305 Or 59, 750 P2d 147 (1988) 5

State v. Wiegers,
373 N W 2d 1 (SD 1985) 20

United States v. Lopez,
4 F3d 1455 (9th Cir 1993) 17

Other Authorities

AMERICAN BAR ASSOCIATION MODEL RULE OF PROFESSIONAL CONDUCT,
Rule 4.2 (2014) 17, 21

Article I, section 11, of the Oregon Constitution 4, 15

NY Const, Art 1, section 6 9

Oregon Evidence Code 503 15

Oregon Rules of Professional Conduct 4.2 16

BRIEF ON THE MERITS OF *AMICI CURIAE* OREGON JUSTICE RESOURCE CENTER.

INTRODUCTION

The Oregon Justice Resource Center (OJRC) is a non-profit organization founded in 2011. OJRC works to "dismantle systemic discrimination in the administration of justice by promoting civil rights and enhancing the quality of legal representation to traditionally underserved communities." OJRC Mission Statement, www.ojrc.info/mission-statement. The OJRC Amicus Committee is comprised of Oregon attorneys from multiple disciplines and law students from Lewis & Clark Law School, where OJRC is located.[1]

The American Civil Liberties Union Foundation of Oregon, Inc. ("ACLU") is a nonprofit, nonpartisan corporation dedicated to maintaining the civil rights and liberties guaranteed or reserved to the people by the Oregon and United States constitutions; to that end, the ACLU has appeared in numerous cases in this and other Oregon courts as *amicus curiae* concerning civil liberties.

The Oregon Criminal Defense Lawyers Association ("OCDLA") is a statewide organization of criminal defense attorneys and others engaged in

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[1] Undersigned Counsel wish to acknowledge and thank Lewis & Clark law students Michael Beilstein and Justin Withem for their invaluable assistance preparing this brief.

criminal defense. OCDLA advocates for the vigorous defense of constitutional rights and the rights of those accused and convicted of crimes.

Amici wish to be heard by this court because an individual's right to counsel is of paramount importance in our adversarial system of justice. Time and again, Oregon courts have recognized the importance of counsel in custodial investigations and during judicial proceedings. Where an individual has invoked his or her right to counsel, the state should honor that invocation and refrain from communicating with that individual until the state knows that that individual is no longer represented by counsel.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

Under Article I, section 11, of the Oregon Constitution, when may police question an incarcerated individual who is represented by counsel?

Proposed Rule of Law

A defendant in custody in connection with a criminal matter for which he is represented by counsel may not be interrogated in the absence of his attorney with respect to that matter or an unrelated matter unless he waives the right to counsel in the presence of his attorney.

SUMMARY OF ARGUMENT

Amici encourage this court to adopt a rule, modeled after the rule adopted by the New York state courts, which prohibits state actors from communicating with individuals the state knows to be represented by counsel on criminal matters. The current "factually related" test is, obviously, fact dependent, requiring state actors to make case-by-case determinations regarding whether criminal charges are sufficiently factually related to entitle a person to representation. The rule advocated by *Amici* requires no such case-by-case determination by state actors, who may have a bias toward viewing the facts in favor of allowing uncounseled communications.

This rule would require that a state actor both refrain from initiating communication with a represented person and would preclude a represented person from waiving the right to counsel, once invoked, without counsel being present. State prosecutors are already bound by ethical rules that prohibit them from communicating with such represented persons. Allowing the police to do what prosecutors cannot invites prosecutors to remain willfully ignorant of police officer's actions, diminishes attorneys' ability to adequately represent their clients, and erodes individuals' rights to the representation of counsel when dealing with the state. Once a person has invoked their right to counsel on criminal matters, the state should respect that invocation and cease all communication with that represented person outside the presence of counsel.

ARGUMENT

> "We may not blithely override the importance of the attorney's entry by permitting interrogation of an accused with respect to matters which some may perceive to be unrelated."
>
> -*People v. Rogers*, 48 NY2d 167, 169, 397 NE2d 709 (1979).

I. Oregon's test for determining whether an individual's right to counsel protects the individual from interrogation must both protect the right to counsel and clearly guide police.

Article I, section 11, of the Oregon Constitution[2] protects a custodial suspect from police interrogation "concerning the events surrounding the crime charged," so long as he has retained an attorney or had one appointed. *State v. Sparklin*, 296 Or 85, 93, 672 P2d 1182 (1983). It "is specific to the criminal episode in which the accused is charged," and it "[does] not extend to the investigation of factually unrelated criminal episodes." *Id.* at 95.

The importance of counsel at a custodial interrogation cannot be understated. The presence of counsel is "one way to secure the right to be free from compelled self incrimination." *Id.* at 89. Having counsel advise a suspect before he speaks with police helps dispel "the coercive atmosphere of police interrogation[.]" *Id.* Because the presence of counsel is so important, the right to have counsel present must be protected and law enforcement must have clear guidelines regarding when

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[2] "In all criminal prosecutions, the accused shall have the right * * * to be heard by himself and counsel[.]" Oregon Const. Art. 1, section 11.

it must refrain from questioning an individual without the presence of his or her counsel.[3]

A. Oregon's current rule neither adequately protects the rights of the individual nor adequately guides police.

This court has recognized that the investigatory stage of a case necessitates counsel:

> "There can be no question that the right to an attorney during the investigative stage is at least as important as the right to counsel during the trial itself. Where once the primary confrontation between state and individual occurred at the trial, now the point at which the individual first confronts the amassed power of the state has moved back in the process from trial to the police stage."

State v. Spencer, 305 Or 59, 73-74, 750 P2d 147, 155 (1988) (considering Art. 1, section 11) (quoting *Sparklin*, 296 Or at 92 n. 9). A suspect in custody, even without formal charges, "is confronted with the full legal power of the state *** [N]either the lack of a selected charge nor the possibility that the police will think

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[3] The state may propose a bright-line rule as well: That law enforcement may interrogate a suspect about any matter so long as the suspect *is not represented in that exact matter*. This rule leads only to abuse; a suspect will be arrested for a minor crime simply to get him into custody, given counsel, and then questioned about a more serious crime for which he has not been charged and is not represented. Under that type of bright-line rule, the state will have the benefit of the coercive nature of custodial interrogations in any case in which a suspect can be held on an unrelated charge. *State v. Shannon*, 241 Or 450, 453, 405 P2d 837, 838 (1965) ("unchecked police interrogation leads to coercive practices").

better of the entire matter changes the fact that the arrested person is, at that moment, ensnared in a "criminal prosecution." *Id.* at 74.

The *Sparklin* rule, however, deems it acceptable for a suspect to confront "the amassed power of the state" and "the full legal power of the state" without the benefit of counsel so long as police determine that the acts are not factually related. *See Sparklin*, 296 Or at 95 ("[T]he article I, section 11 right to an attorney is specific to the criminal episode in which the accused is charged.). This rule harms the adversarial process by excluding defense attorneys from critical meetings with the prosecution, and leaves suspects open to the coercive nature of custodial police interrogation even once represented.

Oregon's rule allowing law enforcement to question represented suspects about "factually unrelated criminal episodes" also does not offer law enforcement sufficiently clear guidelines. Officers must engage in case-by-case considerations each time a new case presents itself. This court has previously indicated a desire to avoid imposing such dilemmas upon officers in the interest of police and court efficiency: "[P]olice need clear guidelines by which they can gauge and regulate their conduct rather than trying to follow a complex set of rules dependent upon particular facts[.]" *State v. Brown*, 301 Or 268, 277, 721 P2d 1357 (1986) (automobile searches); *see also State v. Roberti*, 293 Or 59, 91, 644 P2d 1104, 1123 (1982) (Linde, J., dissenting) ("Police officers deserve and efficient law

enforcement require rules that are clear at the time of the investigatory act; a formula designed only for retrospective judgment on a motion to suppress evidence confuses the rule with its consequence."), *on reh'g* 293 Or 236 (1982), *vacated sub nom, Oregon v. Roberti*, 468 US 1205 (1984); *Berkemer v. McCarty*, 468 US 420, 421, 104 SCt 3138, 3140 (1984) (praising the *Miranda* rule's "simplicity and clarity").

B. Mr. Prieto-Rubio's case exemplifies why a different rule is needed.

The police behavior at issue in Mr. Prieto-Rubio's case illustrates how the lack of a clear standard for the right to counsel led to case-by-case exercises of police discretion: The uncertainty about whether Mr. Prieto-Rubio's right to counsel extended to a particular interrogation has led to more than three years of judicial review.

The police interrogated Mr. Prieto-Rubio while he was in custody, knowing that he was represented by counsel on charges pertaining to a factually related matter.[4] Regardless of the detectives' intent, it is clear that they utilized the fact of Mr. Prieto-Rubio's lawful custody to extract information, even though he was

[4] The extent of the factual relatedness of Mr. Prieto-Rubio's cases will presumably be an issue discussed at length in his briefing. *See State v. Prieto-Rubio*, 262 Or App 149, 156-160, 324 P3d 543 (2014) (describing factors that may evince factual relationship such as temporal proximity, shared location, similar acts, concurrent investigation by authorities, overlapping evidence or witnesses, and a "common scheme or plan").

represented by an attorney. Under the unclear standards of the "factually related" test, they might not have known better.

In his *Sparklin* concurrence, Justice Linde referred favorably to the New York rule explained in *People v. Rogers*, 48 NY2d 167, 397 NE2d 709 (1979). *Sparklin*, 296 Or at 98 (Linde, J., concurring). The New York rule was inapplicable to the case at bar, but Linde nonetheless noted that the New York Court of Appeals had dealt with exactly the shortcomings he saw in the *Sparklin* majority's rule: That, absent the exact factual scenario presented in Mr. Sparklin's case – a defendant jailed in one city on a charge for which he is represented confesses to police from another city that he committed a crime in their jurisdiction – the rule would not clearly dictate what constituted a sufficient factual relationship. For instance, if the officers had been from the same city, but had questioned such a defendant about "activities related in time or place, by the identity of the victim, or by the repetition of similar unlawful acts[,]" the majority's test for admissibility would offer little guidance. *Id.*

Amici agree and advocate the adoption of just such a bright-line rule, modeled after the New York rule.[5] Justice Linde presciently anticipated that a case

[5] This court has previously addressed the New York rule, but it has not yet had the opportunity to adopt it. *See State v. Haynes*, 288 Or 59, 70, 602 P2d 272 (1979) (addressing Article I, section 12, issue); *State v. Kristich*, 226 Or 240, 248, 359 P2d 1106 (1961) (deferring issue to legislature).

addressing this rule would come before this court. Mr. Prieto-Rubio's is just such a case. *Amici* further advocate that the ethical rule prohibiting attorney contact with represented requires adoption of the New York rule.

II. The New York rule properly balances protecting individuals from the power of the state with clear guidance to police.

The New York[6] rule states that "a defendant in custody in connection with a criminal matter for which he is represented by counsel may not be interrogated in the absence of his attorney with respect to that matter or an unrelated matter unless he waives the right to counsel in the presence of his attorney." *People v. Lopez*, 16 NY3d 375, 377, 947 N.E.2d 1155 (2011). This rule stems from *Rogers*, 48 NY2d at 169, which held that "once an attorney has entered the proceeding, thereby signifying that the police should cease questioning, a defendant in custody may not be further interrogated in the absence of counsel," even on unrelated matters.

The defendant in *Rogers* was arrested for robbery and his lawyer instructed police not to question him. Although police ceased interrogation about the robbery (and after a purported waiver of *Miranda* rights), they interrogated Rogers for four

[6] The New York Constitution's grant of a right of counsel to defendants is similar to Article I, section 11. It reads, in relevant part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel[.]" NY Const, Art 1, section 6.

hours on matters unrelated to the robbery.[7] During that interrogation on the unrelated matter, he made statements which were eventually used to implicate him in the robbery charge, notwithstanding the fact that he was represented by an attorney at the time of questioning. *Rogers*, 48 NY2d at 170.

The court framed the issue as "whether once a defendant is represented on pending matters, the police may question the defendant on items unrelated to the subject of that representation after the defendant, in the absence of counsel, has waived his rights." *Id.* The court held that "[o]nce a defendant is represented by an attorney, the police may not elicit from him any statements, except those necessary for processing or his physical needs. Nor may they seek a waiver of this right, except in the presence of counsel." *Id.* at 173.

A. The New York rule emerged to protect an individual's right to counsel and right against self-incrimination.

"[T]he right to counsel [is] a cherished and valuable protection that must be guarded with the utmost vigilance." *Lopez*, 16 N.Y.3d at 380. This is not a remarkable notion: "The presence of counsel confers no undue advantage to the accused. Rather, the attorney's presence serves to equalize the positions of the

[7] Like Mr. Prieto-Rubio, Mr. Rogers was in custody at the time he was questioned about an incident separate from the one for which he was being held, and he was represented on the matter which led to his custody.

accused and sovereign, mitigating the coercive influence of the State and rendering it less overwhelming." *Rogers*, 48 N.Y.2d at 173.

Furthermore, the right is "indelible": Even if such a represented defendant *wished* to waive his right to have counsel present during an interrogation, he cannot do so unless his counsel is present during that waiver, and thus has a chance to advise him against proceeding with the interrogation. *Rogers*, 48 NY2d at 169; *see also People v. Arthur*, 22 NY2d 325, 329, 239 NE2d 537 (1968). This protection is offered so that an attorney has a chance to advise her client against proceeding with any interrogation which may compromise the integrity of his pending case. *Rogers*, 48 NY2d at 173.

Although *Rogers* was an expansion of the right to counsel at interrogations concerning unrelated matters, it "represents no great quantitative change in the protection we have extended to the individual as a shield against the awesome and sometimes coercive force of the State." *Id.* That is, "it would be to ignore reality to deny the role of counsel when the particular episode of questioning does not concern the pending charge." *Id.*[8]

[8] The New York Rule only applies where the suspect is *actually represented* on a pending charge (which the New York courts call "entry"). Thus, police *may* question a suspect on a matter unrelated to the pending charge if the suspect has no attorney on that pending charge. *People v. Ruff*, 81 NY2d 330, 333, 615 NE2d 611, 613 (1993).

It is immaterial that an attorney's presence could decrease the likelihood that a suspect will waive his right to silence. Rather, as the *Rogers* court emphasized, "[a]lthough the State has a significant interest in investigating and prosecuting criminal conduct, that interest cannot override the fundamental right to an attorney guaranteed by our State Constitution." *Id.* Other means of investigation beyond those that erode the right to counsel are available to police. *Id.*

B. The New York rule also evolved to help give police guidance.

Prior to *Rogers*, New York followed a rule not unlike the current formulation of Oregon's rule: New York's right to counsel "excepted from its scope questioning about a charge unrelated to the one on which defendant was represented." *Rogers*, 48 NY2d at 171. Notably, the court highlighted that during the existence of the rule allowing questioning on unrelated charges "it has been difficult to define the precise reach of the limitation concerning unrelated charges." *Id.* at 171.

Prior to *Rogers*, the protection from interrogation without counsel did not apply unless "an attorney has been secured to assist the accused in defending against the *specific charges for which he is held*." *People v. Taylor*, 27 NY2d 327, 332, 266 NE2d 630 (1971) (emphasis added); *see also People v. Hobson*, 39 NY2d 479, 483, 348 NE2d 894 (1976) (restating the exception established in *Taylor*).

Questioning about an unrelated incident was thus excepted from the scope of the right to counsel.

In the years that followed *Taylor* and *Hobson*, this "unrelated incident" exception proved unworkable and required "drawing the subtle distinctions necessitated" by a test concerning the factual relatedness of charges. *Rogers*, 48 NY2d at 171. Court decisions reflected a desire to move away from the "unrelated incident" exception by allowing more and more distantly related incidents to trigger a suspect's right to counsel. *See, e.g.*, *People v. Ermo*, 47 NY2d 863, 392 NE2d 1248 (1979) (noting that "the police exploited concededly impermissible questioning" as to an unrelated charge for which the defendant was represented).

Consequently, the *Rogers* rule is "defined through the adoption of pragmatic and simple tests *** in order to provide an objective measure to guide law enforcement officials and the courts." *Lopez*, 16 N.Y.3d at 381 (internal quotations omitted). New York courts have rejected suggestions that *Rogers* should be limited or modified, because it would introduce "new ambiguities where clarity and certainty are important for the individual as well as the public interest involved." *People v. Burdo*, 91 NY2d 146, 151, 690 NE2d 854, 856 (1997). "The *Rogers* rule is eminently straightforward: when an attorney undertakes representation in a matter for which the defendant is in custody, all questioning is barred unless the police obtain a counseled waiver. *Rogers* therefore requires inquiry on three

objectively verifiable elements – custody, representation and entry." *Lopez*, 16 NY3d at 382. This inquiry is decidedly more straightforward than whether two crimes are factually related.

C. The New York rule has proved workable.

New York still follows the rule announced in *Rogers*. In 1997, the Court of Appeals for New York wrote that "[f]or nearly two decades *Rogers* has stood as a workable, comprehensible, bright line rule, providing effective guidance to law enforcement while ensuring that it is defendant's attorney, not the police, who determines which matters are related and unrelated to the subject of the representation." *Burdo*, 91 NY2d at 151. In 2011, the court updated its timeline, noting that "[f]or over three decades, '*Rogers* has stood as a workable, comprehensible, bright line rule[.]'" *Lopez*, 16 NY3d at 382 (quoting *Burdo*).[9]

Because the New York rule has both adequately protected suspects' rights and provides clear guidance to law enforcement, *Amici* advocate for the adoption of the following rule: A defendant in custody in connection with a criminal matter

[9] In *Lopez*, the court added the requirement that police must ask whether a custodial suspect is represented. *Lopez* held that when police want to interrogate a suspect in custody about an unrelated matter, they "must make a reasonable inquiry concerning the defendant's representational status when the circumstances indicate that there is a probable likelihood that an attorney has entered the custodial matter, and the accused is actually represented on the custodial charge." 16 N.Y.3d 375, 947 N.E.2d 1155 (2011).

for which he is represented by counsel may not be interrogated in the absence of his attorney with respect to that matter or an unrelated matter unless he waives the right to counsel in the presence of his attorney.

III. Both prosecutors and the police should be barred from communicating with an individual once the state knows that the person is represented on criminal matters.

Both the Oregon and federal right to counsel have expanded over time to track the growing importance of pre-trial investigation to the ultimate outcome of a case. *State v. Davis*, 350 Or 440, 470, 256 P3d 1075 (2011). Today, as criminal codes have expanded and plea bargaining has become a primary method for resolving criminal charges, information about one charge will often influence the disposition of other charges, even if factually unrelated. The extent of the right to counsel should reflect actual criminal procedure in order to ensure fairness and prevent potential abuses by police.

As this court has noted, "[i]n the smallest civil matter an attorney and his or her investigator are restricted in their contact with a represented party." *State v. Sparklin*, 296 Or 85, 93 672 P2d 1182 (1983). We as a society recognize the fundamental importance of the attorney-client relationship and, in order to protect that relationship, have developed multiple sources of law protect the attorney-client relationship, including Constitutional provisions, rules of evidence, and ethical rules. *See, e.g.*, Oregon Const. Art. 1, section 11 (right to counsel); OEC 503

(attorney-client privilege); ORPC 4.2 (prohibiting attorneys from communicating with represented persons). This court should conclude that it can "require no less of prosecutors or police in criminal matters" than it does of civil attorneys in the "smallest civil matter[s]." *Sparklin*, 296 Or at 93. By adopting the New York rule proposed above, this court would protect individual's rights to representation, protect attorneys' right and obligation to adequately represent their clients, and remove the inconsistency apparent in holding civil attorneys responsible for the conduct of investigators and not prosecutors for the conduct of the police.

A. Oregon ethical rules prohibit communication with represented individuals outside of the presence of counsel.

Oregon Rule of Professional Conduct (ORPC) 4.2 states that an attorney may not "communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject." This "is a prophylactic rule designed to insulate represented persons against possible overrreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounselled disclosure of information relating to the representation." *In re Conduct of Knappenberger*, 338 Or 341, 345-46, 108 P3d 1161 (2005) (quoting *The Ethical Oregon Lawyer* § 7.42 (Oregon CLE 1991)). The rule "shields a party's substantive interests against encroachment by opposing counsel and safeguards the relationship between the party and her attorney *** [O]ur

adversary system is premised upon functional lawyer-client relationships." *United States v. Lopez*, 4 F3d 1455, 1459 (9th Cir 1993).

The ORPCs apply to state prosecutors. *See In re Conduct of Burrows*, 291 Or 135, 629 P2d 820 (1981) (applying former Disciplinary Rule 7–104(A)). Therefore, under the plain terms of ORPC, a prosecutor violates her ethical obligations if she communicates with, *or* if she causes another to communicate with, a represented person so long as the prosecutor knows the suspect is represented on that "subject."[10] *See, e.g.*, AMERICAN BAR ASSOCIATION MODEL RULE OF PROFESSIONAL CONDUCT ("ABA MRPC"), Rule 4.2, Comment [4] (2014) ("A lawyer may not make a communication prohibited by this Rule through the acts of another."); *State v. Buchholz*, 97 Or App 221, 225 775 P2d 896 (1989) (if a state actor is "directly or indirectly involved in initiating, planning, controlling or supporting a discussion that would elicit incriminating statements from defendant," those actions will be imputed to the state).

In *Burrows*, the court reviewed disciplinary action taken against a district attorney who had violated the no-contact rule by allowing police to speak to a

[10] It is important to note that the term "subject" as used in ORPC 4.2 is much broader than the ABA MRPC, Rule 4.2, which instead uses the term "matter." *In re Newell*, 348 Or 396, 407-08, 234 P3d 967 (2010). "Subject" means "something concerning which something is said." *Id*. at 407 (quoting *Webster's Third New Int'l Dictionary* 2275 (unabridged ed 2002)); *see also In re Burrows*, 291 Or 135, 629 P2d 820 (1981).

defendant about participating in an undercover investigation without his attorney present. *Burrows*, 291 Or at 138. The prosecutors argued that their communications did not relate to the subject for which the defendant was represented, but instead were confined to the undercover work. *Id.* at 142. The court rejected this assertion, quoting the Disciplinary Review Board:

> "[Defendant] was likely as concerned about the ultimate sentence that would be imposed or the charges that might be reduced or dropped as he was about the probabilities of a conviction. For all we know, if [defendant's lawyer had been present], an even better arrangement could have been struck in [defendant's] behalf. * * * In short, we think that where it was clear that [defendant's] undercover drug activities were likely to, or at least were expected to, impact the pending criminal charges, *the subject matter of the communications necessarily involved the pending criminal charges*."

Id. at 143 (emphasis added). Ultimately, the court held that, because the subject of the communication between the prosecutor and the defendant (*i.e.*, defendant's participation as an undercover informant) would affect defendant's sentencing in an entirely separate matter (*i.e.*, rape and robbery proceedings), those communications were on the same "subject."

Burrows acknowledges the reality that charges which are brought and tried together, whether factually-related or not, *necessarily* influence each other's outcome.[11] Especially as a large majority of cases are resolved through pleas, this

[11] Indeed, in Mr. Prieto-Rubio's case, the state fought to obtain the strategic advantage of consolidating the charges for trial.

kind of negotiating is a critical stage in the resolution of the charges. *See Patterson v. Illinois*, 487 US 285, 308, 108 S Ct 2389 (1988) (Stevens, J., dissenting) ("a lawyer is likely to be considerably more skillful at negotiating a plea bargain"). .

Pursuant to *Burrows*, it is clear that a prosecutor may not communicate with a person about the same subject concerning which the person is represented, and that the same "subject" at least includes topics which may influence sentencing. In the instant case, regardless of whether the criminal charges Mr. Prieto-Rubio faced were "factually related," as this court has or may in the future define that term, the communications the police had with Mr. Prieto-Rubio certainly involved the same "subject" as defined in *Burrows* – the communications all related to the subject of crimes Mr. Prieto-Rubio may have committed, and evidence relating to those crimes would be used in any trial, negotiation, or sentencing. Because the communications related to the same "subject" it is undeniable that the prosecutor in this case would have been forbidden by ORPC 4.2 from communicating with Mr. Prieto-Rubio as the police did here, and that the prosecutor would have been forbidden from instructing or allowing the police to do so when she herself would have been prohibited.

ORPC 4.2 must also encompass situations where a prosecutor knows or should know that the police will communicate with a represented person about the same subject regarding which the person is represented. Any other rule invites

prosecutors to remain willfully ignorant of the actions of the police, who, maybe with a wink and a nod, are permitted to do exactly that which the prosecutor is ethically forbidden from doing. Indeed, this court has previously recognized that "[i]t would be difficult to hypothecate a set of circumstances which better illustrate the folly and danger of a principle of ethics which would permit a lawyer to excuse his misfeasance or nonfeasance by delegating to, and then later blaming, a non-lawyer." *Burrows*, 291 Or at 143 (reprimanding prosecutor even though the police had disobeyed his instructions to notify defense counsel).

B. Statements obtained in violation of the no-contact rule should be suppressed as they are in other jurisdictions.

Other states recognize that enforcement of no-contact rules on both police and prosecutors is essential to the adversarial court system. In order to protect the attorney-client relationship, Minnesota suppresses, through its supreme court's inherent supervisory power, certain evidence obtained in violation of the no-contact rule. *State v. Lefthand*, 488 NW 2d 799, 801-02 (Minn 1992); *see also State v. Clark*, 738 NW 2d 316, 341 (Minn 2007) (describing case-by-case approach applied to determine whether suppression is appropriate). In South Dakota, the right to counsel under its constitution "must be held to be at least co-extensive with that provided by the Code of Professional Responsibility to a party in a civil action." *State v. Wiegers*, 373 N W 2d 1 (SD 1985). Kentucky has acknowledged that, in the civil context, even innocent violations of this rule

require disqualification of the attorneys from the case as well as suppression of statements obtained. *Shoney's, Inc. v. Lewis*, 875 SW 2d 514, 516-17 (Ky 1994) ("[when] the integrity of the adversarial process is at stake, we must make every effort to prevent harm to the civil justice system").

C. Once represented, the right to counsel cannot be waived except in the presence of counsel.

Both the New York rule and rule 4.2 recognize that the only way to protect an individual's fundamental right to counsel, once invoked, and attorneys' right and obligation to represent the interests of her client is to completely bar the State from communicating with a represented person outside the presence of counsel. To that end, both rules preclude a represented person from waiving the right to counsel outside the presence of counsel. *Rogers*, 48 NY2d at 169; ABA MRPC, Rule 4.2, Comment [3] ("This rule applies even though the represented person initiates or consents to the communication."). Prohibiting uncounseled waiver is necessary, particularly in custodial settings, in order to protect both the rights of the accused and to protect the rights of the accused's counsel to fulfill her obligation to her client.

Oregon courts recognize that attorneys have the right and obligation to be present during communications between the state and the attorney's client. Even if a defendant has initially waived his right to counsel, that waiver is invalidated if he is not given the chance to accept the assistance of an attorney who actually

attempts to contact him. *State v. Haynes*, 288 Or 59, 70, 602 P2d 272 (1979).[12] "To pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney available to provide at least initial assistance and advice, whatever might be arranged in the long run." *Id.* at 72.

Likewise, the failure to inform the defendant that a lawyer was attempting to contact him "both fail[s] to honor the lawyer's invocation of defendant's right to remain silent and [keeps] defendant from making an informed choice whether to incriminate himself by preventing defendant from learning of the existence of the lawyer and of the lawyer's desires." *State v. Simonsen*, 319 Or 510, 518, 878 P2d 409 (1994).

These decisions acknowledge that lawyers have an obligation to adequately represent their clients' interests and should be afforded the opportunity to do so. Even though neither defendant asserted his right to counsel, the intervention of a lawyer who had never met or spoken with the client was sufficient to result in suppression of the evidence obtained after the lawyer attempted to reach the defendant. *Haynes*, 288 Or at 74; *Simonsen*, 319 Or at 518. In the case of a person who is represented by counsel on one charge but not another, such as Mr. Prieto-Rubio, it is unthinkable that the attorney would decline to be present during

[12] Although this case was decided under the derivative right to counsel under Article I, section 12, its holding should apply with equal force to circumstances where the right to counsel exists under section 11.

questioning regarding the second charge. The interest of an attorney already representing the defendant, and who in all likelihood will end up representing the client on both charges, is far greater than that of the lawyers in *Haynes* and *Simonsen*, and his interest in the case should have the same result of excluding evidence produced in his absence.

The basis for suppressing the statements in *Haynes* was that, after the attorney attempted to contact the defendant, the defendant cannot knowingly or intelligently waive his right to counsel. *Haynes*, 288 Or at 70. Because an attorney would presumably always want to be present for contact between their client and the police or prosecutor, and because of the need for counsel to be present in order to uphold his side of the adversarial process, a represented person should only be able to knowingly or intelligently waive their right to counsel if the attorney is present.

CONCLUSION

While *Amici* are confident that the criminal charges Mr. Prieto-Rubio are indeed "factually related," as this court has defined that term, the factually related test leads to uncertainty. *Amici* offer a bright-line rule, which is easy to follow and in-line with the public policy favoring the attorney-client relationship evidenced by ORPC 4.2. Amorphous tests and rules that allow police to do what prosecutors are ethically prohibited from doing are bound to lead to over-steps by the state –

whether innocent, because a particular police officer believes that charges are not related, or intentional, because the officer knows that the fuzzy grey line will leave room for argument in the future. The certainty of the proffered rule ensures that the state will know that it cannot communicate with a represented person without counsel present.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief on the merits complies with the word-count limitation in ORAP 5.05(2)(b)(i) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 6,285 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

/s/ Alexander A. Wheatley
Alexander A. Wheatley, OSB No. 105395

APPENDIX

TABLE OF CONTENTS

Berkemer v. McCarty,
468 US 420, 104 SCt 3138 (1984) APP-1

Patterson v. Illinois,
487 US 285, 108 S Ct 2389 (1988) APP-19

People v. Arthur,
22 NY2d 325, 239 NE2d 537 (1968) APP-37

People v. Burdo,
91 NY2d 146, 690 NE2d 854 (1997) APP-41

People v. Ermo,
47 NY2d 863, 392 NE2d 1248 (1979) APP-51

People v. Hobson,
39 NY2d 479, 348 NE2d 894 (1976) APP-56

People v. Lopez,
16 NY3d 375, 947 N.E.2d 1155 (2011) APP-66

People v. Rogers,
48 NY2d 167, 397 NE2d 709 (1979) APP-79

People v. Ruff,
81 NY2d 330, 615 NE2d 611 (1993) APP-86

People v. Taylor,
27 NY2d 327, 266 NE2d 630 (1971) APP-90

Shoney's, Inc. v. Lewis,
875 SW 2d 514, (Ky 1994).....APP-94

State v. Clark,
738 N W 2d 316 (Minn 2007) APP-100

State v. Lefthand,
488 NW 2d 799 (Minn 1992) APP-139

State v. Wiegers,
373 N W 2d 1 (SD 1985) APP-144

United States v. Lopez,
4 F3d 1455 (9th Cir 1993) APP-164

United States Supreme Court Reports

BERKEMER *v.* McCARTY, 468 U.S. 420 (1984)

BERKEMER, SHERIFF OF FRANKLIN COUNTY, OHIO *v.* McCARTY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 83-710.

Argued April 18, 1984

Decided July 2, 1984

After observing respondent's car weaving in and out of a highway lane, an officer of the Ohio State Highway Patrol forced respondent to stop and asked him to get out of the car. Upon noticing that respondent was having difficulty standing, the officer concluded that respondent would be charged with a traffic offense and would not be allowed to leave the scene, but respondent was not told that he would be taken into custody. When respondent could not perform a field sobriety test without falling, the officer asked him if he had been using intoxicants, and he replied that he had consumed two beers and had smoked marihuana a short time before. The officer then formally arrested respondent and drove him to a county jail, where a blood test failed to detect any alcohol in respondent's blood. Questioning was then resumed, and respondent again made incriminating statements, including an admission that he was "barely" under the influence of alcohol. At no point during this sequence was respondent given the warnings prescribed by *Miranda* v. *Arizona*, 384 U.S. 436. Respondent was charged with the misdemeanor under Ohio law of operating a motor vehicle while under the influence of alcohol and/or drugs, and when the state court denied his motion to exclude the various incriminating statements on the asserted ground that their admission into evidence would violate the Fifth Amendment because respondent had not been informed of his constitutional rights prior to his interrogation, he pleaded "no contest" and was convicted. After the conviction was affirmed on appeal by the Franklin County Court of Appeals and the Ohio Supreme Court denied review, respondent filed an action in Federal District Court for habeas corpus relief. The District Court dismissed the petition, but the Court of Appeals reversed, holding that *Miranda* warnings must be given to all individuals prior to custodial interrogation, whether the offense investigated is a felony or a misdemeanor traffic offense, and that respondent's postarrest statements, at least, were inadmissible.

Held:

1. A person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in *Miranda*, regardless of the nature or severity of the offense of which he is suspected or for

Page 421

which he was arrested. Thus, respondent's statements made at the station house were inadmissible since he

was "in custody" at least as of the moment he was formally arrested and instructed to get into the police car, and since he was not informed of his constitutional rights at that time. To create an exception to the *Miranda* rule when the police arrest a person for allegedly committing a misdemeanor traffic offense and then question him without informing him of his constitutional rights would substantially undermine the rule's simplicity and clarity and would introduce doctrinal complexities, particularly with respect to situations where the police, in conducting custodial interrogations, do not know whether the person has committed a misdemeanor or a felony. The purposes of the *Miranda* safeguards as to ensuring that the police do not coerce or trick captive suspects into confessing, relieving the inherently compelling pressures generated by the custodial setting itself, and freeing courts from the task of scrutinizing individual cases to determine, after the fact, whether particular confessions were voluntary, are implicated as much by in-custody questioning of persons suspected of misdemeanors as they are by questioning of persons suspected of felonies. Pp. 428-435.

2. The roadside questioning of a motorist detained pursuant to a routine traffic stop does not constitute "custodial interrogation" for the purposes of the *Miranda* rule. Although an ordinary traffic stop curtails the "freedom of action" of the detained motorist and imposes some pressures on the detainee to answer questions, such pressures do not sufficiently impair the detainee's exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights. A traffic stop is usually brief, and the motorist expects that, while he may be given a citation, in the end he most likely will be allowed to continue on his way. Moreover, the typical traffic stop is conducted in public, and the atmosphere surrounding it is substantially less "police dominated" than that surrounding the kinds of interrogation at issue in *Miranda* and subsequent cases in which *Miranda* has been applied. However, if a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him "in custody" for practical purposes, he is entitled to the full panoply of protections prescribed by *Miranda*. In this case, the initial stop of respondent's car, by itself, did not render him "in custody," and respondent has failed to demonstrate that, at any time between the stop and the arrest, he was subjected to restraints comparable to those associated with a formal arrest. Although the arresting officer apparently decided as soon as respondent stepped out of his car that he would be taken into custody and charged with a traffic offense, the officer never communicated his intention to respondent. A policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular time; the

Page 422

only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation. Since respondent was not taken into custody for the purposes of *Miranda* until he was formally arrested, his statements made prior to that point were admissible against him. Pp. 435-442.

3. A determination of whether the improper admission of respondent's postarrest statements constituted "harmless error" will not be made by this Court for the cumulative reasons that (i) the issue was not presented to the Ohio courts or to the federal courts below, (ii) respondent's admissions made at the scene of the traffic stop and the statements he made at the police station were not identical, and (iii) the procedural posture of the case makes the use of harmless-error analysis especially difficult because respondent, while preserving his objection to the denial of his pretrial motion to exclude the evidence, elected not to contest the prosecution's case against him and thus has not yet had an opportunity to try to impeach the State's evidence or to present evidence of his own. Pp. 442-445.

716 F.2d 361, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 445.

Alan C. Travis argued the cause for petitioner. With him on the briefs was *Stephen Michael Miller*.

R. William Meeks argued the cause for respondent. With him on the brief were *Paul D. Cassidy, Lawrence Herman*, and *Joel A. Rosenfeld*.[fn*]

[fn*] Page 422 *Anthony J. Celebrezze, Jr.*, Attorney General, and *Richard David Drake*, Assistant Attorney General, filed a brief for the State of Ohio as *amicus curiae* urging reversal.

Jacob D. Fuchsberg and *Charles S. Sims* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents two related questions: First, does our decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), govern the admissibility of statements made during custodial interrogation by a suspect accused of a misdemeanor traffic

Page 423

offense? Second, does the roadside questioning of a motorist detained pursuant to a traffic stop constitute custodial interrogation for the purposes of the doctrine enunciated in *Miranda?*

I

A

The parties have stipulated to the essential facts. See App. to Pet. for Cert. A-1. On the evening of March 31, 1980, Trooper Williams of the Ohio State Highway Patrol observed respondent's car weaving in and out of a lane on Interstate Highway 270. After following the car for two miles, Williams forced respondent to stop and asked him to get out of the vehicle. When respondent complied, Williams noticed that he was having difficulty standing. At that point, "Williams concluded that [respondent] would be charged with a traffic offense and, therefore, his freedom to leave the scene was terminated." *Id.*, at A-2. However, respondent was not told that he would be taken into custody. Williams then asked respondent to perform a field sobriety test, commonly known as a "balancing test." Respondent could not do so without falling.

While still at the scene of the traffic stop, Williams asked respondent whether he had been using intoxicants. Respondent replied that "he had consumed two beers and had smoked several joints of marijuana a short time before." *Ibid*. Respondent's speech was slurred, and Williams had difficulty understanding him. Williams thereupon formally placed respondent under arrest and transported him in the patrol car to the Franklin County Jail.

At the jail, respondent was given an intoxilyzer test to determine the concentration of alcohol in his blood.[fn1] The test did not detect any alcohol whatsoever in respondent's system. Williams then resumed

questioning respondent
Page 424
in order to obtain information for inclusion in the State Highway Patrol Alcohol Influence Report. Respondent answered affirmatively a question whether he had been drinking. When then asked if he was under the influence of alcohol, he said, "I guess, barely." *Ibid*. Williams next asked respondent to indicate on the form whether the marihuana he had smoked had been treated with any chemicals. In the section of the report headed "Remarks," respondent wrote, "No ang[el] dust or PCP in the pot. Rick McCarty." App. 2.

At no point in this sequence of events did Williams or anyone else tell respondent that he had a right to remain silent, to consult with an attorney, and to have an attorney appointed for him if he could not afford one.

B

Respondent was charged with operating a motor vehicle while under the influence of alcohol and/or drugs in violation of Ohio Rev. Code Ann. § 4511.19 (Supp. 1983). Under Ohio law, that offense is a first-degree misdemeanor and in punishable by fine or imprisonment for up to six months. § 2929.21 (1982). Incarceration for a minimum of three days is mandatory. § 4511.99 (Supp. 1983).

Respondent moved to exclude the various incriminating statements he had made to Trooper Williams on the ground that introduction into evidence of those statements would violate the Fifth Amendment insofar as he had not been informed of his constitutional rights prior to his interrogation. When the trial court denied the motion, respondent pleaded "no contest" and was found guilty.[fn2] He was sentenced to 90
Page 425
days in jail, 80 of which were suspended, and was fined $300, $100 of which were suspended.

On appeal to the Franklin County Court of Appeals, respondent renewed his constitutional claim. Relying on a prior decision by the Ohio Supreme Court, which held that the rule announced in *Miranda* "is not applicable to misdemeanors," *State* v. *Pyle*, 19 Ohio St.2d 64, 249 N.E.2d 826 (1969), cert. denied, 396 U.S. 1007 (1970), the Court of Appeals rejected respondent's argument and affirmed his conviction. *State* v. *McCarty*, No. 80AP-680 (Mar. 10, 1981). The Ohio Supreme Court dismissed respondent's appeal on the ground that it failed to present a "substantial constitutional question." *State* v. *McCarty*, No. 81-710 (July 1, 1981).

Respondent then filed an action for a writ of habeas corpus in the District Court for the Southern District of Ohio.[fn3] The District Court dismissed the petition, holding that "*Miranda* warnings do not have to be given prior to in custody interrogation of a suspect arrested for a traffic offense." *McCarty* v. *Herdman*, No. C-2-81-1118 (Dec. 11, 1981).

A divided panel of the Court of Appeals for the Sixth Circuit reversed, holding that "*Miranda* warnings must be given to *all* individuals prior to custodial interrogation, whether the offense investigated be a felony or a misdemeanor traffic offense." *McCarty* v. *Herdman*, 716 F.2d 361, 363 (1983) (emphasis in original). In applying this principle to the facts of the case, the Court of Appeals distinguished between the statements made by respondent before and after his formal arrest.[fn4] The postarrest statements, the

court ruled, were
Page 426
plainly inadmissible; because respondent was not warned of his constitutional rights prior to or "[a]t the point that Trooper Williams took [him] to the police station," his ensuing admissions could not be used against him. *Id.*, at 364. The court's treatment of respondent's prearrest statements was less clear. It eschewed a holding that "the mere stopping of a motor vehicle triggers *Miranda*," *ibid.*, but did not expressly rule that the statements made by respondent at the scene of the traffic stop could be used against him. In the penultimate paragraph of its opinion, the court asserted that "[t]he failure to advise [respondent] of his constitutional rights rendered *at least some* of his statements inadmissible," *ibid.* (emphasis added), suggesting that the court was uncertain as to the status of the prearrest confessions.[fn5] "Because [respondent] was convicted on inadmissible evidence," the court deemed it necessary to vacate his conviction and order the District Court to issue a writ of habeas corpus. *Ibid.*[fn6] However, the Court of Appeals did not specify which statements, if any, could be used against respondent in a retrial.

We granted certiorari to resolve confusion in the federal and state courts regarding the applicability of our ruling in
Page 427
Miranda to interrogations involving minor offenses[fn7] and to questioning of motorists detained pursuant to traffic stops.[fn8] 464 U.S. 1038 (1984).
Page 428

II

The Fifth Amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." It is settled that this provision governs state as well as federal criminal proceedings. *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964).

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Court addressed the problem of how the privilege against compelled self-incrimination guaranteed by the Fifth Amendment could be protected from the coercive pressures that can be brought to bear upon a suspect in the context of custodial interrogation. The Court held:

"[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of [a] defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the
Page 429
following measures are required. 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 (footnote omitted).

In the years since the decision in *Miranda*, we have frequently reaffirmed the central principle established by that case: if the police take a suspect into custody and then ask him questions without informing him of the rights enumerated above, his responses cannot be introduced into evidence to establish his guilt.[fn9] See, *e. g., Estelle* v. *Smith*, 451 U.S. 454, 466-467 (1981); *Rhode Island* v. *Innis*, 446 U.S. 291, 297-298 (1980) (dictum); *Orozco* v. *Texas*, 394 U.S. 324, 326-327 (1969); *Mathis* v. *United States*, 391 U.S. 1, 3-5 (1968).[fn10]

Petitioner asks us to carve an exception out of the foregoing principle. When the police arrest a person for allegedly committing a misdemeanor traffic offense and then ask him questions without telling him his constitutional rights, petitioner argues, his responses should be admissible against him.[fn11] We cannot agree.

Page 430

One of the principal advantages of the doctrine that suspects must be given warnings before being interrogated while in custody is the clarity of that rule.

"*Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts by requiring the suppression of trust-worthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis." *Fare* v. *Michael C.*, 442 U.S. 707, 718 (1979).

The exception to *Miranda* proposed by petitioner would substantially undermine this crucial advantage of the doctrine. The police often are unaware when they arrest a person whether he may have committed a misdemeanor or a felony. Consider, for example, the reasonably common situation in which the driver of a car involved in an accident is taken into custody. Under Ohio law, both driving while under the influence of intoxicants and negligent vehicular homicide are misdemeanors, Ohio Rev. Code Ann. §§ 2903.07, 4511.99 (Supp. 1983), while reckless vehicular homicide is a felony, § 2903.06 (Supp. 1983). When arresting a person for causing a collision, the police may not know which of these offenses he may have committed. Indeed, the nature of his offense may depend upon circumstances unknowable to the police, such as whether the suspect has previously committed

Page 431

a similar offense[fn12] or has a criminal record of some other kind. It may even turn upon events yet to happen, such as whether a victim of the accident dies. It would be unreasonable to expect the police to make guesses as to the nature of the criminal conduct at issue before deciding how they may interrogate the suspect.[fn13]

Equally importantly, the doctrinal complexities that would confront the courts if we accepted petitioner's proposal would be Byzantine. Difficult questions quickly spring to mind: For instance, investigations into seemingly minor offenses sometimes escalate gradually into investigations into more serious matters;[fn14] at what point in the evolution of an affair of this sort would the police be obliged to give *Miranda* warnings to a suspect in custody? What evidence would be necessary to establish that an arrest for a misdemeanor offense

Page 432

was merely a pretext to enable the police to interrogate the suspect (in hopes of obtaining information about a felony) without providing him the safeguards prescribed by *Miranda*?[fn15] The litigation necessary to resolve such matters would be time-consuming and disruptive of law enforcement. And the end result would be an elaborate set of rules, interlaced with exceptions and subtle distinctions, discriminating between different kinds of custodial interrogations.[fn16] Neither the police nor criminal defendants would benefit from such a development.

Absent a compelling justification we surely would be unwilling so seriously to impair the simplicity and clarity of the holding of *Miranda*. Neither of the two arguments proffered by petitioner constitutes such a justification. Petitioner first contends that *Miranda* warnings are unnecessary when a suspect is questioned about a misdemeanor traffic offense, because the police have no reason to subject such a suspect to the sort of interrogation that most trouble the Court in *Miranda*. We cannot agree that the dangers of police abuse are so slight in this context. For example, the offense of driving while intoxicated is increasingly regarded in many jurisdictions as a very serious matter.[fn17] Especially when the intoxicant at issue is a narcotic drug rather than alcohol, the police sometimes have difficulty obtaining evidence of this crime. Under such circumstances, the incentive for the police to try to induce the defendant to incriminate

Page 433

himself may well be substantial. Similar incentives are likely to be present when a person is arrested for a minor offense but the police suspect that a more serious crime may have been committed. See *supra*, at 431-432.

We do not suggest that there is any reason to think improper efforts were made in this case to induce respondent to make damaging admissions. More generally, we have no doubt that, in conducting most custodial interrogations of persons arrested for misdemeanor traffic offenses, the police behave responsibly and do not deliberately exert pressures upon the suspect to confess against his will. But the same might be said of custodial interrogations of persons arrested for felonies. The purposes of the safeguards prescribed by *Miranda* are to *ensure* that the police do not coerce or trick captive suspects into confessing,[fn18] to relieve the "`inherently compelling pressures'" generated by the custodial setting itself, "`which work to undermine the individual's will to resist,'"[fn19] and as much as possible to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary.[fn20] Those purposes are implicated as much by in-custody questioning of persons suspected of misdemeanors as they are by questioning of persons suspected of felonies.

Page 434

Petitioner's second argument is that law enforcement would be more expeditious and effective in the absence of a requirement that persons arrested for traffic offenses be informed of their rights. Again, we are unpersuaded. The occasions on which the police arrest and then interrogate someone suspected only of a misdemeanor traffic offense are rare. The police are already well accustomed to giving *Miranda* warnings to persons taken into custody. Adherence to the principle that *all* suspects must be given such warnings will not significantly hamper the efforts of the police to investigate crimes.

We hold therefore that a person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in *Miranda*,[fn21] regardless of the nature or severity of the offense of which he is suspected or for which he was arrested.

The implication of this holding is that the Court of Appeals was correct in ruling that the statements made by respondent at the County Jail were inadmissible. There can be no question that respondent was "in custody" at least as of the moment he was formally placed under arrest and instructed to get into the police car. Because he was not informed of

Page 435

his constitutional rights at that juncture, respondent's subsequent admissions should not have been used against him.

III

To assess the admissibility of the self-incriminating statements made by respondent prior to his formal arrest, we are obliged to address a second issue concerning the scope of our decision in *Miranda:* whether the roadside questioning of a motorist detained pursuant to a routine traffic stop should be considered "custodial interrogation." Respondent urges that it should,[fn22] on the ground that *Miranda* by its terms applies whenever "a person has been taken into custody *or otherwise deprived of his freedom of action in any significant way*," 384 U.S., at 444 (emphasis added); see *id.*, at 467.[fn23]

Page 436

Petitioner contends that a holding that every detained motorist must be advised of his rights before being questioned would constitute an unwarranted extension of the *Miranda* doctrine.

It must be acknowledged at the outset that a traffic stop significantly curtails the "freedom of action" of the driver and the passengers, if any, of the detained vehicle. Under the law of most States, it is a crime either to ignore a policeman's signal to stop one's car or, once having stopped, to drive away without permission. *E. g.*, Ohio Rev. Code Ann. § 4511.02 (1982).[fn24] Certainly few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so.[fn25] Partly for these reasons, we have long acknowledged that "stopping an automobile and detaining its occupants constitute a `seizure'

Page 437

within the meaning of [the Fourth] Amendmen[t], even though the purpose of the stop is limited and the resulting detention quite brief." *Delaware* v. *Prouse*, 440 U.S. 648, 653 (1979) (citations omitted).

However, we decline to accord talismanic power to the phrase in the *Miranda* opinion emphasized by respondent. Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated. Thus, we must decide whether a traffic stop exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights.

Two features of an ordinary traffic stop mitigate the danger that a person questioned will be induced "to speak where he would not otherwise do so freely," *Miranda* v. *Arizona*, 384 U.S., at 467. First, detention of a motorist pursuant to a traffic stop is presumptively temporary and brief. The vast majority of roadside detentions last only a few minutes. A motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he most likely will be allowed to continue on his way.[fn26] In this respect,

Page 438

questioning incident to an ordinary traffic stop is quite different from stationhouse interrogation, which

frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek. See *id.*, at 451.[fn27]

Second, circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police. To be sure, the aura of authority surrounding an armed, uniformed officer and the knowledge that the officer has some discretion in deciding whether to issue a citation, in combination, exert some pressure on the detainee to respond to questions. But other aspects of the situation substantially offset these forces. Perhaps most importantly, the typical traffic stop is public, at least to some degree. Passersby, on foot or in other cars, witness the interaction of officer and motorist. This exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist's fear that, if he does not cooperate, he will be subjected to abuse. The fact that the detained motorist typically is confronted by only one or at most two policemen further mutes his sense of vulnerability. In short, the atmosphere
Page 439
surrounding an ordinary traffic stop is substantially less "police dominated" than that surrounding the kinds of interrogation at issue in *Miranda* itself, see 384 U.S., at 445, 491-498, and in the subsequent cases in which we have applied *Miranda*.[fn28]

In both of these respects, the usual traffic stop is more analogous to a so-called "*Terry* stop," see *Terry* v. *Ohio*, 392 U.S. 1 (1968), than to a formal arrest.[fn29] Under the Fourth Amendment, we have held, a policeman who lacks probable cause but whose "observations lead him reasonably to suspect" that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly[fn30] in order to "investigate the circumstances that provoke suspicion." *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 881 (1975). "[T]he stop and inquiry must be `reasonably related in scope to the justification for their initiation.'" *Ibid*. (quoting *Terry* v. *Ohio, supra*, at 29.) Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him,[fn31] he must then be
Page 440
released.[fn32] The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not "in custody" for the purposes of *Miranda*.

Respondent contends that to "exempt" traffic stops from the coverage of *Miranda* will open the way to widespread abuse. Policemen will simply delay formally arresting detained motorist, and will subject them to sustained and intimidating interrogation at the scene of their initial detention. Cf. *State* v. *Roberti*, 293 Or. 59, 95, 644 P.2d 1104, 1125 (1982) (Linde, J., dissenting) (predicting the emergence of a rule that "a person has not been significantly deprived of freedom of action for *Miranda* purposes as long as he is in his own car, even if it is surrounded by several patrol cars and officers with drawn weapons"), withdrawn on rehearing, 293 Or. 236, 646 P.2d 1341 (1982), cert. pending, No. 82-315. The net result, respondent contends, will be a serious threat to the rights that the *Miranda* doctrine is designed to protect.

We are confident that the state of affairs projected by respondent will not come to pass. It is settled that the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is

curtailed to a "degree associated with formal arrest." *California* v. *Beheler*, 463 U.S. 1121, 1125 (1983) *(per curiam)*. If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him "in custody" for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*. See *Oregon* v. *Mathiason*, 429 U.S. 492, 495 (1977) *(per curiam)*.
Page 441

Admittedly, our adherence to the doctrine just recounted will mean that the police and lower courts will continue occasionally to have difficulty deciding exactly when a suspect has been taken into custody. Either a rule that *Miranda* applies to all traffic stops or a rule that a suspect need not be advised of his rights until he is formally placed under arrest would provide a clearer, more easily administered line. However, each of these two alternatives has drawbacks that make it unacceptable. The first would substantially impede the enforcement of the Nation's traffic laws — by compelling the police either to take the time to warn all detained motorists of their constitutional rights or to forgo use of self-incriminating statements made by those motorists — while doing little to protect citizens' Fifth Amendment rights.[fn33] The second would enable the police to circumvent the constraints on custodial interrogations established by *Miranda*.

Turning to the case before us, we find nothing in the record that indicates that respondent should have been given *Miranda* warnings at any point prior to the time Trooper Williams placed him under arrest. For the reasons indicated above, we reject the contention that the initial stop of respondent's car, by itself, rendered him "in custody." And respondent has failed to demonstrate that, at any time between the initial stop and the arrest, he was subjected to restraints comparable to those associated with a formal arrest. Only a short period of time elapsed between the stop and the arrest.[fn34] At no point during that interval was respondent
Page 442
informed that his detention would not be temporary. Although Trooper Williams apparently decided as soon as respondent stepped out of his car that respondent would be taken into custody and charged with a traffic offense, Williams never communicated his intention to respondent. A policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.[fn35] Nor do other aspects of the interaction of Williams and respondent support the contention that respondent was exposed to "custodial interrogation" at the scene of the stop. From aught that appears in the stipulation of facts, a single police officer asked respondent a modest number of questions and requested him to perform a simple balancing test at a location visible to passing motorists.[fn36] Treatment of this sort cannot fairly be characterized as the functional equivalent of formal arrest.

We conclude, in short, that respondent was not taken into custody for the purposes of *Miranda* until Williams arrested him. Consequently, the statements respondent made prior to that point were admissible against him.

IV

We are left with the question of the appropriate remedy. In his brief, petitioner contends that, if we agree with the
Page 443
Court of Appeals that respondent's postarrest statements should have been suppressed but conclude that

respondent's prearrest statements were admissible, we should reverse the Court of Appeals' judgment on the ground that the state trial court's erroneous refusal to exclude the postarrest admissions constituted "harmless error" within the meaning of *Chapman* v. *California*, 386 U.S. 18 (1967). Relying on *Milton* v. *Wainwright*, 407 U.S. 371 (1972), petitioner argues that the statements made by respondent at the police station "were merely recitations of what respondent had already admitted at the scene of the traffic arrest" and therefore were unnecessary to his conviction. Brief for Petitioner 25. We reject this proposed disposition of the case for three cumulative reasons.

First, the issue of harmless error was not presented to any of the Ohio courts, to the District Court, or to the Court of Appeals.[fn37] Though, when reviewing a judgment of a federal court, we have jurisdiction to consider an issue not raised below, see *Carlson* v. *Green*, 446 U.S. 14, 17, n. 2 (1980), we are generally reluctant to do so, *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970).[fn38]

Second, the admissions respondent made at the scene of the traffic stop and the statements he made at the police station were not identical. Most importantly, though respondent at the scene admitted having recently drunk beer and smoked marihuana, not until questioned at the station did he

Page 444

acknowledge being under the influence of intoxicants, an essential element of the crime for which he was convicted.[fn39] This fact assumes significance in view of the failure of the intoxilyzer test to discern any alcohol in his blood.

Third, the case arises in a procedural posture that makes the use of harmless-error analysis especially difficult.[fn40] This is not a case in which a defendant, after denial of a suppression motion, is given a full trial resulting in his conviction. Rather, after the trial court ruled that all of respondent's self-incriminating statements were admissible, respondent elected not to contest the prosecution's case against him, while preserving his objection to the denial of his pretrial motion.[fn41] As a result, respondent has not yet had an opportunity to try to impeach the State's evidence or to present evidence of his own. For example, respondent alleges that, at the time of his arrest, he had an injured back and a limp[fn42] and that those ailments accounted for his difficulty getting out of the car and performing the balancing test; because he pleaded "no contest," he never had a chance to make that argument to a jury. It is difficult enough, on the basis of a complete record of a trial and the parties' contentions regarding the relative importance of each portion of the evidence presented, to determine whether the erroneous admission of particular material affected the outcome. Without the benefit of such a record in this case, we decline to rule that

Page 445

the trial court's refusal to suppress respondent's postarrest statements "was harmless beyond a reasonable doubt." See *Chapman* v. *California*, 386 U.S., at 24.

Accordingly, the judgment of the Court of Appeals is

Affirmed.

[fn1] Page 423 For a description of the technology associated with the intoxilyzer test, see *California* v. *Trombetta*, 467 U.S. 479, 481-482 (1984).

[fn2] Page 424 Ohio Rev. Code Ann. § 2937.07 (1982) provides, in pertinent part: "If the plea be `no contest' or words of similar import in pleading to a misdemeanor, it shall constitute a stipulation that the judge or magistrate may make [a] finding of guilty or not guilty from the explanation of circumstances, and if guilt be found, impose or continue for sentence accordingly."

Ohio Rule of Criminal Procedure 12(H) provides: "The plea of no contest does not preclude a defendant from asserting upon appeal that the trial Page 425 court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence."

[fn3] Page 425 On respondent's motion, the state trial court stayed execution of respondent's sentence pending the outcome of his application for a writ of habeas corpus. *State* v. *McCarty*, No. 80-TF-C-123915 (Franklin County Mun. Ct., July 28, 1981).

[fn4] Page 425 In differentiating respondent's various admissions, the Court of Appeals accorded no significance to the parties' stipulation that respondent's Page 426 "freedom to leave the scene was terminated" at the moment Trooper Williams formed an intent to arrest respondent. The court reasoned that a "`reasonable man' test," not a subjective standard, should control the determination of when a suspect is taken into custody for the purposes of *Miranda. McCarty* v. *Herdman*, 716 F.2d, at 362, n. 1 (quoting *Lowe* v. *United States*, 407 F.2d 1391, 1397 (CA9 1969)).

[fn5] Page 426 Judge Wellford, dissenting, observed: "As I read the opinion, the majority finds that McCarty was not in custody until he was formally placed under arrest." 716 F.2d, at 364. The majority neither accepted nor disavowed this interpretation of its ruling.

[fn6] Page 426 Judge Wellford's dissent was premised on his view that the incriminating statements made by respondent after he was formally taken into custody were "essentially repetitious" of the statements he made before his arrest. Reasoning that the prearrest statements were admissible, Judge Wellford argued that the trial court's failure to suppress the postarrest statements was "harmless error." *Id.*, at 365.

[fn7] Page 427 In *Clay* v. *Riddle*, 541 F.2d 456 (1976), the Court of Appeals for the Fourth Circuit held that persons arrested for traffic offenses need not be given *Miranda* warnings. *Id.*, at 457. Several state courts have taken similar positions. See *State* v. *Bliss*, 238 A.2d 848, 850 (Del. 1968); *County of Dade* v. *Callahan*, 259 So.2d 504, 507 (Fla.App. 1971), cert. denied, 265 So.2d 50 (Fla. 1972); *State* v. *Gabrielson*, 192 N.W.2d 792, 796 (Iowa 1971), cert. denied, 409 U.S. 912 (1972); *State* v. *Angelo*, 251 La. 250, 254-255, 203 So.2d 710, 711-717 (1967); *State* v. *Neal*, 476 S.W.2d 547, 553 (Mo. 1972); *State* v. *Macuk*, 57 N.J. 1, 15-16, 268 A.2d 1, 9 (1970). Other state courts have refused to limit in this fashion the reach of *Miranda*. See *Campbell* v. *Superior Court*, 106 Ariz. 542, 552, 479 P.2d 685, 695 (1971); *Commonwealth* v. *Brennan*, 386 Mass. 772, 775, 438 N.E.2d 60, 63 (1982); *State* v. *Kinn*, 288 Minn. 31, 35, 178 N.W.2d 888, 891 (1970); *State* v. *Lawson*, 285 N.C. 320, 327-328, 204 S.E.2d 843, 848 (1974); *State* v. *Fields*, 294 N.W.2d 404, 409 (N.D. 1980) (*Miranda* applicable at least to "more serious [traffic] offense[s] such as driving while intoxicated"); *State* v. *Buchholz*, 11 Ohio St.3d 24, 28, 462 N.E.2d 1222, 1226 (1984) (overruling *State* v. *Pyle*, 19 Ohio St.2d 64, 249 N.E.2d 826 (1969), cert. denied, 396 U.S. 1007 (1970), and holding that "*Miranda* warnings must be given prior to any custodial interrogation regardless of whether the individual is suspected of committing a felony or misdemeanor"); *State* v. *Roberti*, 293 Or. 59, 644 P.2d 1104, on rehearing, 293 Or. 236, 646 P.2d 1341 (1982), cert. pending, No. 82-315; *Commonwealth* v. *Meyer*, 488 Pa. 297, 305-306, 412 A.2d 517, 521 (1980); *Holman* v. *Cox*, 598

P.2d 1331, 1333 (Utah 1979); *State* v. *Darnell*, 8 Wn. App. 627, 628, 508 P.2d 613, 615, cert. denied, 414 U.S. 1112 (1973).

[fn8] Page 427 The lower courts have dealt with the problem of roadside questioning in a wide variety of ways. For a spectrum of positions, see *State* v. *Tellez*, 6 Ariz. App. 251, 256, 431 P.2d 691, 696 (1967) (*Miranda* warning must be given as soon as the policeman has "reasonable grounds" to believe the detained motorist has committed an offense); *Newberry* v. *State*, 552 S.W.2d 457, 461 (Tex.Crim.App. 1977) (*Miranda* applies when there is probable cause to arrest the driver and the policeman "consider[s] the driver] to be in custody and would not . . . let him leave"); *State* v. *Roberti*, 293 Ore., at 236, 646 P.2d, at 1341 (*Miranda* applies as soon as the officer forms an intention to arrest the motorist); *People* v. *Ramirez*, 199 Colo. 367, 372, n. 5, 609 P.2d 616, 618, n. 5 (1980) (en banc); *State* v. *Darnell, supra*, at 629-630, 508 P.2d, at 615 (driver is "in custody" for *Miranda* purposes at Page 428 least by the time he is asked to take a field sobriety test); *Commonwealth* v. *Meyer, supra*, at 307, 412 A.2d, at 521-522 (warnings are required as soon as the motorist "reasonably believes his freedom of action is being restricted"); *Lowe* v. *United States, supra*, at 1394, 1396; *State* v. *Sykes*, 285 N.C. 202, 205-206, 203 S.E.2d 849, 850 (1974) (*Miranda* is inapplicable to a traffic stop until the motorist is subjected to formal arrest or the functional equivalent thereof); *Allen* v. *United States*, 129 U.S.App.D.C. 61, 63-64, 390 F.2d 476, 478-479 ("[S]ome inquiry can be made [without giving *Miranda* warnings] as part of an investigation notwithstanding limited and brief restraints by the police in their effort to screen crimes from relatively routine mishaps"), modified, 131 U.S.App.D.C. 358, 404 F.2d 1335 (1968); *Holman* v. *Cox, supra*, at 1333 (*Miranda* applies upon formal arrest).

[fn9] Page 429 In *Harris* v. *New York*, 401 U.S. 222 (1971), the Court did sanction use of statements obtained in violation of *Miranda* to impeach the defendant who had made them. The Court was careful to note, however, that the jury had been instructed to consider the statements "only in passing on [the defendant's] credibility and not as evidence of guilt." 401 U.S., at 223.

[fn10] Page 429 The one exception to this consistent line of decisions is *New York* v. *Quarles*, 467 U.S. 649 (1984). The Court held in that case that, when the police arrest a suspect under circumstances presenting an imminent danger to the public safety, they may without informing him of his constitutional rights ask questions essential to elicit information necessary to neutralize the threat to the public. Once such information has been obtained, the suspect must be given the standard warnings.

[fn11] Page 429 Not all of petitioner's formulations of his proposal are consistent. At some points in his brief and at oral argument, petitioner appeared to advocate an exception solely for drunken-driving charges; at other points, he Page 430 seemed to favor a line between felonies and misdemeanors. Because all of these suggestions suffer from similar infirmities, we do not differentiate among them in the ensuing discussion.

[fn12] Page 431 Thus, under Ohio law, while a first offense of negligent vehicular homicide is a misdemeanor, a second offense is a felony. Ohio Rev. Code Ann. § 2903.07 (Supp. 1983). In some jurisdictions, a certain number of convictions for drunken driving triggers a quantum jump in the status of the crime. In South Dakota, for instance, first and second offenses for driving while intoxicated are misdemeanors, but a third offense is a felony. See *Solem* v. *Helm*, 463 U.S. 277, 280, n. 4 (1983).

[fn13] Page 431 Cf. *Welsh* v. *Wisconsin*, 466 U.S. 740, 761 (1984) (WHITE, J., dissenting) (observing that officers in the field frequently "have neither the time nor the competence to determine" the severity of the offense for which they are considering arresting a person).

It might be argued that the police would not need to make such guesses; whenever in doubt, they could ensure compliance with the law by giving the full *Miranda* warnings. It cannot be doubted, however, that in some cases a desire to induce a suspect to reveal information he might withhold if informed of his rights would induce the police not to take the cautious course.

[fn14] Page 431 See, *e. g., United States* v. *Schultz*, 442 F. Supp. 176 (Md. 1977) (investigation of erratic driving developed into inquiry into narcotics offenses and terminated in a charge of possession of a sawed-off shotgun); *United States* v. *Hatchel*, 329 F. Supp. 113 (Mass. 1971) (investigation into offense of driving the wrong way on a one-way street yielded a charge of possession of a stolen car).

[fn15] Page 432 Cf. *United States* v. *Robinson*, 414 U.S. 218, 221, n. 1 (1973); *id.*, at 238, n. 2 (POWELL, J., concurring) (discussing the problem of determining if a traffic arrest was used as a pretext to legitimate a warrantless search for narcotics).

[fn16] Page 432 Cf. *New York* v. *Quarles*, 467 U.S., at 663-664 (O'CONNOR, J., concurring in judgment in part and dissenting in part).

[fn17] Page 432 See Brief for State of Ohio as *Amicus Curiae* 18-21 (discussing the "National Epidemic Of Impaired Drivers" and the importance of stemming it); cf. *South Dakota* v. *Neville*, 459 U.S. 553, 558-559 (1983); *Perez* v. *Campbell*, 402 U.S. 637, 657, 672 (1971) (BLACKMUN, J., concurring in part and dissenting in part).

[fn18] Page 433 See *Rhode Island* v. *Innis*, 446 U.S. 291, 299, 301 (1980); *Miranda* v. *Arizona*, 384 U.S. 436, 445-458 (1966).

[fn19] Page 433 *Minnesota* v. *Murphy*, 465 U.S. 420, 430 (1984) (quoting *Miranda* v. *Arizona, supra*, at 467); see *Estelle* v. *Smith*, 451 U.S. 454, 467 (1981); *United States* v. *Washington*, 431 U.S. 181, 187, n. 5 (1977).

[fn20] Page 433 Cf. Development in the Law — Confessions, 79 Harv. L. Rev. 935, 954-984 (1966) (describing the difficulties encountered by state and federal courts, during the period preceding the decision in *Miranda*, in trying to distinguish voluntary from involuntary confessions).

We do not suggest that compliance with *Miranda* conclusively establishes the voluntariness of a subsequent confession. But cases in which a defendant can make a colorable argument that a self-incriminating statement was "compelled" despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare.

[fn21] Page 434 The parties urge us to answer two questions concerning the precise scope of the safeguards required in circumstances of the sort involved in this case. First, we are asked to consider what a State must do in order to demonstrate that a suspect who might have been under the influence of drugs or alcohol when subjected to custodial interrogation nevertheless understood and freely waived his

constitutional rights. Second, it is suggested that we decide whether an indigent suspect has a right, under the Fifth Amendment, to have an attorney appointed to advise him regarding his responses to custodial interrogation when the alleged offense about which he is being questioned is sufficiently minor that he would not have a right, under the Sixth Amendment, to the assistance of appointed counsel at trial, see *Scott* v. *Illinois*, 440 U.S. 367 (1979). We prefer to defer resolution of such matters to a case in which law enforcement authorities have at least attempted to inform the suspect of rights to which he is indisputably entitled.

[fn22] Page 435 In his brief, respondent hesitates to embrace this proposition fully, advocating instead a more limited rule under which questioning of a suspect detained pursuant to a traffic stop would be deemed "custodial interrogation" if and only if the police officer had probable cause to arrest the motorist for a crime. See Brief for Respondent 39-40, 46. This ostensibly more modest proposal has little to recommend it. The threat to a citizen's Fifth Amendment rights that *Miranda* was designed to neutralize has little to do with the strength of an interrogating officer's suspicions. And, by requiring a policeman conversing with a motorist constantly to monitor the information available to him to determine when it becomes sufficient to establish probable cause, the rule proposed by respondent would be extremely difficult to administer. Accordingly, we confine our attention below to respondent's stronger argument: that all traffic stops are subject to the dictates of *Miranda*.

[fn23] Page 435 It might be argued that, insofar as the Court of Appeals expressly held inadmissible only the statements made by respondent after his formal arrest, and respondent has not filed a cross-petition, respondent is disentitled at this juncture to assert that *Miranda* warnings must be given to a detained motorist who has not been arrested. See, *e. g., United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401, n. 2 (1975). However, three considerations, in combination, prompt us to consider the question highlighted by respondent. First, as indicated above, the Court of Appeals' judgment regarding the time at which *Miranda* became applicable is ambiguous; some of the court's statements cast doubt upon the admissibility Page 436 of respondent's prearrest statements. See *supra*, at 425-426. Without undue strain, the position taken by respondent before this Court thus might be characterized as an argument in support of the judgment below, which respondent is entitled to make. Second, the relevance of *Miranda* to the questioning of a motorist detained pursuant to a traffic stop is an issue that plainly warrants our attention, and with regard to which the lower courts are in need of guidance. Third and perhaps most importantly, both parties have briefed and argued the question. Under these circumstances, we decline to interpret and apply strictly the rule that we will not address an argument advanced by a respondent that would enlarge his rights under a judgment, unless he has filed a cross-petition for certiorari.

[fn24] Page 436 Examples of similar provisions in other States are: Ariz. Rev. Stat. Ann. §§ 28-622, 28-622.01 (1976 and Supp. 1983-1984); Cal. Veh. Code Ann. §§ 2800, 2800.1 (West Supp. 1984); Del. Code Ann., Tit. 21, § 4103 (1979); Fla. Stat. § 316.1935 (Supp. 1984); Ill. Rev. Stat., ch. 95 1/2 ¶ 11-204 (1983); N.Y. Veh. & Traf. Law § 1102 (McKinney Supp. 1983-1984); Nev. Rev. Stat. § 484.348(1) (1983); 75 Pa. Cons. Stat. § 3733(a) (1977); Wash. Rev. Code § 46.61.020 (1983).

[fn25] Page 436 Indeed, petitioner frankly admits that "[n]o reasonable person would feel that he was free to ignore the visible and audible signal of a traffic safety enforcement officer . . . . Moreover, it is nothing short of sophistic to state that a motorist ordered by a police officer to step out of his vehicle would reasonabl[y] or prudently believe that he was at liberty to ignore that command." Brief for Petitioner 16-17.

[fn26] Page 437 State laws governing when a motorist detained pursuant to a traffic stop may or must be issued a citation instead of taken into custody vary significantly, see Y. Kamisar, W. LaFave, & J. Israel, Modern Criminal Procedure 402, n. a (5th ed. 1980), but no State requires that a detained motorist be arrested unless he is accused of a specified serious crime, refuses to promise to appear in court, or demands to be taken before a magistrate. For a representative sample of these provisions, see Ariz. Rev. Stat. Ann. §§ 28-1053, 28-1054 (1976); Ga. Code Ann. § 40-13-53 (Supp. 1983); Kan. Stat. Ann. §§ 8-2105, 8-2106 (1982); Nev. Rev. Stat. §§ 484.793, 484.795, 484.797, 484.799, 484.805 (1983); Ore. Rev. Stat. § 484.353 (1983); S.D. Codified Laws § 32-33-2 (Supp. 1983); Tex. Rev. Civ. Stat. Ann., Art. 6701d, §§ 147, 148 (Vernon 1977); Va. Code Page 438 § 46.1-178 (Supp. 1983). Cf. National Committed on Uniform Traffic Laws and Ordinances, Uniform Vehicle Code and Model Traffic Ordinance §§ 16-203 — 16-206 (Supp. 1979) (advocating mandatory release on citation of all drivers except those charged with specified offenses, those who fail to furnish satisfactory self-identification, and those as to whom the officer has "reasonable and probable grounds to believe . . . will disregard a written promise to appear in court").

[fn27] Page 438 The brevity and spontaneity of an ordinary traffic stop also reduces the danger that the driver through subterfuge will be made to incriminate himself. One of the investigative techniques that *Miranda* was designed to guard against was the use by police of various kinds of trickery — such as "Mutt and Jeff" routines — to elicit confessions from suspects. See 384 U.S., at 448-455. A police officer who stops a suspect on the highway has little chance to develop or implement a plan of this sort. Cf. LaFave, "Street Encounters" and the Constitution: *Terry, Sibron, Peters*, and Beyond, 67 Mich. L. Rev. 39, 99 (1968).

[fn28] Page 439 See *Orozco* v. *Texas*, 394 U.S. 324, 325 (1969) (suspect arrested and questioned in his bedroom by four police officers); *Mathis* v. *United States*, 391 U.S. 1, 2-3 (1968) (defendant questioned by a Government agent while in jail).

[fn29] Page 439 No more is implied by this analogy than that most traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*. We of course do not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop.

[fn30] Page 439 Nothing in this opinion is intended to refine the constraints imposed by the Fourth Amendment on the duration of such detentions. Cf. *Sharpe* v. *United States*, 712 F.2d 65 (CA4 1983), cert. granted, 467 U.S. 1250 (1984).

[fn31] Page 439 Cf. *Adams* v. *Williams*, 407 U.S. 143, 148 (1972).

[fn32] Page 440 Cf. *Terry* v. *Ohio*, 392 U.S., at 34 (WHITE, J., concurring).

[fn33] Page 441 Contrast the minor burdens on law enforcement and significant protection of citizens' rights effected by our holding that *Miranda* governs custodial interrogation of persons accused of misdemeanor traffic offenses. See *supra*, at 432-434.

[fn34] Page 441 Cf. *Commonwealth* v. *Meyer*, 488 Pa., at 301, 307, 412 A.2d, at 518-519, 522 (driver who was detained for over one-half hour, part of the time in a patrol car, held to have been in custody for the purposes of *Miranda* by the time he was questioned concerning the circumstances of an accident).

[fn35] Page 442 Cf. *Beckwith* v. *United States*, 425 U.S. 341, 346-347 (1976) ("`It was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the Court to impose the *Miranda* requirements with regard to custodial questioning'") (quoting *United States* v. *Caiello*, 420 F.2d 471, 473 (CA2 1969)); *People* v. *P.*, 21 N.Y.2d 1, 9-10, 233 N.E.2d 255, 260 (1967) (an objective, reasonable-man test is appropriate because, unlike a subjective test, it "is not solely dependent either on the self-serving declarations of the police officers or the defendant nor does it place upon the police the burden of anticipating the frailties or idiosyncrasies of every person whom they question").

[fn36] Page 442 Cf. *United States* v. *Schultz*, 442 F. Supp., at 180 (suspect who was stopped for erratic driving, subjected to persistent questioning in the Page 443 squad car about drinking alcohol and smoking marihuana, and denied permission to contact his mother held to have been in custody for the purposes of *Miranda* by the time he confessed to possession of a sawed-off shotgun).

[fn37] Page 443 Judge Wellford, dissenting in the Court of Appeals, did address the issue of harmless error, see n. 6, *supra*, but without the benefit of briefing by the parties. The majority of the panel of the Court of Appeals did not consider the question.

[fn38] Page 443 Nor did petitioner mention harmless error in his petition to this Court. Absent unusual circumstances, cf. n. 23, *supra*, we are chary of considering issues not presented in petitions for certiorari. See this Court's Rule 21.1(a) ("Only the questions set forth in the petition or fairly included therein will be considered by the Court").

[fn39] Page 444 This case is thus not comparable to *Milton* v. *Wainwright*, 407 U.S. 371 (1972), in which a confession presumed to be inadmissible contained no information not already provided by three admissible confessions. See *id.*, at 375-376.

[fn40] Page 444 Because we do not rule that the trial court's error was harmless, we need not decide whether harmless-error analysis is even applicable to a case of this sort.

[fn41] Page 444 Under Ohio law, respondent had a right to pursue such a course. See n. 2, *supra*.

[fn42] Page 444 Indeed, respondent points out that he told Trooper Williams of these ailments at the time of his arrest, and their existence was duly noted in the Alcohol Influence Report. See App. 2.

JUSTICE STEVENS, concurring in part and concurring in the judgment.

The only question presented by the petition for certiorari reads as follows:

"Whether law enforcement officers must give `*Miranda* warnings' to individuals arrested for misdemeanor traffic offenses."

In Parts I, II, and IV of its opinion, the Court answers that question in the affirmative and explains why that answer requires that the judgment of the Court of Appeals be affirmed. Part III of the Court's opinion is written for the purpose of discussing the admissibility of statements made by respondent "prior to his formal arrest," see *ante*, at 435. That discussion is not necessary to the disposition of the case, nor necessary to answer the only question presented by the certiorari petition. Indeed, the Court of Appeals quite properly did not pass on the question answered in Part III since it was entirely unnecessary to the judgment in this case. It thus wisely followed the cardinal rule that a court should not pass on a constitutional question in advance of the necessity of deciding it. See, *e. g., Ashwander* v. *TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

Lamentably, this Court fails to follow the course of judicial restraint that we have set for the entire federal judiciary. In this case, it appears the reason for reaching out to decide a question not passed upon below and unnecessary to the judgment is that the answer to the question upon which we granted review is so clear under our settled precedents that the majority — its appetite for deciding constitutional questions

Page 446

only whetted — is driven to serve up a more selectable issue to satiate it. I had thought it clear, however, that no matter how interesting or potentially important a determination on a question of constitutional law may be, "broad considerations of the appropriate exercise of judicial power prevent such determinations unless actually compelled by the litigation before the Court." *Barr* v. *Matteo*, 355 U.S. 171, 172 (1957) *(per curiam)*. Indeed, this principle of restraint grows in importance the more problematic the constitutional issue is. See *New York* v. *Uplinger*, 467 U.S. 246, 251 (1984) (STEVENS, J., concurring).

Because I remain convinced that the Court should abjure the practice of reaching out to decide cases on the broadest grounds possible, *e. g., United States* v. *Doe*, 465 U.S. 605, 619-620 (1984) (STEVENS, J., concurring in part and dissenting in part); *Grove City College* v. *Bell*, 465 U.S. 555, 579 (1984) (STEVENS, J., concurring in part and concurring in result); *Colorado* v. *Nunez*, 465 U.S. 324, 327-328 (1984) (STEVENS, J., concurring); *United States* v. *Gouveia*, 467 U.S. 180, 193 (1984) (STEVENS, J., concurring in judgment); *Firefighters* v. *Stotts*, 467 U.S. 561, 590-591 (1984) (STEVENS, J., concurring in judgment); see also, *University of California Regents* v. *Bakke*, 438 U.S. 265, 411-412 (1978) (STEVENS, J., concurring in judgment in part and dissenting in part); *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658, 714 (1978) (STEVENS, J., concurring in part); cf. *Snepp* v. *United States*, 444 U.S. 507, 524-525 (1980) (STEVENS, J., dissenting), I do not join Part III of the Court's opinion.

Page 447

United States Supreme Court Reports

PATTERSON *v.* ILLINOIS, 487 U.S. 285 (1988)

108 S.Ct. 2389

PATTERSON *v.* ILLINOIS

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 86-7059.

Argued March 22, 1988

Decided June 24, 1988

After being informed by police that he had been indicted for murder, petitioner, who was in police custody, twice indicated his willingness to discuss the crime during interviews initiated by the authorities. On both occasions, petitioner was read a form waiving his rights under *Miranda* v. *Arizona*, 384 U.S. 436, initialed each of the five specific warnings on the form, and signed the form. He then gave inculpatory statements to the authorities. The Illinois trial court denied his motions to suppress his statements on constitutional grounds, and the statements were used against him at trial. The State Supreme Court affirmed his conviction, rejecting his contention that the warnings he received, while adequate to protect his *Fifth* Amendment rights as guaranteed by *Miranda*, did not adequately inform him of his *Sixth* Amendment right to counsel.

Held: The postindictment questioning that produced petitioner's incriminating statements did not violate his Sixth Amendment right to counsel. Pp. 290-300.

(a) Petitioner cannot avail himself of the argument that, because his Sixth Amendment right to counsel arose with his indictment, the police were thereafter barred from initiating questioning, since he at no time sought to have counsel present. The essence of *Edwards* v. *Arizona*, 451 U.S. 477, and its progeny, on which petitioner relies, is the preservation of the integrity of an accused's choice to communicate with police only through counsel. Had petitioner indicated he wanted counsel's assistance, the questioning would have stopped, and further questioning would have been forbidden unless he himself initiated the meeting. *Michigan* v. *Jackson*, 475 U.S. 625. However, once an accused "knowingly and intelligently" elects to proceed without counsel, the uncounseled statements he then makes need not be excluded at trial. Pp. 290-291.

(b) Petitioner's contention that his Sixth Amendment rights were violated because he did not "knowingly and intelligently" waive his right to have counsel present during his postindictment questioning is without merit. The constitutional minimum for determining whether a waiver was

"knowing and intelligent" is that the accused be made sufficiently aware of his right to have counsel present and of the possible consequences of a decision to forgo the aid of counsel. Here, by admonishing petitioner with the *Miranda* warnings, respondent met this burden, and petitioner's waiver was valid. First, by telling him that he had the

Page 286

rights to consult an attorney, to have a lawyer present while he was questioned, and even to have a lawyer appointed if he could not afford one, the authorities conveyed to him the sum and substance of his Sixth Amendment rights. Second, by informing him that any statement he made could be used against him, the authorities made him aware of the ultimate adverse consequence of his decision to waive his Sixth Amendment rights and of what a lawyer could "do for him" during postindictment questioning: namely, advise him to refrain from making any such statements. Petitioner's inability here to articulate with precision what additional information should have been provided before he would have been competent to waive his right to counsel supports the conclusion that the information that was provided satisfies the constitutional minimum. Pp. 292-297.

(c) This Court has never adopted petitioner's suggestion that the Sixth Amendment right to counsel is "superior" to or "more difficult" to waive than its Fifth Amendment counterpart. Rather, in Sixth Amendment cases, the court has defined the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at the particular stage of the proceedings in question, and the dangers to the accused of proceeding without counsel at that stage. An accused's waiver is "knowing and intelligent" if he is made aware of these basic facts. *Miranda* warnings are sufficient for this purpose in the post-indictment questioning context, because, at that stage, the role of counsel is relatively simple and limited, and the dangers and disadvantages of self-representation are less substantial and more obvious to an accused than they are at trial. Pp. 297-300.

116 Ill.2d 290, 507 N.E.2d 843, affirmed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BLACKMUN, J., filed a dissenting opinion, *post*, p. 300. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 301.

Donald S. Honchell argued the cause for petitioner. With him on the briefs were *Paul P. Biebel, Jr.*, and *Robert P. Isaacson*.

Jack Donatelli, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief were *Neil F. Hartigan*, Attorney General, *Shawn W. Denney*, Solicitor General, and *Terrence M. Madsen* and *Kenneth A. Fedinets*, Assistant Attorneys General.

Andrew J. Pincus argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief

Page 287

were *Solicitor General Fried, Assistant Attorney General Weld*, and *Deputy Solicitor General Bryson*.[fn*]

[fn*] Page 287 Briefs of *amici curiae* urging affirmance were filed for the Washington Legal Foundation by *Daniel J. Popeo* and *Paul D. Kamenar;* and for Americans for Effective Law Enforcement, Inc., et al. by *David Crump, Courtney A. Evans, Bernard J. Farber, Daniel B. Hales, James A. Murphy, Jack E. Yelverton, Fred E. Inbau, Wayne W. Schmidt*, and *James P. Manak*.

JUSTICE WHITE delivered the opinion of the Court.

In this case, we are called on to determine whether the interrogation of petitioner after his indictment violated his Sixth Amendment right to counsel.

I

Before dawn on August 21, 1983, petitioner and other members of the "Vice Lords" street gang became involved in a fight with members of a rival gang, the "Black Mobsters." Some time after the fight, a former member of the Black Mobsters, James Jackson, went to the home where the Vice Lords had fled. A second fight broke out there, with petitioner and three other Vice Lords beating Jackson severely. The Vice Lords then put Jackson into a car, drove to the end of a nearby street, and left him face down in a puddle of water. Later that morning, police discovered Jackson, dead, where he had been left.

That afternoon, local police officers obtained warrants for the arrest of the Vice Lords, on charges of battery and mob action, in connection with the first fight. One of the gang members who was arrested gave the police a statement concerning the first fight; the statement also implicated several of the Vice Lords (including petitioner) in Jackson's murder. A few hours later, petitioner was apprehended. Petitioner was informed of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and volunteered to answer questions put to him by the police. Petitioner gave a statement concerning the initial fight between the rival gangs, but denied knowing anything

Page 288

about Jackson's death. Petitioner was held in custody the following day, August 22, as law enforcement authorities completed their investigation of the Jackson murder.

On August 23, a Cook County grand jury indicted petitioner and two other gang members for the murder of James Jackson. Police Officer Michael Gresham, who had questioned petitioner earlier, removed him from the lockup where he was being held, and told petitioner that because he had been indicted he was being transferred to the Cook County jail. Petitioner asked Gresham which of the gang members had been charged with Jackson's murder, and upon learning that one particular Vice Lord had been omitted from the indictments, asked: "[W]hy wasn't he indicted, he did everything." App. 7. Petitioner also began to explain that there was a witness who would support his account of the crime.

At this point, Gresham interrupted petitioner, and handed him a *Miranda* waiver form. The form contained five specific warnings, as suggested by this Court's *Miranda* decision, to make petitioner aware of his right to counsel and of the consequences of any statement he might make to police.[fn1] Gresham read the warnings aloud, as petitioner read along with him. Petitioner initialed each of the five warnings, and signed the waiver form. Petitioner then gave a lengthy statement to police officers concerning the Jackson murder; petitioner's statement described in detail the role of each of the Vice Lords — including himself — in the murder of James Jackson.

Later that day, petitioner confessed involvement in the murder for a second time. This confession came in an interview

Page 289

with Assistant State's Attorney (ASA) George Smith. At the outset of the interview, Smith reviewed with petitioner the *Miranda* waiver he had previously signed, and petitioner confirmed that he had signed the waiver and understood his rights. Smith went through the waiver procedure once again: reading petitioner his rights, having petitioner initial each one, and sign a waiver form. In addition, Smith informed petitioner that he was a lawyer working with the police investigating the Jackson case. Petitioner then gave another inculpatory statement concerning the crime.

Before trial, petitioner moved to suppress his statements, arguing that they were obtained in a manner at odds with various constitutional guarantees. The trial court denied these motions, and the statements were used against petitioner at his trial. The jury found petitioner guilty of murder, and petitioner was sentenced to a 24-year prison term.

On appeal, petitioner argued that he had not "knowingly and intelligently" waived his Sixth Amendment right to counsel before he gave his uncounseled postindictment confessions. Petitioner contended that the warnings he received, while adequate for the purposes of protecting his *Fifth* Amendment rights as guaranteed by *Miranda*, did not adequately inform him of his *Sixth* Amendment right to counsel. The Illinois Supreme Court, however, rejected this theory, applying its previous decision in *People* v. *Owens*, 102 Ill.2d 88, 464 N.E.2d 261, cert. denied, 469 U.S. 963 (1984), which had held that *Miranda* warnings were sufficient to make a defendant aware of his Sixth Amendment right to counsel during postindictment questioning. *People* v. *Thomas*, 116 Ill.2d 290, 298-300, 507 N.E.2d 843, 846-847 (1987).

In reaching this conclusion, the Illinois Supreme Court noted that this Court had reserved decision on this question on several previous occasions[fn2] and that the lower courts are

Page 290

divided on the issue. *Id.*, at 299, 507 N.E.2d, at 846. We granted this petition for certiorari, 484 U.S. 895 (1987), to resolve this split of authority and to address the issues we had previously left open.

II

There can be no doubt that petitioner had the right to have the assistance of counsel at his postindictment interviews with law enforcement authorities. Our cases make it plain that the Sixth Amendment guarantees this right to criminal defendants. *Michigan* v. *Jackson*, 475 U.S. 625, 629-630 (1986); *Brewer* v. *Williams*, 430 U.S. 387, 398-401 (1977); *Massiah* v. *United States*, 377 U.S. 201, 205-207 (1964).[fn3] Petitioner asserts that the questioning that produced his incriminating statements violated his Sixth Amendment right to counsel in two ways.

A

Petitioner's first claim is that because his Sixth Amendment right to counsel arose with his indictment, the police were thereafter barred from initiating a meeting with him. See Brief for Petitioner 30-31; Tr. of Oral Arg. 2, 9, 11, 17. He equates himself with a preindictment suspect who, while being interrogated,

asserts his Fifth Amendment right to counsel; under *Edwards* v. *Arizona*, 451 U.S. 477 (1981), such a suspect may not be questioned again unless he initiates the meeting.

Petitioner, however, at no time sought to exercise his right to have counsel present. The fact that petitioner's Sixth

Page 291

Amendment right came into existence with his indictment, *i. e.*, that he had such a right at the time of his questioning, does not distinguish him from the preindictment interrogatee whose right to counsel is in existence and available for his exercise while he is questioned. Had petitioner indicated he wanted the assistance of counsel, the authorities' interview with him would have stopped, and further questioning would have been forbidden (unless petitioner called for such a meeting). This was our holding in *Michigan* v. *Jackson, supra*, which applied *Edwards* to the Sixth Amendment context. We observe that the analysis in *Jackson* is rendered wholly unnecessary if petitioner's position is correct: under petitioner's theory, the officers in *Jackson* would have been completely barred from approaching the accused in that case unless he called for them. Our decision in *Jackson*, however, turned on the fact that the accused "ha[d] asked for the help of a lawyer" in dealing with the police. *Jackson, supra*, at 631, 633-635.

At bottom, petitioner's theory cannot be squared with our rationale in *Edwards*, the case he relies on for support. *Edwards* rested on the view that once "an accused . . . ha[s] expressed his desire to deal with the police only through counsel" he should "not [be] subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication." *Edwards, supra*, at 484-485; cf. also *Michigan* v. *Mosley*, 423 U.S. 96, 104, n. 10 (1975). Preserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny — not barring an accused from making an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone. If an accused "knowingly and intelligently" pursues the latter course, we see no reason why the uncounseled statements he then makes must be excluded at his trial.

Page 292

B

Petitioner's principal and more substantial claim is that questioning him without counsel present violated the Sixth Amendment because he did not validly waive his right to have counsel present during the interviews. Since it is clear that after the *Miranda* warnings were given to petitioner, he not only voluntarily answered questions without claiming his right to silence or his right to have a lawyer present to advise him but also executed a written waiver of his right to counsel during questioning, the specific issue posed here is whether this waiver was a "knowing and intelligent" waiver of his Sixth Amendment right.[fn4] See *Brewer* v. *Williams, supra*, at 401, 404; *Johnson* v. *Zerbst*, 304 U.S. 458, 464-465 (1938).

In the past, this Court has held that a waiver of the Sixth Amendment right to counsel is valid only when it reflects "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst, supra*, at 464. In other words, the accused must "kno[w] what he is doing" so that "his choice is made with eyes open." *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 279 (1942). In a case arising under the Fifth Amendment, we described this requirement as "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran* v. *Burbine*, 475 U.S. 412, 421 (1986). Whichever of these formulations is used, the key inquiry in a case such as this one

must be: Was the accused, who waived his Sixth Amendment rights during postindictment questioning, made sufficiently aware of his right to have counsel present during the questioning, and of the possible consequences

Page 293

of a decision to forgo the aid of counsel? In this case, we are convinced that by admonishing petitioner with the *Miranda* warnings, respondent has met this burden and that petitioner's waiver of his right to counsel at the questioning was valid.[fn5]

First, the *Miranda* warnings given petitioner made him aware of his right to have counsel present during the questioning. By telling petitioner that he had a right to consult with an attorney, to have a lawyer present while he was questioned, and even to have a lawyer appointed for him if he could not afford to retain one on his own, Officer Gresham and ASA Smith conveyed to petitioner the sum and substance of the rights that the Sixth Amendment provided him. "Indeed, it seems self-evident that one who is told he" has such rights to counsel "is in a curious posture to later complain" that his waiver of these rights was unknowing. Cf. *United States* v. *Washington*, 431 U.S. 181, 188 (1977). There is little more petitioner could have possibly been told in an effort to satisfy this portion of the waiver inquiry.

Second, the *Miranda* warnings also served to make petitioner aware of the consequences of a decision by him to waive his Sixth Amendment rights during postindictment questioning. Petitioner knew that any statement that he made could be used against him in subsequent criminal proceedings. This is the ultimate adverse consequence petitioner could have suffered by virtue of his choice to make

Page 294

uncounseled admissions to the authorities. This warning also sufficed — contrary to petitioner's claim here, see Tr. of Oral Arg. 7-8 — to let petitioner know what a lawyer could "do for him" during the postindictment questioning: namely, advise petitioner to refrain from making any such statements.[fn6] By knowing what could be done with any statements he might make, and therefore, what benefit could be obtained by having the aid of counsel while making such statements, petitioner was essentially informed of the possible consequences of going without counsel during questioning. If petitioner nonetheless lacked "a full and complete appreciation of all of the consequences flowing" from his waiver, it does not defeat the State's showing that the information it provided to him satisfied the constitutional minimum. Cf. *Oregon* v. *Elstad*, 470 U.S. 298, 316-317 (1985).

Our conclusion is supported by petitioner's inability, in the proceedings before this Court, to articulate with precision what additional information should have been provided to him before he would have been competent to waive his right to counsel. All that petitioner's brief and reply brief suggest is petitioner should have been made aware of his "right under the Sixth Amendment to the broad protection of counsel" — a rather nebulous suggestion — and the "gravity of [his] situation." Reply Brief for Petitioner 13; see Brief for Petitioner 30-31. But surely this latter "requirement" (if it is one) was met when Officer Gresham informed petitioner that he had been formally charged with the murder of James Jackson.

Page 295

See n. 8, *infra*. Under close questioning on this same point at argument, petitioner likewise failed to suggest any meaningful additional information that he should have been, but was not, provided in advance of his decision to waive his right to counsel.[fn7] The discussions found in favorable court decisions, on which petitioner relies, are similarly lacking.[fn8]

Page 296

As a general matter, then, an accused who is admonished with the warnings prescribed by this Court in *Miranda*, 384 U.S., at 479, has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one.[fn9] We feel that

Page 297

our conclusion in a recent Fifth Amendment case is equally apposite here: "Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." See *Moran* v. *Burbine*, 475 U.S., at 422-423.

C

We consequently reject petitioner's argument, which has some acceptance from courts and commentators,[fn10] that since "the sixth amendment right [to counsel] is far superior to that of the fifth amendment right" and since "[t]he greater the right the greater the loss from a waiver of that right," waiver of an accused's Sixth Amendment right to counsel should be "more difficult" to effectuate than waiver of a suspect's Fifth Amendment rights. Brief for Petitioner 23. While our cases have recognized a "difference" between the Fifth Amendment and Sixth Amendment rights to counsel, and the "policies" behind these constitutional guarantees,[fn11] we have never suggested that one right is "superior" or "greater" than the other, nor is there any support in our cases for the notion that because

Page 298

a Sixth Amendment right may be involved, it is more difficult to waive than the Fifth Amendment counterpart.

Instead, we have taken a more pragmatic approach to the waiver question — asking what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage — to determine the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized.

At one end of the spectrum, we have concluded there is no Sixth Amendment right to counsel whatsoever at a postindictment photographic display identification, because this procedure is not one at which the accused "require[s] aid in coping with legal problems or assistance in meeting his adversary." See *United States* v. *Ash*, 413 U.S. 300, 313-320 (1973). At the other extreme, recognizing the enormous importance and role that an attorney plays at a criminal trial, we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial. See *Faretta* v. *California*, 422 U.S. 806, 835-836 (1975); cf. *Von Moltke* v. *Gillies*, 332 U.S. 708, 723-724 (1948). In these extreme cases, and in others that fall between these two poles, we have defined the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel. An accused's waiver of his right to counsel is "knowing" when he is made aware of these basic facts.

Applying this approach, it is our view that whatever warnings suffice for *Miranda*'s purposes will also be sufficient in the context of postindictment questioning. The State's decision to take an additional step

and commence formal adversarial proceedings against the accused does not substantially increase the value of counsel to the accused at questioning, or expand the limited purpose that an attorney serves when the

Page 299

accused is questioned by authorities. With respect to this inquiry, we do not discern a substantial difference between the usefulness of a lawyer to a suspect during custodial interrogation, and his value to an accused at postindictment questioning.[fn12]

Thus, we require a more searching or formal inquiry before permitting an accused to waive his right to counsel at trial than we require for a Sixth Amendment waiver during postindictment questioning — *not* because postindictment questioning is "less important" than a trial (the analysis that petitioner's "hierarchical" approach would suggest) — but because the full "dangers and disadvantages of self-representation," *Faretta, supra*, at 835, during questioning are less substantial and more obvious to an accused than they are at trial.[fn13] Because the role of counsel at questioning is relatively simple and limited, we see no problem in having a waiver procedure at that stage which is likewise simple and limited. So long as the accused is made aware of the "dangers and disadvantages

Page 300

of self-representation" during postindictment questioning, by use of the *Miranda* warnings, his waiver of his Sixth Amendment right to counsel at such questioning is "knowing and intelligent."

III

Before confessing to the murder of James Jackson, petitioner was meticulously informed by authorities of his right to counsel, and of the consequences of any choice not to exercise that right. On two separate occasions, petitioner elected to forgo the assistance of counsel, and speak directly to officials concerning his role in the murder. Because we believe that petitioner's waiver of his Sixth Amendment rights was "knowing and intelligent," we find no error in the decision of the trial court to permit petitioner's confessions to be used against him. Consequently, the judgment of the Illinois Supreme Court is

Affirmed.

[fn1] Page 288 Although the signed waiver form does not appear in the record or the appendix, petitioner concedes that he was informed of his right to counsel to the extent required by our decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Brief for Petitioner 3; Tr. of Oral Arg. 6-8.

This apparently included informing petitioner that he had a right to remain silent; that anything he might say could be used against him; that he had a right to consult with an attorney; that he had a right to have an attorney present during interrogation; and that, as an indigent, the State would provide him with a lawyer if he so desired.

[fn2] Page 289 See, *e. g., Michigan* v. *Jackson*, 475 U.S. 625, 635-636, n. 10 (1986); *Moran* v. *Burbine*, 475 U.S. 412, 428, n. 2 (1986); *Brewer* v. *Williams*, 430 U.S. 387, 405-406 (1977).

[fn3] Page 290 We note as a matter of some significance that petitioner had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities. Once an accused has

a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect. See *Maine* v. *Moulton*, 474 U.S. 159, 176 (1985). The State conceded as much at argument. See Tr. of Oral Arg. 28.

Indeed, the analysis changes markedly once an accused even *requests* the assistance of counsel. See *Michigan* v. *Jackson, supra;* Part II-A, *infra*.

[fn4] Page 292 Of course, we also require that any such waiver must be voluntary. Petitioner contested the voluntariness of his confession in the trial court and in the intermediate appellate courts, which rejected petitioner's claim that his confessions were coerced. See 140 Ill. App.3d 421, 425-426, 488 N.E.2d 1283, 1287 (1986).

Petitioner does not appear to have maintained this contention before the Illinois Supreme Court, and in any event, he does not press this argument here. Thus, the "voluntariness" of petitioner's confessions is not before us.

[fn5] Page 293 We emphasize the significance of the fact that petitioner's waiver of counsel was only for this limited aspect of the criminal proceedings against him — only for postindictment questioning. Our decision on the validity of petitioner's waiver extends only so far.

Moreover, even within this limited context, we note that petitioner's waiver was binding on him *only* so long as he wished it to be. Under this Court's precedents, at any time during the questioning petitioner could have changed his mind, elected to have the assistance of counsel, and immediately dissolve the effectiveness of his waiver with respect to any subsequent statements. See, *e. g., Michigan* v. *Jackson*, 475 U.S., at 631-635; Part II-A, *supra*. Our decision today does nothing to change this rule.

[fn6] Page 294 An important basis for our analysis is our understanding that an attorney's role at postindictment questioning is rather limited, and substantially different from the attorney's role in later phases of criminal proceedings. At trial, an accused needs an attorney to perform several varied functions — some of which are entirely beyond even the most intelligent layman. Yet during postindictment questioning, a lawyer's role is rather undimensional: largely limited to advising his client as to what questions to answer and which ones to decline to answer.

We discuss this point in greater detail below. See Part II-C, *infra*.

[fn7] Page 295 Representative excerpts from the relevant portions of argument include the following:

"QUESTION: [Petitioner] . . . was told that he had a right to counsel.

"MR. HONCHELL [petitioner's counsel]: He was told — the word `counsel' was used. He was told he had a right to counsel. But not through information by which it would become meaningful to him, because the method that was used was not designed to alert the accused to the Sixth Amendment rights to counsel. . . .

"QUESTION: . . . You mean they should have said you have a Sixth Amendment right to counsel instead of just, you have a right to counsel?

"He knew he had a right to have counsel present before [he] made the confession. Now, what in addition did he have to know to make the waiver an intelligent one?

"MR. HONCHELL: He had to meaningfully know he had a Sixth Amendment right to counsel present because —

"QUESTION: What is the difference between meaningfully knowing and knowing?

"MR. HONCHELL: Because the warning here used did not convey or express what counsel was intended to do for him after indictment.

"QUESTION: So then you say . . . [that] he would have had to be told more about what counsel would do for him after indictment before he could intelligently waive?

"MR. HONCHELL: That there is a right to counsel who would act on his behalf and represent him.

. . . . .

"QUESTION: Well, okay. So it should have said, in addition to saying counsel, counsel who would act on your behalf and represent you? That would have been the magic solution?

"MR. HONCHELL: That is a possible method, yes." Tr. of Oral Arg. 7-8.

We do not believe that adding the words "who would act on your behalf and represent you" in Sixth Amendment cases would provide any meaningful improvement in the *Miranda* warnings. Cf. *Brewer* v. *Williams*, 430 U.S., at 435-436, n. 5 (WHITE, J., dissenting).

[fn8] Page 295 Even those lower court cases which have suggested that something beyond *Miranda* warnings is — or may be — required before a Sixth Amendment Page 296 waiver can be considered "knowing and intelligent" have failed to suggest just what this "something more" should be. See, *e. g., Felder* v. *McCotter*, 765 F.2d 1245, 1250 (CA5 1985); *Robinson* v. *Percy*, 738 F.2d 214, 222 (CA7 1984); *Fields* v. *Wyrick*, 706 F.2d 879, 880-881 (CA8 1983).

An exception to this is the occasional suggestion that, in addition to the *Miranda* warnings, an accused should be informed that he has been indicted before a postindictment waiver is sought. See, *e. g., United States* v. *Mohabir*, 624 F.2d 1140, 1150 (CA2 1980); *United States* v. *Payton*, 615 F.2d 922, 924-925 (CA1), cert. denied, 446 U.S. 969 (1980). Because, in this case, petitioner concedes that he was so informed, see Brief for Petitioner 3, we do not address the question whether or not an accused must be told that he has been indicted before a postindictment Sixth Amendment waiver will be valid. Nor do we even pass on the desirability of so informing the accused — a matter that can be reasonably debated. See, *e. g.*, Tr. of Oral Arg. 24.

Beyond this, only one Court of Appeals — the Second Circuit — has adopted substantive or procedural requirements (in addition to *Miranda*) that must be completed before a Sixth Amendment waiver can be effectuated for postindictment questioning. See *United States* v. *Mohabir*, 624 F.2d, at 1150-1153. As have a majority of the Courts of Appeals, we reject *Mohabir*'s holding that some

"additional" warnings or discussions with an accused are required in this situation, or that any waiver in this context can only properly be made before a "neutral . . . judicial officer." *Ibid*.

[fn9] Page 296 This does not mean, of course, that all Sixth Amendment challenges to the conduct of postindictment questioning will fail whenever the challenged practice would pass constitutional muster under *Miranda*. For example, we have permitted a *Miranda* waiver to stand where a suspect was not told that his lawyer was trying to reach him during questioning; in the Sixth Amendment context, this waiver would not be valid. See *Moran* v. *Burbine*, 475 U.S., at 424, 428. Likewise a surreptitious conversation between an undercover police officer and an unindicted suspect would not give rise to any *Miranda* violation as long as the "interrogation" was not in a custodial setting, see *Miranda*, 384 U.S., at 475; however, once the Page 297 accused is indicted, such questioning would be prohibited. See *United States* v. *Henry*, 447 U.S. 264, 273, 274-275 (1980).

Thus, because the Sixth Amendment's protection of the attorney-client relationship — "the right to rely on counsel as a `medium' between [the accused] and the State" — extends beyond *Miranda*'s protection of the Fifth Amendment right to counsel, see *Maine* v. *Moulton*, 474 U.S., at 176, there will be cases where a waiver which would be valid under *Miranda* will not suffice for Sixth Amendment purposes. See also *Michigan* v. *Jackson*, 475 U.S., at 632.

[fn10] Page 297 See, *e. g., United States* v. *Mohabir, supra*, at 1149-1152; Note, Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel, 82 Colum. L. Rev. 363, 372 (1982).

[fn11] Page 298 See, *e. g., Michigan* v. *Jackson, supra*, at 633, n. 7; *Rhode Island* v. *Innis*, 446 U.S. 291, 300, n. 4 (1980).

[fn12] Page 299 We note, incidentally, that in the *Miranda* decision itself, the analysis and disposition of the waiver question relied on this Court's decision in *Johnson* v. *Zerbst*, 304 U.S. 458 (1938) — a *Sixth* Amendment waiver case. See *Miranda*, 384 U.S., at 475.

From the outset, then, this Court has recognized that the waiver inquiry focuses more on the lawyer's role during such questioning, rather than the particular constitutional guarantee that gives rise to the right to counsel at that proceeding. See *ibid.;* see also *Moran* v. *Burbine*, 475 U.S., at 421. Thus, it should be no surprise that we now find a strong similarity between the level of knowledge a defendant must have to waive his Fifth Amendment right to counsel, and the protection accorded to Sixth Amendment rights. See Comment, Constitutional Law — Right to Counsel, 49 Geo. Wash. L. Rev. 399, 409 (1981).

[fn13] Page 299 As discussed above, see n. 6, *supra*, an attorney's role at questioning is relatively limited. But at trial, counsel is required to help even the most gifted layman adhere to the rules of procedure and evidence, comprehend the subtleties of *voir dire*, examine and cross-examine witnesses effectively (including the accused), object to improper prosecution questions, and much more. Cf., *e. g.*, 1 Bench Book for United States District Court Judges 1.02-2 — 1.02-5 (3d ed. 1986); *McDowell* v. *United States*, 484 U.S. 980 (1987) (WHITE, J., dissenting from denial of certiorari).

JUSTICE BLACKMUN, dissenting.

I agree with most of what JUSTICE STEVENS says in his dissenting opinion, *post*, p. 301. I, however, merely would hold that after formal adversary proceedings against a defendant have been commenced, the Sixth Amendment mandates that the defendant not be "`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.'" *Michigan* v. *Jackson*, 475 U.S. 625, 626 (1986), quoting *Edwards* v. *Arizona*, 451 U.S. 477, 484-485 (1981).

The Court's majority concludes, *ante*, at 290-291: "The fact that petitioner's Sixth Amendment right came into existence with his indictment . . . does not distinguish him from the preindictment interrogatee whose right to counsel is in existence and available for his exercise while he is questioned." I must disagree. "[W]hen the Constitution grants protection against criminal proceedings without the assistance of counsel,

Page 301

counsel must be furnished whether or not the accused requested the appointment of counsel." *Carnley* v. *Cochran*, 369 U.S. 506, 513 (1962) (internal quotations omitted). In my view, the Sixth Amendment does not allow the prosecution to take undue advantage of any gap between the commencement of the adversary process and the time at which counsel is appointed for a defendant.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

The Court should not condone unethical forms of trial preparation by prosecutors or their investigators. In civil litigation it is improper for a lawyer to communicate with his or her adversary's client without either notice to opposing counsel or the permission of the court.[fn1] An attempt to obtain evidence for use at trial by going behind the back of one's adversary would be not only a serious breach of professional ethics but also a manifestly unfair form of trial practice. In the criminal context, the same ethical rules apply and, in my opinion, notions of fairness that are at least as demanding should also be enforced.

After a jury has been empaneled and a criminal trial is in progress, it would obviously be improper for the prosecutor to conduct a private interview with the defendant for the purpose

Page 302

of obtaining evidence to be used against him at trial. By "private interview" I mean, of course, an interview initiated by the prosecutor, or his or her agents, without notice to the defendant's lawyer and without the permission of the court. Even if such an interview were to be commenced by giving the defendant the five items of legal advice that are mandated by *Miranda*, see *ante*, at 288, n. 1, I have no doubt that this Court would promptly and unanimously condemn such a shabby practice. As our holding in *Michigan* v. *Jackson*, 475 U.S. 625 (1986), suggests, such a practice would not simply constitute a serious ethical violation, but would rise to the level of an impairment of the Sixth Amendment right to counsel.[fn2]

Page 303

The question that this case raises, therefore, is at what point in the adversary process does it become impermissible for the prosecutor, or his or her agents, to conduct such private interviews with the opposing party? Several alternatives are conceivable: when the trial commences, when the defendant has actually met and accepted representation by his or her appointed counsel, when counsel is appointed, or when the adversary process commences. In my opinion, the Sixth Amendment right to counsel demands that a firm and unequivocal line be drawn at the point at which adversary proceedings commence.

In prior cases this Court has used strong language to emphasize the significance of the formal commencement of adversary proceedings. Such language has been employed to explain decisions denying the defendant the benefit of the protection of the Sixth Amendment in preindictment settings, but an evenhanded interpretation of the Amendment would support the view that additional protection should automatically attach the moment the formal proceedings

Page 304

begin. One such example is *Kirby* v. *Illinois*, 406 U.S. 682 (1972), in which the Court concluded that the general rule requiring the presence of counsel at pretrial, lineup identifications, see *United States* v. *Wade*, 388 U.S. 218 (1967); *Gilbert* v. *California*, 388 U.S. 263 (1967), should not extend to protect custodial defendants not yet formally charged. Justice Stewart's plurality opinion explained the significance of the formal charge:

"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. It is this point, therefore, that marks the commencement of the `criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable. See *Powell* v. *Alabama*, 287 U.S., at 66-71; *Massiah* v. *United States*, 377 U.S. 201; *Spano* v. *New York*, 360 U.S. 315, 324 (Douglas, J., concurring)." 406 U.S., at 689-690 (footnote omitted).

Similarly, in *United States* v. *Gouveia*, 467 U.S. 180 (1984), we relied upon the significance of the absence of a formal charge in concluding that the Sixth Amendment does not require the appointment of counsel for indigent prison inmates confined in administrative detention while authorities investigate their possible involvement in criminal activity. Again the Court noted that "given the plain language of the Amendment and its purpose of protecting the unaided layman at critical confrontations with his adversary, our conclusion that the right to counsel attaches at the initiation of adversary judicial

Page 305

criminal proceedings `is far from a mere formalism.' *Kirby* v. *Illinois*, 406 U.S., at 689." *Id.*, at 189.

Most recently, in *Moran* v. *Burbine*, 475 U.S. 412 (1986), the Court upheld a waiver of the right to counsel in a pretrial context even though the waiver "would not be valid" if the same situation had arisen after indictment, see *ante*, at 296-297, n. 9. In the *Moran* opinion, the Court explained:

"It is clear, of course, that, absent a valid waiver, the defendant has the right to the presence of an attorney during any interrogation occurring after the first formal charging proceeding, the point at which the Sixth Amendment right to counsel initially attaches. *United States* v. *Gouveia*, 467 U.S. 180, 187 (1984); *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972) (opinion of Stewart, J.). See *Brewer* v. *Williams*, 430 U.S., at 400-401. And we readily agree that once the right *has* attached, it follows that the police may not interfere with the efforts of a defendant's attorney to act as a `"medium" between [the suspect] and the State' during the interrogation. *Maine* v. *Moulton*, 474 U.S. 159, 176 (1985); see *Brewer* v. *Williams, supra*, at 401, n. 8. The difficulty for respondent is that the interrogation sessions that yielded the inculpatory statements took place *before* the initiation of `adversary judicial proceedings.' *United States* v. *Gouveia, supra*, at 192." 475 U.S., at 428.

Today, however, in reaching a decision similarly favorable to the interest in law enforcement unfettered by process concerns, the Court backs away from the significance previously attributed to the initiation of formal proceedings. In the majority's view, the purported waiver of counsel in this case is properly equated with that of an unindicted suspect. Yet, as recognized in *Kirby, Gouveia*, and *Moran*, important differences

Page 306

separate the two.[fn3] The return of an indictment, or like instrument, substantially alters the relationship between the state and the accused. Only after a formal accusation has "the government . . . committed itself to prosecute, and only then [have] the adverse positions of government and defendant . . . solidified." *Kirby*, 406 U.S., at 689. Moreover, the return of an indictment also presumably signals the government's conclusion that it has sufficient evidence to establish a prima facie case. As a result, any further interrogation can only be designed to buttress the government's case; authorities are no longer simply attempting "`to solve a crime.'" *United States* v. *Mohabir*, 624 F.2d 1140, 1148 (CA2 1980) (quoting *People* v. *Waterman*, 9 N.Y.2d 561, 565, 175 N.E.2d 445, 447 (1961)); see also *Moran* v. *Burbine*, 475 U.S., at 430. Given the significance of the initiation of formal proceedings and the concomitant shift in the relationship between the state and the accused, I think it quite wrong to suggest that *Miranda* warnings — or for that

Page 307

matter, any warnings offered by an adverse party — provide a sufficient basis for permitting the undoubtedly prejudicial — and, in my view, unfair — practice of permitting trained law enforcement personnel and prosecuting attorneys to communicate with as-of-yet unrepresented criminal defendants.

It is well settled that there is a strong presumption against waiver of Sixth Amendment protections, see *Michigan* v. *Jackson*, 475 U.S., at 633; *Von Moltke* v. *Gillies*, 332 U.S. 708, 723 (1948) (plurality opinion); *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938), and that a waiver may only be accepted if made with full awareness of "the dangers and disadvantages of self-representation," *Faretta* v. *California*, 422 U.S. 806, 835 (1975); see also *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 279 (1942) (accused "may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open"). Warnings offered by an opposing party, whether detailed or cursory, simply cannot satisfy this high standard.

The majority premises its conclusion that *Miranda* warnings lay a sufficient basis for accepting a waiver of the right to counsel on the assumption that those warnings make clear to an accused "what a lawyer could `do for him' during the postindictment questioning: namely, advise [him] to refrain from making any [incriminating] statements." *Ante*, at 294 (footnote omitted).[fn4] Yet, this is surely a gross understatement of the disadvantage of proceeding without a lawyer and

Page 308

an understatement of what a defendant must understand to make a knowing waiver.[fn5] The *Miranda* warnings do not, for example, inform the accused that a lawyer might examine the indictment for legal sufficiency before submitting his or her client to interrogation or that a lawyer is likely to be considerably more skillful at negotiating a plea bargain and that such negotiations may be most fruitful if initiated prior to any interrogation. Rather, the warnings do not even go so far as to explain to the accused the nature of the charges pending against him — advice that a court would insist upon before allowing a defendant to enter a guilty plea with or without the presence of an attorney, see *Henderson* v. *Morgan*, 426 U.S. 637 (1976). Without defining precisely the nature of the inquiry required to establish a valid waiver of the

Sixth Amendment right to counsel, it must be conceded that at least minimal advice is necessary — the accused must be told of the "dangers and disadvantages of self-representation."

Yet, once it is conceded that certain advice is required and that after indictment the adversary relationship between the state and the accused has solidified, it inescapably follows

Page 309

that a prosecutor may not conduct private interviews with a charged defendant. As at least one Court of Appeals has recognized, there are ethical constraints that prevent a prosecutor from giving legal advice to an uncounseled adversary.[fn6] Thus, neither the prosecutor nor his or her agents can ethically provide the unrepresented defendant with the kind of advice that should precede an evidence-gathering interview after formal proceedings have been commenced. Indeed, in my opinion even the *Miranda* warnings themselves are a species of legal advice that is improper when given by the prosecutor after indictment.

Moreover, there are good reasons why such advice is deemed unethical, reasons that extend to the custodial, postindictment setting with unequaled strength. First, the offering of legal advice may lead an accused to underestimate the prosecuting authorities' true adversary posture. For an incarcerated defendant — in this case, a 17-year-old who had been in custody for 44 hours at the time he was told of the

Page 310

indictment — the assistance of someone to explain why he is being held, the nature of the charges against him, and the extent of his legal rights, may be of such importance as to overcome what is perhaps obvious to most, that the prosecutor is a foe and not a friend. Second, the adversary posture of the parties, which is not fully solidified until formal charges are brought, will inevitably tend to color the advice offered. As hard as a prosecutor might try, I doubt that it is possible for one to wear the hat of an effective adviser to a criminal defendant while at the same time wearing the hat of a law enforcement authority. Finally, regardless of whether or not the accused actually understands the legal and factual issues involved and the state's role as an adversary party, advice offered by a lawyer (or his or her agents) with such an evident conflict of interest cannot help but create a public perception of unfairness and unethical conduct. And as we held earlier this Term, "courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat* v. *United States*, 486 U.S. 153, 160 (1988). This interest is a factor that may be considered in deciding whether to override a defendant's waiver of his or her Sixth Amendment right to conflict-free representation, see *ibid.*, and likewise, should be considered in determining whether a waiver based on advice offered by the criminal defendant's adversary is ever appropriate.[fn7]

In sum, without a careful discussion of the pitfalls of proceeding without counsel, the Sixth Amendment right cannot properly be waived. An adversary party, moreover, cannot adequately provide such advice. As a result, once the right to counsel attaches and the adversary relationship between

Page 311

the state and the accused solidifies, a prosecutor cannot conduct a private interview with an accused party without "dilut[ing] the protection afforded by the right to counsel," *Maine* v. *Moulton*, 474 U.S. 159, 171 (1985). Although this ground alone is reason enough to never permit such private interviews, the rule also presents the added virtue of drawing a clear and easily identifiable line at the point between the investigatory and adversary stages of a criminal proceeding. Such clarity in definition of constitutional rules that govern criminal proceedings is important to the law enforcement profession as well as to the private citizen. See *Arizona* v. *Roberson*, 486 U.S. 675 (1988). It is true, of course, that the interest in effective law enforcement would benefit from an opportunity to engage in incommunicado questioning of

defendants who, for reasons beyond their control, have not been able to receive the legal advice from counsel to which they are constitutionally entitled. But the Court's single-minded concentration on that interest might also lead to the toleration of similar practices at any stage of the trial. I think it clear that such private communications are intolerable not simply during trial, but at any point after adversary proceedings have commenced.

I therefore respectfully dissent.

[fn1] Page 301 Disciplinary Rule 7-104 of the ABA Model Code of Professional Responsibility (1982) provides in relevant part:
"(A) During the course of his representation of a client a lawyer shall not:

"(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

Likewise, Rule 4.2 of the ABA Model Rules of Professional Conduct (1984) provides:

"In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

[fn2] Page 302 In *Jackson*, we held that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." 475 U.S., at 636. In that case we held the waiver invalid even though the appointed law firm had not yet received notice of the appointment and the defendant had not yet been informed that a law firm had been appointed to represent him. *Id.*, at 627.

Similarly, our holdings in *Massiah* v. *United States*, 377 U.S. 201 (1964), *United States* v. *Henry*, 447 U.S. 264 (1980), and *Maine* v. *Moulton*, 474 U.S. 159 (1985), suggest that law enforcement personnel may not bypass counsel in favor of direct communications with an accused. In each of these cases, the government engaged in secret attempts to elicit incriminating statements from an indicted suspect through the use of government informants. Yet, the Court's analysis does not turn primarily upon the covert nature of the interrogation. See *Brewer* v. *Williams*, 430 U.S. 387, 400 (1977) ("That the incriminating statements were elicited surreptitiously in the *Massiah* case, and otherwise here, is constitutionally irrelevant"). Nor does the finding of a Sixth Amendment violation appear to turn upon the absence of a waiver, which, of course, could not have been obtained given the surreptitious nature of the attempts to elicit incriminating statements. But cf. *Jackson*, 475 U.S., at 641, n. 4 (REHNQUIST, J., dissenting). As the Court wrote in *Moulton:*

"Once the right to counsel has attached and been asserted, the State must of course honor it. This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to Page 303 respect and preserve the accused's choice to seek this assistance. We have on several occasions been called upon to clarify the scope of the State's obligation in this regard, and have made clear that, at the very least, the

prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." 474 U.S., at 170-171 (footnote omitted).

See also *Henry*, 447 U.S., at 274 ("By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel") (footnote omitted); *Massiah*, 377 U.S., at 206 ("We hold that the petitioner was denied the basic protections of [the Sixth Amendment] guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel"). I think it clear that an *ex parte* communication between a prosecutor, or his or her agents, and a represented defendant — regardless of whether the accused has received *Miranda* warnings — can only be viewed as an attempt to "circumven[t]" and "dilut[e] the protection afforded by the right to counsel." *Moulton*, 474 U.S., at 171.

[fn3] Page 306 Other of our prior decisions have also made clear that the return of a formal charge fundamentally alters the relationship between the State and the accused, conferring increased protections upon defendants in their interactions with state authorities. In *Michigan* v. *Jackson*, 475 U.S. 625 (1986), we explained:

"Indeed, after a formal accusation has been made — and a person who had previously been just a `suspect' has become an `accused' within the meaning of the Sixth Amendment — the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation. Thus, the surreptitious employment of a cellmate, see *United States* v. *Henry*, 447 U.S. 264 (1980), or the electronic surveillance of conversations with third parties, see *Maine* v. *Moulton*, [474 U.S. 159 (1985)]; *Massiah* v. *United States*, 377 U.S. 201 (1964), may violate the defendant's Sixth Amendment right to counsel even though the same methods of investigation might have been permissible before arraignment or indictment." *Id.*, at 632 (footnote omitted).

See also *Wyrick* v. *Fields*, 459 U.S. 42, 50 (1982) (MARSHALL, J., dissenting).

[fn4] Page 307 The majority finds support for its conclusion that *Miranda* warnings provide a sufficient basis for a waiver of the Sixth Amendment right to counsel in "petitioner's inability, in the proceedings before this Court, to articulate with precision what additional information should have been provided to him before he would have been competent to waive his right to counsel." *Ante*, at 294. Additional — although not exhaustive — possible warnings, however, have been articulated. See, *e. g., United States* v. *Callabrass*, 458 F. Supp. 964, 967 (SDNY 1978). Part of the difficulty in fashioning a proper boilerplate set of warnings is that, unlike in the Fifth Amendment context, the information that must be imparted to the accused will vary from case to case as the facts, legal issues, and parties differ.

[fn5] Page 308 Respondent, and the United States as *amicus curiae*, argue that the comprehensive inquiry required by *Faretta* v. *California*, 422 U.S. 806 (1975), should not be extended to pretrial waivers because the role of counsel — and conversely the difficulty of proceeding without counsel — is more important at trial. I reject the premise that a lawyer's skills are more likely to sit idle at a pretrial interrogation than at trial. Both events require considerable experience and expertise and I would be reluctant to rank one over the other. Moreover, as we recognized in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964):

"[T]he `right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination.' *In re Groban*, 352 U.S. 330, 344 (Black, J., dissenting). `One can imagine a cynical prosecutor saying: "Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial."' *Ex parte Sullivan*, 107 F. Supp. 514, 517-518." *Id.*, at 487-488 (footnote omitted).

See also *United States* v. *Wade*, 388 U.S. 218, 226 (1967); *Spano* v. *New York*, 360 U.S. 315, 325, 326 (1959) (Douglas, J., concurring).

[fn6] Page 309 In discussing a suggestion that the prosecutor should supplement the customary *Miranda* warnings in the postindictment setting, the Court of Appeals for the Second Circuit wrote:

"We believe there are strong policy reasons, grounded in ethical considerations, for not adopting the . . . alternative of having the prosecutor give further warnings to the defendant. The government itself points out that a prosecutor `is, in many senses, an adversary of the defendant, and, as such, is counselled not to give him legal advice'; in support of this proposition, the government cites the ABA Code of Professional Responsibility, DR 7-104(A)(2).[14]

"[14] DR 7-104(A) provides:

"During the course of his representation of a client a lawyer shall not:

"(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

"(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client." *United States* v. *Mohabir*, 624 F.2d 1140, 1152 (1980).

[fn7] Page 310 In *Wheat*, we sustained the District Court's decision to reject the defendant's waiver of the right to conflict-free representation even though Wheat, unlike the petitioner, made his decision to waive this right with the assistance of additional counsel, see 486 U.S., at 172 (STEVENS, J., dissenting).

Page 312

New York Court of Appeals
Reports

PEOPLE *v.* ARTHUR, 22 N.Y.2d 325 (1968)

292 N.Y.S.2d 663, 239 N.E.2d 537

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* LIMUEL ARTHUR,

Appellant.

Court of Appeals of the State of New York.

Argued May 13, 1968

Decided June 14, 1968

Appeal from the Appellate Division of the Supreme Court in the Fourth Judicial Department,
Page 326
GEORGE D. OGDEN, J.

David O. Boehm for appellant.

John C. Little, Jr., District Attorney (*Norman A. Palmiere* of counsel), for respondent.

SCILEPPI, J.

At approximately 5:30 P.M. on July 24, 1963, the defendant, while walking across the Clarissa Street Bridge in the City of Rochester, either dropped or threw his two-year-old son into the Genesee River. The child was rescued and suffered no serious injuries.
Page 327

The defendant was arrested near the scene of the incident and immediately confessed that he had thrown his son into the river. The defendant was placed in a police car and brought to the Detective Division of Police Headquarters where he was questioned by the police. At approximately 6:30 P.M., one of the interrogating officers began typing a statement which was signed by the defendant at approximately 6:45 P.M.

In the meantime Herbert Stern, an attorney, was at home watching the 6:00 P.M. news on television. The first item in the newscast dealt with the incident at the Clarissa Street Bridge and the arrest of the defendant. Mr. Stern, who had known the defendant for a period of two years and who had acted as his personal attorney in several matters, including an accident case which was pending in July of 1963, became concerned and decided to go to police headquarters "to see what had happened". He left his home

at about 6:05 P.M. and arrived at Police Headquarters at 15 or 20 minutes after six. Mr. Stern approached Deputy Chief Jensen who seemed to be in charge of the investigation. He identified himself as an attorney representing the defendant and asked to see him. Officer Jensen replied that he was not sure if Stern could see the defendant, but he would find out and let him know. Jensen left the room and returned a few minutes later. He told Stern that the police were finishing up with their questioning and, if he waited a few minutes, he could see the defendant.

After the police completed questioning the defendant, Stern was admitted to the interrogation room where he spoke to the defendant. Stern testified that the defendant appeared to be intoxicated and that he was unable to coherently answer his questions except to say that "the boy was in the river". After speaking to the defendant for 10 or 11 minutes, Mr. Stern left the interrogation room and told Officer Jensen, "I think this fellow is pretty sick and I think you should leave him alone. There is no sense in talking to him anymore". Mr. Stern testified that he had not been asked by anyone to go to Police Headquarters and that he went there on his own because he felt he had an obligation to the defendant.

On the following morning, the defendant was questioned, in the absence of an attorney, by Detective Fantigrossi. The defendant made incriminating statements.

Page 328

The defendant was tried on an indictment charging him with attempted murder in the first degree. The defendant's written confession was admitted against him over trial counsel's objection. In addition, Detective Fantigrossi testified to the incriminating statements made by the defendant on the morning following his arrest. This testimony was not objected to. At the close of the trial, the defendant was found guilty of attempted murder in the second degree.

The Appellate Division unanimously affirmed without opinion.

Relying on *People* v. *Donovan* (13 N.Y.2d 148), *People* v. *Failla* (14 N.Y.2d 178) and *People* v. *Gunner* (15 N.Y.2d 226), the defendant argues that the written confession is inadmissible because all or part of it was obtained after his attorney had requested to see him. He also contends that the oral admissions made to Detective Fantigrossi are inadmissible because they were obtained in the absence of counsel after his attorney had been granted access to him.

In response to the defendant's contentions, the People argue that the cases relied on by the defendant are inapposite since there is no evidence that Mr. Stern was retained by the defendant or by anyone on his behalf before he arrived at Police Headquarters, and since Mr. Stern took no positive action to protect the defendant's rights once he arrived on the scene.

While it is true that the defendants in *Donovan, Gunner* and *Failla* were represented by retained counsel, the holdings in these cases were not dependent upon that factor. Indeed, in enunciating the fundamental right of the accused to be represented by counsel, we painted with broad strokes. Thus, in *People* v. *Donovan,* Judge FULD, speaking for the court, stated at page 151: "[W]e are of the opinion that, quite apart from the Due Process Clause of the Fourteenth Amendment, this State's constitutional and statutory provisions pertaining to the privilege against self incrimination and the right to counsel * * *, not to mention our own guarantee of due process * * *, require the exclusion of a confession taken from a

defendant, during a period of detention, after his attorney had requested and been denied access to him" (accord *People* v. *Failla,* 14 N.Y.2d 178, 180).

Similarly, in *People* v. *Gunner* (*supra*) it was argued that *Donovan* and *Failla* were not applicable because Gunner's attorney

Page 329

had not physically appeared at the police station and asked to see his client as had Donovan's and Failla's attorneys. The court rejected this contention holding (p. 232) that a defendant's right to counsel is not dependent upon "mechanical" and "arbitrary" requirements. Thus, the principle which may be derived from these pre-*Miranda* (*Miranda* v. *Arizona,* 384 U.S. 436) cases is that, once the police know or have been apprised of the fact that the defendant is represented by counsel or that an attorney has communicated with the police for the purpose of representing the defendant, the accused's right to counsel attaches; and this right is not dependent upon the existence of a formal retainer.

Nor is it significant that Mr. Stern did not, immediately upon his arrival at Police Headquarters, instruct the police not to take any statements from the defendant (compare *People* v. *Friedlander,* 16 N.Y.2d 248, *People* v. *Sanchez,* 15 N.Y.2d 387, *People* v. *Failla, supra,* and *People* v. *Donovan, supra,* with *People* v. *Gunner, supra*). Once an attorney enters the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney, of the defendant's right to counsel (*People* v. *Vella,* 21 N.Y.2d 249). There is no requirement that the attorney or the defendant request the police to respect this right of the defendant.

Trial counsel did not object to the introduction of Detective Fantigrossi's testimony and he objected to the admission of the written confession only on the ground that it was involuntary and not on the ground that it was obtained in the absence of counsel. The failure to object to the admissions on right to counsel grounds is not fatal since we are concerned with the deprivation of a fundamental constitutional right (*People* v. *McLucas,* 15 N.Y.2d 167). *People* v. *DeRenzzio* (19 N.Y.2d 45) is not in point. In that case, we refused to apply the *McLucas* principle since DeRenzzio's trial counsel not only failed to object to the introduction of postindictment statements but he strategically used them in the defense of his client. Moreover, we were unwilling to apply the rule of *People* v. *Di Biasi* (7 N.Y.2d 544) retroactively to a trial which had been conducted more than 20 years before *Di Biasi* was decided. Neither of these factors exist in the case at bar.

Page 330

To conclude, under the prior decisions of this court, the written confession and the oral admissions made to Detective Fantigrossi were obtained in violation of the defendant's right to counsel. Consequently, they were inadmissible.

Accordingly, the judgment appealed from should be reversed and a new trial ordered.

Chief Judge FULD and Judges BURKE, BERGAN, KEATING and BREITEL concur with Judge SCILEPPI; Judge JASEN concurs in result.

Judgment reversed, etc.

New York Court of Appeals Reports

PEOPLE v. BURDO, 91 N.Y.2d 146 (1997)

690 N.E.2d 854, 667 N.Y.S.2d 970

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. FRANCIS J. BURDO,

Respondent.

Court of Appeals of the State of New York.

Argued September 17, 1997

Decided October 30, 1997

APPEAL, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered November 7, 1996, which affirmed an order of the Clinton County Court (Patrick R. McGill, J.), granting a motion by defendant to suppress certain oral and written statements given to police.

People v Burdo, 224 A.D.2d 115, affirmed.

Penelope D. Clute, District Attorney of Clinton County, Plattsburgh, for appellant.

Page 147

MaryAnne Bukolt, Plattsburgh, for respondent.

Jonathan E. Gradess, Albany, and *Alfred O'Connor* for New York State Defenders Association, *amicus curiae.*

Richard A. Brown, District Attorney of Queens County, Kew Gardens *(Anne C. Feigus* and *Roseann B. MacKechnie* of counsel), for New York State District Attorneys' Association, *amicus curiae.*

Page 148

SMITH, J.

Applying the principle enunciated in *People v Rogers* (48 N.Y.2d 167), we conclude that under the circumstances of this case, the custodial interrogation was improper and defendant's statements made during questioning must be suppressed. The order of the Appellate Division should therefore be affirmed.

Defendant was incarcerated in the Clinton County jail after his arrest and arraignment on rape charges. Defendant was also being held on an unrelated probation violation, for which he was arrested and detained prior to the rape arrest. On December 12, 1994, police investigators went to the jail to question defendant concerning the June 1993 disappearance and death of Leo Gebo.

The officers met with defendant in the library of the jail where he was advised of his *Miranda* rights. Defendant stated that he understood his rights and was willing to speak to the officers. One investigator specifically asked if defendant wanted to speak to an attorney but he declined. Defendant was also informed that he could terminate the interview at any time, and that the officers were aware that he was represented by counsel for the pending rape charge. It was agreed that the officers would not question defendant about the pending charges for which defendant was incarcerated.

Defendant was told that a relative had given a statement regarding defendant's involvement in the murder of Leo Gebo. Defendant denied that his relative had participated in the murder and instead admitted that he, defendant, had been "high on pot and booze" when the murder occurred. Defendant stated that his relative had tried to stop him from killing Gebo. When an investigator suggested that another party might have been involved, defendant looked "puzzled," then rose and left the room.

Approximately 15 minutes later, the investigators asked whether defendant would come out of his cell and continue the conversation. Defendant agreed and rejoined the investigators in the library to resume the interview. For about one hour, defendant detailed his involvement in the kidnap, robbery and murder of Gebo. After describing his activities in the murder, defendant agreed to sign a written statement regarding the incident. After the statement was completed, it was given to defendant who read and signed it. Defendant's *Miranda* rights were printed at the beginning of the statement. Defendant initialed each right and the waiver clause.

Page 149

Prior to trial, County Court held a *Huntley* hearing to determine the validity of defendant's confession (*see, People v Huntley,* 15 N.Y.2d 72). The court noted that defendant was in custody on an unrelated charge for which he was represented by counsel. The court further noted that the officers who questioned him knew that defendant was represented by counsel on that charge. County Court found *People v Rogers* (48 N.Y.2d 167, *supra)* to be controlling and held that defendant could not waive his *Miranda* rights under the circumstances. In so holding, the court suppressed the oral and written statements made by defendant pursuant to the invalid waiver of his rights. The Appellate Division affirmed the order of County Court and a Judge of this Court granted leave to appeal. We affirm.

The holding of *People v Rogers* is clear. There we held that "once an attorney has entered the proceeding, thereby signifying that the police should cease questioning, a defendant in custody may not be further interrogated in the absence of counsel" (*People v Rogers,* 48 N.Y.2d 167, 169, *supra).* In *People v Bing,* we adhered to our holding in *Rogers* saying:

"Our holding [in *Rogers*] * * * emphasized that since defendant was *represented* on the charge on which he was held in custody, *he could not be interrogated in the absence of counsel on any matter,* whether related or unrelated to the subject of the representation" (*People v Bing,* 76 N.Y.2d 331, 340 [emphasis added]).

Last year, this Court unanimously reaffirmed its commitment to the holding and principle enunciated in *Rogers*:

"Importantly, *Rogers* establishes and still stands for the important protection and principle that once a defendant in custody on a particular matter is *represented by or requests* counsel, custodial interrogation about any subject, whether related or unrelated to the charge upon which representation is sought or obtained, must cease" (*People v Steward,* 88 N.Y.2d 496, 501 [emphasis added]; *see also, People v West,* 81 N.Y.2d 370, 377-378).

Our holding in *Rogers* was grounded in the New York State Constitution and predicated on several important policy considerations which resonate to this day. As this Court stated:

"Our acknowledgment of an accused's right to the

Page 150

presence of counsel, even when the interrogation concerns unrelated matters, represents no great quantitative change in the protection we have extended to the individual as a shield against the awesome and sometimes coercive force of the State * * * [T]he attorney's presence serves to equalize the positions of the accused and sovereign, mitigating the coercive influence of the State and rendering it less overwhelming. That the rule diminishes the likelihood of a waiver or self incriminating statements is immaterial to our system of justice" (*People v Rogers,* 48 N.Y.2d 167, 173, *supra).*

Notwithstanding the fact that defendant's statements might pertain to a matter unrelated to the formal representation on a pending charge upon which defendant was in custody, suppression is mandated under *Rogers* which, in the absence of a counseled waiver, bars further custodial interrogation of a suspect "on any matter" (*People v Bing,* 76 N.Y.2d, at 340).

Rogers clearly applies to the instant case. Defendant was in custody at the Clinton County jail pursuant to a pending charge of rape and assault.[fn*] It is also conceded that defendant had been assigned legal representation following his arraignment and subsequent incarceration on a pending charge. The officers who questioned defendant were fully aware of these facts and proceeded to interrogate the defendant anyway. Under a plain reading of *Rogers,* the State was prohibited from questioning him under these circumstances.

The People, and the dissent, urge this Court to confine the rule in *Rogers* only to circumstances when an attorney, in some active fashion, interjects herself into the proceedings and signifies that the police should cease questioning. Under such circumstances, they would condone custodial interrogation on unrelated matters in the absence of an explicit or active invocation of the right to counsel by either defendant or his assigned counsel. That is not *Rogers'* holding and teaching and we decline to so limit its reach.

Finally, we underscore that our decision neither expands nor narrows *Rogers,* which established the principle that a defendant

Page 151

represented by counsel on the charge on which he is held in custody cannot be interrogated in the absence of counsel "on any matter." For nearly two decades *Rogers* has stood as a workable, comprehensible, bright line rule, providing effective guidance to law enforcement while ensuring that it is defendant's

attorney, not the police, who determines which matters are related and unrelated to the subject of the representation. We reject the proposal put forth by the dissent to now modify *Rogers* to "an actual attorney-client relationship or an invocation of his right to counsel" (dissenting opn, at 160). The dissent's proposal both upsets the careful balance of interests maintained by *Rogers* and introduces its own new ambiguities where clarity and certainty are important for the individual as well as the public interest involved.

Accordingly, the order of the Appellate Division should be affirmed.

[fn*] We reject the People's argument that defendant's "stay" at the Clinton County jail does not constitute "custody" under *Rogers*. While we have declined to adopt a per se rule that any questioning of an inmate in a correctional facility is "custodial," here, defendant was incarcerated after a lower court arraignment on a charge of rape in the first degree. We conclude that defendant was "in custody" under the circumstances presented.

WESLEY, J. (dissenting).

Because I believe the majority expands the scope of *People v Rogers* (48 N.Y.2d 167) and a defendant's right to counsel arising from the commencement of a criminal proceeding, I respectfully dissent. In my view, defendant must establish an actual attorney-client relationship or an invocation of his right to counsel under the Fifth Amendment of the United States Constitution and article I, § 6 of our State Constitution before the protection of *Rogers* becomes available. From my view of the record, defendant failed to establish either.

I.

Under our constitutional jurisprudence, the right to counsel arises from two significantly different scenarios: (1) upon the commencement of formal proceedings, and (2) when an uncharged individual has actually retained a lawyer, or while in custody has requested a lawyer (*People v West,* 81 N.Y.2d 370, 373). The first parallels to some degree the right to counsel arising under the Sixth Amendment to the United States Constitution, which also attaches with the commencement of formal proceedings (*Kirby v Illinois,* 406 U.S. 682). That right under our law is broader, however, in several respects. For example, it attaches whenever there is significant judicial activity, such as the filing of a felony complaint to obtain an arrest warrant (*see, People v Harris,* 77 N.Y.2d 434, 440; *People v Samuels,* 49 N.Y.2d 218, 221), and it can attach if arraignment is unduly delayed (*see, People v Hopkins,* 58 N.Y.2d 1079, 1081).

Page 152

It has come to be associated with the line of cases beginning with *People v Di Biasi* (7 N.Y.2d 544) (*see, People v West, supra*). The fact that a suspect has counsel solely because of the commencement of formal proceedings in one matter, however, does not preclude police from interrogating the suspect about unrelated matters in the absence of counsel (*People v Kazmarick,* 52 N.Y.2d 322; *People v Herner,* 156 Misc.2d 735, 746-747, *affd* 212 A.D.2d 1042, *lv denied* 85 N.Y.2d 974).

The second manner in which New York's right to counsel can attach, when an uncharged individual has actually retained a lawyer, or while in custody has requested a lawyer, originated in the context of custodial interrogation (*People v West, supra,* 81 N.Y.2d, at 374). Like the privilege against self-incrimination under the Fifth Amendment to the United States Constitution, it is intended to "`"preserv[e]

the integrity of an accused's choice to communicate with police only through counsel"" (*People v Claudio,* 83 N.Y.2d 76, 81, *rearg dismissed* 88 N.Y.2d 1007; *see also, People v Kazmarick, supra,* 52 N.Y.2d, at 327). Nevertheless, because this right to counsel can arise when an individual has actually retained a lawyer, it cannot be said to arise under the privilege against self-incrimination alone; instead, we have said that this right is rooted in "the privilege against self incrimination, the right to be aided by counsel and due process" (*People v Skinner,* 52 N.Y.2d 24, 28; *see also, People v Cunningham,* 49 N.Y.2d 203, 207; *People v Arthur,* 22 N.Y.2d 325, 328; *People v Donovan,* 13 N.Y.2d 148, 151).

New York has extended this right independently of the Supreme Court's analysis of its Fifth Amendment counterpart. We have held that, once the privilege against self-incrimination has been invoked, a suspect cannot be interrogated even in a noncustodial setting (*People v Skinner, supra*), and that, once invoked, a suspect cannot waive the privilege in the absence of counsel (*People v Cunningham, supra*). This right has come to be associated with cases such as *People v Hobson* (39 N.Y.2d 479; *see, People v West, supra,* at 374).

The question of whether this particular right to counsel protects a suspect held in custody on one matter from being interrogated about other unrelated matters has repeatedly drawn our attention. In *People v Taylor* (27 N.Y.2d 327, 330-332), we held that a suspect held in police custody and represented by counsel on one matter could be questioned about unrelated matters in which the suspect was not represented by counsel (*see also, People v Hobson, supra,* 39 N.Y.2d, at 483). We limited this rule in *People v Ermo* (47 N.Y.2d 863),

Page 153

when we precluded the police from exploiting impermissible questioning about a matter in which a suspect was represented by counsel to obtain statements from the suspect about other unrelated matters in which the suspect was not represented.

We further limited *Taylor* in *Rogers* (*People v Rogers, supra,* 48 N.Y.2d, at 173). In *Rogers,* the defendant had advised the police that he had an attorney, but that he was willing to speak to the police in the attorney's absence. After the attorney contacted the police and instructed them to cease questioning, the police asked no further questions about the robbery for which the defendant had been arrested, but continued to question him about unrelated activities. After six hours of interrogation, during which defendant was manacled to furniture, defendant made an inculpatory statement concerning the charge on which he had counsel. We held that, once an attorney had "entered the proceeding" *(id.,* at 169), the police could not elicit from the defendant any statements except those necessary for processing or his physical needs, nor could they seek a waiver of the right to counsel except in the presence of counsel (*see, People v Bing,* 76 N.Y.2d 331, 349, *rearg denied sub nom. People v Cawley,* 76 N.Y.2d 890).

The defendant's right to counsel in *Rogers* arose from the *Hobson* category of cases noted earlier. The existence of the attorney-client relationship was interposed as an assertion of the defendant's right not to incriminate himself. The defendant informed the police that he had an attorney, and his attorney directed the police to stop questioning his client.

It is significant to note that in *Bing* this Court specifically held that *Rogers "modified* the *Taylor* rule" (*People v Bing, supra,* 76 N.Y.2d, at 340 [emphasis added]). The Court recognized that the *Taylor* rule remained viable and that *Rogers* was directed at limiting the police "from exploiting custody on the crime on which Rogers had counsel." (*Id.,* at 340.) "Under such circumstances, the *Taylor* rule necessarily gave

way to insure *that questioning stopped* and `accidental' interference with the established lawyer-client relationship was avoided" (*People v Bing, supra,* 76 N.Y.2d, at 340 [emphasis added]).

Thereafter, in *People v Bartolomeo* (53 N.Y.2d 225), we extended the *Rogers* rule to hold that the mere pendency of one matter in which the right to counsel had attached prohibited the police from questioning a suspect about other matters, related or unrelated. We soon set about creating exceptions to *Bartolomeo,* and eventually overruled it in a trilogy of cases under the heading of *People v Bing* (*supra*).
Page 154

The Court emphasized in *Bing* that it was not retreating from the holding in *Rogers* (76 N.Y.2d, at 350). In *Bing,* we distinguished *Bartolomeo* (*supra*) from *Rogers* on the ground that the defendant in *Bartolomeo* had been taken into custody for questioning on a new, unrelated charge for which he was not represented. "Since the right to counsel is personal and may be waived by a defendant (*see, People v Davis,* [75 N.Y.2d 517]), the court had to create an indelible right, a right that defendant could not waive in the absence of counsel, to justify suppression of the voluntary statement. It did so by implying a derivative right" (*People v Bing, supra,* at 350).

The Court noted, however, that in *Rogers,* "the right to counsel *had been invoked* on the charges on which defendant was taken into custody and he and his counsel *clearly asserted* it" (76 N.Y.2d, at 350) (emphasis added). It seems clear to me that the majority in *Bing* viewed *Rogers* as a case involving a defendant's right to counsel in a self-incrimination context. Rogers had a lawyer and his lawyer told the police to stop questioning him. The police disregarded that relationship, exploited the custodial charge on which Rogers had counsel, and eventually obtained an incriminating statement on that charge. The foundation of Rogers' "right to counsel" as recognized by the majority in *Bing* was an actual attorney-client relationship that was invoked to prohibit an interrogation conducted without counsel present. *Rogers* did not involve a right to counsel arising from the commencement of formal proceedings — a *Di Biasi* category right (*see, People v West, supra,* 81 N.Y.2d, at 377 ["if at the time of questioning, the accused is not actually represented in the unrelated matter — for example, if the right to counsel had attached solely because of the commencement of formal proceedings — no *Rogers* right arises"]). If it had, then the *Rogers* right to counsel also would have been purely derivative and would have been swept away with *Bartolomeo* by *Bing.*

In two of the three *Bing* cases, the defendants had been taken into custody on charges for which those defendants had counsel and were then questioned on matters that appeared to be unrelated to the custodial charges. In *People v Bing,* the defendant, who was suspected of a New York burglary, was actually arrested on an Ohio arrest warrant arising out of a burglary in that State for which the defendant was represented by counsel (76 N.Y.2d, at 335). In *People v Cawley,* the defendant had been arrested on a bench warrant arising out of robbery charges for which he was represented at arraignment by counsel, and gave
Page 155
inculpatory statements about new, unrelated criminal conduct (76 N.Y.2d, at 336). If *Rogers* were read to mean what the majority now ascribes to it, then the Court in *Bing* would have been required to overrule *Rogers* also: Bing and Cawley did have counsel on the charges for which they were in custody (*see, People v Bing, supra,* 76 N.Y.2d, at 346, 358-359 [dissenting opn as to *People v Cawley*]).

The Court in *Bing* recognized this and further recognized that under *Bartolomeo* the derivative right to counsel had attached to the defendants indelibly. The Court in *Bing* had to resolve the scope of the protections afforded Cawley and Bing because of their existing attorney-client relationships on the charges for which they were in custody. The Court rejected the position now taken by the majority — that assignment of counsel at arraignment created a right to counsel within the scope of *Rogers*. "To afford him [Cawley] an indelible right to counsel on the new * * * charges based on the *superficial relationship* with a lawyer assigned to him for arraignment on the prior charges, presses reason to the limit" (*People v Bing, supra,* at 347 [emphasis added]). The "superficial" attorney-client relationship on the custodial charge did not preclude the police in *Bing* and *Cawley* from seeking valid waivers of their right to counsel prior to questioning on matters unrelated to the charges on which they were held. The majority in *Bing* clearly recognized that the attorney-client relationship at issue for Mr. Cawley was superficial because of its origin. If that were not so, *Rogers* would have applied.

Since *Bing,* we have reiterated that a defendant whose right to counsel has attached solely by virtue of the commencement of formal proceedings in one matter can be interrogated about other unrelated charges in which the suspect is not represented (*People v Ruff,* 81 N.Y.2d 330; *see also, People v West, supra,* 81 N.Y.2d, at 377-378). Nevertheless, with respect to the *Hobson* right to counsel, we held in *People v Steward* (88 N.Y.2d 496) that "*Rogers* establishes and still stands for the important protection and principle that once a defendant in custody on a particular matter is represented by or requests counsel, custodial interrogation about any subject, whether related or unrelated to the charge upon which representation is sought or obtained, must cease" (88 N.Y.2d, at 501).

This Court in *Steward* noted the distinction drawn between *Bing* and *Rogers.* In *Rogers* "`the right to counsel had been invoked on the *charges on which defendant was taken into custody and he and his counsel clearly asserted it'"* (*People v*

Page 156

Steward, supra, at 502 [emphasis in original], quoting *People v Bing,* 76 N.Y.2d 331, 350, *supra).* I agree with this analysis.

The underlying premise of *Rogers* was that when an individual is held on a charge for which he actually has a lawyer and his lawyer has expressly directed the police to cease questioning the defendant, it would be meaningless to allow the police to honor counsel's request only to the extent it covered areas that the police believed to be related to that charge.

"[I]t is the role of defendant's attorney, not the State, to determine whether a particular matter will or will not touch upon the extant charge. Once a defendant has an attorney as advocate of his rights, the attorney's function cannot be negated by the simple expedient of questioning in his absence." (*People v Rogers, supra,* at 173.)

The Court in *Steward,* however, permitted the questioning of the defendant even though an attorney had been assigned to him at his arraignment on misdemeanor charges unrelated to felonies to which he later confessed and the authorities were aware of that assignment. The Appellate Division premised its decision in *Steward* on the absence of an actual attorney-client relationship (217 A.D.2d 919). However, this Court focused on the fact that, although defendant did have counsel on the misdemeanors (for which he had not been held in custody), this did not create a derivative right to counsel on the unrelated felonies. I completely agree with this Court's analysis in *Steward* in this regard.

I part company with the present majority concerning the language in *Steward* that seems to imply that whenever someone is held in custody on a charge for which they "have counsel", that person cannot be interrogated about unrelated charges. To my mind, that goes beyond *Rogers* as later limited by *Bing* and our other cases in this area and is inconsistent with our holdings in *People v Kazmarick* (*supra*), and *People v West* (*supra*).

In this case, it is conceded by the People that counsel had been assigned on the probation violation and the rape charge, but it is impossible on this record to determine what, if anything, had happened on either matter other than initial arraignments (on the petition and the felony complaint) and assignment of counsel. In his motion to suppress, defendant alleged that while he "was in jail awaiting Grand Jury action" on the rape charge and the violation of probation and after

Page 157

"counsel had been appointed and appeared on each matter", he was impermissibly questioned without counsel present. Nothing more was alleged or proven with regard to the attorney-client relationship on either matter.

Defendant did indicate to one of the police officers the name of his attorney on the rape charge, but never invoked his right to speak to her, nor did his counsel instruct the police officers not to speak to defendant. Defendant was never questioned by either officer about the rape or the underlying incident involving the violation of probation. The hearing court found that the rape charge was wholly unrelated to the murder; no one contests that.[fn1]

The defendant bears the burden of establishing the existence of an attorney-client relationship (*see, People v Rosa,* 65 N.Y.2d 380, 387; *see also, People v West, supra,* 81 N.Y.2d, at 385 [dissenting opn]). On this record, I cannot agree that defendant was actually represented by counsel in a *Rogers* context. There is no question in this case that the police made no attempt to exploit the custodial charges in derogation of defendant's right to counsel (*see, People v Ermo,* 47 N.Y.2d 863, *supra; see also, People v Cohen,* 90 N.Y.2d 632 [decided today]). There is no question in this case that defendant did not invoke his right to counsel in a Fifth Amendment context. Contrary to the majority's conclusion, the record fails to establish anything more than a "superficial relationship with a lawyer assigned to [Burdo] for arraignment on the prior charges" (*People v Bing, supra,* at 347). The majority diminishes the Court's precedents in this area and confuses one's right to counsel in a specific proceeding with an actual existing attorney-client relationship which serves as the basis for the broader protections offered defendants under New York law by *People v Rogers* in this area.

II.

I believe that the Bench and Bar will continue to struggle with this Court's prior holdings in this area until we bring into better focus the underlying difference between the right to counsel under the Sixth Amendment and the right to counsel associated with the Fifth Amendment privilege against self-incrimination

Page 158

and the State constitutional corollaries (NY Const, art I, § 6).

In some respects, our holdings do reflect the difference between the two rights. In cases such as *Rogers,* for example, when a defendant or counsel has invoked the right to counsel during a custodial interrogation

on one matter, we have correctly held that this right (which is based on the Fifth Amendment privilege against self-incrimination) precludes police from questioning the defendant on unrelated matters. Similarly, as in *Ruff* and *Kazmarick,* when the right to counsel has arisen solely by virtue of the commencement of formal proceedings in one matter (that is, under the Sixth Amendment), we have implicitly recognized that this right is "offense-specific", and have held that police are not precluded from questioning the suspect about unrelated matters.

I do not mean to suggest that either the right to counsel or the privilege against self-incrimination set forth in New York Constitution, article I, § 6 must be limited to the same scope as that of the Sixth and Fifth Amendments to the United States Constitution. As noted earlier, we have provided greater protection under the New York Constitution in both contexts. But we have also recognized in the context of the right to counsel at a lineup that the scope of the right to counsel differs depending upon whether the source of that right is the Fifth or the Sixth Amendment (*see, People v Wilson,* 89 N.Y.2d 754, 758; *People v Hawkins,* 55 N.Y.2d 474, 482-483, *cert denied* 459 U.S. 846). Someday, perhaps we will recognize that the right to counsel at a custodial interrogation is similarly dependent upon whether the source of that right is an offense-specific right to counsel or a more encompassing privilege against self-incrimination.

New York has a rich tradition of ensuring that an individual can be shielded from "the awesome and sometimes coercive force of the State" (*People v Rogers,* 48 N.Y.2d 167, 173, *supra).* I am not unmindful of that tradition and its validity. I am also aware of the importance of stare decisis to the legitimacy and stability of this Court (*see, People v Bing, supra,* 76 N.Y.2d, at 337-338; *see also, People v Hobson, supra,* 39 N.Y.2d, at 487-491). However, I am deeply concerned about a decision that recognizes that a police officer can question an individual who has been assigned an attorney on one matter, is released, and then taken into custody on another unrelated matter, but a police officer cannot question another individual whose right to counsel appears to have attached by the same process, but who

Page 159

happens to have remained in jail on the original charge. Both are subjected to the "awesome and sometimes coercive force of the State" yet only one gets the benefit of the attorney-client relationship in mitigating that force.

III.

The Supreme Court has distinguished between the right to counsel that arises under the Sixth Amendment and the privilege against self-incrimination, with its attendant right to counsel, that arises under the Fifth Amendment. The purpose of the Sixth Amendment right to counsel is to protect uncounseled individuals at critical confrontations with government, after their adverse positions have solidified with respect to a particular alleged crime (*United States v Gouveia,* 467 U.S. 180, 189). Once this right has attached or been invoked, it cannot be waived during a police-initiated interview in the absence of counsel (*Michigan v Jackson,* 475 U.S. 625, 636). But this right is offense-specific: statements regarding other unrelated crimes as to which the Sixth Amendment right has not yet attached remain admissible (*Maine v Moulton,* 474 U.S. 159, 180, n 16).

By comparison, the right to counsel associated with the Fifth Amendment privilege against self-incrimination is designed to protect suspects who "desire to deal with the police only through counsel" (*Edwards v Arizona,* 451 U.S. 477, 484). Once the right is asserted, the suspect cannot be approached during custody for further interrogation in the absence of counsel (*Edwards v Arizona, supra,* 451 US, at

484-485; *Minnick v Mississippi,* 498 U.S. 146, 150). This right is *not* offense-specific: once it is invoked with respect to one offense, the suspect cannot be approached without counsel regarding any offense, related or unrelated (*Arizona v Roberson,* 486 U.S. 675).

The Supreme Court has been careful not to conflate the two rights. In *McNeil v Wisconsin* (501 U.S. 171), the Court held that the invocation of the Sixth Amendment right to counsel at an arraignment would include the protection of counsel for a custodial interrogation that was part of the same prosecution, but it did not constitute the invocation of the Fifth Amendment right to the protection of counsel for a custodial interrogation on unrelated charges.[fn2] This line of analysis avoids the danger of erecting a functional derivative right to counsel that we expressly rejected in *Bing.*

Page 160

IV.

Applying New York constitutional analysis, because defendant failed to establish an actual attorney-client relationship or an invocation of his right to counsel concerning the murder charge in this case, and because the police carefully respected defendant's right to counsel on the unrelated rape and probation violation charges (*cf., People v Cohen,* 90 N.Y.2d 632, *supra* [decided today]; *People v Rogers, supra; People v Ermo, supra*), I would reverse, deny the motion to suppress, and remit the matter to Clinton County Court for further proceedings on the indictment.

Chief Judge KAYE and Judges TITONE, BELLACOSA, LEVINE and CIPARICK concur with Judge SMITH; Judge WESLEY dissents and votes to reverse in a separate opinion.

Order affirmed.

[fn1] I also take no exception to the majority's determination that defendant was "in custody". Nevertheless, he was not manacled to a chair for a long time like the defendant in *Rogers.* Indeed, on one occasion, he got up and left the jail library without interference from the officers.

[fn2] The Supreme Judicial Court of Massachusetts and most other State courts have chosen to follow the rule that the Sixth Amendment right to counsel is offense-specific (*Commonwealth v Rainwater,* 425 Mass. 540, 681 N.E.2d 1218).

Page 161

New York Court of Appeals
Reports

PEOPLE v. ERMO, 47 N.Y.2d 863 (1979)

392 N.E.2d 1248, 419 N.Y.S.2d 65

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. WILLIAM ERMO, Respondent.

Court of Appeals of the State of New York.

Argued May 3, 1979

Decided June 12, 1979

Appeal from the Appellate Division of the Supreme Court in the Second Judicial Department, RAYMOND E. ALDRICH, JR., J.

Page 864

John R. King, District Attorney (Bridget R. Rahilly of counsel), for appellant.

Samuel Collins, Public Defender (Marshall L. Brenner of counsel), for respondent.

MEMORANDUM.

The order of the Appellate Division should be affirmed.

Defendant was interrogated with respect to two sex offenses committed some seven months apart, a homicide on August 3, 1971 of which he was convicted, and an assault on March 13, 1972. The interrogation was conducted on three separate days, March 14, 15 and 22, 1972, by the same team of police officers. On March 14 and again, but to a lesser extent, on March 15 and 22 questions with respect to the two offenses were interwoven, and on March 22 numerous references were made to the earlier questionings. As the police were aware, the Public Defender was assigned to represent defendant with respect to the March 13 assault prior to the continued interrogation on March 15. The Appellate Division reversed County Court and suppressed the statements made on March 15 and 22 after assignment of counsel and ordered a new trial.

Page 865

On this record the Appellate Division (61 A.D.2d 177, 182) was correct in evaluating the police interrogation as an integrated whole, in which the impermissible questioning as to the assault was not discrete or fairly separable, and in concluding that "the assault charge was used by the same team of law enforcement officials as a crucial element in the securing of defendant's confessions of March 15 and March 22, 1972 to the felony murder". As the dissenter states, had defendant been interrogated with

respect to the homicide alone, it would have been error to have suppressed his statements on the ground that he had an attorney who was not present; defendant's representation by that attorney was with respect to the different and unrelated assault charge. Examination of the transcripts of the three days of defendant's interrogation in this case, however, discloses that the police exploited concededly impermissible questioning as to the assault for the purpose and with the effect of advancing their interrogation on the homicide charge. It was on that basis that the court held that any purported waiver of defendant's right to counsel during the questioning of March 15 and March 22, 1972 was ineffective in the absence of the previously assigned Public Defender and accordingly suppressed the statements made on those dates. *(People v Hobson,* 39 N.Y.2d 479; cf. *People v Carl,* 46 N.Y.2d 806.) We do not in any way depart from our holdings in the cases cited by the dissenter, in none of which was there the element of exploitation, the critical factor on which our affirmance depends in this case.

We note additionally that, although it may be said that defendant failed to preserve the error on which the reversal of his conviction is based, the failure to raise his contention does not foreclose our reaching the issue *(People v Arthur,* 22 N.Y.2d 325, 329).

JASEN, J. (concurring).

I concur in the result reached by the majority.

Were it not for the disposition at the Appellate Division, the error with respect to denial of the right to counsel would not have been preserved for our review. *(People v Tutt,* 38 N.Y.2d 1011.) It is only because the Appellate Division had jurisdiction to consider the contention, even though the error was not raised at the suppression hearing, and because the Appellate Division predicated its reversal on this error, that defendant may urge the correctness of the Appellate Division's determination

Page 866

of the question of law involved in support of an affirmance.

GABRIELLI, J. (dissenting).

By a bare majority, the Appellate Division has overturned defendant's murder conviction. I dissent from an affirmance of the order below and vote to sustain the conviction. Because we are here concerned with pure questions of law, it is unnecessary to detail the events leading to the homicide, to which defendant confessed. The sole issue presented is whether his questioning was proper in all the circumstances. No issue is created and there is no question concerning the proper giving of the *Miranda* warnings and rights.

When the defendant William Ermo was first accused of assaulting a young schoolgirl on March 13, 1972 no one suspected that he was involved in the murder of another girl, Ursula Shiba, some seven months before. Indeed there was no relationship between the assault and the homicide to cause any suspicion. The victims were unrelated, the crimes were months apart, the methods of committing them were very different, and, indeed, only the proximity of the defendant's address to that of the homicide victim caused the police to even question him about the murder. Nevertheless, the majority relies on the fact that "questions with respect to the two offenses were [so] interwoven" as to invalidate the defendant's waiver of counsel on the homicide charge and suppress the confession.

This flies in the face of the rule that this court has consistently followed since we first recognized the so-called *Donovan-Arthur* rule (see *People v Donovan,* 13 N.Y.2d 148; *People v Arthur,* 22 N.Y.2d 325). We have, until today, always held that a defendant may waive counsel without having an attorney present although he is represented by counsel on an entirely unrelated pending charge (see, e.g., *People v Stanley,* 15 N.Y.2d 30; *People v Simons,* 22 N.Y.2d 533; *People v Hetherington,* 27 N.Y.2d 242; *People v Taylor,* 27 N.Y.2d 327; *People v Clark,* 41 N.Y.2d 612; *People v Coleman,* 43 N.Y.2d 222).

As we said in the earlier cases, "the mere fact that the defendant has been arraigned or indicted on one charge does not prevent law-enforcement officials from interrogating him, in the absence of an attorney, about another and different crime — upon which he has been neither arraigned nor indicted — or render inadmissible a confession or other inculpatory statement obtained as a result of such questioning. * * *
Page 867
The reason is clear. With regard to the second crime about which the defendant is questioned, there has not yet been `the formal commencement of the criminal action' against him" *(People v Simons, supra,* p 539; *People v Stanley, supra,* pp 32-33). The rule was continued and refined in *People v Taylor (supra).* There a unanimous court stated that the rule precluding a defendant from waiving his right to have an attorney present in the absence of that attorney "does not obtain unless and until the police or prosecutor learn that an attorney has been secured to assist the accused *in defending against the specific charges for which he is held*" (27 N.Y.2d 327, 332, *supra;* emphasis in original). Where, as here, the charge on which a defendant is being questioned differs from the charge for which he has an attorney there is no legal impediment to questioning him on the former charge even in the absence of an attorney.

This does not mean that the police may accuse someone of a crime as a mere "sham" or a pretext for holding the defendant in connection with the investigation of another crime *(People v Taylor,* 27 N.Y.2d 327, 331, *supra;* see, also, *People v Vella,* 21 N.Y.2d 249). Such a simple ruse to avoid the rules concerning waiver would make the protection of cases such as *People v Arthur* (22 N.Y.2d 325, *supra)* and *People v Hobson* (39 N.Y.2d 479) useless. But in the absence of such conduct the questioning is permitted so long as the proceeding in which the defendant is represented by counsel is unrelated to the charge on which he is being questioned *(People v Coleman,* 43 N.Y.2d 222, 226, *supra).*

This is not to say that every slight relationship between the two crimes requires suppression. For example, in *People v Taylor (supra),* the defendants were incarcerated on a robbery charge when, due to the similarity of that crime to an unsolved robbery-murder, the police questioned one of the defendants, who subsequently confessed. Although undeniably the crimes were similar, and in fact were so similar that the *modus operandi* of one led to the solution of the other, the crimes were not related in the sense that would require suppression.

Nor are the crimes involved here more closely related than those in *Taylor.* In fact, Detective Chickering, who first questioned the defendant about the murder, stated that he did so because of the proximity of the defendant's address to that of the murder victim. Even if, as hypothesized by the Appellate
Page 868
Division, the sexual nature of the assault led the police to suspect that the defendant was involved in the murder, that would be the sole link between the two crimes, and, as in *People v Taylor (supra)* the mere fact that the crimes were similarly committed would not render the confessions inadmissible.

There is, of course, another situation where the police are not permitted to interrogate a suspect absent his lawyer's presence. This occurs when the suspect's attorney has communicated to the police that he will not permit them to interrogate his client (see *People v Carl,* 46 N.Y.2d 806; *People v Ramos,* 40 N.Y.2d 610). Obviously, in that situation it makes no difference that the crimes are unrelated, because once a lawyer has informed the police that they are not to interrogate his client he is entitled to have those wishes respected (see *People v Byrne,* 47 N.Y.2d 117). But since there is no evidence or any indication whatsoever that the defendant's lawyer communicated with the police in any such manner, those cases are inapplicable as well.

Thus, in the final analysis the result reached by the majority is not in accord with any of the prior cases dealing with this area of the law. It apparently establishes a new standard, whereby the determinative factor becomes whether the questions regarding two crimes are "interwoven", and not whether the *crimes* themselves are related. No explanation is given for this change, and the cases do not support it.

This court in an unanimous opinion stated with unmistakable clarity in *People v Clark* (41 N.Y.2d 612, 615, *supra)* that: "Representation by counsel in a proceeding unrelated to the investigation is insufficient to invoke" the rule that a person may not be interrogated after a lawyer has entered another proceeding in which he is represented by counsel; and I find it impossible to accept the rationalization of the majority that the case of *People v Coleman* (43 N.Y.2d 222, 224, *supra)* stands as authority for their position. There, after being brought from prison where he was being held on "an unrelated charge", Coleman was subjected to a lineup. This court framed the issue presented as follows: "We are asked to pass on the question of whether a defendant, incarcerated pending trial on a charge for which he was represented by counsel, may waive, in the absence of an attorney, his right to counsel at a lineup, held in an unrelated investigation, in which his presence was secured pursuant to a court order of removal". This court
Page 869
resolved that issue by stating that: "Today we reach this question and decide that the right to counsel may be waived notwithstanding the absence of counsel whom a defendant had retained with respect to a wholly unrelated charge" (p 226).

By their holding today, the majority, with one fell swoop, is disavowing and overruling well-established precedents which have been founded on logic, law, reason and justice. Those, to name but a few which have formed the bulwark of *stare decisis* in this sensitive area of law, are: *People v Stanley* (15 N.Y.2d 30 [Nov. 25, 1964], *supra); People v Simons* (22 N.Y.2d 533 [July 2, 1968], *supra); People v Hetherington* (27 N.Y.2d 243 [Nov. 18, 1970], *supra); People v Taylor* (27 N.Y.2d 327 [Jan. 6, 1971], *supra); People v Clark* (41 N.Y.2d 612 [April 7, 1977], *supra);* and *People v Coleman* (43 N.Y.2d 222 [Nov. 22, 1977], *supra).*

For all these reasons, I respectfully dissent and vote to reverse.

Chief Judge COOKE and Judges JONES, WACHTLER and FUCHSBERG concur; Judge JASEN concurs in result in a separate memorandum; Judge GABRIELLI dissents and votes to reverse in another opinion.

Order affirmed in a memorandum.

New York Court of Appeals
Reports

PEOPLE v. HOBSON, 39 N.Y.2d 479 (1976)

384 N.Y.S.2d 419, 348 N.E.2d 894

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. HENRY CORNELIUS HOBSON,

Appellant.

Court of Appeals of the State of New York.

Argued February 20, 1976

Decided May 4, 1976

Page 480

Appeal from the Appellate Division of the Supreme Court in the Second Judicial Department, ERNEST L. SIGNORELLI, J.

Gerald J. Callahan, John F. Middlemiss, Jr., and *Leon J. Kesner* for appellant.

Page 481

Henry F. O'Brien, District Attorney (Charles M. Newell of counsel), for respondent.

Chief Judge BREITEL.

Defendant, following denial of a motion to suppress his incriminating statements, was convicted, after a guilty plea, of third degree robbery (Penal Law, § 160.05). He was sentenced to seven years' imprisonment. His conviction was affirmed, and he appeals.

The issue is whether a defendant in custody, represented by a lawyer in connection with criminal charges under investigation, may validly, in the absence of the lawyer, waive his right to counsel.

There should be a reversal. Once a lawyer has entered a criminal proceeding representing a defendant in connection with criminal charges under investigation, the defendant in custody may not waive his right to counsel in the absence of the lawyer *(People v Arthur,* 22 N.Y.2d 325, 329). Any statements elicited by an agent of the State, however subtly, after a purported "waiver" obtained without the presence or assistance of counsel, are inadmissible. Since the purported "waiver" of defendant's right to counsel was obtained in the absence of his lawyer, who had represented him at a just-completed lineup in connection

with the criminal charges, his
Page 482
statements were inadmissible and should have been suppressed.

The facts are undisputed. On February 7, 1973, at approximately 8:30 P.M., defendant entered a delicatessen in Central Islip in Suffolk County. After asking for directions from the owner, George Gundlach, defendant drew a gun and demanded all the cash in the register. After he had received the cash and a number of packages of cigarettes, defendant left.

When the police arrived shortly thereafter, Mr. Gundlach described the robber to Suffolk County Detective Dolan. He then accompanied the detective to the police station, where he eventually identified photographs of defendant as those of the culprit. Mr. Gundlach did state, however, that to be positive he would have to see defendant in person.

Nine months later, on September 26, 1973, defendant was being held in the Suffolk County Jail on charges unrelated to the delicatessen robbery. He was not under arrest for the robbery at that time, although he was a photograph-identified suspect. Defendant was placed in a five-man lineup. Because defendant had requested counsel, Samuel McElroy, a Legal Aid lawyer, was assigned and present to represent him. Mr. Gundlach identified defendant as the robber. Mr. McElroy then left.

After Mr. McElroy left, a Sheriff's deputy asked Detective Dolan if he desired to speak to defendant. Despite his admitted knowledge that defendant was now represented by counsel on the robbery charge, Dolan replied that he would. The detective had not told Mr. McElroy that he was going to speak to defendant, nor did he make any effort to reach counsel before seeing defendant. At the deputy's request, defendant signed an undescribed form of "waiver" (which Dolan testified he had never seen) and agreed to speak to Dolan. Defendant was then brought to an "interview" room in the jailhouse.

Detective Dolan read to defendant the standard preinterrogation warnings and asked him if he understood. Defendant said that he did. The detective then asked defendant "Do you wish to contact a lawyer?" Defendant shook his head, indicating "No". The detective then asked "Having these rights in mind, do you wish to talk to me now without a lawyer?" Defendant replied "Yes".

Defendant then inquired of Dolan whether he had been identified by Mr. Gundlach, and the detective told him that he
Page 483
had. Expressing a desire to "clear up everything", defendant in effect confessed to the robbery.

In *People v Arthur* (22 N.Y.2d 325, 329, *supra),* the court held: "Once an attorney enters the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney, of the defendant's right to counsel *(People v. Vella,* 21 N.Y.2d 249). There is no requirement that the attorney or the defendant request the police to respect this right of the defendant." The rule of the *Arthur* case has been restated many times (see *People v Hetherington,* 27 N.Y.2d 242, 244-245; *People v Paulin,* 25 N.Y.2d 445, 450; *People v McKie,* 25 N.Y.2d 19, 26; *People v Miles,* 23 N.Y.2d 527, 542, cert den 395 U.S. 948; cf. *People v Stephen J.B.,* 23 N.Y.2d 611, 616).

This unequivocal and reiterated statement of the law in this State is no mere "dogmatic claim" or "theoretical statement of the rule" (see, contra, *People v Robles,* 27 N.Y.2d 155, 158, cert den 401 U.S. 945, thus characterizing the rule). It is, instead, a rule grounded in this State's constitutional and statutory guarantees of the privilege against self incrimination, the right to the assistance of counsel, and due process of law (see *People v Arthur,* 22 N.Y.2d 325, 328, *supra; People v Failla,* 14 N.Y.2d 178, 180; *People v Donovan,* 13 N.Y.2d 148, 151; Richardson, Evidence [10th ed], § 545, at p 546). Indeed, the rule resisted narrow classification of defendants entitled to its protection; it is applicable to a defendant when taken into custody, whether as an "accused", a "suspect", or a "witness" (cf. *People v Sanchez,* 15 N.Y.2d 387, 389).

Of course, as with all verbalizations of constitutional principles, the rule of the *Arthur* case *(supra)* is not an absolute. Thus, the fact that a defendant is represented by counsel in a proceeding unrelated to the charges under investigation is not sufficient to invoke the rule (see *People v Hetherington,* 27 N.Y.2d 242, 245, *supra; People v Taylor,* 27 N.Y.2d 327, 331-332). The rule applies only to a defendant who is in custody; it does not apply to noncustodial interrogation *(People v McKie,* 25 N.Y.2d 19, 28, *supra).* Moreover, the rule of the *Arthur* case *(supra)* does not render inadmissible a defendant's spontaneously volunteered statement *(People v Kaye,* 25 N.Y.2d 139, 144; cf. *People v Robles,* 27 N.Y.2d 155, 159, cert den 401 U.S. 945, *supra).*

The *Donovan* and *Arthur* cases *(supra)* extended constitutional protections of a defendant under the State Constitution

Page 484

beyond those afforded by the Federal Constitution (compare *People v Arthur,* 22 N.Y.2d 325, 329, *supra;* and *People v Donovan,* 13 N.Y.2d 148, 151, *supra;* with *Miranda v Arizona,* 384 U.S. 436, 475; and *Escobedo v Illinois,* 378 U.S. 478, 486-487; see Richardson, Evidence [10th ed], *op. cit.,* at pp 548-549; but cf., e.g., *Massiah v United States,* 377 U.S. 201, 205-206; *United States v Thomas,* 474 F.2d 110, 112, cert den 412 U.S. 932; *United States ex rel. Lopez v Zelker,* 344 F. Supp. 1050, 1054, affd 465 F.2d 1405, cert den 409 U.S. 1049, dealing with the right to counsel after the commencement of adversary judicial proceedings).

Notwithstanding that warnings alone might suffice to protect the privilege against self incrimination, the presence of counsel is a more effective safeguard against an involuntary waiver of counsel than a mere written or oral warning in the absence of counsel (see *United States v Massimo,* 432 F.2d 324, 327 [FRIENDLY, J., dissenting], cert den 400 U.S. 1022; compare ALI, Model Code of Pre-Arraignment Procedure [Tent Draft No. 6, 1974], § 140.8, subd [2]; *Miranda v Arizona,* 384 U.S. 436, 475, *supra).* The rule that once a lawyer has entered the proceedings in connection with the charges under investigation, a person in custody may validly waive the assistance of counsel only in the presence of a lawyer breathes life into the requirement that a waiver of a constitutional right must be competent, intelligent and voluntary (see *People v Witenski,* 15 N.Y.2d 392, 395; *Matter of Bojinoff v People,* 299 N.Y. 145, 151-152; *Johnson v Zerbst,* 304 U.S. 458, 464). Indeed, it may be said that a right too easily waived is no right at all.

Moreover, an attempt to secure a waiver of the right of counsel in a criminal proceeding in the absence of a lawyer, already retained or assigned, would constitute a breach of professional ethics, as it would be in the least-consequential civil matter (see ABA Code of Professional Responsibility, DR7-104, subd [A], par [1]; *People v Robles,* 27 N.Y.2d 155, 162 [FULD, Ch. J., dissenting], cert den 401 U.S. 945, *supra;*

United States v Thomas, 474 F.2d 110, 111-112, cert den 412 U.S. 932, *supra; United States v Springer,* 460 F.2d 1344, 1355 [STEVENS, J., dissenting], cert den 409 U.S. 873; *United States v Durham,* 475 F.2d 208, 211 [SWYGERT, Ch. J.]; *Coughlan v United States,* 391 F.2d 371, 376 [HAMLEY, J., dissenting], cert den 393 U.S. 870; Drinker, Legal Ethics, p 202; Broeder, *Wong Sun v United States:* A Study in Faith and Hope, 42 Neb L Rev 483, 601; cf. *People v Lopez,* 28 N.Y.2d 23, 29 [dissenting opn], cert

Page 485

den 404 U.S. 840). Since the Code of Professional Responsibility is applicable, it would be grossly incongruous for the courts to blink its violation in a criminal matter.

Of course, it would not be rational, logical, moral, or realistic to make any distinction between a lawyer acting for the State who violates the ethic directly and one who indirectly uses the admissions improperly obtained by a police officer, who is the badged and uniformed representative of the State. To do so would be, in the most offensive way, to permit that to be done indirectly what is not permitted directly. Indeed, in each of the cases cited above the rejected "waiver" was secured by investigators and not by lawyers.

Moreover, the principle is not so much, important as that is, to preserve the civilized decencies, but to protect the individual, often ignorant and uneducated, and always in fear, when faced with the coercive police power of the State. The right to the continued advice of a lawyer, already retained or assigned, is his real protection against an abuse of power by the organized State. It is more important than the preinterrogation warnings given to defendants in custody. These warnings often provide only a feeble opportunity to obtain a lawyer, because the suspect or accused is required to determine his need, unadvised by anyone who has his interests at heart. The danger is not only the risk of unwise waivers of the privilege against self incrimination and of the right to counsel, but the more significant risk of inaccurate, sometimes false, and inevitably incomplete descriptions of the events described. Surely, the need for and right to a lawyer at an identification lineup is insignificant compared to the need in an ensuing interrogation. If Dick the Butcher said, "The first thing we do, let's kill all the lawyers", the more zealous policeman in the station or jailhouse may well say, "The first thing we do, let's get rid of all the lawyers" (Shakespeare, Henry VI, pt II, act IV, sc ii).

The rule to be applied in this case would be evident, unquestionably evident, on the basis of what has been discussed thus far, but for one significant circumstance. Between September, 1970 and September, 1972 three cases were decided in this court which departed from the evident rule. The reasons for the departure were never made explicit, but nice distinctions were used, if the fact of departure was mentioned at all. On the other hand, the line of cases out of which the *Arthur* case *(supra)* arose, as well as the *Arthur* case itself, was an elaborated legal development, consciously evolved as

Page 486

such, stretching back at least to 1960 (see *People v Di Biasi,* 7 N.Y.2d 544; and *People v Spano,* 4 N.Y.2d 256, 264-267 [DESMOND J., dissenting], revd 360 U.S. 315). It was not a string of happenstances (see *People v Lopez,* 28 N.Y.2d 23, 26-28 [dissenting opn], cert den 404 U.S. 840, *supra,* for a detailed analysis of the development of the right to counsel in this State; but see, in contrast, *People v Robles,* 27 N.Y.2d 155, 158-160, cert den 401 U.S. 945, *supra).* The three cases were *People v Robles (supra); People v Lopez* (28 N.Y.2d 23, cert den 404 U.S. 840, *supra),* and *People v Wooden* (31 N.Y.2d 753). The *Wooden* case simply relied on the *Lopez* case, without opinion, three Judges concurring on constraint of the *Lopez* case. The *Robles* case involved an egregiously brutal and unnatural double murder. The *Lopez*

case also involved a murder. That is perhaps the best that one can speculate about what moved the court, reminiscent of the adage about the influence of "hard cases".

In the *Robles* case (p 158), the *Arthur* rule was discussed as "merely a theoretical statement" and it was said that "this dogmatic claim is not the New York law" citing *People v Kaye* (25 N.Y.2d 139, *supra)* and *People v McKie* (25 N.Y.2d 19, *supra),* cases which applied as exceptions to the right to counsel doctrine spontaneous statements and noncustodial interrogation. There was further discussion of cases quite beside the issue, turning on coercion, trickery, and the like, as conditions which would require exclusion of interrogations of uncounseled defendants.

Actually the stability of these odd cases has already been undermined, albeit collaterally. The hapless Lopez, defeated in the State courts, went to the Federal courts. There the District Court in an extensive opinion by Judge MARVIN FRANKEL granted habeas corpus relief, adopting the reasoning of the dissenters in the State court as a statement of Federal constitutional principles *(United States ex rel. Lopez v Zelker,* 344 F. Supp. 1050, 1054, *supra).* The Court of Appeals for the Second Circuit affirmed unanimously from the Bench, without opinion (465 F.2d 1405, cert den 409 U.S. 1049). (See, also, *People v Santos,* 85 Misc.2d 602, 608 [NYLJ, March 24, 1976, at p 8, col 6], declining to follow the *Lopez* case, *supra.)* As for the *Robles* case *(supra),* the Richardson treatise is unsure of its effect on the *Arthur* line of cases (Richardson, Evidence [10th ed], *op. cit.,* at pp 547-548, listing five unanswered questions). Nor were the distinguished Justices in the Appellate Division for the Fourth Department able to agree (see *People v Pellicano,*
Page 487
40 A.D.2d 169 [opn by Mr. Justice DEL VECCHIO and dissenting opn by Mr. Justice CARDAMONE]).

The problem this departure from a deliberately elaborated line of cases raises is: What is required of a stable court in applying the eminently desirable and essential doctrine of *stare decisis.* Which is the *stare decisis:* The odd cases or the line of development never fully criticized or rejected?

FRANKFURTER, a stalwart for stability and systemic values in a jurisprudence, and no evanescent impulsive innovator, answered the question rather succinctly. In *Helvering v Hallock* (309 U.S. 106, 119) he said: "We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."

The *Di Biasi-Arthur* line of cases, stretching over almost two decades, represents "a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience". The three odd cases of uncertain root, present recency in time, but surely are in collision with the "prior doctrine", and in each instance decided by the closest possible margin in the court. They do not merit application of "a mechanical formula of adherence", just because of their recency.

Stare decisis, if it is to be more than shibboleth, requires more subtle analysis. Indeed, the true doctrine by its own vitality should not, perversely, give to its violation strength and stability. That would be like the parricide receiving mercy because he is an orphan. The odd cases rode roughshod over *stare decisis*

and now would be accorded *stare decisis* as their legitimate right, whether or not they express sound, good, or acceptable doctrine.

There are many thinkers in the law whose comments on *stare decisis* bear directly on the problem in this case. Invariably, the concern is with the exercise of restraint in overturning established well-developed doctrine and, on the other hand, the justifiable rejection of archaic and obsolete doctrine which has lost its touch with reality (see, e.g., *Heyert v Orange & Rockland Utilities,* 17 N.Y.2d 352, 360-361 [VAN VOORHIS, J.], and cases and materials cited). But one comment

Page 488

by Mr. Justice VON MOSCHZISKER, as long ago as 1924, is especially useful. He said: "From the very nature of law and its function in society, the elements of certainty, stability, equality, and knowability are necessary to its success, but reason and the power to advance justice must always be its chief essentials; and the principal cause for standing by precedent is not to be found in the inherent probable virtue of a judicial decision, it `is to be drawn from a consideration of the nature and object of law itself, considered as a system or a science'." (Von Moschzisker, Stare Decisis in Courts of Last Resort, 37 Harv L Rev 409, 414.)

The nub of the matter is that *stare decisis* does not spring full-grown from a "precedent" but from precedents which reflect principle and doctrine rationally evolved. Of course, it would be foolhardy not to recognize that there is potential for jurisprudential scandal in a court which decides one way one day and another way the next; but it is just as scandalous to treat every errant footprint barely hardened overnight as an inescapable mold for future travel.

While this case involves a narrow issue of the right to counsel in a criminal matter, it necessarily turns on what appears to be binding precedent, and hence, the doctrine of *stare decisis.* It is not sufficient to limit the discussion of the doctrine to its application to this case. There is the danger, otherwise, of a misunderstanding of the doctrine's role in the larger perspective in which this case is but an isolated instance. Indeed, this case is another example in which a treatment of the particular requires treatment of the universal under which it falls.

Distinctions in the application and withholding of *stare decisis* require a nice delicacy and judicial self-restraint. At the root of the techniques must be a humbling assumption, often true, that no particular court as it is then constituted possesses a wisdom surpassing that of its predecessors. Without this assumption there is jurisprudential anarchy. There are standards for the application or withholding of *stare decisis,* the ignoring of which may produce just that anarchy.

For one, in this case the court deals with constitutional limitations contained in the Bill of Rights. Legislative correction is confined. Although the limitations are designed to protect the individual against the encroachments of a transitory majority, the principle is well established that in cases interpreting the Constitution courts will, nevertheless, if convinced

Page 489

of prior error, correct the error (see, e.g., *Glidden Co. v Zdanok,* 370 U.S. 530, 543; *Smith v Allwright,* 321 U.S. 649, 665-666; *Burnet v Coronado Oil & Gas Co.,* 285 U.S. 393, 406-407 [BRANDEIS, J., dissenting]; Von Moschzisker, 37 Harv L Rev 407, 420-421). But the conviction of error must be imperative.

Tort cases, but especially personal injury cases, offer another example where courts will, if necessary, more readily reexamine established precedent to achieve the ends of justice in a more modern context (see, e.g., *Victorson v Bock Laundry Mach. Co.,* 37 N.Y.2d 395; *Goldberg v Kollsman Instrument Corp.,* 12 N.Y.2d 432; *Bing v Thunig,* 2 N.Y.2d 656; *Woods v Lancet,* 303 N.Y. 349). Significantly, in these cases the line of precedent, although well established, was found to be analytically unacceptable, and, more important, out of step with the times and the reasonable expectations of members of society.

Always critical to justifying adherence to precedent is the requirement that those who engage in transactions based on the prevailing law be able to rely on its stability. This is especially true in cases involving property rights, contractual rights, and property dispositions, whether by grant or testament (see, e.g., *United States v Title Ins. Co.,* 265 U.S. 472, 486-487; *Heyert v Orange & Rockland Utilities,* 17 N.Y.2d 352, 360, 362-363, *supra* [property rights]; *United States v Flannery,* 268 U.S. 98, 105 [commercial transactions]; *Matter of Eckart,* 39 N.Y.2d 493, decided herewith; Douglas, Stare Decisis, 49 Col L Rev 735-736 [wills]; cf. *Endresz v Friedberg,* 24 N.Y.2d 478, 488-489 [wrongful death action under EPTL 5-4.1]; *Matter of Brown,* 362 Mich. 47, 52 [statute pertaining to the descent and distribution of property]). The absence of such factors, on the other hand, makes easier the reassessment of aberrational departures from precedents and accepted principles.

Precedents involving statutory interpretation are entitled to great stability *(Matter of Schinasi,* 277 N.Y. 252, 265-266; see 20 Am Jur 2d, Courts, § 198). After all, in such cases courts are interpreting legislative intention and a sequential contradiction is a grossly aggrogated legislative power. Moreover, if the precedent or precedents have "misinterpreted" the legislative intention, the Legislature's competency to correct the "misinterpretation" is readily at hand. (See, e.g., *People v Butts,* 32 N.Y.2d 946, 947; *People v Cicale,* 35 N.Y.2d 661, 662, concurred in on constraint and decided on authority of *People v Carter,* 31 N.Y.2d 964.)

There is a more rarely recognized principle, a sort of exception

Page 490

to the general rule about the interpretation of statutes by courts. There are statutes drawn in such general terms that it is evident that the legislative intention is that the courts, by their interpretation, indeed construction, fill in, by a case-by-case approach, the skeletal outlines. Those are statutes which apply general and therefore flexible standards. The classic example is that of the antitrust statutes, Federal and State, which apply "rules of reason". In such cases the degree of flexibility in handling statutory precedents is that much the greater, but still not unlimited. (See Breitel, The Lawmakers, 65 Col L Rev 749, 761.)

There are obviously other principles that do not now come to mind but most likely would share the rationale of those already discussed. Throughout, however, a precedent is less binding if it is little more than an ipse dixit, a conclusory assertion of result, perhaps supported by no more than generalized platitudes. On the contrary, a precedent is entitled to initial respect, however wrong it may seem to the present viewer, if it is the result of a reasoned and painstaking analysis. Indeed, that constitutes one of the bases for treating the *Robles* and *Lopez* cases as overruled in principle, just because they did not satisfy the rational test when compared to the line of reasoned and consciously developed cases which a bare majority in the *Lopez* and *Robles* cases found unsatisfactory.

The closeness of a vote in a precedential case is hardly determinative *(Semanchuck v Fifth Ave. & 37th St. Corp.,* 290 N.Y. 412, 420; see 21 CJS, Courts, § 189, at p 307). It certainly should not be. Otherwise, every precedent decided by a bare majority is a nonprecedent — one to be followed if a later court likes it, and not to be followed if it does not like it. In the *Semanchuck* case, Chief Judge LEHMAN stated the rule precisely: "Three judges, including the writer of this opinion, dissented from the decision in the earlier case, insofar as it held that the general contractor was not, under the contract, entitled to indemnity from the subcontractor. The controversy over the applicable rule to be followed in the construction of the indemnity agreement has been resolved by that decision. The authoritative force of a decision as a precedent in succeeding cases is not determined by the unanimity or division in the court. The controversy settled by a decision in which a majority concur should not be renewed without sound reasons, not existing here. All the judges of the court accept the

Page 491

decision in the *Walters* case *[Walters v Rao Elec. Equip. Co.,* 289 N.Y. 57] and the rules which form the basis for that decision as guides in analogous cases."

Similarly, the accident of a change of personalities in the Judges of a court is a shallow basis for jurisprudential evolution *(Simpson v Loehmann,* 21 N.Y.2d 305, 314 [concurring opn]; see *Minichiello v Rosenberg,* 410 F.2d 106, 109 [FRIENDLY, J.], cert den 396 U.S. 844). In the *Simpson* case, the troublesome precedent was all but mint-new; its symmetrical conformance to prior law was facially absent. Nevertheless, the precedent was followed just because it would have been scandalous for a court to shift within less than two years because of the replacement of one of the majority in the old court by one who now intellectually would have preferred to have voted with the old minority and the new one.

The ultimate principle is that a court is an institution and not merely a collection of individuals; just as a higher court commands superiority over a lower not because it is wiser or better but because it is institutionally higher. This is what is meant, in part, as the rule of law and not of men.

Accordingly, the order of the Appellate Division should be reversed, the plea vacated, and the statements of defendant suppressed.

JASEN, J. (concurring).

Convinced as I am that the reasoning which prompted the holdings in the *Robles* and *Lopez* cases has failed to produce a stable and recognized rule, I concur in the majority opinion and particularly for the respect it accords to the doctrine of *stare decisis* and the limited exceptions which it would allow.

GABRIELLI, J. (concurring)

I concur in the result reached by the majority. In doing so, however, I am unable to join in overruling *People v Lopez* (28 N.Y.2d 23). I would adhere to the established view that, until counsel is assigned or retained by a defendant in a criminal action, he is perfectly free, after suitable and proper admonitions, to waive his right to the presence and assistance of counsel and make voluntary statements *(People v Bodie,* 16 N.Y.2d 275; cf. *People v Meyer,* 11 N.Y.2d 162, 165). It is always the task of the courts, of course, to assure that such a waiver is knowingly and intelligently made and that statements following a waiver are voluntarily given.

We succinctly stated in *People v Bodie (supra,* p 279) that
Page 492
"since the right to counsel also imports the right to refuse counsel, we hold that a defendant may effectively waive his right to an attorney." This holding is qualified, of course, in the situation where counsel has been assigned or retained in which case we have held that a defendant may not be interrogated without the presence or consent of counsel *(People v Arthur,* 22 N.Y.2d 325; *People v Vella,* 21 N.Y.2d 249; *People v Donovan,* 13 N.Y.2d 148). Under the circumstances of the instant case, it is this rule which is applicable as the majority ably demonstrates. To reach the result in the case before us, it is unnecessary to consider *People v Lopez (supra).* As noted in the majority opinion, defendant Hobson was represented by counsel at the time of the interrogation, while, in *Lopez,* the defendant decided to forego representation by counsel.

While the rule in the Federal courts may be unsettled, several of them have recognized the admissibility of postindictment statements made after a waiver of right to counsel. Thus, in *United States ex rel. O'Connor v State of New Jersey* (405 F.2d 632, 636) the Third Circuit Court of Appeals, focusing on the quality of the waiver, stated that "only a clear, explicit, and intelligent waiver may legitimate interrogation without counsel following indictment" (see, also, *United States v Crisp,* 435 F.2d 354, 358-359. And, in *United States v Garcia* (377 F.2d 321, 324, cert den 389 U.S. 991), the Second Circuit indicated that *"Massiah [v United States,* 377 U.S. 201] does not immunize a defendant from normal investigation techniques after indictment".

In the landmark decision of *Massiah v United States* (377 U.S. 201, 206, *supra),* the United States Supreme Court held that the defendant "was denied the basic protections of that guarantee [Sixth Amendment right to counsel] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." In *Massiah,* the defendant had retained counsel before the statements were elicited from him and, significantly, the court noted that "it was entirely proper to continue an investigation of the suspected criminal activities of the defendant * * * even though the defendant had already been indicted" *(supra,* p 207).

I do not view the Federal District Court decision in *United States ex rel. Lopez v Zelker* (344 F. Supp. 1050, affd
Page 493
465 F.2d 1405) as requiring a contrary result. The essence of Judge FRANKEL's decision in the *Lopez* habeas corpus proceeding was that defendant's waiver of the right to counsel was not knowingly and intelligently rendered because he was not aware of the outstanding indictment against him for the crime of murder. The decision, therefore, is predicated upon a view of the facts which is divergent from the facts as developed in the proceedings against Lopez in our State courts. The majority of this court in *Lopez* observed that "[d]efendant does not dispute either the waiver or the sufficiency of the evidence to find that it was intelligently and understandingly made" *(supra,* p 25). The trial court in *Lopez,* affirmed by an unanimous Appellate Division, found, following a suppression hearing, that "the People have proven beyond a reasonable doubt that the defendant intelligently understood the warnings and knowingly expressed his waiver of Constitutional rights," and we held that there was evidence in the record to sustain such a finding (p 25). Thus, three New York courts found that Lopez made voluntary statements following a knowing and intelligent waiver of the right to counsel.

I would only add that adopting the position proposed by the majority would bar the admissibility of any statements which a defendant might wish to tender in response to any police inquiry, no matter how knowingly and intelligently made, following the commencement of any criminal action by the filing of an accusatory instrument even so minor as a simplified traffic information.[fn*]

Judges JONES, WACHTLER, FUCHSBERG and COOKE concur with Chief Judge BREITEL; Judge JASEN concurs in a separate opinion; Judge GABRIELLI concurs in result in another separate opinion.

Order reversed, etc.

[fn*] CPL 1.20 (subd [1]) defines an accusatory instrument as "an indictment, an information, a simplified traffic information, a prosecutor's information, a misdemeanor complaint or a felony complaint."

New York Court of Appeals Reports

PEOPLE v. LOPEZ, 16 N.Y.3d 375 (2011)

2011 NY Slip Op 01316

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. OLLMAN LOPEZ,

Appellant.

No. 13.

Court of Appeals of the State of New York.

Argued January 6, 2011.

decided February 22, 2011.

APPEAL, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered September 15, 2009. The Appellate Division affirmed a judgment of the Supreme Court, Richmond County (Stephen Rooney, J.), which had convicted defendant, upon a jury verdict, of murder in the second degree (two counts: one count each of intentional murder and felony murder), attempted robbery in the first degree, and criminal possession of a weapon in the second degree.

People v Lopez, 65 AD3d 1166, affirmed.

Page 376

Legal Aid Society, New York City (*Svetlana M. Kornfeind* and *Steven Banks* of counsel), for appellant. Appellant's statement was introduced at trial in violation of his right to counsel, where appellant was in continuous custody on a pending drug case on which he had an attorney, but the detective who was investigating an unrelated homicide deliberately avoided asking appellant about his possible representation in the custodial case before eliciting a waiver of his rights. (*People v Hobson*, 39 NY2d 479;

Page 377

People v Rogers, 48 NY2d 167; *People v Burdo*, 91 NY2d 146; *People v Steward*, 88 NY2d 496; *People v Bing*, 76 NY2d 331; *People v Kazmarick*, 52 NY2d 322; *People v Cunningham*, 49 NY2d 203; *People v Carranza*, 3 NY3d 729; *People v Garofolo*, 46 NY2d 592; *People v Pinzon*, 44 NY2d 458.)

Daniel M. Donovan, Jr., District Attorney, Staten Island (*Morrie I. Kleinbart* of counsel), for respondent. Defendant's state constitutional right to counsel was fully respected. (*People v Burdo*, 91 NY2d 146; *People v Arthur*, 22 NY2d 325; *People v Samuels*, 49 NY2d 218; *People v West*, 81 NY2d

370; *People v Cunningham*, 49 NY2d 203; *People v Hobson*, 39 NY2d 479; *People v Cohen*, 90 NY2d 632; *People v Rogers*, 48 NY2d 167; *People u Robles*, 72 NY2d 689; *People v Kazmarick*, 52 NY2d 322.)

Before: Chief Judge LIPPMAN and Judges CIPARICK and JONES concur with Judge GRAFFEO; Judge SMITH concurs in result in a separate opinion in which Judges READ and PIGOTT.

OPINION OF THE COURT

GRAFFEO, J.

Under New York's indelible right to counsel rule, a defendant in custody in connection with a criminal matter for which he is represented by counsel may not be interrogated in the absence of his attorney with respect to that matter or an unrelated matter unless he waives the right to counsel in the presence of his attorney (*see People v Rogers*, 48 NY2d 167 [1979]). In this case, we must determine whether the rule applies even if the interrogator is unaware that an incarcerated defendant is represented by an attorney. We conclude that if it is reasonable for an interrogator to suspect that an attorney may have entered the custodial matter, there must be an inquiry regarding the defendant's representational status and the interrogator will be charged with the knowledge that such an inquiry likely would have revealed.

I

In early 2002, Hamoud Thabeat was murdered in his Staten Island bodega. The case remained unsolved for some time until an individual came forward and informed the police that defendant Oilman Lopez had shot Thabeat. The informant explained that, shortly after the shooting, he was talking to a group of young men in the neighborhood about this incident. He claimed that, during the conversation, defendant had laughed and stated that he had shot the store owner. The informant further identified defendant (whom he had known for years) from a photo array.
Page 378

After receiving this information, the investigating officer, Detective Mattei, interviewed one of the young men who had been present during the conversation reported by the informant. This individual recalled that, on the day of the killing, either defendant or Jonah Alston had suggested that they rob a store. Later that day, defendant admitted to his friends that he had shot the store owner. Another acquaintance of defendant who had been with him that day told Mattei that Alston claimed defendant had killed Thabeat and that defendant confirmed that he was the shooter. Based on these interviews, Mattei spoke to Alston, who confessed in a videotaped interview that he had accompanied defendant to the bodega to commit a robbery and that defendant had shot Thabeat. The other young men who cooperated with the police were not involved in the underlying crime.

Detective Mattei eventually learned that defendant was incarcerated in Pennsylvania on a drug charge. The Pennsylvania authorities told Mattei that defendant was in custody because he was unable to post his $10,000 bail. Mattei traveled to the correctional facility where defendant was jailed to speak to him about the Staten Island homicide. Mattei was not informed about the details of the Pennsylvania crime and he did not inquire about them. Unbeknownst to the detective, defendant was represented by an attorney in connection with the Pennsylvania offense.

When allowed to meet with defendant, Detective Mattei issued *Miranda* warnings to him, advised defendant that he did not want to discuss the Pennsylvania matter and indicated that he was investigating the Staten Island murder. Mattei inquired if defendant wanted to speak to an attorney about the New York case and defendant responded that he did not. In the course of the interview, Mattei played a portion of Alston's taped confession, after which defendant acknowledged that he had been involved in the robbery but claimed that Alston was the shooter. Defendant signed a written statement to that effect.

After Mattel's interview and while defendant remained incarcerated, he discussed his role in the Staten Island murder with another inmate. Defendant disclosed to that inmate that he had shot the deli owner during the botched robbery. Defendant further stated that he told Detective Mattei that his accomplice was the shooter because he planned to use his sister as an alibi witness, intending to claim that he was at her house when Thabeat was shot. The inmate related this conversation to his

Page 379

lawyer and this information was eventually provided to the New York prosecutor handling the Staten Island matter.

For his role in the killing of Thabeat, defendant was indicted for felony murder in the second degree, intentional murder in the second degree, three counts of attempted robbery in the first degree and criminal possession of a weapon in the second and third degrees.[fn1] Defendant moved to suppress his confession to Detective Mattei, asserting that his right to counsel had been violated when Mattei questioned him about the Staten Island murder without first obtaining a waiver of his right to counsel in the presence of his Pennsylvania attorney. During the suppression hearing, Mattei testified that he did not know that a lawyer was representing defendant on the Pennsylvania charge, nor did he ask about it. Supreme Court denied defendant's motion, concluding that the right to counsel did not attach because Mattei lacked actual knowledge of the attorney's involvement in the Pennsylvania matter. Following a jury trial, defendant was convicted of intentional murder, felony murder, attempted robbery in the first degree and criminal possession of a weapon in the second degree.[fn2] He was sentenced to a prison term of 25 years to life.

The Appellate Division affirmed the conviction (65 AD3d 1166 [2d Dept 2009]), holding that, although defendant was represented by a lawyer on the charge for which he was in custody in Pennsylvania, the indelible right to counsel was not implicated because the interviewing detective was not aware that defendant had a lawyer in Pennsylvania. A Judge of this Court granted leave to appeal (13 NY3d 908 [2009]) and we now affirm on different grounds.

II

Relying on *People v Burdo* (91 NY2d 146 [1997]), defendant contends that his confession should have been suppressed because he was in police custody when Detective Mattei interviewed him, his indelible right to counsel had attached upon assignment of a lawyer on the Pennsylvania charge and Mattei did not secure a valid waiver of that right before questioning him. The People disagree and maintain that the right to counsel did not attach because Mattei did not have

Page 380

actual knowledge that defendant was represented on the Pennsylvania matter. The People also assert that recognition of a right to counsel under these circumstances will resurrect the discredited "derivative right to counsel" rule of *People v Bartolomeo* (53 NY2d 225 [1981]).

New York has long viewed the right to counsel as a cherished and valuable protection that must be guarded with the utmost vigilance (*see e.g. People v Harris*, 77 NY2d 434, 439 [1991]). Arising from the due process guarantee in our State Constitution, the entitlement to effective assistance of counsel and the privilege against compulsory self-incrimination, the right to counsel is referred to as "indelible" because, once it "attaches," interrogation is prohibited unless the right is waived in the presence of counsel (*see People v Bing*, 76 NY2d 331, 338-339 [1990]). We have explained that attachment occurs when (1) a person in custody requests the assistance of an attorney or a lawyer enters the case or (2) a criminal proceeding is commenced against the defendant by the filing of an accusatory instrument (*see People v West*, 81 NY2d 370, 373-374 [1993]). We are concerned only with actual representation for the purposes of this appeal.

When an attorney enters a case to represent the accused, the police may not question the accused about that matter regardless of whether the person is in police custody (*see People v West*, 81 NY2d at 375). If, however, the police seek to question the suspect about a matter that is not related to the case that the attorney is handling, different rules apply (*People v West*, 81 NY2d at 377). In the seminal case *of People v Rogers* (48 NY2d 167 [1979]), we established that an individual who is in custody for an offense and is represented by counsel on that case may not be questioned about any matter — related or unrelated to the crime for which there is legal representation — unless the accused validly waives the right to counsel (*see People v Rogers*, 48 NY2d at 169). Simply put, the *Rogers* rule states that the indelible right to counsel activates the moment that an attorney becomes involved (*see id.* ["once an attorney has entered the proceeding . . . a defendant in custody may not be further interrogated in the absence of counsel"]; *People v Steward*, 88 NY2d 496, 501 [1996] ["*Rogers* establishes and still stands for the important protection and principle that once a defendant in custody on a particular matter is represented by or requests counsel, custodial interrogation about any subject, whether related or unrelated to the charge upon which representation is

Page 381

sought or obtained, must cease"]). The issue of the extent of police knowledge was not addressed in *Rogers* because the interrogating officers in that case had been directly informed by Rogers' lawyer that they could not question him after he was taken into custody (*see* 48 NY2d at 170).

In *People v Burdo* (91 NY2d 146 [1997]), we applied the *Rogers* rule to a situation where the defendant was incarcerated for rape, had been assigned an attorney for that charge and the police were aware of counsel's involvement. The police sought to question the defendant about a missing person — a matter unrelated to the rape — and, outside the presence of his attorney, he declined to consult a lawyer about the new matter. We held that *Rogers* prohibited the police from inquiring about the missing person, specifically noting that, as in *Rogers*, the police were "fully aware" that the defendant was represented on the matter for which he was in custody (*id.* at 150). The case now before us is distinguishable from these precedents because Detective Mattei testified that he was not aware that defendant was represented by an attorney on the Pennsylvania drug charge.[fn3]

In deciding whether *Rogers* and *Burdo* should direct the outcome here, we are mindful of several overarching principles that have guided the development of New York's indelible right to counsel rules. Our jurisprudence in this area "has continuously evolved with the ultimate goal of `achieving a balance between the competing interests of society in the protection of cherished individual rights, on the one hand, and in effective law enforcement and investigation of crime, on the other'" (*People v Grice*, 100 NY2d 318, 322-323 [2003], quoting *People v Waterman*, 9 NY2d 561, 564 [1961]). Consequently, the

parameters of the indelible right to counsel are defined "through the adoption of `pragmatic and . . . simple test[s]' (*People v Failla*, 14 NY2d 178, 181 [1964]) grounded on `common sense and fairness' (*People v Bing*, 76 NY2d at 339)" (*People v Grice*, 100 NY2d at 323) in order to "provid[e] an objective measure to guide law enforcement officials and the courts" (*People v Robles*, 72 NY2d 689, 699 [1988]).
Page 382

For over three decades, "*Rogers* has stood as a workable, comprehensible, bright line rule, providing effective guidance to law enforcement while ensuring that it is defendant's attorney, not the police, who determines which matters are related and unrelated to the subject of the representation" (*People v Burdo*, 91 NY2d at 151). The *Rogers* rule is eminently straightforward: when an attorney undertakes representation in a matter for which the defendant is in custody, all questioning is barred unless the police obtain a counseled waiver. *Rogers* therefore requires inquiry on three objectively verifiable elements — custody, representation and entry (*see e.g. People v Burdo*, 91 NY2d at 149; *People v Steward*, 88 NY2d at 502; *People v West*, 81 NY2d at 377; *People v Bing*, 76 NY2d at 350).

In this case, defendant was in custody pending prosecution on Pennsylvania charges and he was represented by a Pennsylvania attorney who had entered that case. The only remaining question is whether Detective Mattei should have been deemed chargeable with knowledge of that representation and entry. In *People v Kazmarick* (52 NY2d 322, 328 [1981]), we recognized that there may be circumstances in which "law enforcement officials may . . . be chargeable with knowledge that [a] defendant is in fact represented by counsel . . . on an unrelated charge, in such a way as to cut off their rights to interrogate." More recently, we explained that "either actual or constructive knowledge by interrogating police officers suffices to perpetuate the indelible right to counsel once attached" (*People v Bongarzone-Suarrcy*, 6 NY3d 787, 789 [2006]). We have also applied a constructive knowledge rationale in a situation where an attorney communicated with the police agency that has custody of a suspect, but the interrogating officer was not aware of that communication (*see People v Pinzon*, 44 NY2d 458, 463-464 [1978]; *see generally People v Carranza*, 3 NY3d 729, 730 [2004]).

We believe that imputation of constructive knowledge is appropriate under the facts of this case as well. In our view, society's interest in protecting individual constitutional rights would be devalued if the police were allowed to question an incarcerated individual under circumstances where it would be reasonable for the interrogating officer to expect that it is highly likely that the accused has an attorney on the custodial matter. Permitting a police officer to remain deliberately indifferent — avoiding any inquiry on the subject notwithstanding the nature of the custodial charges and the likelihood that a lawyer has entered the matter — in order to circumvent the protection
Page 383
afforded by *Rogers* is not only fundamentally unfair to the rights of the accused, it further undermines the preexisting attorney-client relationship that serves as the foundation of the *Rogers* rule. A contrary holding would allow a police officer who is fairly certain that an attorney is involved in the custodial matter to flout *Rogers* by claiming that he was not fully confident about a lawyer's involvement. For these reasons, we hold that an officer who wishes to question a person in police custody about an unrelated matter must make a reasonable inquiry concerning the defendant's representational status when the circumstances indicate that there is a probable likelihood that an attorney has entered the custodial matter, and the accused is actually represented on the custodial charge.

The circumstances of this case readily demonstrate the necessity of this principle. Detective Mattei was aware of several facts that would have led a police officer to reasonably conclude that it was highly likely that defendant had legal representation on the Pennsylvania charge. Specifically, defendant was incarcerated on a drug charge for transporting narcotics into that state and was being held in lieu of $10,000 bail. The fact that bail had been set indicated that defendant had been arraigned in court on the charge. Arraignment undoubtedly signified that defendant's right to counsel had attached — whether under the Sixth Amendment to the United States Constitution (*see e.g. Fellers v United States*, 540 US 519, 523 [2004]), Pennsylvania law (*see e.g. Commonwealth v Gwynn*, 596 Pa 398, 410, 943 A2d 940, 948 [2008]) or the New York Constitution (*see HurrellHarring v State of New York*, 15 NY3d 8, 20 [2010]) — and made it probable that defendant had been assigned or had retained an attorney, which was true in this case. Under these circumstances, Mattei should have resolved any doubt that may have remained by inquiring about defendant's representational status, rather than avoiding the topic, before commencing interrogation about the Staten Island murder and eliciting the incriminating statements.[fn4] Since it is likely that a reasonable inquiry would have revealed counsel's involvement, the detective is chargeable with that knowledge and defendant's indelible right to counsel was violated because the questioning was not preceded by a valid waiver.

Page 384

Our holding does not, as the People claim, resurrect *People v Bartolomeo* (53 NY2d 225 [1981]). That decision expanded the prohibition on interrogation regarding unrelated matters by creating a "derivative right to counsel" that attached to a new criminal offense whenever a suspect was represented by counsel in connection with unrelated pending charges and regardless of whether the suspect was in custody on the pending charges. The derivative right was fictional because it presumed the existence of an attorney-client relationship in connection with the new, unrelated matter even though the accused was not actually represented by an attorney in the new case. Because *Bartolomeo* proved to be unworkable, it was overruled by *People v Bing* (76 NY2d at 350) and the derivative right no longer exists (*see People v Steward*, 88 NY2d at 500). In contrast, here, defendant was in custody for an offense for which he had representation and, as such, his right to counsel on that crime had "attached indelibly" (*People v West*, 81 NY2d at 379). Thus, in the absence of a valid waiver, *Rogers* precluded questioning about the unrelated homicide while defendant remained in custody on the Pennsylvania charge.

Accordingly, we conclude that defendant's indelible right to counsel was violated because the discussion about the Staten Island murder occurred while he was in custody for the Pennsylvania offense, the interrogating detective is chargeable with knowledge that an attorney had entered the case to represent him on the Pennsylvania matter and a valid waiver was not secured from defendant before questioning commenced.

III

The concurrence expresses the view that this Court's right to counsel jurisprudence is too complicated and that we should limit *Rogers* to its facts. It recommends that the better course would be to overrule *Bing, West, Steward, Burdo* and the many cases that have relied on those decisions — and return to the more restrictive rule articulated in *People v Taylor* (27 NY2d 327 [1971]).[fn5] Under *Taylor*, the police were allowed to interrogate a person who was in custody and represented by an attorney who had entered the case about any matter unrelated to the custodial charge.

Page 385

We disagree with our concurring colleagues because *Rogers* offered several persuasive reasons for recognizing a right to counsel that extended beyond *Taylor*. The *Rogers* rule provides an extra measure of protection to the attorney-client relationship when a defendant is in custody on a represented charge in recognition of the fact that the right to counsel is "a shield against the awesome and sometimes coercive force of the State" (48 NY2d at 173). Moreover, *Rogers* explained that "it is the role of [the] defendant's attorney, not the State, to determine whether a particular matter will or will not touch upon the extant charge" and "the attorney's function cannot be negated by the simple expedient of questioning in his absence" (*id.*). The concurrence does not question the validity of this reasoning.

The path we have taken in right to counsel cases may have been bumpy at times and the concurrence understandably questions the continuing validity of some of the rationales used by this Court in *Rogers, Bartolomeo* and *Bing*. But the conclusion we reach today is consistent with the holdings in those decisions and our other undisturbed precedent.

Rogers was correctly decided because the defendant was in custody for an offense for which he was actually represented by a lawyer who had entered the case and communicated his representation to the police. In contrast, in *Bartolomeo* the defendant was in custody for an offense but he did not have counsel on that charge. He did, however, have legal representation in connection with a prior, unrelated criminal case. We erred in *Bartolomeo* by inferring a fictional attorney-client relationship on the matter for which he was in custody. The feature that distinguishes the two cases is whether the defendant was in custody for an offense with actual representation on that charge and notification to the police.

The issue of police custody was also a pivotal concern in *Bing* and *Cawley* (a companion case to *Bing*). Neither defendant was in custody for the offense for which an attorney had entered. Bing and Cawley were under arrest for being fugitives from justice but they were not represented by counsel on that matter when the incriminating statements were elicited. [fn6] Both cases are distinguishable from this appeal because defendant Lopez

Page 386

was in custody for the Pennsylvania offense and an attorney had entered that proceeding before Detective Mattei began the interrogation. If defendant had made bail on the Pennsylvania charge and been released, or if he had been released and was arrested on a fugitive warrant for failure to appear, he could have been questioned about an unrelated matter, just as Bing and Cawley were.

As we have explained, both *Rogers* and today's decision are premised on the fact that the right to counsel was violated on the particular matter for which the defendant was in custody. In *Rogers*, the defendant was in custody for a robbery and his right to counsel on that charge was violated when the police continued to question him and elicited the incriminating statement. So too, in *Burdo*, the defendant was in custody for rape when he was questioned about a missing person and we held that his right to counsel on the rape (not the murder) had been violated. Similarly, defendant in this case was in custody for the Pennsylvania drug charge and his right to counsel on that offense (not the murder) was violated when Detective Mattei questioned him about the Staten Island homicide.

In sum, the holding here is consistent with *Bing* and *Cawley*, and we see no compelling basis to overrule *Rogers* and its progeny.

IV

A violation of the indelible right to counsel does not automatically constitute reversible error. Instead, it is reviewed under the harmless error doctrine for constitutional violations (*see e.g. People v West*, 81 NY2d at 373; *People v Krom*, 61 NY2d 187, 201 [1984]; *People v Flecha*, 60 NY2d 766, 767 [1983]; *People v Sanders*, 56 NY2d 51, 66-67 [1982]; *People v Rogers*, 48 NY2d at 174). Errors of this type "are considered harmless when, in light of the totality of the evidence, there is no reasonable possibility that the error affected the jury's verdict" (*People v*

Page 387

Douglas, 4 NY3d 777, 779 [2005]; *see People v Crimmins*, 36 NY2d 230, 240-241 [1975]). If no such possibility exists, the error is deemed to be harmless beyond a reasonable doubt (*see People v Goldstein*, 6 NY3d 119, 129 [2005]).

Here, there is no reasonable possibility that the introduction of defendant's improperly obtained statement to Detective Mattei affected the conviction in light of the other evidence that overwhelmingly established that defendant murdered Hamoud Thabeat. The People's proof demonstrated that defendant had spontaneously and unequivocally told at least three acquaintances that he shot Thabeat during the failed robbery. None of these individuals had any apparent motive to lie about defendant's admissions. The information these individuals conveyed to law enforcement was independently obtained and their testimony was strongly corroborative.

Particularly, three of the young men who had been with defendant on the day the shooting occurred provided the jury with consistent and specific details about their activities that day (e.g., drinking alcohol, smoking marijuana and playing video games, as well as information regarding who had entered and exited the house). Two of them testified that defendant had confessed to shooting two bullets at Thabeat and remarked that nothing was stolen from the store. One of the men further testified that defendant said he had used a revolver to shoot Thabeat in the chest. None of these companions had been with defendant at the scene of the shooting.

Defendant's admissions to his friends were confirmed by other evidence at trial. A medical examiner testified that Thabeat had been hit by two bullets and that the fatal shot was to the chest. Police officers who responded to the crime scene testified that nothing had been disturbed in the store and money remained in the cash register. A ballistics expert concluded that the recovered bullet was a .38 caliber and "definitely" had been fired from a revolver. Expert testimony explained that the lack of bullet casings at the scene of the killing was because revolvers, unlike semi-automatic handguns, do not automatically eject shell casings when fired. All of this forensic evidence supported the testimony of defendant's companions.

In addition, while defendant was incarcerated in Pennsylvania, he confessed to another inmate that he had killed the store owner and had lied to the police when he told them that Alston was the shooter. He also described to the inmate how he planned

Page 388

to use his sister to establish a false alibi. The only conceivable source of this information had to be defendant himself.[fn7]

Considered in its totality, this evidence was overwhelming and it effectively narrowed the scope of the central question that was before the jury: whether defendant or Jonah Alston was the shooter. In this regard, defendant's jailhouse statement to Detective Mattei was, in a sense, partially exculpatory since he claimed that Alston murdered Thabeat and that he was merely a passive participant in the robbery gone

awry. Since the jury found defendant guilty of shooting Thabeat, it necessarily disbelieved what he told Mattei and thereby diminished the importance of the improperly obtained statement in the overall context of the case. Moreover, defendant did not present to the jury any theory that cast significant doubt upon his guilt. For all of these reasons, we find that the violation of defendant's indelible right to counsel was harmless beyond a reasonable doubt.

Accordingly, the order of the Appellate Division should be affirmed.

[fn1] Alston was named as a codefendant in the felony murder and attempted robbery counts.

[fn2] Alston was tried separately and convicted of felony murder and related offenses.

[fn3] This case also differs from *Burdo* because defendant was not incarcerated in New York when he was questioned and Pennsylvania does not recognize an indelible right to counsel to the extent that we do in New York (*see generally Commonwealth v Yarris*, 519 Pa 571, 593-594, 549 A2d 513, 524-525 [1988]). We have previously held that the interrogation of a defendant by a New York law enforcement agent outside of this state is subject to our right to counsel jurisprudence (*see People v Bing*, 76 NY2d at 344-345).

[fn4] Had the detective asked defendant directly and he denied having an attorney for the Pennsylvania case, we have no doubt that Mattei could have accepted that assertion at face value if it would have been reasonable to do so (*see generally People v Lucarano*, 61 NY2d 138, 148 [1984]).

[fn5] The parties in this appeal have neither questioned the continuing viability of *Rogers* and its progeny nor suggested that we should retreat to the *Taylor* rule. Furthermore, stare decisis dictates that prior decisions are entitled to significant deference and may be overruled only when there is a compelling justification for doing so.

[fn6] The concurrence states that Bing and Cawley "were in custody on charges for which they had lawyers" (concurring op at 393). This is not so. The record in *Bing* reveals that Bing had been arrested in Ohio for burglary, arraigned, assigned counsel and released on bail. He then fled from that state, for which an arrest warrant was issued. Bing therefore knew that he was wanted in Ohio when he was apprehended by the police in New York. He was under arrest in this state for violating the terms of his bail in Ohio, not for committing the burglary. Similarly, Cawley had been arrested for robbery, released on his own recognizance and later absconded. This resulted in the issuance of a bench warrant for his arrest, which served as the predicate for his incarceration at the time he was questioned by the police. The *Bing* Court viewed these arrests in New York as separate from the prior charges for which the defendants had legal representation, placing them beyond the reach of the *Rogers* rule.

[fn7] The Pennsylvania informant received no tangible reward for his testimony aside from the New York prosecutor's offer to write a letter to Pennsylvania authorities acknowledging his assistance in this case.

SMITH, J. (concurring).

Over the last several decades, we have described the New York right to counsel that we have created as "pragmatic," "simple," "grounded on `common sense and fairness'," "workable" and "comprehensible."

The majority quotes all these descriptions today and adds that the law is "eminently straightforward" (*see* majority op at 381, 382, 383 [and the authorities there cited]).

I think we protest too much. In reality, our right to counsel jurisprudence is so complicated that it is almost incomprehensible, and it regularly produces unjust results. This case is an example. The majority, struggling to harmonize our cases — an attempt which, as I will try to show, does not succeed — is led to the conclusion that Detective Mattei infringed defendant's right to a lawyer. But it is hard to imagine any case in which a prisoner's waiver of that right could be more free of coercion, deception or any other form of unfairness. The majority finds the waiver bad because Mattei should have realized that a Pennsylvania lawyer was representing defendant on a drug charge completely unrelated to the murder Mattei was investigating; in common sense, the Pennsylvania case should have no bearing at all on the validity of defendant's waiver.
Page 389

The majority's attempt to reconcile the cases fails because no satisfactory reconciliation is possible. I therefore propose that we simplify our law by limiting *People v Rogers* (48 NY2d 167 [1979]) to its facts, and returning to the old-time religion of *People v Taylor* (27 NY2d 327 [1971]). *Taylor*, unlike *Rogers* and more recent cases, did establish a simple, workable rule: that a suspect's relationship with a lawyer in one case does not bar police questioning of him about another, unrelated case.

The facts of *Rogers*, the case in which we abandoned the *Taylor* rule, were these: Defendant was arrested as a suspect in a robbery. After he had been questioned about that robbery for two hours, a lawyer entered the case on his behalf and asked the police to stop questioning him. They did not stop, but changed the subject: They questioned him — for four more hours, in which he was manacled to a chair — about "unrelated activities in which he had not participated" (48 NY2d at 170). After this, the defendant, for reasons unclear in the *Rogers* opinion, "uttered an inculpatory statement" *about the original crime (id.*).

It is easy to see why we did not like what happened in *Rogers*, and I would have no quarrel with a rule excluding a defendant's statement on facts like those; perhaps a rule providing that, where a defendant is represented by counsel on a particular matter, any statement *about that matter* that is elicited by police questioning in counsel's absence is inadmissible. But in *Rogers*, unfortunately, we went much further, saying that "once a defendant is represented by an attorney, the police may not elicit from him any statements, except those necessary for processing or his physical needs" (48 NY2d at 173). Under this rule, statements about a new case in which defendant never had a lawyer can be excluded.

This has led — and is still leading, more than 30 years later — to much trouble and confusion. In *People v Bartolomeo* (53 NY2d 225, 229 [1981]) we held that

"[w]here to the knowledge of the interrogating officer a suspect being questioned had been arrested by the same law enforcement agency nine days previously on an unrelated charge, statements obtained in consequence of the interrogation must be suppressed if in fact the suspect is represented by an attorney with respect to the unrelated charge even though the fact of such representation is unknown to the officer."

Page 390

Nine years later, we decided that we had gone too far, and overruled *Bartolomeo* in *People v Bing* (76 NY2d 331 [1990]). We explained in *Bing*:

"The right to assistance of counsel is one of the important means of protection against police harassment afforded individuals. But the right recognized must rest on some principled basis which justifies its social cost. *Bartolomeo* has no such basis. It rests on a fictional attorney-client relationship derived from a prior charge and premised on the belief that a lawyer would not refuse to aid his newly charged client. The decision to retain counsel rests with the client, however, not the lawyer and by hypothesis *Bartolomeo* defendants have waived their right to counsel and chosen not to hire a lawyer to represent them on the new unrelated charges. Indeed, they have done so after receiving the benefit of legal advice and after at least one prior experience dealing with the authorities." (*Id.* at 348-349 [citation omitted].)

The above language (and much else in the *Bing* opinion) reads like an argument for overruling not only *Bartolomeo* but the broad rule of *Rogers.* In the typical case to which the *Rogers* rule applies — this one, for example — the suspect's assumed representation by counsel on a second, unrelated case is "a fictional attorney-client relationship derived from a prior charge." In this and similar cases, it is no less true than in *Bartolomeo* that "defendants have waived their right to counsel and chosen not to hire a lawyer to represent them on the new unrelated charges" — and, indeed, that they "have done so after receiving the benefit of legal advice and after at least one prior experience dealing with the authorities."

Despite this, *Bing* did not reject the rule of *Rogers* — the *Bing* majority opinion ends, surprisingly, with a declaration that *Rogers* is still good law:

"We emphasize in closing that although *Rogers* and *Bartolomeo* are frequently linked in legal literature and *Rogers* was the only case cited to support the new rule adopted in *Bartolomeo*, the two holdings are quite different. In *People v Rogers*, the right to counsel had been invoked on the charges on which defendant was taken into custody and he and his

Page 391

counsel clearly asserted it. To protect his rights, we established a bright-line rule preventing the police from questioning defendant about those charges or any other charges. 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. Since the right to counsel is personal and may be waived by a defendant, the court had to create an indelible right, a right that defendant could not waive in the absence of counsel, to justify suppression of the voluntary statement. It did so by implying a derivative right arising from the prior pending charges. We find the *Bartolomeo* rule unworkable, and therefore overrule it, but our decision today should not be understood as retreating from the stated holding *of Rogers." (Id.* at 350 [citations omitted].)

It has never-been entirely clear what the *Bing* court thought distinguished *Rogers* and *Bartolomeo*: What made *Rogers* right and *Bartolomeo* wrong? A possible distinction is that *Bartolomeo* went beyond *Rogers* by prohibiting questioning not only where the police actually knew of a prior representation, but where they could readily have discovered it. In *Bartolomeo* itself, both the majority and the dissent

emphasized that point. The words "even though the fact of such representation is unknown to the officer" arepart of the *Bartolomeo* majority's statement of its holding (quoted above), while the dissent stressed "that the police knew only that defendant had been previously arrested and did not know defendant had counsel on those earlier charges" (53 NY2d at 236 [Wachtler, J., dissenting]). Three years after the *Bing* decision, in *People v West* (81 NY2d 370 [1993]), we said that this was indeed what distinguished *Rogers* and *Bartolomeo.* According to *West*, the "*Bartolomeo* right was problematic" because "[u]nlike *Rogers*, the *Bartolomeo* right could attach without police awareness of the unrelated representation" (*id.* at 378).

The majority today criticizes the idea of giving dispositive weight to the distinction between a police officer's actual knowledge and that which a reasonable officer would think "highly likely" (majority op at 383). The criticism is cogent. I agree that in this case, Detective Mattei, if he thought about the question at all, would probably have assumed that defendant had counsel

Page 392

on the pending Pennsylvania charge, and it seems arbitrary to make the case turn on whether that assumption ripened into actual knowledge. But for me, the point of greater importance is that there is no reason why either the assumption or the knowledge should have prevented Mattei from asking questions about a matter having nothing to do with the Pennsylvania case.

If actual knowledge does not suffice to distinguish *Rogers* and *Bartolomeo* (and thus to justify *Bing's* overruling of one case but not the other), what is the distinguishing feature? Today's majority suggests that it is the occasion for the suspect's custody. Rogers, when questioned by the police, was in custody on the charge on which a lawyer represented him; Bartolomeo was in custody on a later charge, on which he was unrepresented. Indeed, the language I have already quoted from *Bing* points out that in *Rogers* "the right to counsel had been invoked on the charges on which defendant was taken into custody." And in *People v Steward* (88 NY2d 496, 499 [1996]) we seemed to embrace the "custody" rationale, saying that the distinguishing feature of the *Bartolomeo* right was that "it did not hinge on or relate to the matter for which a defendant was then in custody and being questioned."

But the "custody" explanation *of Bing's* distinction between *Rogers* and *Bartolomeo* cannot be the correct one, for a simple reason: It fails to account for the result in *Bing* itself, and in *People v Cawley*, decided with *Bing.* Bing was arrested in New York on an Ohio warrant, at a time when he had counsel on the Ohio charge. While in custody on that charge in New York, he was questioned about and admitted involvement in an unrelated burglary. Cawley was arrested for robbery, jumped bail and was rearrested on a bench warrant. Thus, he was in custody on the original robbery charge when he "gave inculpatory statements about new, unrelated criminal conduct" (76 NY2d at 336). If custody was the basis for the line that *Bing* drew between *Rogers* and *Bartolomeo*, why were Bing's and Cawley's statements not suppressed? My predecessor on this Court asked essentially this question 14 years ago, and received no answer (*see People v Burdo*, 91 NY2d 146, 154-155 [1997, Wesley, J., dissenting]).

Today's majority attempts to answer the question, but its answer does not work. It says that Bing and Cawley were not "in custody for the offense for which an attorney had entered" but "were under arrest for being fugitives from justice" and "were not represented by counsel on that matter" (majority op

Page 393

at 385). But being a fugitive from justice is not a separate "matter" from the offense that caused the fugitive to flee. Bing and Cawley fled to avoid facing, were arrested on, and when questioned were in custody on charges for which they had lawyers. The majority offers no reason why their status as former

fugitives should have impaired their right to counsel. Indeed, the *Bing* court rejected the argument that "a defendant who absconds and never contacts his lawyer . . . has terminated the attorney-client relationship" (76 NY2d at 346).

The facts of *Bing* are relevant to our case in another way: In *Bing*, as here, the only existing attorney-client relationship was in a case from another state. It does not make sense to suppress a confession in a New York case solely because of a relationship that is governed by the laws of Ohio or Pennsylvania; those states can decide for themselves how the relationship can best be protected. It was this that persuaded then-Judge Kaye, who was opposed to overruling *Bartolomeo*, to concur in the result in *Bing*. She acknowledged "the absurdity of extending *Bartolomeo* to [the *Bing*] facts" (76 NY2d at 356 [concurring in *Bing* and dissenting in *Cawley*]).

Bing was identical to this case in all material respects: a defendant in custody on an out-of-state charge, interrogated by New York officers about an unrelated New York crime. Though the *Bing* court was divided 4-3 on the question of overruling *Bartolomeo*, all seven Judges agreed that Bing's right to counsel had not been violated. Since the majority here accepts *Bing* as good law, it is hard to understand how it reaches the opposite conclusion.

I conclude that the effort to find consistency in our cases in this area is a fruitless one. I therefore return to a more basic point: In common sense, Detective Mattei did nothing wrong and this defendant's right to a lawyer was not interfered with in any way. He did not have a lawyer in the case Detective Mattei was talking to him about, and he validly waived his right to counsel in that case. The fact that he had a lawyer in an unrelated Pennsylvania case should be of no significance.

We said in *People v Steward: "Bing* unequivocally eliminates any right to counsel derived solely from a defendant's representation in a prior unrelated proceeding" (88 NY2d at 500). Today's majority echoes this comment — "the derivative right no longer exists" (majority op at 384). *Steward* said, and today's majority repeats, that the right recognized in *Rogers* is not

Page 394

"derivative," but I do not see how this can be so if the word derivative has any intelligible meaning (*see West*, 81 NY2d at 378 ["(l)ike *Rogers*, (the *Bartolomeo*) right was derivative"]). If this defendant's right in this New York case did not derive from his Pennsylvania representation, where did it come from?

For these reasons, I think we should accept, at long last, the logical implication of *Bing*: The rule *of Rogers*, as well as that of *Bartolomeo*, is unjustifiable. We should return to the *Taylor* rule. I would therefore hold that the courts below committed no error in admitting defendant's statements to Detective Mattei into evidence. I would not reach the question of harmless error.

Order affirmed.

Page 395

New York Court of Appeals Reports

PEOPLE v. ROGERS, 48 N.Y.2d 167 (1979)

422 N.Y.S.2d 18, 397 N.E.2d 709

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. HERBERT L. ROGERS, Appellant.

Court of Appeals of the State of New York.

Argued September 13, 1979

Decided October 23, 1979

Appeal from the Appellate Division of the Supreme Court in the Second Judicial Department, EDWARD A. BAKER, J.

Page 168

Michael J. Obus, Matthew Muraskin and *Barbara M. Rosen* for appellant.

Page 169

Denis Dillon, District Attorney (Judith K. Sternberg and *William C. Donnino* of counsel), for respondent.

Chief Judge COOKE.

We hold today that once an attorney has entered the proceeding, thereby signifying that the police should cease questioning, a defendant in custody may not be further interrogated in the absence of counsel. We may not blithely override the importance of the attorney's entry by permitting interrogation of an accused with respect to matters which some may perceive to be unrelated.

Defendant was convicted, after jury trial, of robbery in the first degree and, upon plea of guilty, of burglary in the third degree. The evidence at trial in part consisted of eyewitness testimony and certain statements made by defendant while in custody and after his attorney had instructed police to cease further questioning. Defendant unsuccessfully sought to suppress this proof and the judgments of conviction were affirmed

Page 170

by the Appellate Division, without opinion. There should be a reversal and a new trial on the robbery indictment.

Defendant was arrested in his home on December 16, 1975 at about 10:15 A.M. as a suspect in a liquor store robbery committed by two youths on February 7, 1975. Defendant was handcuffed, placed in a patrol car and taken to the robbery squad in Mineola. At the time of arrest, and again at police headquarters, *Miranda* warnings were administered. Defendant informed the police that he had an attorney but that he was willing to speak in the absence of the attorney. After a two-hour period of interrogation in which defendant denied complicity in the crime, the police received a communication from his attorney instructing them to cease further questioning.

Thereafter, the police asked no further questions about the robbery but, under a purported waiver of defendant's rights, continued to question concerning unrelated activities in which he had not participated. These queries continued for approximately four hours after the communication from his attorney. During this entire period, defendant was manacled. After inquiries ceased, the police completed the paper work necessary to process defendant and no further information was sought. Defendant then uttered an inculpatory statement which was overheard by one of the detectives who had been questioning him. His motion to suppress the statement was denied on the ground that the assertion was spontaneously volunteered, and this appeal is based on that ruling.[fn1]

The genesis of defendant's utterance must be determined to be either as one arising out of sheer spontaneity or as having been induced by illegal police questioning. The threshold issue is whether once a defendant is represented on pending matters, the police may question the defendant on items unrelated to the subject of that representation after the defendant, in the absence of counsel, has waived his rights.

This court has jealously guarded the individual's privilege against self incrimination and right to counsel, demanding that these fundamental rights be accorded the highest degree of respect by those representing the State. Indeed, it has been announced in broad language that "[o]nce an attorney enters
Page 171
the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney, of the defendant's right to counsel * * * There is no requirement that the attorney or the defendant request the police to respect this right of the defendant" *(People v Arthur,* 22 N.Y.2d 325, 329; see, also, *People v Settles,* 46 N.Y.2d 154; *People v Hobson,* 39 N.Y.2d 479).

The People maintain nonetheless that a waiver in the presence of counsel is necessary only when the defendant is subjected to interrogation concerning the charge on which he is represented. Thus, it is urged that the four-hour interrogation after the attorney had entered the proceeding was proper because it dealt only with unrelated matters. The People's position, however, is untenable, it being at odds with the thrust of recent decisions concerning the scope of the State constitutional right to counsel (NY Const, art I, § 6).

It is true that previous decisions of this court, rendered in an era when the *Arthur* rule was in doubt, excepted from its scope questioning about a charge unrelated to the one on which defendant was represented (see *People v Taylor,* 27 N.Y.2d 327; *People v Hetherington,* 27 N.Y.2d 242; but see *People v Vella,* 21 N.Y.2d 249). And, when the *Arthur* rule was revitalized in *People v Hobson* (39 N.Y.2d 479, 483, *supra),* the exception for unrelated charges was again articulated, although there the court had no need to apply the rule. Since *Hobson,* however, it has been difficult to define the precise reach of the limitation concerning unrelated charges. Perhaps this is a result of the obvious difficulty encountered in drawing the subtle distinctions necessitated by the interaction of the *Hobson* and *Taylor* rules.

Specifically, in *People v Ramos* (40 N.Y.2d 610), where the defendant, who was represented by an attorney on a drug charge, had been advised not to make any statements at the time of his arrest on an unrelated charge, the advice of the attorney was deemed sufficient to trigger the *Arthur* rule, and the statements concerning the unrelated charge were suppressed. The ruling was based not on "the mere fortuity that [defendant] was represented by counsel on an unrelated charge, but rather * * * on the attorney's affirmative and direct action relative to the interrogation which was about to be commenced" *(Ramos,* 40 N.Y.2d, at p 617). The broad *Taylor* rule was refined and limited to include the situation "where

Page 172

counsel had not entered the proceeding and where no request for counsel had been made, even though the same defendant might, by mere happenstance, be represented by counsel in a totally unrelated proceeding" *(id.)*.

Last term in *People v Carl* (46 N.Y.2d 806, 807), it was held to be a "technicality of little significance" that defendant was questioned concerning a crime different than the one for which he was in custody. Prior to the interrogation, counsel had instructed the Sheriff not to speak with defendant in the absence of counsel. Notwithstanding that separate crimes were involved, the court determined that the charges were sufficiently related to preclude interrogation in the absence of counsel because the two incidents occurred within approximately one week, both involved burglaries or attempted burglaries at the same location and both were charged in the same indictment.

The *Taylor* limitation was further refined in *People v Ermo* (47 N.Y.2d 863), where defendant was questioned about both an assault and a homicide, committed seven months apart, in the absence of the attorney who represented him on the assault charge. Although conceding that the police would have been entitled to question defendant on the homicide alone, the court nonetheless held statements concerning the homicide to be inadmissible because "the police exploited concededly impermissible questioning as to the assault for the purpose and with the effect of advancing their interrogation on the homicide charge" *(id.,* at p 865). By suppressing these statements, however, the question no longer was whether the defendant was represented on the charge about which he was questioned. Rather, the focus of inquiry was the circumstances of the interrogation and whether its subject included a charge on which defendant had an attorney (see 47 N.Y.2d, at p 868, GABRIELLI, J., dissenting).

Thus following *Hobson* it has been urged in several cases and under a variety of circumstances that the exception concerning unrelated charges was applicable. In each instance, however, it has been found that the exception could not be applied or expanded consistent with the *Hobson* rationale. It is evident that in these cases, the *Taylor* rule was considerably narrowed (but cf. *People v Coleman,* 43 N.Y.2d 222; *People v Clark,* 41 N.Y.2d 612). The common thread running through these holdings is the simple fact that defendant was represented by an attorney at the time of the

Page 173

interrogation. We today recognize that the *Taylor* rule is inconsistent with the principles enunciated in *Hobson* and declare that once a defendant is represented by an attorney, the police may not elicit from him any statements, except those necessary for processing or his physical needs. Nor may they seek a waiver of this right, except in the presence of counsel.

Our acknowledgment of an accused's right to the presence of counsel, even when the interrogation concerns unrelated matters, represents no great quantitative change in the protection we have extended to

the individual as a shield against the awesome and sometimes coercive force of the State. An attorney is charged with protecting the rights of his client and it would be to ignore reality to deny the role of counsel when the particular episode of questioning does not concern the pending charge. It cannot be assumed that an attorney would abandon his client merely because the police represent that they seek to question on a matter unrelated to the charge on which the attorney has been retained or assigned. Finally, it is the role of defendant's attorney, not the State, to determine whether a particular matter will or will not touch upon the extant charge. Once a defendant has an attorney as advocate of his rights, the attorney's function cannot be negated by the simple expedient of questioning in his absence.

The presence of counsel confers no undue advantage to the accused. Rather, the attorney's presence serves to equalize the positions of the accused and sovereign, mitigating the coercive influence of the State and rendering it less overwhelming. That the rule diminishes the likelihood of a waiver or self incriminating statements is immaterial to our system of justice (see *People v Settles,* 46 N.Y.2d 154, 164, *supra; People v Donovan,* 13 N.Y.2d 148, 152). Although the State has a significant interest in investigating and prosecuting criminal conduct, that interest cannot override the fundamental right to an attorney guaranteed by our State Constitution.[fn2] Available are means other than subjecting a person represented by an attorney to interrogation in the absence of counsel.

Page 174

Having determined that the police interrogation was improper, we turn then to the question whether the inculpatory statement was admissible as a "spontaneously volunteered statement" *(People v Hobson,* 39 N.Y.2d, at p 483, *supra).* To fit within this narrow exception, the "spontaneity has to be genuine and not the result of inducement, provocation, encouragement or acquiescence, no matter how subtly employed" *(People v Maerling,* 46 N.Y.2d 289, 302-303). Given the unique circumstances here, there can be no conclusion other than that defendant's statement did not fall within the exception. Defendant, a youth of limited education, was vigorously questioned by two experienced detectives. Although no physical force was employed, the interrogation covered an extensive period — approximately six hours — and during this entire time defendant was manacled to furniture. A coercive atmosphere had been affirmatively created by the continuous interrogation and the significant restriction on defendant's freedom of movement. The statement was made in the interrogation room when defendant was still handcuffed and while the police processed the paper work in his presence. It cannot be doubted that the psychologically coercive influence of the police tactics had its effect on defendant and induced the statement apparently directed to himself (compare *People v McKie,* 25 N.Y.2d 19, and *People v Kaye,* 25 N.Y.2d 139, with *People v Garofolo,* 46 N.Y.2d 592, and *People v Maerling,* 46 N.Y.2d 289, *supra).*

Mere custody exerts some coercive influence on a suspect, but generally, such influence alone will not form the predicate for finding a statement nonspontaneous as a matter of law. Nor is a statement to be precluded simply because it followed a period of questioning conducted at some prior time. Here there is much more; defendant's will was overborne by a course of conduct destructive of dignity with no respite save for a mere half hour.

The introduction of defendant's inculpatory statement was error, which cannot be termed "harmless beyond a reasonable doubt" *(People v Crimmins,* 36 N.Y.2d 230, 237), and requires a new trial.[fn3] Since defendant's plea of guilty to

Page 175

burglary in satisfaction of another indictment was entered upon an agreement that the sentence imposed

would run concurrently with the sentence imposed on the robbery conviction, the plea should be vacated *(People v Clark,* 45 N.Y.2d 432).

The order of the Appellate Division should be reversed, judgments and plea of guilty vacated, statement suppressed and case remitted to Nassau County Court for a new trial on the robbery indictment and further proceedings on the burglary indictment in accordance with this opinion.

[fn1] Defendant does not challenge on this appeal the refusal to suppress identification testimony or the statements made by defendant prior to the call to the police by defendant's attorney.

[fn2] Contrary to the suggestion of the dissent, this holding creates no undue impediment to the investigation of criminal conduct unrelated to the pending charge. An accused represented by counsel may still be questioned about such matters; we hold simply that information obtained through that questioning in the absence of counsel may not be used against him. Thus, the police may continue to obtain information from a defendant who is a mere witness to unrelated events.

[fn3] [2] Defendant raises as another point on this appeal that the trial court erred when it informed the jury that the defendant had requested the charge that no inferences were to be drawn from the defendant's failure to testify. Defendant failed to object to the charge and thereby failed to preserve this issue for review. In any event, in light of the disposition of this case, it is unnecessary to rule on this issue. Because a new trial is warranted, however, we note that it is unnecessary and improper to qualify the charge with words indicating that it is given at defendant's request (see *People v McLucas,* 15 N.Y.2d 167).

JASEN, J. (dissenting).

I simply cannot accept the theory, espoused by the majority of this court, that a defendant represented by counsel in a pending criminal proceeding may not be questioned by law enforcement officers even about concededly unrelated matters in the absence of that counsel. To reach such a result, the majority not only misperceives the right of an accused to be represented by counsel, but, also, blindly elevates that right above the compelling interest of the State to investigate and prosecute criminal conduct.

It has long been recognized in this State that law enforcement officers may question a defendant about matters which are unrelated to the criminal proceeding in which the defendant is represented by counsel. *(People v Ermo,* 47 N.Y.2d 863, 865; *People v Coleman,* 43 N.Y.2d 222, 226-227; *People v Clark,* 41 N.Y.2d 612, 615, cert den 434 U.S. 864; *People v Hobson,* 39 N.Y.2d 479, 483; *People v Taylor,* 27 N.Y.2d 327, 331-332; *People v Hetherington,* 27 N.Y.2d 242, 245.) Contrary to the majority's assertion, this rational rule of law is hardly inconsistent with the principle that "[o]nce an attorney enters the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney, of the defendant's right to counsel" *(People v Arthur,* 22 N.Y.2d 325, 329; *People v Hobson,* 39 N.Y.2d 479, 483, *supra).* That no inconsistencies were ever perceived or, indeed, anticipated by this court from the application of these two distinct concepts is apparent from the plain language of *Hobson* itself, where this court, in unanimously reaffirming the rule of the *Arthur* case *(supra)* observed: "[T]he fact that a defendant is represented by counsel in a proceeding unrelated

to the charges under investigation is not sufficient to invoke the *[Arthur]* rule (see *People v Hetherington,*

27 N.Y.2d 242, 245, *supra; People v Taylor,* 27 N.Y.2d 327, 331-332)." *(People v Hobson,* 39 N.Y.2d, at p 483, *supra.)* Thus, the majority's assertion that these rules of law are inconsistent is belied by the unequivocal language of the very case from which they attempt to draw support.

Nor does the rule of law which authorizes the questioning of a defendant as to matters unrelated to the proceeding in which he is represented by an attorney impinge upon the right of an accused to be assisted by counsel. With respect to these unrelated matters, there has yet to be any formal commencement of a criminal proceeding against the defendant to which the right to counsel would attach. *(People v Simons,* 22 N.Y.2d 533, 539; *People v Stanley,* 15 N.Y.2d 30, 32-33.) Further, the defendant, after being informed of his constitutional rights, could simply refuse to respond to inquiries posed to him by the law enforcement officers or request that an attorney be provided for him during questioning. A defendant is under no compulsion to answer any questions whatsoever, even as to unrelated matters. Thus, as in this case, where a defendant voluntarily chooses to provide the police with information concerning criminal activity which differs from the criminal conduct which gave rise to his arrest and there is absolutely no indication of exploitation of defendant by law enforcement officers, a defendant's right to counsel is simply not jeopardized.

In my opinion, implementation of the majority's holding — purportedly predicated on right to counsel principles — will serve only to impede effective law enforcement by depriving police officers of valuable sources of information. For example, pursuant to the majority's position, law enforcement officers will be precluded from questioning a defendant charged with driving a motor vehicle while intoxicated about a brutal murder unless they first contact the defendant's attorney representing him on the driving while intoxicated charge and secure his presence at the questioning. This is so even if the defendant was an innocent bystander who witnessed the murder and voluntarily agreed to co-operate with the police. Surely, the right to counsel was never intended to prevent a defendant from voluntarily co-operating with the police concerning matters unrelated to the crime for which he is

Page 177

charged. To hold to the contrary defies both constitutional principles and common sense.

Even accepting, *arguendo,* the view of the majority that defendant was improperly questioned as to unrelated crimes, there exists an additional, and, indeed, fatal flaw in the rationale adopted by the majority. I had thought it was a well-established principle of law in this State that a spontaneous statement made to police by a defendant who had been advised of his constitutional rights is not rendered inadmissible solely because the defendant was in custody and represented by counsel who was not present when the statement was volunteered. *(People v Clark,* 41 N.Y.2d 612, 615, *supra; People v Hobson,* 39 N.Y.2d 479, 483, *supra; People v Kaye,* 25 N.Y.2d 139, 143-144; *Matter of Carlton W.,* 63 A.D.2d 830; *People v Howard,* 62 A.D.2d 179, 181; *People v Talamo,* 55 A.D.2d 506, 507-508.)

Yet, today, the majority holds that the concededly volunteered statement of this convicted defendant was not spontaneous, and, therefore, must be suppressed. Such conclusion is reached by the majority only after reviewing the facts in the record and drawing inferences therefrom. This, we are unable to do. (NY Const, art VI, § 3.)

The issue of whether an inculpatory statement is "spontaneous" and, thus, admissible into evidence despite law enforcement officers' failure to honor a defendant's right to counsel is essentially one of fact. *(People v Maerling,* 46 N.Y.2d 289, 301.) Here, County Court, after considering all the facts and

circumstances present, determined that defendant's inculpatory statement was spontaneous. This finding of spontaneity, being affirmed by the Appellate Division, is beyond our review if there exists any factual support in the record for such determination. *(Id.;* cf. *People v Leonti,* 18 N.Y.2d 384, 390.) Stated differently, the sole question before this court is whether, under any view of the facts, it could be concluded that defendant's statement was not solicited by law enforcement officers.

The testimony adduced at the suppression hearing reveals that defendant was not physically abused or threatened by the police officers. Defendant was questioned only as to matters concerning unrelated crimes after 1:00 P.M. and, further, all questioning of defendant occurred during the daytime and ceased by 4:45 P.M. It was not until a half hour later when defendant, while gazing out the window, uttered the inculpatory

Page 178

statement. The police officers were not conversing with defendant at this time, as they were completing their paper work with respect to defendant's arrest.

Given these circumstances, I find more than ample evidence to support County Court's determination that defendant's statement was spontaneous. In my opinion, the majority, in holding to the contrary, has transgressed our limited scope of review in these matters and has, in actuality, usurped the authority of County Court and the Appellate Division to pass upon issues of fact. Where reasonable minds may differ as to the inferences to be drawn from a certain set of circumstances, this court "may not interfere with the affirmed findings of that court possessing authority to resolve the issues of fact." *(People v Wharton,* 46 N.Y.2d 924, 925.)

Further, as we noted in *People v Kaye* (25 N.Y.2d 139, 145, *supra),* "[t]ruly voluntary confessions constitute a highly trustworthy type of evidence * * * No court has yet held that a police officer must take affirmative steps, by gag or otherwise, to prevent a talkative person in custody from making an incriminatory statement within his hearing. * * * To require a police officer to prevent a prisoner from volunteering a statement, or to prevent the officer from divulging statements spontaneously made to him would stretch the comprehension of the average citizen to the breaking point. Our decisions must appear to be rational, fair as well as practical, if the courts are to retain the respect of the people. The admonition of Justice CARDOZO is particularly appropriate under these circumstances — `[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament.' *(Snyder v. Massachusetts,* 291 U.S. 97, 122.)"

Accordingly, I would affirm the order of the Appellate Division.

Judges JONES, WACHTLER, FUCHSBERG and MEYER concur with Chief Judge COOKE; Judge JASEN dissents and votes to affirm in a separate opinion in which Judge GABRIELLI concurs.

Order reversed, judgments and plea of guilty vacated, statement suppressed and case remitted to Nassau County Court for further proceedings on the indictments in accordance with the opinion herein.

Page 179

New York Court of Appeals Reports

PEOPLE v. RUFF, 81 N.Y.2d 330 (1993)

615 N.E.2d 611, 599 N.Y.S.2d 221

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. RICHARD RUFF, Appellant.

Court of Appeals of the State of New York.

Argued April 29, 1993

Decided June 8, 1993

Appeal from the Appellate Division of the Supreme Court in the Third Judicial Department, Thomas W. Keegan, J.

Thomas Marcelle, Albany, for appellant.

Page 331

Sol Greenberg, District Attorney of Albany County, Albany *(Michael J. Connolly* of counsel), for respondent.

HANCOCK, JR., J.

The issue in this case is whether defendant's statements to police should have been suppressed as violative of his right to counsel under this Court's holding in *People v Ermo* (47 N.Y.2d 863). We held in *Ermo* that a defendant's statement had been taken in violation of his right to counsel because it was elicited while questioning defendant on pending charges on which defendant was represented by counsel. We reasoned that such exploitation of impermissible questioning by the police interfered with the attorney-client relationship and thus violated the right to counsel. The present case calls on the Court to determine whether, in the absence of representation by counsel on the pending charges, questioning on those charges requires suppression of defendant's statement on an

Page 332

unrelated matter. For the following reasons, we conclude that it does not and, accordingly, affirm.

I.

In 1987, a warrant was issued in Rensselaer County for the arrest of defendant charging him with sexual abuse in the first degree. Christopher Ruff, defendant's cousin, was employed as a police dispatcher when he learned of the warrant. He contacted State Police investigators and informed them that he believed that defendant was involved in the 1957 murder of his brother, Billy Ruff, in Albany County. In

November of 1988, the investigators located defendant in Florida. They discussed extradition of defendant on the 1987 sexual abuse charges with the Rensselaer County District Attorney, but failed to obtain the necessary authorization to bring defendant back to this State. The investigators were advised that Rensselaer County was withdrawing the warrant and were led to believe that the sexual abuse charges against defendant would be dropped. The Albany County District Attorney, however, was interested in investigating defendant's possible involvement in the 1957 murder and authorized the investigators to travel to Florida to question defendant.

On November 16, 1988, State Police Investigators Brant and Lewis traveled to Florida and, with a Florida law enforcement officer, located defendant at his place of employment. Defendant agreed to accompany the officers to the local police station for questioning. After being read *Miranda* warnings, defendant was questioned about the sexual abuse allegations. He admitted committing acts constituting several sex crimes, including those involved in the Rensselaer County charges and signed a written statement admitting that conduct.

Defendant was then asked whether he knew anything about the 1957 murder. He denied any knowledge of the circumstances of Billy Ruff's death, but agreed to submit to a polygraph examination. The next day, the investigators took defendant to a civilian polygraph technician who, after defendant received *Miranda* warnings and signed a waiver, questioned defendant about the murder out of the presence of the investigators. At the conclusion of the questioning, the technician indicated to defendant that he had "a problem". Defendant responded, "Yes, I know. The problem is I killed Billy." Defendant then wrote on a piece of paper "I am an alcoholic. I am cured. In August 1957, I killed Billy, and I need help."
Page 333
Upon further questioning by the investigators, defendant elaborated on the events leading to the death. He was subsequently arrested as a fugitive from New York and transported back to this State. In April of 1989, defendant was indicted in Albany County for the murder.[fn*]

At a pretrial *Huntley* hearing, defendant moved to suppress his statements about the murder as violative of his right to counsel which had attached with regard to the pending Rensselaer County sexual abuse charges *(see, People v Samuels,* 49 N.Y.2d 218). The trial court denied the motion and defendant was subsequently convicted of murder in the first degree *(see,* Penal Law of 1957 § 1044). The Appellate Division unanimously affirmed.

II.

In *People v Kazmarick* (52 N.Y.2d 322), this Court held that pending criminal charges do not bar the police from questioning a suspect on an unrelated matter, when the suspect is not in fact represented by counsel on the pending charges. In deciding *Kazmarick,* the Court distinguished its previous decision in *People v Rogers* (48 N.Y.2d 167) which held that once an attorney had entered proceedings on prior pending charges, police may not question a suspect in custody on those charges, even on unrelated matters, in the absence of counsel. The Court had reasoned in *Rogers* that any questioning, even on unrelated matters, presents a potential interference with the critical relationship which exists between attorney and client and thus threatens the suspect's right to counsel *(id.,* at 173).

But, the *Rogers* holding had never been applied to bar uncounseled questioning when no attorney-client relationship had been established on the pending charges and when the right to counsel arose solely upon

the commencement of formal proceedings *(see, Samuels, supra,* at 221). In *Kazmarick,* the Court simply reaffirmed the narrow application of *Rogers* as confined to situations where an attorney had entered the pending proceedings. It held that *Rogers* did not preclude questioning on unrelated charges where defendant's right to counsel had attached in the pending case solely by virtue of commencement of formal proceedings *(see, Kazmarick, supra,* at 328). This Court clearly distinguished between the attachment of the right by commencement of formal

Page 334

proceedings and by the entrance of counsel into pending proceedings and noted:

"Defendant in an overly simplistic lumping of the two lines of cases argues from *Samuels* that the arrest warrant and accusatory instrument * * * created a nonwaivable right to counsel and from *Rogers* that attachment of that right prevented interrogation on any other criminal matter. While the filing of an accusatory instrument triggers a right to counsel with respect to the charge made by the accusatory instrument, *the right to counsel and representation by counsel are not the same thing * * * Simply put, the legal fiction of representation indulged by the Samuels line of cases is not tantamount to the actual or requested representation protected by the Rogers-Cunningham line" (id.,* at 327-328 [emphasis added]).

In the present case, defendant's right to counsel had attached on the Rensselaer County sexual abuse charges but defendant had neither retained nor requested counsel. Thus, under *Kazmarick,* inasmuch as no attorney-client relationship had been established on the pending charges, the investigators were not barred from questioning on the unrelated Albany County homicide.

Defendant's reliance on *People v Ermo (supra)* for a contrary result is misplaced. In *Ermo,* the police interrogated defendant, in the absence of counsel, intermingling questions relating to the matter on which defendant was represented with questions on an unrelated matter. This Court concluded that the questioning of defendant on the unrelated matter was violative of defendant's right to counsel because "the police exploited concededly impermissible questioning" *(id.,* at 865) interfering with the attorney-client relationship on the pending matter to elicit statements on the unrelated matter. It was this type of interference with an existing attorney-client relationship on a pending charge that led to our decision in *Rogers* barring custodial questioning on even unrelated matters absent an effective waiver of the right to counsel *(see, People v West,* 81 N.Y.2d 370, 377 [decided today]; *People v Robles,* 72 N.Y.2d 689, 697-698; *Rogers, supra,* at 171-173).

The present case, however, does not involve police interference with an attorney-client relationship by questioning in a manner designed to elicit statements on an unrelated matter.

Page 335

In the absence of actual representation, questioning on the pending charges does not require suppression of statements on unrelated matters under *Ermo.* We need not and do not reach the question whether — in circumstances not present here — police questioning on unrelated matters could rise to a level of exploitation that could not be tolerated by this Court.

We have reviewed defendant's remaining contentions and find them to be without merit.

Accordingly, the order of the Appellate Division should be affirmed.

Chief Judge KAYE and Judges SIMONS, TITONE, BELLACOSA and SMITH concur.

Order affirmed.

[fn*] Prior to the Albany County indictment, defendant was arraigned on and pleaded guilty to the Rensselaer County charges of sexual abuse.

Page 336

New York Court of Appeals
Reports

PEOPLE *v.* TAYLOR, 27 N.Y.2d 327 (1971)

318 N.Y.S.2d 1, 266 N.E.2d 630

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* RONALD TAYLOR and

CURTIS TAYLOR, Appellants, et al., Defendant.

Court of Appeals of the State of New York.

Argued November 23, 1970

Decided January 6, 1971

Page 328

Appeal from the Appellate Division of the Supreme Court in the First Judicial Department, JOHN M. MURTAGH, J.

Herbert S. Siegal for Ronald Taylor, appellant.

Otto F. Fusco for Curtis Taylor, appellant.

Burton B. Roberts, District Attorney (*Bennett M. Epstein* of counsel), for respondent.

SCILEPPI, J.

The question raised in this appeal is whether certain inculpatory statements made by the appellants were elicited by law enforcement officials in violation of their right to counsel under prior decisions of this court.

On March 22, 1968, one Bernhard W. West was killed during a street assault and robbery in Bronx County. The police investigation of this incident was conducted by a Detective Russo who on April 10, 1968 learned that appellants Ronald and Curtis
Page 329
Taylor herein and a third defendant, Gail White (who is not a party to the instant appeal) had been arrested for a robbery with a *modus operandi* similar to that used herein. On April 11, Russo went to the Women's House of Detention where Gail White had been incarcerated pending trial for the unrelated robbery. He informed her that he was investigating a case where a man had been "cut and robbed" in The Bronx and

advised her of her rights under *Miranda* v. *Arizona* (384 U.S. 436). She agreed to talk without a lawyer and made a statement implicating the appellants and herself in the West murder. Thereafter, on April 16, 1968, she was brought to the office of Assistant District Attorney Goldsmith, advised of her rights and made another statement. That same day, the appellants were taken to Mr. Goldsmith's office. Each was advised of his rights, both verbally and by signing a form after having read the same. Thereupon, both appellants gave detailed incriminating statements and were subsequently indicted for the murder of Bernhard West. In January, 1969, a pretrial *Huntley* hearing was conducted on appellants' motion to suppress the aforesaid statements. The court found that the Taylor brothers and Gail White had waived their rights under *Miranda,* but, relying on *People* v. *Vella* (21 N.Y.2d 249) suppressed all the statements because they had been assigned counsel when they were arraigned on the unrelated robbery charge. On an appeal by the People, the Appellate Division unanimously reversed (34 A.D.2d 530) on the authority of our decision in *People* v. *Stanley* (15 N.Y.2d 30) and ordered that the motion to suppress be denied. The case is here on a certificate issued by an Associate Judge of this court.

Appellants argue that the trial court properly suppressed the incriminating statements and ask us to reinstate that order. We disagree. In *People* v. *Stanley* (15 N.Y.2d 30, *supra*) we held that though incriminating statements elicited in the absence of counsel and after the commencement of criminal proceedings by arraignment or indictment are inadmissible at a subsequent trial on charges for which the accused has been indicted or arraigned (see, e.g., *People* v. *Di Biasi,* 7 N.Y.2d 544; *People* v. *Waterman,* 9 N.Y.2d 561), the People are still privileged to question the accused as to unrelated crimes in the absence of counsel. As the then Judge FULD observed (*Stanley, supra,* at pp. 32-33);

Page 330

"However, as the language of the cases makes clear, the mere fact that the defendant has been arraigned or indicted on one charge does not prevent law-enforcement officials from interrogating him, in the absence of an attorney, about another and different crime — upon which he has been neither arraigned nor indicted — or render inadmissible a confession or other inculpatory statement obtained as a result of such questioning. (See *People* v. *Weinstein,* 11 N.Y.2d 1098; *People* v. *Lathan,* 12 N.Y.2d 822.) The reason is clear. With regard to the second crime about which the defendant is questioned, there has not yet been `the formal commencement of the criminal action' against him. (*People* v. *Waterman,* 9 N.Y.2d 561, 565, *supra*; see, also, Richardson, Evidence [9th ed., 1964], p. 547.)" Inasmuch as in the instant case at the time of the questioning no criminal proceedings had commenced against appellants on the West murder, our postindictment-postarraignment rule does not bar the statements. Appellants, however, argue that they were rendered inadmissible under the rule as enunciated in *People* v. *Donovan* (13 N.Y.2d 148) and its progeny (see, e.g., *People* v. *Paulin,* 25 N.Y.2d 445; *People* v. *Arthur,* 22 N.Y.2d 325; *People* v. *Vella,* 21 N.Y.2d 249, *supra*; *People* v. *Gunner,* 15 N.Y.2d 226). Since appellants never requested counsel during the interrogation and in point of fact specifically waived the right to have counsel present under *Miranda* v. *Arizona* (*supra*), the question presented narrows down to whether the fact that the assistant district attorney knew that counsel had been assigned in another case, renders the statements inadmissible. In support of this position, appellants rely on *People* v. *Vella* (*supra*) where after being arraigned and assigned counsel in New York County on a charge of receiving stolen property, defendant was questioned by the State Police in Suffolk County concerning a burglary of a home in that county and theft therefrom of property involved in the New York County charge. We said (at p. 251) that "[s]uch interrogation, despite the defendant's waiver of counsel, was impermissible. Consequently, the confession obtained from him should not have been received in evidence." Additionally, appellant Curtis Taylor relies on *People* v. *Arthur* (*supra,* at pp. 328-329) where we said that "once the police know or have been apprised of the fact that the defendant is represented by counsel or that an attorney has communicated with

Page 331
the police for the purpose of representing the defendant, the accused's right to counsel attaches".

We hold that neither *Vella* nor *Arthur* mandate a reversal herein as it is our view that the Appellate Division correctly determined that the statements were admissible under *People* v. *Stanley* (*supra*). Firstly, we see no merit whatsoever to appellants' contention that the *Stanley* rule has not survived the *Donovan* cases (see *People* v. *Jackson,* 22 N.Y.2d 446; *People* v. *Simons,* 22 N.Y.2d 533; *People* v. *Malloy,* 22 N.Y.2d 559). In *Stanley* (*supra,* at p. 33), we added that "[i]t would be a different matter, of course, if the first arraignment was a `sham', merely `a pretext for holding the defendant in connection with the investigation' of the other crime. (See *People* v. *Robinson,* 13 N.Y.2d 296, 301; *People* v. *Davis,* 13 N.Y.2d 690.)" *People* v. *Vella* (*supra*) is nothing more than an application of the exception contemplated in *Stanley.* There, the charges in both counties were not unrelated and the arrest by the State Police practically occurred in the presence of the assigned attorney. Though the arraignment by the New York County authorities upon a charge of receiving may have been bona fide, the character of the proceeding changed when the arresting officers immediately turned the defendant over to the waiting police from Suffolk County. The prior arraignment was nothing more than a device to allow the Suffolk authorities to arrest and question on matters which concerned acts which were the foundation to both the New York and Suffolk charges and we held that the statements were inadmissible under both our postarraignment and *Donovan* rules. In the instant case, counsel was merely assigned to represent appellants at an arraignment on an unrelated charge. This arraignment was not a sham and in point of fact appellants were convicted on the robbery charge and are now serving a sentence pursuant to that conviction. Nor can it be said that the arraignment was a pretext to detain appellants in connection with the investigation of the West murder since the interrogation complained of did not occur until nearly one week had elapsed after the arraignment on the unrelated charge. As we recently said in *People* v. *Hetherington* (27 N.Y.2d 242, 245): "Quite obviously, the fact that the defendant may have been represented in the past by an attorney in some unrelated case is, for present purposes, beside the point. In
Page 332
light of *People* v. *Arthur* (22 N.Y.2d 325, 329, *supra*) — and the other cases cited above — further questioning of an accused in the absence of counsel is proscribed only after the police learn that `an attorney [has] enter[ed] the proceedings' in connection with the charges under investigation. (See, also, *People* v. *Delle Rose,* 27 N.Y.2d 882, also decided today.) It follows, therefore, that, since the defendant did not have an attorney representing him in this case — or desire one — there was no violation of his right to counsel, and his statements were properly received in evidence."

Thus, the thrust of our prior decisions is that once the police learn that an attorney has entered *the proceeding,* it is offensive to our system of justice, in the absence of a waiver, to permit further questioning by representatives of the People. Implicit in this rationale is the concept that the rule does not obtain unless and until the police or prosecutor learn that an attorney has been secured to assist the accused *in defending against the specific charges for which he is held.* It is, therefore, of no consequence that the law enforcement officials involved herein learned that an attorney had been assigned at the arraignment on the robbery charge since this attorney was in no way connected with the instant criminal proceeding. Moreover, if we were to accept appellants' interpretation of the *Donovan-Vella-Arthur* rule, it would then obtain whenever a defendant has had an attorney in any unrelated proceeding. We never intended that the rule should go so far.

Consequently, since appellants neither requested counsel, nor had one entered the proceeding, no right to counsel attached under our State Constitution and the inculpatory statements elicited should not have been suppressed.

Accordingly, the order appealed from should be affirmed.

Chief Judge FULD and Judges BURKE, BERGAN, BREITEL, JASEN and GIBSON concur.

Order affirmed.

Page 333

Kentucky
Reports

SHONEY'S, INC. v. LEWIS, 875 S.W.2d 514 (Ky. 1994)

SHONEY'S, INC., Shoney's, Inc. d/b/a Lee's Famous Recipe Chicken,

Appellant, v. Honorable Thomas R. LEWIS, Judge, Warren Circuit Court,

Division One, Appellee, Roxanne Herr, Real Party in Interest.

No. 93-SC-214-MR.

Supreme Court of Kentucky.

January 31, 1994.

Reconsideration Denied May 26, 1994.

Richard S. Cleary, Jeffrey A. Savarise, Greenebaum, Doll & McDonald, Louisville, Charles E. English, Sr., Paul Gliatta, English, Lucas, Priest & Owsley, Bowling Green, for appellant.

Dale Golden, Rudloff, Golden & Evans, Bowling Green, for real party in interest.

Thomas R. Lewis, Judge, Warren Circuit Court, Division One, pro se.

OPINION OF THE COURT BY JUSTICE LAMBERT AND ORDER REVERSING

The motion of appellants, Shoney's, Inc. and Shoney's, Inc. d/b/a Lee's Famous Recipe Chicken, for a Writ of Mandamus was denied, without opinion, in an original action in the Kentucky Court of Appeals. Pursuant to CR 76.36 (7)(a), this appeal is as a matter of right.

This litigation involves allegations of sexual harassment brought by the Real Party in Interest, Roxanne Herr, against Shoney's, Lee's, and Mohammed Boka, an employee of Lee's. Prior to commencement of the underlying litigation, on September 21, 1992, Herr's counsel contacted Lee's Senior Vice-President of Human Resources concerning the complaint of sexual harassment. In this conversation, Herr's counsel was informed that Lee's would be represented by counsel and was given the name of such counsel. On September 29, 1992, Herr's counsel spoke with Lee's counsel by telephone about the

Page 515

possibilities of a pre-litigation settlement. This conversation was confirmed by Lee's counsel in a letter dated October 1, 1992, which detailed the actions his "client" had taken. Subsequent to these conversations and correspondence, Herr's counsel met with and procured sworn statements from two of

Lee's employees, a general manager and a relief manager, without consent from or notice to Lee's counsel. The statements concerned the facts and circumstances of the underlying case.

On October 26, 1992, Herr, represented by the same counsel, filed her complaint for sexual harassment. Lee's moved to disqualify Herr's counsel and his law firm from the case alleging a violation of SCR 3.130, Rule 4.2, which prohibits communication with a person represented by counsel. Without opinion, the Warren Circuit Court declined to disqualify counsel and denied the request to prohibit use of the sworn statement. Lee's sought a Writ of Mandamus in the Court of Appeals to require Judge Lewis to disqualify Herr's counsel for violating the rule against ex parte contacts with parties known to be represented by counsel, and to suppress the written statements obtained. Lee's seeks to reverse the Court of Appeals' denial of relief and obtain an order directing the Warren Circuit Court to disqualify Herr's counsel and to suppress the evidence obtained by the ex parte communication.

SCR 3.130, Rule 4.2 Communication with Person Represented by Counsel, provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Id. At the trial court hearing on the disqualification, Herr's counsel made the following admissions: (1) that prior to litigation, he was advised that Lee's would be represented by the law firm of Greenebaum, Doll & McDonald (hereinafter "Greenebaum"); (2) that he took written statements from two of Lee's senior managerial employees, without consent of or notice to Greenebaum; (3) that the statements were "very important . . . super important" to Herr's case; and (4) that he had also taken a "stack" of written statements from other Lee's employee's. From this, there is no doubt that the statements "were about the subject of the representation" as provided in SCR 3.130, Rule 4.2.

We turn now to whether Lee's managerial employees were represented parties for purposes of the rule. The comment to the rule provides, in pertinent part, as follows:

[2] In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with *persons having a managerial responsibility on behalf of the organization*, and with any other persons whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. (Emphasis added.)

SCR 3.130, Rule 4.2, comment 2. The managerial employees herein are precisely within the group of persons provided for in the comment. It is undisputed that they were of senior managerial rank and such fact allows for no conclusion other than the applicability of the rule.

Finally, we must decide whether SCR 3.130, Rule 4.2, applies both before and after formal proceedings have begun. For this we turn to the plain language of the rule which is without any requirement of a formal proceeding. When an attorney represents a party in a specific matter, that attorney may not communicate with any other represented party about the matter without the consent of opposing counsel. While SCR 3.130, Rule 4.2, comment 1, provides that it does not apply to communications with parties concerning other matters, here it is conceded that the communication was about the underlying case. Both

sides rely on *United States v. Jamil*, 546 F. Supp. 646 (E.D.N.Y. 1982) rev'd on other grounds, 707 F.2d 638 (2d Cir. 1983). In *Jamil*, an individual retained an attorney after having been made aware that he was a target of a grand jury investigation and that an indictment was imminent. The United States subsequently used a wired informant to obtain a statement from the

Page 516

defendant. The U.S. District Court addressed the issue of whether the rule corresponding to our Rule 4.2 applied prior to an indictment and held that when a person retains counsel to protect him during an investigation, the person becomes a "represented party" for purposes of the ethical prohibition on ex parte contacts.

Pursuant to SCR 3.530, the Kentucky Bar Association has adopted Formal Ethics Opinions. In Opinion KBA E-65, the Association addressed the question we face today. It answered that "A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel . . . but should deal only with his counsel." *See* Canon 9, Canons of Professional Ethics. The American Bar Association has opined "It is clear that Canon 9 is to be construed literally and does not allow a communication with an opposing party, without the consent of his counsel, though his purpose be merely to investigate the facts." Accordingly, we hold that the communication between Herr's counsel and Lee's managerial employees was improper.

We must now consider the appropriate remedy. Lee's contends disqualification of the Herr's counsel is required and cites many Kentucky Bar Association disciplinary actions in support of this position. While there appears to be no direct Kentucky authority on Motions to Disqualify counsel nor on the remedy therefore, other jurisdiction have disqualified counsel in similar situations.

In *Papanicolaou v. Chase Manhattan Bank, N.A.*, 720 F. Supp. 1080 (S.D.N.Y. 1989), the United States District Court for the Southern District of New York, under its version of Rule 4.2, disqualified the defendant's law firm because a partner had discussed the merits of the case with the plaintiff outside the presence of the plaintiff's counsel. Noting that the firm in question had expended thousands of hours of work on the case, the District Court nevertheless found it had an obligation "to disqualify the offending counsel when the integrity of the adversarial process is at stake." It continued, "a trial judge should primarily assess the possibility of prejudice at trial that might result from the attorney's unethical act" with any doubt "to be resolved in favor of disqualification." *Id.* at 1083. *See also Shelton v. Hess*, 599 F. Supp. 905 (S.D.Tex. 1984). Herr's counsel relies on *W.T. Grant Co. v. Haines*, 531 F.2d 671 (2d Cir. 1976), where the United States Court of Appeals for the Second Circuit refused to disqualify an attorney who interrogated a defendant-employee moments after filing a complaint. *W.T. Grant* is distinguishable from the case at bar in that the defendant-employee was not represented by counsel at the time of the interrogation. *Id.* at 675. Here, the witnesses interrogated were high level employees of a represented party, a fact of which Herr's counsel was fully aware. We conclude that the trial court erred in failing to order disqualification of Herr's counsel and that the Court of Appeals erred in failing to grant a writ of mandamus.

With respect to the statements wrongfully obtained, the only satisfactory remedy is suppression. In *Bender v. Eaton*, Ky., 343 S.W.2d 799 (1961), the plaintiff was ordered by the court to produce certain medical reports. The plaintiff sought a writ of prohibition to prevent enforcement of the order. The Court of Appeals agreed. In granting prohibition, the court held that "once the information is furnished it cannot be recalled." *Id.* at 802. It opined that if evidence is improperly discovered a later objection may be

unavailing and the harm complete. In the present case, if the improperly obtained statements are not suppressed, they may acquire an independent significance, such that irreparable prejudice may result. In *Papanicolaou v. Chase Manhattan Bank, N.A.*, 720 F. Supp. 1080 (S.D.N.Y. 1989), it appears to have been taken for granted that suppression of the statements was the appropriate remedy for such a violation. Following its detailed discussion of the facts and law with respect to disqualification and concluding that it was necessary, the *Papanicolaou* Court ordered various depositions deleted from the record.

We recognize that disqualification of a party's counsel and suppression of information obtained by that counsel is a drastic remedy and the decisions of the courts below reflect a proper reticence. Nevertheless, in circumstances

Page 517

such as these, with the integrity of the adversarial process is at stake, we must make every effort to prevent harm to the civil justice system.

For the foregoing reasons, we reverse the Court of Appeals and remand this cause to the Warren Circuit Court with directions to enter an order disqualifying Dale Golden and the firm of Rudloff, Golden & Evans from further participation in this litigation. The trial court shall further require said attorneys to disclose to Lee's counsel the identity of all persons from whom such statements were taken and refrain from any further disclosure of the substance of the statements in question.

IT IS SO ORDERED.

STEPHENS, C.J., and REYNOLDS and SPAIN, JJ., concur.

WINTERSHEIMER, J., concurs in result only.

LEIBSON, J., dissents by separate opinion in which STUMBO, J., joins.

LEIBSON, Justice, dissenting.

Respectfully, I dissent.

The Kentucky Rules of Civil Procedure and the Kentucky Rules of Evidence specify the rules related to discovery and to the admission and exclusion of evidence. None of these rules authorize suppression of statements taken from employee witnesses by an adverse party, even if some of the employees happen to function in some type of managerial capacity. If the statements taken here from managerial employees related to factual observations rather than to matters covered by the attorney/client privilege or by the work product rule, they were not protected by CR 26.02 or any other Civil Rule. On the contrary, at this stage of this litigation we should assume that use of the statements will be confined to factual matters bearing on the plaintiff's allegations of misconduct, matters within the scope of discovery and not privileged: that the statements will be used only as authorized by the Kentucky Rules of Evidence. We should assume that the trial court will be quite capable of using its authority to keep out privileged matters and inadmissible evidence, as the rules require, without our interceding by writ of prohibition or mandamus.

The question here is purely one of ethical violation, and the appropriate remedy. No Kentucky authority suggests disqualifying a party's attorney and suppressing any and all use of the evidence he has obtained is an appropriate remedy in present circumstances. Certainly Rule 4.2 of the Rules of Professional Conduct, which we have adopted in SCR 3.130, does not so provide.

A lawsuit is a search for the truth, and this legal principle is too important to sacrifice to the particular ethical violation charged here. This legal principle should be the overriding consideration in deciding whether suppression of the evidence contained in the statements obtained from Shoney's employees is the appropriate remedy for the ethical violation the Majority believes has occurred here.

We must consider very carefully in deciding when the interest at stake justifies suppressing the truth. As Justice Scott Reed so aptly put it in *Nazareth Literary & Benevolent Inst. v. Stephenson*, Ky., 503 S.W.2d 177 (1973), in considering questions of this nature we must first ask, "wherein the public interest lies." When should the court craft a rule creating a privilege where none exists, a privilege which will be used to suppress evidence of the truth? The interest of justice lies in keeping such privileges few in number and carefully scrutinized, taking care to construe suppression to apply only where essential to protect some interest more important than a just determination of the pending case according to the true facts. Protecting Shoney's corporate interests against statements freely given by their employees about relevant facts is *not* such an interest.

Elsewhere in SCR 3.130, where appropriate, as where a client insists on presenting false testimony, the duties of a lawyer in conducting the litigation are specifically provided. Here, even were we to assume that Roxanne Herr's counsel should be disqualified in this case because he violated an ethical rule pertaining to the management of the case, certainly the remedy further provided to Shoney's, entirely suppressing any use of

Page 518

the statements in the present litigation, is a draconian remedy. It is made up entirely of whole cloth and it serves only to prevent rather than assist in discovery of the truth.

Bender v. Eaton, Ky., 343 S.W.2d 799 (1961), cited in the Majority Opinion, does not address the present facts. It involved providing a writ of prohibition to prevent a trial court from enforcing an unauthorized order compelling discovery. Once the trial court forced the party complaining to submit to the discovery sought, the genie was out of the bottle. Here the opposite situation obtains. Discovery from Shoney's employees has been already freely obtained; in a manner the Majority concludes unethical, but nevertheless one forbidden by no law or rule of legal procedure. The genie is already out of the bottle, and no rule authorizes suppressing factual information already obtained.

The obvious remedy of a party aggrieved by the unethical conduct of a lawyer is to complain to the Kentucky Bar Association, a complaint which, if appropriate, will be followed by punishment of the lawyer commensurate with the seriousness of his misconduct. In this case, instead of punishing the lawyer, we are punishing the client, presumably innocent of any wrongdoing in this affair. Worse yet, we are punishing the judicial process by suppressing evidence otherwise admissible in the search for the truth.

The attorney who took the statements questions whether there was really an ethical violation here. Certainly, when employed, a competent attorney investigates his client's case *before* filing suit to avoid, if possible, filing a frivolous lawsuit. Should communicating with Shoney's corporate counsel about a

potential claim while continuing the investigation, in itself, foreclose the right to further investigate the facts before filing suit? We seem to have so concluded in this case, painting with a broad brush where fine lines are called for. Whether there was any impropriety here, and if so, exactly what was inappropriate and what was not, is quite unclear. While the questions of impropriety raised here are matters which may be as reasons to deprive the client, Herr, of the benefit of evidence obtained in the investigation of her case. Suppressing statements counsel obtained is not justified so long as the information obtained involved neither privileged material, nor proof of deceptive, false or misleading conduct so significantly tainting the integrity of the statements as to destroy their evidentiary value.

So far as this record shows, before obtaining the statements, Herr's counsel made appropriate disclosures to Shoney's employees regarding his representation and the nature of the investigation. In such circumstances, as both the trial court and the Court of Appeals correctly perceived, the record presented no reason for taking the action Shoney's demanded, disqualifying Herr's lawyer and suppressing any use of the statements he obtained. The reasons for the remedy imposed here exist only in the imagination of Shoney's counsel. Shoney's has succeeded in using this Court to turn what is (if anything) a quarrel over ethics into a defense to this action.

STUMBO, J., joins this dissent.

Minnesota Reports

STATE v. CLARK, 738 N.W.2d 316 (Minn. 2007)

STATE of Minnesota, Respondent, v. Courtney Bernard CLARK, Appellant.

No. A06-1765.

Supreme Court of Minnesota.

September 13, 2007.

Appeal from the District Court, Ramsey County, Elena L. Ostby, J.

Page 317

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Page 318

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Page 319

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Page 320

SYLLABUS

District court did not err when it admitted statements the defendant made to the police during three interviews when (1) the defendant's heroin withdrawal symptoms did not prevent him from voluntarily waiving his right to silence; (2) the conduct of the interrogating officers did not deprive the defendant of his ability to make an unconstrained and wholly autonomous decision to speak as he did; and (3) the defendant waived his Sixth Amendment right to counsel during two post-arraignment interviews.

District court did not err when it admitted statements the defendant made to the police during two post-arraignment interviews because although the prosecutor violated Minn. R. Prof. Conduct 4.2 by permitting the police to interview the defendant without securing the express consent of the defendant's lawyer, the state's conduct was not so egregious as to warrant suppression of the resulting statements under the facts of this case.

Page 321

District court abused its discretion in admitting for substantive purposes the defendant's prior conviction, but a new trial is not warranted because the defendant did not establish that he was prejudiced by the admission of the prior conviction.

John M. Stuart, State Public Defender, Paul J. Maravigli, Assistant State Public Defender, Minneapolis, MN, for Appellant.

Lori Swanson, Attorney General, Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant Ramsey County Attorney, St. Paul, MN, for Respondent.

Heard, considered, and decided by the court en banc.

OPINION

ANDERSON, Paul H., Justice.

Courtney Bernard Clark was convicted in Ramsey County for murdering Rodney Foster and attempting to murder Foster's girlfriend, B.B., while committing or attempting to commit aggravated robbery, kidnapping, and criminal sexual conduct. At Clark's trial, the state introduced over Clark's objection three recorded interviews between Clark and the police. In the first and second interviews, Clark denied involvement in the charged offenses. In the third interview, Clark admitted tying up Foster and B.B. and robbing Foster, and he stated that Foster died "by accident." During all three interviews, Clark denied having sexual relations with B.B. on the date in question. Clark's trial testimony was largely consistent with his statements during the third interview and directly opposed to the testimony of B.B., the state's primary witness. On appeal, Clark argues that the district court erred on several grounds when it admitted the recorded interviews and when it admitted, for substantive purposes, Clark's prior conviction for criminal sexual conduct. We affirm.

Appellant Courtney Bernard Clark was indicted in Ramsey County for the murder of Rodney Foster and attempted murder of Foster's girlfriend, B.B. Clark pleaded not guilty to all eight counts of the indictment.[fn1] Clark was subsequently tried before a Ramsey County jury, and B.B. was the state's primary witness.

B.B.'s Testimony

B.B. testified that she had only known Clark for a few days as of the date of Foster's murder — Saturday, July 16, 2005. Several days before that Saturday, Foster learned that Clark did not have a home and invited Clark to stay at Foster's apartment.[fn2] While spending time at Foster's apartment, Clark apparently observed Foster's drug dealer, "Taboo," packaging heroin for sale and selling heroin to Foster. Clark also spent time getting high with Foster and B.B. on drugs that Foster gave him.

B.B. and Foster were alone in the apartment and watching a movie in the living room early on Saturday when Clark, Foster's roommate, and the roommate's friend D.T. arrived at approximately 3 a.m. The

roommate and D.T. left soon thereafter. Clark eventually asked Foster for some heroin. When Foster told Clark he did not have any, Clark became angry. At Foster's request, Clark then took a seat on the couch

and continued to converse with Foster. B.B. testified that she fell asleep while Foster and Clark were talking.

B.B. awoke to see Clark standing over her with a gun, telling her to get on her stomach and put her hands behind her back. Clark then ordered Foster, who was lying on his left side, to get on his stomach. Clark bound B.B.'s wrists and feet, and at some point placed a sock in her mouth. B.B. was unable to see Foster but she deduced, based on comments Foster made to Clark, that Clark had also bound Foster's wrists. Clark then asked where the drugs and money were located. Foster told Clark he would find the items in Foster's bedroom. Clark went to Foster's bedroom and returned with drugs and money.

Sometime thereafter, Clark carried B.B. from the living room into the bathroom and left her on the bathroom floor in the dark. B.B. testified that she could hear Clark moving around the apartment searching through papers and clothes. After about three hours, she heard a muffled cry from Foster, who had apparently remained in the living room. Soon thereafter, Clark entered the bathroom briefly to reassure B.B. "that everything was going to be all right."

Clark returned to the bathroom several minutes later and said, "Foster, do you care if I fuck your bitch?" B.B. heard no response from Foster and Clark then said, "Did you hear that? * * * He doesn't care." Clark then dragged B.B. into Foster's bedroom where he placed her, still bound and gagged, on her back on an air mattress. Clark then partially removed his clothing and pulled B.B.'s pajama pants to her ankles, and vaginally raped her for approximately 10 minutes. When the rape was over, B.B. saw Clark carry a condom into the bathroom. She then heard him flush the toilet and turn on the water. Clark returned with a washcloth and scrubbed B.B.'s genital area. He then went back to the bathroom, ran some water, and returned with the washcloth again. After he washed B.B. a second time, Clark pulled up B.B.'s pants and dressed himself.

Clark next turned B.B. onto her stomach on the air mattress. From this position B.B. could see Foster's feet protruding from a laundry bag on the floor, which caused her to panic. Clark then told B.B. that Foster was dead and said, "Now it's time for the grand finale." Clark proceeded to kneel over B.B. and to place and hold a plastic bag over her head. He told B.B. to breathe and "[j]ust let go." Although B.B. was still bound and gagged, she was able to free her left hand and tear the bag off her face, at which point Clark became angry and swore at her. A minute or so later, Clark stood up, looked out the windows, and started snorting heroin. Shortly thereafter, he offered B.B. some crack cocaine by removing the gag and placing a lighted crack pipe to her mouth. After B.B. smoked the pipe, Clark replaced the gag, rebound her wrists, and rolled her up in some bed sheets.

B.B. observed Clark try without success to throw Foster's body out the bedroom window. Clark then dragged the body out of the bedroom. B.B. ultimately heard a door in the apartment shut, then Foster's vehicle — a white, SUV-type truck — being started and a squealing of tires. Five to seven minutes later, Clark returned to the apartment. He unwrapped B.B. and unbound her feet and hands. He then forced B.B. to leave the apartment with him and threatened to kill her mother and children. At the time Clark made these threats, he

was holding B.B.'s driver's license, which listed the address where her mother and children resided.

When B.B. entered the apartment building hallway with Clark, she saw a neighbor she recognized. As she passed this neighbor, B.B. mouthed the words "Help me." The neighbor kept walking, and B.B. followed Clark out of the apartment building. Some people whom B.B. recognized were sitting on the front stairs of the building. She made eye contact with one of them as she followed Clark to Foster's truck, which was parked in the building's driveway. A neighbor then came out of the building and followed Clark and B.B., and as B.B. reached the truck, the neighbor grabbed B.B.'s arm and said to Clark, "She doesn't look like she wants to go with you." B.B. then turned and ran back into the building. B.B. testified that she ran through the building's second and third floor hallways and knocked on every apartment door as she ran by, not waiting to see if anyone would answer. She was ultimately admitted into a third floor apartment, and one of the apartment's occupants called 911.

Other Witnesses for the State

A Sexual Assault Nurse Examiner (SANE nurse) who examined B.B. in the early afternoon on July 16 testified that she found bloody discharge on B.B.'s cervix, suggesting an injury consistent with rough or forced sexual intercourse. A woman who was staving with her daughter in Foster's apartment building at the time of the murder testified that she saw B.B. leaving with Clark and mouthing the words "Help me." The woman's daughter testified that she and several other persons were gathered on the front steps of the apartment building when she saw Clark and B.B. emerge on the morning of July 16. The daughter said that she told Clark to let B.B. go. She also said that she saw Clark leave the scene in a white truck.

A forensic scientist from the Minnesota Bureau of Criminal Apprehension testified that Clark's DNA was not found on evidence seized from the crime scene, including washcloths, bed sheets, a condom wrapper found in the bedroom, semen stains on the pants B.B. was wearing before and after the rape, and B.B.'s driver's license. The scientist also testified that Clark's DNA was not found on biological samples taken from B.B. by the SANE nurse.

Several witnesses testified that they saw Clark in the Lake Harriett area of Minneapolis on the morning of the next day — Sunday, July 17. One of these witnesses saw Clark in a parking lot near the Lake Harriett concessions building, looking lost or confused. This witness observed Clark standing about 30 yards from a white truck, which was the only vehicle in the parking lot at that time. Another witness, who resided in the area, testified that Clark drove a white SUV into his driveway and onto the yard of a neighbor. While the witness was talking with Clark, the neighbor emerged from her house and said that she had called the police. Clark then sped from the scene in the SUV. One of Clark's cousins testified that Clark visited her that Sunday, and he was driving a white truck that she had never known him to drive. The cousin noticed that Clark had "a nice amount of money" — more than she had ever seen Clark carry.

A Washington County police officer testified that one week later, in the early morning hours of July 24, Clark was arrested after he drove a station wagon in the wrong direction on a highway exit ramp and then failed to pull over for the police. Clark ultimately crashed into some large cement barriers and was taken to the Ramsey County Law Enforcement Center.
Page 324

A Minneapolis police officer testified that during the evening of July 24, the police responded to a radio call indicating that a body had been discovered near some railroad tracks in southeast Minneapolis. The

body was ultimately identified as Foster's. Two of the responding officers testified that they observed beaten-down vegetation near the body, indicating that a vehicle had driven in the area.

A forensic pathologist with the Hennepin County Medical Examiner's Office testified that Foster's body was partially buried under a pile of fresh dirt that "clearly didn't belong there" and was not part of the native landscape. The body was "packaged" in a laundry bag and two plastic bags covered Foster's head. A ligature surrounded Foster's head, holding a gag in place, and other ligatures bound his wrists and ankles. The pathologist told the jury that in his opinion, Foster's death was a homicide. He said that Foster died of asphyxia, which could have been caused by someone placing bags over Foster's head or obstructing his pharynx.

A University of Minnesota botanist testified that four plant fragments obtained from the undercarriage of Foster's truck were fragments of species present at the scene where Foster's body was found. The botanist said that two of the four species are not commonly found in the southern part of Minnesota.

Clark's Recorded Statements

St. Paul Police Sergeant Steven Frazer, the primary investigator on Foster's case, testified regarding three interviews he conducted with Clark after Clark was arrested — two on July 26 and one on August 3. Frazer said that he conducted the interviews together with Minneapolis Police Officer Michael Doran, for whom Clark had worked as a paid informant. The state played for the jury an audiotape of the first interview and videotapes of the second and third interviews.

During the first interview, Clark showed surprise on learning that Foster was dead. Clark acknowledged that he was in Foster's apartment with several other persons on the night Foster was murdered, but he vehemently denied that he assaulted Foster or that he witnessed any assault against Foster. Clark asserted that he did not have sex with B.B. that night, and that he had not driven Foster's truck after Foster died. During the second interview, Clark told the officers that he saw a mutual acquaintance "snap" during an argument with Foster and choke Foster to death. He said he did not know that Foster had been tied up. He admitted driving Foster's truck away from the apartment after the murder but denied that Foster's body was in the truck.

During the third interview, Clark ultimately admitted that he tied up and gagged Foster and tied up B.B. in order to rob Foster of his drugs. Clark denied intending to kill Foster and said that Foster died accidentally from a heart attack or drug overdose after Clark gagged him. Clark said that he placed a plastic bag over Foster's head after he knew that Foster had died. Later in the interview, Clark stated that the plastic bag was inadvertently caught up with Foster's body when it was wrapped in a laundry bag. Clark said that a person named "Boo"[fn3] and other persons "disposed of Foster's body. He said he did not know where Foster's body was taken. He again denied having sex with B.B. or placing a bag over her head. Finally, he admitted leaving the apartment in Foster's truck.
Page 325

Clark's Testimony

Clark testified on his own behalf. Clark said that he stayed overnight at Foster's apartment several nights before and including July 16. He began staying there when he realized that Foster's apartment had

become a hub for certain drug-related activities that he was being paid to help Officer Doran investigate. He was using drugs during this time period, partly to avoid raising the suspicions of persons under investigation.

According to Clark, Foster's roommate and D.T. brought Clark to Foster's apartment during the early morning hours of July 16, but they eventually left, at which point Clark was alone with Foster and B.B. Clark asked Foster for drugs, but Foster refused. Clark then sat on the couch and "had words" with Foster. Sometime later that morning, Clark and B.B. walked into Foster's bedroom. Clark saw approximately 380 grams of heroin in the bedroom, and B.B. told him about cocaine located elsewhere in the apartment.

Clark testified that he then decided to take the drugs in Foster's apartment as part of a set-up. He believed that by "stealing" the drugs, he would motivate Boo and others to pursue him with some guns that Doran wanted to confiscate. Taboo was in Foster's apartment by the time Clark decided to take the drugs, and Taboo knew what Clark was planning to do. Clark used a kitchen knife to threaten Foster and B.B. He tied up and gagged Foster, and also tied up B.B. to "make it look good for Foster." Clark said he did not have any guns during the incident. He also said he told B.B. beforehand that he planned to steal the drugs, and B.B. did not attempt to stop him.

Clark stated that after he tied up Foster and B.B., he began searching for drugs. He then carried B.B. to Foster's bedroom after she signaled that she wanted to be moved. B.B. slipped out of the ligatures once she was in the bedroom, and Clark did not retie her. B.B. then told Clark where to find the drugs. Clark ultimately bagged four kilograms of cocaine and obtained a ride from an acquaintance of Taboo's. He said that when he left, Taboo was still at the apartment. Clark brought the drugs to a Ross Street residence and returned to Foster's apartment about 10 minutes later, at around 6 or 7 a.m. The person who gave Clark a ride did not stay, and Taboo left the apartment shortly after Clark returned.

Clark testified that in an effort to "check on" Foster, he slapped Foster's face, but Foster did not move. Clark said he then realized that Foster was dead. Clark sat and cried for approximately a half hour while thinking about what he had done. Clark then told B.B., who had been in the back of the apartment getting high, what had occurred. B.B. gave Clark the keys to Foster's truck so Clark could drive to a public telephone to call Boo.[fn4] When Clark returned 15 minutes later, he found that B.B. had tried to "make the house ransacked." Boo arrived at Foster's apartment at 8 or 9 a.m. with two men Clark did not know. Boo told Clark he would "take care of things. Clark said he initially helped look for something in the apartment to "put [Foster's body] in," but he then became too upset to help, and he went to the back of the apartment with B.B.

Clark said that sometime later, he went to use the bathroom and when he emerged, Boo was gone, and he had apparently

taken Foster's body with him. Clark and B.B. then left the apartment together. When Clark and B.B. reached Foster's truck, B.B. changed her mind and walked back to the apartment building after a neighbor said to Clark, "She don't want to go with you." After asking B.B. if she was sure she wanted to stay and seeing B.B. start "breaking down," Clark drove to the Ross Street residence alone. He then moved the drugs from that residence to a Minneapolis home that Doran had previously searched. He left the drugs at the Minneapolis home and then went to a public telephone to call Doran. Doran did not answer his telephone, but Clark did not leave a message because what had happened was "too serious."

Clark testified that he drove into the yard of the residence near Lake Harriet on July 17 in order to avoid being caught by some men who were chasing him because of the drugs he had stolen. He then drove to the Lake Harriet park area to use a pay telephone to call a cousin. When he told the cousin what had happened, the cousin told him, "I already know. I[saw] it on the news." The cousin drove to Lake Harriet to give Clark a ride, and Clark left Foster's truck in the Lake Harriet parking lot.

Clark said he lied to the police when he was interviewed on July 26 because he was going through withdrawal sickness and because he wanted to speak only with Doran, not Frazer. According to Clark, Doran had visited him in his cell before the first interview and had instructed him not to speak about the investigation in which Clark was serving as a paid informant. Clark said he told the truth when he spoke with Doran alone during the August 3 interview. He said that he did not intend to kill Foster, he did not place a bag over Foster's head and suffocate him, and he did not have any sexual relations with B.B. He said he did not give the police all of the details on August 3 that he gave to the jury because of the instruction he had received from Doran regarding Doran's investigation.

State's Rebuttal Witness

After the defense rested, the state called Doran as its sole rebuttal witness. Doran confirmed that Clark worked for him as a paid informant in the summer of 2005. The last time Doran had contact with Clark before Foster's murder was on July 13, and his first contact with Clark after the murder was at the Ramsey County Law Enforcement Center (LEC) on July 26. Doran said he did not speak with Clark in his cell before he and Frazer interviewed Clark. Doran indicated that all conversations with Clark after Foster's murder took place in Frazer's presence, except for the few minutes in which Doran and Clark were alone during the August 3 interview and a later September interview that was not previously discussed at trial.

Clark's Motion to Suppress Statements to the Police

Before Clark's trial began, he moved the district court to suppress the statements he made during his interviews with Frazer and Doran on July 26 and August 3. Clark argued that when he made the statements he was mentally incapacitated as a result of heroin withdrawal, and therefore, he did not knowingly, voluntarily, and intelligently waive his rights to remain silent and to have his lawyer present. He also argued that his statements were the product of coercion, and that the state violated his Sixth Amendment right to counsel and our case law respectively by interviewing him without his lawyer present and without sufficient notice to his lawyer. The court conducted a pretrial hearing on Clark's motion and heard testimony from several witnesses.
Page 327

First July 26 Interview

The first interview on July 26 took place at the LEC before Clark's arraignment and lasted for approximately 40 minutes. Clark was not yet represented by counsel. At the start of the interview, Frazer and Doran obtained a signed *Miranda* waiver form from Clark. Clark wrote his initials next to each of four points on the form, indicating that he understood his *Miranda* rights. Frazer said that although Clark appeared to be in a drug withdrawal state during this interview, he was completely appropriate and timely with his answers.

Clark testified that before the first interview on July 26, Doran visited him in his cell for about 10 minutes and told him not to discuss with anyone his work as a confidential informant. Clark said that Doran also told him "I'm your attorney. I can prove [sic] better than your attorney. Just do what I'm telling you to do." Clark stated that Doran also said he would "take care of everything," which Clark interpreted as a promise "to help [him] in some kind of way."

Second July 26 Interview

Frazer testified that at some point after the first interview ended but before Clark was arraigned, Clark told LEC staff that he wanted to speak with the officers after his arraignment. Frazer said that by the time he learned of Clark's request, he knew that a lawyer had been appointed to represent Clark and therefore, he had to follow certain procedures before conducting another interview. Frazer contacted Assistant Ramsey County Attorney Charles Balck for advice on how to proceed. Balck told Frazer that he would contact the public defender's office and get back to Frazer. Balck subsequently contacted Frazer before the arraignment hearing ended and told him that the officers could speak with Clark if Clark initiated contact because the public defender's office was "aware of the situation." Balck testified that he could not remember speaking to Frazer on July 26 but that every time he learned about a request by Clark to speak with the police, he "contacted, or attempted to contact" someone at the public defender's office.

Tom Handley, who was appointed Clark's public defender at Clark's arraignment hearing, testified that he spoke with Balck by telephone on the day of the arraignment or the next day. Handley said that during this conversation, he told Balck that it would "be a better practice to not [have the officers] speak to Mr. Clark, just [to] avoid any [legal] problems down the road." Handley said that Balck might have told him on the day of the arraignment that the police planned to speak with Clark.

Frazer and Doran next met with Clark after Clark's arraignment. The interview lasted approximately 50 minutes and began with the following exchange:

Frazer: Do you remember this paper we went over with your rights on it earlier?

Clark: Yeah.

Frazer: And you asked us to talk to you this time, right? You want to talk to us?

Clark: Yeah.

Shortly thereafter, Frazer reviewed with Clark the *Miranda* waiver Clark signed earlier that day, ending with the following statements:

Frazer: You have the right to talk to a lawyer and to have the lawyer with you during any questioning. If you cannot afford a lawyer one will be appointed for you and you may remain silent until you have talked to a lawyer. You remember [these rights] from earlier when we talked?

Clark: Yeah. I just talked to him. He's pissed off.

* * *

Frazer: Having these rights in mind are you willing to talk to us like you asked us downstairs —

Clark: Yeah * * * [b]ut right now my mind ain't right. * * * I gotta get some detox. * * * It's coming stronger and stronger, man.

Frazer then asked if Clark wanted him to check on the nurse's whereabouts. Clark assented, and Frazer left the interview to request medical treatment for Clark. During Frazer's brief absence, Clark continued to volunteer information to Doran about Clark's involvement in Foster's case.

When Frazer returned, he resumed questioning Clark. Toward the end of the interview, Frazer told Clark about evidence that contradicted or undermined Clark's account of the case. Clark then stated, "Let me do this here. Let me get dried out. Call ya'll back. `Cause I ain't feeling it." After some brief conversation, Clark restated his desire to "get dried out." Soon thereafter, the interview ended with Doran stating that Clark would have to contact the officers if he wanted to talk to them again because the officers could not initiate any further conversations. After the officers left the room, Clark yawned and lay down on the floor. When Frazer returned to the room a few minutes later and asked what Clark was doing, Clark said that he was "stretching out" and that his symptoms were worse than they were before. At Frazer's request, Clark stood up off the floor and seated himself in a wheelchair. Frazer assured Clark that a nurse would be available shortly, and he wheeled Clark out of the interview room.

Clark testified at the pretrial hearing that on July 26, he was vomiting "everywhere" as a result of drug withdrawal, and that he asked to be brought back to his cell after the arraignment hearing. He said he did not ask to, nor did he want to, speak to the officers a second time that day. He said that he only waived his right to remain silent during the second interview in order to speak with Doran about their earlier conversation in Clark's cell.

Events Leading up to August 3 Interview

Frazer testified that the following day, July 27, he received voicemail messages from LEC staff indicating that Clark wished to speak with him and Doran. Frazer contacted Balck, who told him that Clark's lawyer needed to be contacted before any interviews. Balck instructed Frazer to inform Clark that (1) the state was having trouble reaching Clark's lawyer, Tom Handley; and (2) Clark should try telephoning Handley. Frazer testified that Balck told him the officers were not to interview Clark again until Handley received notice and called Frazer back. Frazer then visited Clark at the LEC, conveyed the above information, and confirmed that Clark had Handley's phone number. During this meeting, Clark asked Frazer if Frazer could "tell [him] something off the record." Frazer declined to speak about the investigation and told Clark that he needed to contact his lawyer before he and the police could communicate.

In the meantime, the public defender's office had decided to reassign Clark's case from Handley to another lawyer. Connie Iversen, a supervisor charged with reassigning Clark's case, testified that she learned late in the day on July 27 that Balck had telephoned to say that Clark wanted to speak with the

police. Iversen had not yet reassigned the case when she learned of Balck's call. Because Iversen knew that the LEC would close for dinner
Page 329
service at 4 p.m., she went to the LEC to speak with Clark rather than sending another lawyer. Iversen said that she met with Clark for at least an hour and that when she left the meeting, Clark did not want to talk to the police. Iversen said that she left a message for Balck later in the evening on July 27, conveying Clark's position.

Frazer testified that on Thursday, July 28, he again received notice that Clark wished to speak with him and Doran. Frazer then contacted Balck, who told him that Balck and Iversen had set a time for the officers to interview Clark. Later that day — apparently at the time Balck and Iversen had set — Frazer and Doran arrived at the LEC. Frazer said that he never reached the room where Clark was waiting because Iversen "confronted" him in a lobby area near that room and told him that Clark would not be speaking with the officers that day. Frazer said that when he insisted on hearing that information directly from Clark, Iversen stepped in front of him, "basically bump[ed] into [him]," and told him that he could not go near her client. Frazer stated that the confrontation with Iversen continued in the same manner for a few minutes and did not end until he told Iversen that her conduct was unprofessional and walked away.

Iversen gave a substantially different account of the incident with Frazer and the events leading up to that incident. Iversen said that she received a message from Balck late in the day on July 28, stating that Clark had again contacted the police in an effort to speak with them. Iversen said that she was told that Frazer planned to interview Clark at 6 p.m. that day. On receiving this information, she immediately went to the LEC to speak with Clark. Iversen found the LEC closed for dinner service, and while she waited for it to reopen, she went next door to the police station to tell Frazer that she would soon be meeting with Clark and that in all likelihood, Clark would not agree to talk to Frazer. Iversen said that she was unable to meet with Frazer, but a staff person at the police station telephoned Frazer on her behalf. After the telephone call ended, the staff person told Iversen that Frazer did not want to speak to her and that "he was going to come down and talk to [Clark] regardless." Iversen then told the staff person to give Frazer a message that he could meet with Clark in her presence on the following morning, Friday July 29.

Iversen testified that she next returned to the LEC, where she was admitted to speak with Clark at 5:30 p.m. She said that after she met with Clark, she encountered Frazer in an LEC hallway area and told him that Clark did not want to speak with him. She stated that Frazer was rude, angry, and loud, and that he invaded her "personal space." She also said that Frazer asked her about the meeting she had suggested for Friday, July 29. Iversen then told Frazer that she did not think that meeting would happen because Clark had just told her that he no longer wanted to talk to the police based on her advice. Iversen said that after this conversation with Frazer, she either spoke with Balck or left him a message to convey that Clark did not want to speak to the police. The following day, Iversen assigned Clark's case to Richard Sarette and Iversen had no further involvement in the case.

Frazer testified that on August 2, he heard from LEC staff that Clark wanted to speak with him and Doran. Frazer then contacted Balck and told him that the officers wanted to schedule a time through the public defender's office to interview Clark. Frazer told the court that during the
Page 330

whole day, on [August 2], [he and Balck] were in contact maybe two or three times, and [Balck] was basically [saying] "I'm still trying to get this message through, we want to do this right, we're going to take the high road on this, I'll let you know," and that kind of progressed to the end of the day, on [August 2], and [Frazer] had not heard a definitive answer. But Mr. Balck relayed that Miss Iversen was very frustrated with her client wanting to continue to talk even after her advice, and that ultimately boiled over into a phone call when, [Frazer] believe[d], Mr. Balck was on his off time, away from the office, and he called [Frazer] and said, "Well, we've waited this long, we're just going to have to wait until we get this thing ironed out. It isn't going to happen today," meaning [August 2], and it didn't.

Meanwhile, Frazer continued to receive calls through August 3 that Clark wanted to speak with the police. Frazer said he again contacted Balck, who stated that he

would be in contact again with the public defender's office and that he would be setting up a * * * definitive time when we would have this interview, because it was getting to the point where he was having a hard time getting an answer out of the public defender's office, and he basically told [Frazer] that he was going to pick a time and say we would be there, and their lawyer * * * could either be there or not at their choice.

Frazer said that he later heard back from Balck that "a notification had been made to the public defender's office and that they were aware of the [9 p.m. interview] time," and that regardless of whether Clark's lawyer was present, Frazer should proceed with the interview.

It is not clear from Balck's testimony whether he made any efforts to contact the public defender's office on August 2. He said that shortly after 8:40 p.m. on August 3, he left a voicemail message for Iversen or Handley at the public defender's office, indicating that Clark had requested to speak to the police and that "there would be contact with the police as a result of the defendant's contact." Balck said he also left a message with the after-hours answering service for the public defender's office and that LuNhia Yang, an on-call lawyer, subsequently contacted him at home. Balck testified that he received Yang's call at approximately 10:40 p.m., but Yang told the court that she talked to Balck sometime before sending an e-mail message to Iversen at 9:56 p.m. Balck said that he gave Yang the same information he had left in the voicemail message for Iversen or Handley. Balck testified that although he was unable to reach Iversen or Handley directly, he did not instruct Frazer to wait to interview Clark on August 3. He could not remember whether either Handley or Iversen ever told him that Clark did not wish to speak to police.

August 3 Interview

Starting at approximately 9 p.m. on August 3, Frazer and Doran conducted their third interview with Clark. The interview lasted approximately two hours and Clark's lawyer was not present. Frazer read Clark his *Miranda* rights at the beginning of the interview and obtained a signed waiver form. Shortly thereafter, the following exchange occurred:

Frazer: Okay. Just so we're clear * * *

I got a call from the Ramsey County I [d]eputies that said you would like to talk to [Doran] and [me] again about the case. Is that true?

Clark: Yeah.

Frazer: And you know you have a lawyer assigned to this case for you, right?

Clark: Yeah, yeah.

Page 331

Frazer: And you know that you can have him or her with you if you wanted them, right?

Clark: Yeah.

Frazer: And you've chosen to talk to us without them being here, right?

Clark: Yeah.

Frazer testified that Clark appeared to have "completely moved beyond the withdrawal symptoms" he complained of in the earlier interviews and that he appeared to be free of drugs and alcohol.

Clark's testimony about the third interview differed from that given by the police officers. Specifically, Clark denied making a request to speak to the officers about the case in the days leading up to August 3. He also testified that he had smuggled heroin into the LEC and that he was high during the August 3 interview.

Based on the testimony above, the district court denied Clark's motion to suppress the statements he made during the July 26 and August 3 interviews.

State's Motion to Admit Clark's Prior Conviction

Before Clark's trial started, the state notified Clark of its intent to introduce several past convictions for impeachment purposes if Clark chose to testify. Shortly before the state rested its case in chief, the state moved the district court to admit only one of these convictions, but for substantive purposes — specifically, to prove Clark's intent with respect to the alleged rape of B.B. After hearing argument on the state's motion, the district court agreed to allow the reading of a transcript in which Clark pleaded guilty in 1994 to attempted first-degree criminal sexual conduct.

Conviction and Appeal

The jury found Clark guilty of all eight counts of murder and attempted murder. The district court convicted Clark of all counts except the lesser-included offenses of second-degree intentional murder and attempted second-degree intentional murder, which counts the court dismissed. The court then sentenced Clark to life imprisonment without the possibility of parole.[fn5] On this appeal, Clark argues that the district court erred on three grounds when it refused to suppress the statements he made to the police during the two July 26 interviews and the August 3 interview. Specifically, Clark asserts that the statements should have been suppressed because (1) his heroin withdrawal symptoms prevented him from

voluntarily waiving his right to silence during the two July 26 interviews; (2) his statements in all three interviews were the product of coercion or otherwise improper interrogation techniques by the police; and (3) the state violated Clark's Sixth Amendment rights and Minn. R. Prof. Conduct 4.2 by conducting post-arraignment interviews with Clark outside the presence of his lawyer. Clark also argues that the court abused its discretion when it admitted his 1994 conviction for substantive purposes.

I.

We first address Clark's argument that the district court erred when it concluded that he voluntarily waived his right to remain silent during the two July 26 interviews. The Fifth Amendment to the U.S. Constitution, made applicable to the states by the Fourteenth Amendment, prohibits the government from compelling a person to testify against himself. *State v. Scott*, 584 N.W.2d 412, 417 (Minn. 1998).
Page 332
A person may waive his Fifth Amendment right to remain silent, but such a waiver must be knowingly, intelligently, and voluntarily given. *Id.* (citing, among other decisions, *Miranda v. Arizona*, 384 U.S. 436, 475, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). When deciding whether a defendant voluntarily waived his right to remain silent, courts consider the totality of the circumstances based on factors such as the defendant's age, maturity, intelligence, education, experience, and ability to comprehend. *State v. Hinder*, 268 N.W.2d 734, 735 (Minn. 1978). Other relevant factors include, among others, the lack of or adequacy of warnings, the length and legality of the detention, the nature of the interrogation, any physical deprivations, and limits on access to counsel and friends. *Id.*

Findings of fact surrounding a purported *Miranda* waiver are reviewed for clear error, and legal conclusions based on those facts are reviewed de novo to determine whether the state has proven by a preponderance of the evidence that the defendant waived his *Miranda* rights voluntarily. *State v. Burrell*, 697 N.W.2d 579, 591 (Minn. 2005). Here, the district court made a number of detailed factual findings that correspond to the *hinder* factors. The court found that Clark is 33 years old and sufficiently intelligent "to comprehend questions asked of him, including legal terminology," and that Clark is a "mature individual with a lot of `street smarts,'" whose extensive experience with the criminal justice system began in adolescence and included three prior felonies. The court also found that Clark received adequate *Miranda* warnings at the beginning of each interview and acknowledged that he understood his rights, and that Clark initiated the second July 26 interview. Finally, the court found that (1) Clark "did not appear to be in physical distress" during the interviews; (2) Clark "demonstrated a clear understanding of the questions"; (3) Clark "appeared willing to talk for hours"; and (4) Clark's "own attorneys never believed that [he] was unable to track and understand what was going on" and never requested a psycho-logical evaluation for possible mental illness.

Our review of the recorded interviews provides strong support for the district court's findings, including those concerning Clark's physical condition. Clark's interaction with the officers at the beginning of each interview shows that he understood the *Miranda* rights he was waiving, and we see no evidence to substantiate Clark's assertion that his heroin withdrawal symptoms interfered in any substantive way with his cognition or volition. Further, while Clark complained about these symptoms during both July 26 interviews and sometimes placed his head on the table during the second interview, he was consistently responsive and coherent.

The district court's factual findings — which we cannot deem clearly erroneous on the record before us — support a conclusion that under our case law, Clark voluntarily waived his *Miranda* rights. Apposite cases include *State v. Williams*, 535 N.W.2d 277, 288 (Minn. 1995), in which we identified as relevant the defendant's extensive criminal background and concomitant experience in the criminal justice system; and *State v. Blom*, 682 N.W.2d 578, 615 (Minn. 2004), in which we noted that although the defendant was on prescription drugs, there was no evidence that he was materially impaired when he "spoke in a normal tone of voice, freely and voluntarily gave answers to questions, and was alert, lucid, cooperative, and calm."[fn6] In

Page 333

light of these and other cases, we hold that the district court did not err when it concluded that Clark voluntarily waived his right to remain silent during the two July 26 interviews.

II.

We next address Clark's argument that the district court erred when it refused to suppress the statements he made to police during the three interviews because these statements were the involuntary product of coercion or otherwise improper interrogation techniques by the police. When deciding whether a defendant's statement is involuntary, courts inquire whether police conduct, "together with other circumstances surrounding the interrogation, [was] so coercive, so manipulative, [and] so overpowering [as to] deprive□ [a defendant] of his ability to make an unconstrained and wholly autonomous decision to speak as he did." *State v. Pilcher*, 472 N.W.2d 327, 333 (Minn. 1991). This totality-of-the-circumstances inquiry "significantly overlaps" the approach courts use in determining whether a defendant voluntarily waived his *Miranda* rights. *Williams*, 535 N.W.2d at 287. Courts look with disfavor on implied and express promises made by the police during interrogation, but such promises do not automatically render a statement involuntary. *State v. Ritt*, 599 N.W.2d 802, 808 (Minn. 1999).

We review a district court's conclusion as to the voluntariness of a statement de novo to determine whether the state proved voluntariness based on the totality of the circumstances. Id. at 808. We make this determination based on all factual findings that are not clearly erroneous. Id. Here, the court made several detailed factual findings relevant to deciding whether Clark's confession was voluntary. For example, the court found that Clark initiated two of the interviews, *see Blom*, 682 N.W.2d at 615 (noting that the defendant initiated the interview); that Clark was not held in poor conditions and was provided with cigarettes, *see Ritt*, 599 N.W.2d at 810 (noting that defendant "was allowed to smoke freely" during interview); and that the officers kept the interviews low-key and fairly short, *see State v. Thaggard*, 527 N.W.2d 804, 812 (Minn. 1995) (noting that interview was relatively short).

The district court also found that Clark was not subjected to threats or trickery and that the police did not "employ any improper, coercive atmosphere while interviewing [Clark]." But we note that Frazer and Doran made several comments during the July 26 and August 3 interviews that could arguably be characterized as implied or express promises. For example, Doran told Clark at the beginning of the first interview on July 26 that

today's the luckiest day you got going for ya. And do you know why? `Cause today you're gonna set yourself free. All this shit that's happened to you in the past up `til now — is done. It's over. From this day forward Courtney — look me in the *eye — from this day forward your future's spotless.* You can never fuck up again if you don't want to. Okay? So what I'm telling you — man to man, today, nothing else will

matter. We're gonna get all those fuckin' demons and all that shit off your back. Okay? You're gonna be real with me like you have in the past, and we're gonna deal with this today. Okay?

(emphasis added). Moments later, immediately after Clark signed a *Miranda* waiver form, Doran told Clark,

Page 334

Courtney, I wish I had two days to talk to you. We'll do as much as we can now. I want you to dig down deep and let's get every fuckin' demon off your back. Okay? Like I said, no longer are we going to live like this anymore. The old Courtney Clark is dead. As of right now — today — your future is spotless. You've got nothing wrong in your future. If you talk to your God and find it in your soul right now let's get all those fuckin' demons off your back. Man to man, okay? I want you to tell me what the fuck happened.

During the second July 26 interview, Doran and Frazer encouraged Clark several times to "get the demons off' his back, but neither officer alluded to Doran's comment in the first interview that Clark's future would be "spotless" if he told them the truth.

At the beginning of the August 3 interview, Doran and Clark had the following exchange:

Doran: Tonight's the night it's all cleared up. From this day forward we're done with this, okay? I don't want to keep coming back here and talking[;] we're gonna get this shit done tonight. And then we're gonna carry on with our lives. Like I said before C, your future is spotless — starting today, your future is spotless.

Clark: Compared to what?

Doran: C, ya can't screw up anymore. Today's a good day. Today is a good day. And I think tonight after your conversation you're gonna set your soul free, you're gonna tell me exactly what happened in your own words * * * okay?

Clark: [shaking head yes]

Doran: That's what's gonna happen to-night and I feel that, I feel good about it, otherwise I wouldn't have come here * * *.

Later in that interview, Frazer and Doran indicated to Clark that while a conviction for first-degree premeditated murder would necessarily result in a sentence of life imprisonment without the possibility of parole, "something other than a pre-planned * * * murder of Foster — and rape of [B.B.]" might result in Clark "getting out [of prison] sometime." Shortly thereafter, Clark asked if he could speak to Doran alone for 5 minutes. Frazer left the interview room, and Doran said:

I know what happened. I think you got so whacked out, you lost your head. You didn't plan this, you didn't plan to kill — * * * But because you were high and you were whacked out, you lost your head. You didn't plan this. C, you didn't plan this, but it ended up that way.

Clark then said, "That's right," to which Doran responded,

> This is a life — this is a life sentence. Now if you want to tell the real deal — tell the real deal — what happened and cooperate and do the right thing and not tell lies — there might be a break in this. They might not give you life without parole.

In the exchange that followed, Doran told Clark that premeditated versus accidental killing was "the difference between [Clark] spending the rest of [his] life in prison with no parole" and "serving your time * * * and then having some form of life after prison." Moments later, Doran again told Clark that if Clark told the truth, his future would be "spotless." Clark then asked Doran, "What you gonna do for me?" Doran said he would do whatever he could and would tell "them" that Clark was being honest and had not premeditated Foster's murder. Clark then proceeded to give Doran an account that was largely consistent with the testimony

Page 335

he ultimately gave at trial. Clark repeated this account when Frazer returned to the room.

Clark has a colorable argument that the officer's comments with respect to the "spotless" future that would await him were improper because they were potentially misleading. But a careful review of the recorded interviews and transcripts reveals that Clark did not interpret the officers' spotless future comments as promises of lenient treatment. *See Thaggard*, 527 N.W.2d at 811-12 (describing as "key" the fact that an implied promise of lenient treatment did not lead the defendant to believe that he would avoid prosecution if he confessed). For example, after one of these comments, Clark asked perceptively, "Compared to what?" Doran responded by repeating his earlier statement that Clark could "set [his] *soul* free" (emphasis added). In the context of the interviews as a whole, the officer's "spotless" future and related comments are most properly characterized as appeals to Clark's conscience and personal integrity — not as implied promises for lenient treatment in exchange for a confession.

As to the officers' suggestions that Clark could avoid receiving a sentence of life imprisonment without parole if he confessed to accidentally killing Foster, it is important to distinguish between comments identifying the potential sentences imposed for different degrees of murder and express promises that a defendant will be charged with a lesser offense in exchange for his confession. *See State v. Slowinski* 450 N.W.2d 107, 112 (Minn. 1990). In *Slowinski* the defendant argued that police used coercive methods to obtain his confession when they (1) "implied that by confessing, [the] defendant might be charged with a lesser crime"; and (2) "suggested they had influence with the county attorney" regarding the crimes to be charged. Id. at 111-12. In evaluating Slowinski's argument, we stated that it would not be "improper for police officers to inform a defendant of the various degrees of murder," but it *would* be improper for the police to suggest that they had influence with the county attorney to argue for lenient treatment. *Id.* at 112. We nonetheless concluded that improper suggestions of influence with the county attorney "were not the kind of statements that would make an innocent man confess." *Id.*

Here, neither Frazer nor Doran promised Clark that he would be charged with a less serious offense if he admitted to accidentally killing Foster; rather, the officers indicated that if Clark cooperated and told the truth, "there *might* be a break" and Clark "*might not* [receive] life without parole" (emphasis added). Further, while Doran told Clark that Doran would do whatever he could and would tell "them" that Clark was being honest, this statement does not convey any assurance that the officers could substantially influence the disposition of Clark's case. *See State v. Beckman*, 354 N.W.2d 432, 437 (Minn. 1984)

(upholding the admission of a confession despite interrogator's comment that defendant's cooperation would be brought to the district court's attention). For the foregoing reasons, we conclude that Frazer's and Doran's comments — while troubling in some respects — cannot reasonably be construed as comments that would make an innocent man confess.

We also conclude that contrary to Clark's contention, the officers did not make improper threats against Clark in an effort to obtain his statement. Near the end of the first July 26 interview, Frazer told Clark that "if you don't talk again, * * * we're gonna have to proceed ahead with what other people have said about you * * * and I don't think you want that to happen." At other points during the

Page 336

interviews, Frazer attempted to persuade Clark to talk by describing inculpatory evidence that had already emerged or could reasonably emerge in the officers' investigation. But Clark does not argue that Frazer misrepresented the emerging evidence in the case, and we have held that it is not improper for interrogators to inform a defendant of the evidence marshaled against him. *See, e.g., Pitcher*, 472 N.W.2d at 334.

Notwithstanding the case law discussed above, Clark contends that the combined effect of the officers' interrogative techniques and his heroin withdrawal symptoms compels a conclusion that his July 26 statements were not voluntary.[fn7] In support of this contention, Clark points to indications in the record that he was suffering flu-like symptoms, including sweating and nausea. Clark also points to his testimony that he vomited before the interviews. Accepting these facts as true, we still cannot conclude that Clark's physical discomfort — even when combined with allegedly improper comments by did. To the contrary, rather than succumbing to the officers' interrogative techniques, Clark insisted throughout both July 26 interviews that he had no involvement in Foster's murder. The fact that Clark adhered to a fabricated account of Foster's death also shows that his will was not overborne. *See id.; Ritt*, 599 N.W.2d at 810 (noting that while the interrogation "may have been unpleasant" for the defendant, "there [was] little indication that her will was overborne" in light of her continued denial of possessing the criminal intent that was eventually proved at trial).

For all of the foregoing reasons, we hold that the district court did not err when it concluded that Clark's statements during the two July 26 interviews and the August 3 interview were voluntary and therefore admissible.[fn8]

III.

We now turn to Clark's claims regarding violations of his Sixth Amendment right to counsel and Minn. R. Prof. Conduct 4.2 with respect to the second July 26 interview and the August 3 interview (post-arraignment interviews). In his brief, Clark characterized these claims as related, if not overlapping. Specifically, he asserted that "part of an accused person's right to counsel "is based on" Rule 4.2. But at oral argument, Clark conceded that a Sixth Amendment claim is analytically distinct from a Rule 4.2 claim and that each is governed by a different body of law. Having made this distinction, Clark focused his argument on the state's alleged violation of Rule 4.2. It is not clear whether Clark's comments at oral argument constituted an implicit withdrawal of his Sixth Amendment claim. Accordingly, we first

Page 337

address whether the state violated Clark's Sixth Amendment right to counsel, and second, whether the state violated Rule 4.2.

Sixth Amendment Right to Counsel

The Sixth Amendment to the U.S. Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to * * * have the assistance of counsel for his defence." U.S. Const. amend. VI. This right attaches as soon as the accused person is subject to adverse judicial proceedings, including arraignments. *See, e.g., United States v. Gouveia*, 467 U.S. 180, 187-88, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984). An accused person can waive his Sixth Amendment right to counsel, but the government bears the burden of proving that the person "understood that he had a right to have counsel present during an interrogation and that he intentionally relinquished or abandoned that known right." *Giddings v. State*, 290 N.W.2d 595, 597 (Minn. 1980) (citing *Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)); *see also State v. Kivimaki* 345 N.W.2d 759, 763 (Minn. 1984) (adopting the Eighth Circuit's conclusion that the validity of a waiver of the right to counsel under either the Sixth or Fifth Amendment "is judged by essentially the same standard"). In deciding whether the government has met its burden, courts consider the circumstances of each case, including the age, experience, and background of the defendant. *Giddings*, 290 N.W.2d at 597.

In this case, the district court concluded that the state met its burden of proving that Clark "voluntarily, knowingly, and intelligently abandoned or relinquished" his known right to counsel during his post-arraignment interviews. This conclusion is supported by the court's factual findings regarding (1) Clark's age, experience, and background; and (2) the adequacy of the *Miranda* warning that police gave to Clark at the second July 26 interview, which warning explicitly addressed Clark's right to have a lawyer present. As previously stated, these findings are not clearly erroneous on the record before us. Moreover, with respect to the August 3 interview, the transcript indicates that shortly after Frazer gave Clark a *Miranda* warning, the following exchange occurred:

Frazer: [Y]ou know you have a lawyer assigned to this case for you, right? Clark: Yeah, yeah.

Frazer: And you know that you can have him or her here with you if you wanted them, right?

Clark: Yeah.

Frazer: And you've chosen to talk to us without them being here, right?

Clark: Yeah.

For the foregoing reasons, we hold that the district court did not err when it concluded that the state did not violate Clark's Sixth Amendment right to counsel by conducting the post-arraignment interviews.

Minnesota Rule of Professional Conduct 4.2

Minnesota Rule of Professional Conduct 4.2 provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

"[O]ur case law clearly establishes that [Rule] 4.2 applies to prosecutors involved in custodial interviews of a charged suspect." *State v. Miller*, 600 N.W.2d 457, 464 (Minn. 1999). Moreover, police contact with a suspect may be attributed

Page 338

to a prosecutor when the prosecutor orders or ratifies the police contact, as apparently happened in this case. *Id.* The purpose of Rule 4.2 is to protect the represented individual "from the supposed imbalance of legal skill and acumen between the lawyer and the party litigant." *Id.* at 463 (quotation marks omitted).

In this case, the district court admitted Clark's statements from the post-arraignment interviews after finding that Clark's lawyer had *notice* of the interviews and an opportunity to be present. Clark essentially argues that the district court misconstrued what Rule 4.2 requires, and that the state violated the rule by failing to obtain his lawyer's *consent* before conducting the interviews. The state argues that the court properly construed and applied Rule 4.2, and further, that suppression of Clark's statements would be unwarranted even if the state did violate the rule. In light of these arguments, we first consider what steps the state must take when Rule 4.2 applies before interviewing a represented criminal defendant outside the presence of the defendant's lawyer. We then decide whether the state took those steps here, and if not, whether the state's violation of Rule 4.2 warrants suppression of Clark's statements.

Rule 4.2 Requirements

Precisely what Rule 4.2 requires of the state in the context of a criminal case is a question of law we review de novo. *See Lennartson v. Anoka-Hennepin Indep. Sch. Dist. No. 11*, 662 N.W.2d 125, 129 (Minn. 2003). In *Miller*, we described the scope of Rule 4.2 as follows:

[Rule] 4.2 protects the right of counsel *to be present* during any communication between the counsel's client and opposing counsel. The focus of [Rule] 4.2 is on the obligation of attorneys to respect the relationship of the adverse party and the party's attorney. * * * [T]he party cannot waive the application of [Rule 4.2] — *only the party's attorney can approve the direct contact and only the party's attorney can waive the attorney's right to be present* during a communication between the attorney's client and opposing counsel.

600 N.W.2d at 464 (citing *United States v. Lopez*, 4 F.3d 1455, 1462 (9th Cir. 1993)) (emphasis added). Based on the passage above and the plain language of Rule 4.2, we agree with Clark that a lawyer representing a criminal defendant is owed more than notice and an opportunity to be present before the state interviews the defendant about the subject of the representation. We also agree that the operative word in Rule 4.2 is "consent."

The more difficult question is precisely what the defendant's lawyer must consent *to* before the state may permissibly communicate with the defendant. Our language in *Miller* could support an interpretation of Rule 4.2 requiring the state to obtain the lawyer's consent before communicating with the defendant *outside the lawyer's presence.* Under this interpretation, the state could interview a defendant who insists on speaking to the police over his lawyer's objection, as long as the lawyer is present during the interview. This interpretation denies the defense lawyer "veto power" over a defendant's decision to speak with the police, while arguably helping to achieve the Rule's purpose — protecting the defendant from being "taken advantage of." *See Miller*, 600 N.W.2d at 463 (quotation marks omitted).

An alternative interpretation of Rule 4.2 is that the state must obtain consent from the defendant's lawyer before engaging in *any* communication with the defendant, even when the defendant has requested contact with the police after being counseled against such contact and the defendant's
Page 339
lawyer is present. This interpretation is troubling in that it substantially infringes on a defendant's autonomy in favor of his lawyer's beliefs as to the defendant's best interests. *See* Carl A. Pierce, *Variations on a Basic Theme: Revisiting the ABA's Revision of Model Rule U.2 (Part III)*, 70 Tenn. L.Rev. 643, 648 (2003) ("[T]he no-contact rule * * * is simply too paternalistic and does not accord sufficient respect for the client's autonomy or the client's freedom to speak without the prior consent of [his] lawyer."); John Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests*, 127 U. Pa. L.Rev. 683, 689 (1979) ("A legal system valuing informed personal choice should not assume that a client aided by his lawyer cannot make a sound decision whether to communicate with opposing counsel."). Such an infringement on personal autonomy is arguably unnecessary in the criminal law context, given the protections that the Constitution and case law provide to criminal defendants against government over-reaching. As previously stated, these protections are entirely independent of Rule 4.2.[fn9]

Notwithstanding the concerns set forth above, we conclude that when a government attorney is involved in a matter such that Minn. R. Prof. Conduct 4.2 applies, the state may not have *any* communication with a represented criminal defendant about the subject of the representation unless (1) the state first obtains the lawyer's consent; (2) the communication is "authorized by law" as discussed below; or (3) the state obtains a court order authorizing the communication. We reach our conclusion on the plain and unambiguous language of the rule as currently written.[fn10] Accordingly, to the extent that any of our past cases suggest that the state can meet the requirements of Rule 4.2 by providing the defendant's lawyer notice and an opportunity to be present, those cases are no longer good law.

Whether the State Violated Rule 4.2

With the foregoing principles in mind, we must now decide whether the state violated Rule 4.2 when officers Frazer and Doran conducted the post-arraignment interviews with Clark. There was no court order authorizing the interviews; accordingly, the state must establish either that Clark's lawyer consented to the interviews or that the interviews were authorized by law. The record contains no evidence that Clark's lawyer consented to the August 3 interview between Clark and the
Page 340
police. But the record is more ambiguous with respect to the second July 26 interview in light of testimony from Balck and Handley, as well as Clark's indication to Frazer and Doran that he had spoken to Handley and Handley was "pissed off." While this evidence could support an argument that Handley gave tacit consent for the interview, we conclude that tacit consent — even to the extent it existed here — is not sufficient to meet the requirements of Rule 4.2.

We also conclude that the post-arraignment interviews of Clark were not communications "authorized by law" for the purposes of Rule 4.2. The comments following Rule 4.2 provide examples of communications authorized by law, including

communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative

activities of lawyers representing governmental entities, directly or through investigative agents, *prior to the commencement of criminal or civil enforcement proceedings.*

Minn. R. Prof. Conduct 4.2 cmt. 5 (emphasis added). There is no dispute in this case that the second July 26 interview and the August 3 interview took place after criminal proceedings were commenced against Clark. Further, we do not conclude that Clark was "exercising a constitutional or other legal right" when he communicated with the police during these interviews. Finally, we discern no other basis on which to conclude that the interviews in this case were authorized by law.

For all of the foregoing reasons, we conclude that the state violated Rule 4.2 by conducting the post-arraignment interviews with Clark.

Whether Suppression is Warranted

Having concluded that the state violated Rule 4.2, we must determine whether the sanction that Clark seeks in this appeal — that is, suppression of the post-arraignment interview statements — is warranted. As a preliminary matter, we note that Rule 4.2 is a rule of professional conduct, not a constitutional or statutory provision. "The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies." Minn. R. Prof. Conduct, Scope cmt. 20. Accordingly, a rule violation is "a basis for invoking the disciplinary process," *id.* cmt. 19, and "does not necessarily warrant any * * * nondisciplinary remedy," *Id.* cmt. 20.

Based on analogous principles underlying their own rules of professional conduct, "nearly every court that has ruled on [a no-contact rule violation in a criminal law context] has found that suppression of a [statement] is an inappropriate remedy for a lawyer's ethical violation." *State v. McCarthy*, 819 A.2d 335, 341 (Me. 2003) (footnote omitted); *see, e.g., State v. Johnson*, 318 N.W.2d 417, 437 (Iowa 1982) (concluding that suppression of a defendant's statements is not an appropriate remedy for the government's violation of the no-contact rule); *State v. Morgan*, 231 Kan. 472, 646 P.2d 1064, 1070 (1982) (same); *People v. Green*, 405 Mich. 273, 274 N.W.2d 448, 454-55 (1979) (same); *State v. Decker*, 138 N.H. 432, 641 A.2d 226, 229-30 (1994) (same); *see also State v. Ford*, 793 P.2d 397, 399-400 (Utah Ct.App. 1990) (holding that the government's violation of the no-contact rule is not an independent basis for reversing a defendant's conviction).

Unlike these jurisdictions, we have not adopted a per se rule placing suppression of defendant's statements outside the ambit of possible sanctions for a violation of

Page 341

Rule 4.2. Rather, we have taken a case-by-case approach to determining whether the state's conduct is so egregious as to compromise the fair administration of justice. *See State v. Ford*, 539 N.W.2d 214, 224-25 (Minn. 1995). In cases where the state's conduct is sufficiently egregious, we may determine that suppression is warranted.

One such case is *State v. Lefthand*, 488 N.W.2d 799 (Minn. 1992). We had not yet articulated the egregiousness standard when we decided *Lefthand*, a case that references Rule 4.2 indirectly in the broader context of constitutional protections against self-incrimination. Id. at 801 n. 6 Nonetheless, we concluded that suppression of Lefthand's inculpatory statement was warranted regardless of his apparent waiver of constitutional protections given the circumstances under which the police obtained the

statement.[fn11] *Id.* at 801-02; *see also Ford* 539 N.W.2d at 224 (noting that Lefthand was advised of and waived his constitutional rights). Specifically, the police interviewed Lefthand with permission from the prosecutor assigned to the case but without notification to the defendant's lawyer. *Lefthand*, 488 N.W.2d at 800. At the time of the interview, Lefthand, who had made his first court appearance in connection with two alleged homicides, was in custody pending a court-ordered Rule 20 mental competency examination. *Id.* We did not indicate in *Lefthand* how the interview came to occur, but we noted in a subsequent case that Left hand initiated contact with the police. *Ford*, 539 N.W.2d at 224.

In *Ford*, we addressed an alleged violation of Rule 4.2 under somewhat different circumstances and ultimately concluded that suppression of the defendant's statements was not warranted. *Id.* at 225. The police in *Ford* conducted two custodial interviews with a represented defendant who requested to speak with the police. *Id.* at 223. The defendant initiated the first contact by stating that he had to speak with the police "right away" about "a matter of urgency and a life and death situation." *Id.* The police conducted both interviews without notifying either the county attorney or the defendant's lawyer. Id. Without considering whether the police officers' conduct would fall within the ambit of Rule 4.2 absent the county attorney's involvement, we noted that while statements taken in violation of the Rule are *subject to* exclusion,

Lefthand did not create an automatic exclusionary rule for a violation of Rule 4.2, [Minn. R. Prof. Conduct], by a prosecutor. Driving our decision in *Lefthand*, was our belief that *the fair administration of justice had been compromised.* Our determination that the material should be excluded in that case and future similar cases was not based solely on the violation of the [Minn. R. Prof. Conduct], but rather was based on the egregiousness of the government's action in total. * * * The facts in *Lefthand* were egregious. Less egregious
Page 342
violations do not require so severe a remedy.

Id. at 224-25 (emphasis added).

In *Miller*, we considered the egregiousness of the state's conduct in the context of the "authorized by law" exception to Rule 4.2. 600 N.W.2d at 464-68. *Miller* involved police officers who acted under the direction of assistant county attorneys to execute a search warrant against a business under investigation by local and federal agencies. *Id.* at 460-62. During the execution of the warrant, the defendant — then a suspect — agreed to participate in an interview with police after faxing a copy of the warrant to his lawyer. *Id.* at 461. While the interview was underway, the lawyer contacted the police officer overseeing the warrant execution on site and told the officer he did not want police to take statements from any of the business's employees without the lawyer's presence. *Id.* The officer refused to terminate the interviews and refused to let the lawyer speak to the defendant. *Id.* The lawyer then contacted an assistant county attorney, who ratified the officer's conduct. *Id.* After receiving the assistant county attorney's response to his inquiry, the defendant's lawyer proceeded to the premises where his client was being interviewed and again asserted that he represented the business and its employees. *Id.*, The officer did not permit the lawyer to enter the building where the interviews were occurring or permit the lawyer to speak with any of the employees. *Id.* at 461-62. We concluded that in light of these facts, the state's conduct was sufficiently egregious to compromise the administration of justice and to exceed what was "authorized by law." *Id.* at 468. Consequently, we held that the parts of the defendant's statements taken after his lawyer contacted the officer at the site must be suppressed. *Id.*

When we consider the actions of Balck, Frazer, and Doran in the context of the cases discussed above, we conclude that the conduct surrounding the state's violation of Rule 4.2 was not so egregious as to warrant the suppression of the statements Clark made during the post-arraignment interviews. First, we conclude that based on our existing case law, Balck could reasonably have believed that his obligation under Rule 4.2 was to provide Clark's lawyer with notice and an opportunity to be present at the post-arraignment interviews.[fn12] Further, the record before us does not support a conclusion that the district court clearly erred in finding that Clark's lawyer received such notice and an opportunity to be present at the second July 26 interview. In contrast, the record does support a conclusion that the court clearly erred in finding that Balck provided Clark's lawyer with notice of the August 3 interview *and an opportunity to be*

Page 343

present. Balck's after-hours voicemail messages left twenty minutes before the August 3 interview do not effectively provide such an opportunity.

Nonetheless, when we consider all the evidence in the record, we do not perceive Balck's actions as evidencing the bad faith or blatant disregard of professional obligations that we have previously associated with the phrase "egregious conduct." Unlike the assistant county attorney in *Miller*, Balck did not authorize the police to deny access to Clark by Clark's lawyer even as that lawyer waited outside the door to the interview room demanding to talk to Clark. To the contrary, according to Frazer, Balck tried to reach Clark's lawyer on August 2 and refused to allow a police interview to occur because Balck was unable to "get [a] message through." We see no basis to discount as unreliable Frazer's sworn testimony that after Balck made several unsuccessful attempts to reach Clark's lawyer on August 2, Balck told Frazer that "we're just going to have to wait until we get this thing ironed out" and "[i]t isn't going to happen today." Moreover, Frazer indicated that Balck expressed his intention that the state "take the high road" with respect to Clark's case. This intention is apparent in Balck's actions on July 27 and August 2, actions which indicate that he tried to meet Rule 4.2's requirements as he understood them.

The dissent theorizes that Balck may have been frustrated because Clark's lawyers were successful in blocking past interviews. We believe that it would be just as valid to speculate that by August 3, Balck had grown frustrated by the combination of Clark's multiple requests to speak to the police despite the advice of his lawyers, the multiple changes in lawyers representing Clark, and what Balck may have perceived to have been a lack of responsiveness by the public defender's office. At a minimum, the record supports a conclusion that there was poor communication between both offices that may have led to frustration on both sides; this frustration may have led to Balck's lapse in judgment when he did not attempt to prevent the 9 p.m. interview on August 3. Thus, while we do not condone Balck's failure to prevent the August 3 interview, we disagree with the dissent's characterization of Balck's actions as a flagrant display of professional misconduct aimed at thwarting Clark's right to the assistance of counsel. Rather, we conclude that in light of all the testimony before the district court, Balck's failure to prevent the August 3 interview to proceed is more appropriately characterized as a lapse of professional judgment under frustrating circumstances.

There is substantial evidence in the record that Clark made repeated efforts to speak with the police — before *and after* consulting with his lawyers — and that Clark, not the state, initiated the post-arraignment interviews. Indeed, Frazer testified that Balck told him "Iversen was very frustrated with her client wanting to continue to talk even after her advice," and Balck told the court that Iversen told him on the morning of August 4 that she was "washing her hands" of Clark — a statement Iversen did not deny under

cross-examination.[fn13] While Clark's repeated initiation of contact with the police does not affect our decision as to whether the state violated Rule 4.2, it does influence our conclusion that the conduct leading to the

Page 344

violation was not so egregious as to warrant the suppression of Clark's statements.

Finally, we note our basic disagreement with the dissent as to what the record establishes regarding the motivations of the police and Balck in this case. The dissent apparently concludes that there was a conscious and coordinated campaign by the police, assisted by Balck, to undermine Clark's constitutional rights. But we find little evidence to support the dissent's conclusion that "Balck played a role in *assisting* the police to *implement* their *strategy* to get access to Clark after counsel was appointed" (emphasis added). Rather, we conclude the record establishes that once the police recognized that Clark was represented by a lawyer, they contacted Balck to seek Balck's advice on how to proceed before responding to Clark's repeated requests to talk to them. This is precisely what we should ask the police to do, and we encourage the police to continue working closely with prosecutors to help ensure that a defendant's rights are not violated.

The record further establishes that in response to the officers' inquiries between July 26 and August 2, Balck repeatedly attempted to meet what he reasonably believed to be his professional obligations. More particularly, as previously noted, Balck testified that with the exception of August 3, each time he was contacted by Frazer, he "attempted and did contact" someone from the public defender's office for the purpose of informing the public defender that Clark had made contact with the police.

At bottom, our disagreement with the dissent appears to stem from how we construe the record as a whole. We arrive at different conclusions regarding not only *what* happened between the police, Balck, Clark, and Clark's lawyers — but also *why* the events unfolded as they did. More particularly and in addition to the examples we have already addressed, we note that in support of its conclusion that "the police adopted a clear strategy to undermine Clark's relationship with his counsel, even before counsel was appointed," the dissent states that Doran said to Clark: "`I am your attorney. I can prove better than your attorney. Just do what I tell you to do.'" In reaching this conclusion, the dissent notes that the sole basis for this statement attributed to Doran is Clark's "un-rebutted" testimony at the *Rasmussen* hearing. While Doran was not specifically questioned during the *Rasmussen* hearing about whether he made such a statement to Clark, we conclude that Doran essentially rebutted Clark's statement when Doran testified that he did not have *any* conversations with Clark at the LEC before the formal pre-arraignment interview he conducted with Frazer.

Moreover, we do not agree with the dissent's conclusion that there was no particular urgency compelling the police to respond to Clark's requests to talk with them. By definition, the existence of an ongoing murder investigation implicates public safety, and the police have a duty to identify and vigorously investigate any clues that could lead to the arrest and incapacitation of persons who may have played a role in the murder. The police could reasonably have believed that Clark wanted to provide actionable information to assist in their investigation, and therefore, they acted with appropriate urgency in attempting to respond to Clark's repeated requests to talk with them. Further, the record reveals that on July 27 and August 2, the police did not respond "immediately" to Clark's request to talk; rather, they delayed interviewing Clark for one or more days to enable Balck to notify Clark's lawyer. Finally, we note that

Page 345
Clark did give testimony that was consistent with his August 3 statement.

For all of the foregoing reasons, we conclude that the district court did not err when it denied Clark's motion to suppress the statements Clark made to the police during the post-arraignment interviews on July 26 and August 3.

IV.

Finally, we consider Clark's claim that the district court abused its discretion when it admitted evidence of Clark's 1994 conviction for substantive purposes. We review the admission of *Spreigl* evidence[fn14] for an abuse of discretion. *Blom*, 682 N.W.2d at 611 (citation omitted). The appellant challenging the admission of *Spreigl* evidence bears the burden of showing the error and any resulting prejudice. *Id.*

Evidence of other crimes, wrongs, or acts is not admissible "to prove the character of a person in order to show action in conformity therewith," but it may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b). Courts examine five factors in deciding whether to admit such evidence: (1) whether the state has given "notice of its intent to admit the evidence"; (2) whether the state has "clearly indicate[d] what the evidence will be offered to prove"; (3) whether there is "clear and convincing evidence that the defendant participated in the prior act"; (4) whether the evidence is "relevant and material to the state's case"; and (5) whether the probative value of the "evidence is outweighed by its potential prejudice to the defendant." *State v. Ness*, 707 N.W.2d 676, 685-86 (Minn. 2006).

Here, the *Spreigl* evidence was admitted in the form of a transcript read by an assistant Ramsey County attorney. In the transcript, Clark admitted that on July 25, 1993, while carrying a gun, he entered the bedroom of the victim in her Minneapolis home. Clark further admitted that he showed the victim the gun, causing her to have reasonable fear that he might hurt her, and that he attempted to penetrate the victim with his penis. Clark argues as he did in the district court that the information contained in the transcript is irrelevant and unfairly prejudicial.

As a preliminary matter, we note that the record is not clear on precisely what material fact Clark's prior conviction was admitted to establish. *Id.* at 686. ("In assessing the probative value and need for the evidence, the district court must identify the precise disputed fact to which the *Spreigl* evidence would be relevant." (quotation marks omitted)). The court stated its basis for admitting the evidence as follows:

In this case the State's case is weak on the issue of intent and accident. It's also weak on the issue of the rape. The defense argues that they are not arguing that this happened by accident. I disagree. The * * * defendant * * * indicated, when he spoke to Officer Doran, that whatever happened to Foster happened by accident, and that he did not intend to kill him. He also rebuts the claim that he intended to rape [B.B.].

The court's reasoning is problematic because the state did not indicate that it intended to offer the *Spreigl* evidence to prove absence of accident, either with respect to Foster or B.B. Moreover, Clark consistently stated in interviews with the police and in his trial testimony that he had *no sexual relations* with B.B. on July

Page 346
16 — thus, the "precise disputed fact" is whether sexual relations occurred at all.

In *State v. Wermerskirchen*, we noted that in prosecutions for rape and sexual abuse, *Spreigl* evidence may be introduced to establish, by showing a common scheme or plan — that a sexual act occurred. 497 N.W.2d 235, 240-41 (Minn. 1993). More precisely, we stated that when a defendant contends that the conduct on which the charge was based was "a fabrication," *Spreigl* evidence is admissible to rebut that contention as long as the district court is satisfied that the evidence is sufficiently relevant to the charged crime. Id. at 241-42. The closer the relationship between the past misconduct and the charged offense, "in terms of time, place, or modus operandi, the greater the relevance and probative value of the [*Spreigl*] evidence." *See Ness*, 707 N.W.2d at 688.

Clark's past misconduct and the alleged rape of B.B. are relatively close in terms of place, notwithstanding Clark's assertion to the contrary. Both acts occurred in the same metropolitan area, with the past misconduct occurring at a home in Minneapolis and the alleged rape of B.B. occurring at an apartment in St. Paul.

Regarding proximity in time, Clark's past sexual misconduct occurred 12 years before the alleged rape of B.B., but because Clark was incarcerated for approximately three years for that misconduct, 9 years is a more appropriate characterization of the time span for the purposes of our analysis. *See Wermerskirchen*, 497 N.W.2d at 242 n. 3 (noting that time a defendant spent in prison may be insignificant to the extent the defendant was incapacitated from committing crime). While we have affirmed the admission of past misconduct that occurred 19 years before the charged crime, *see id.*, we have characterized as "troubling" a time span of 16 years when the defendant was incarcerated for six of those years. *Blum*, 682 N.W.2d at 612. Generally, as the time span increases between the past misconduct and the crime charged, the similarity between the acts in terms of modus operandi must likewise increase in order for the past misconduct to be relevant. *State v. Washington*, 693 N.W.2d 195, 201 (Minn. 2005)

Based on the discussion above, the crux of our inquiry is whether Clark's past misconduct and the alleged rape of B.B. share a sufficiently similar modus operandi such that the past misconduct is relevant despite the 9-year time span. When determining whether past misconduct is admissible under the common scheme or plan exception, the misconduct "must have a *marked similarity* in modus operandi to the charged offense." *Ness*, 707 N.W.2d at 688 (emphasis added). "[I]f the prior crime is simply of the same generic type as the charged offense, it ordinarily should be excluded." *State v. Wright*, 719 N.W.2d 910, 917-18 (Minn. 2006) (quoting *State v. Shannon*, 583 N.W.2d 579, 585 (Minn. 1998)).

Here, the only apparent similarities between Clark's past misconduct *as presented to the jury* and the alleged rape of B.B. are (1) both acts involved the use of a gun to threaten the victims; (2) both acts occurred in the victims' bedrooms; and (3) both acts involved vaginal penetration or attempted vaginal penetration.[fn15] In contrast,
Page 347
in our previous cases affirming the admission of *Spreigl* evidence, the jury was presented with details tending to establish a more distinctive modus operandi. For example, in *Kennedy*, the past misconduct and the crime charged both involved the same victim and "nearly identical" advances, and both incidents occurred in the victim's bedroom. 585 N.W.2d at 391. In *Wright*, both incidents (1) "involved intrusions into homes of vulnerable victims whom the [defendant] had known for some time"; (2) took place "in the

early morning hours"; (3) "were preceded by extensive drug use"; (4) were committed with similar weapons; and (5) involved "markedly similar" injuries to the victims. 719 N.W.2d at 918. And in *Blom*, "[b]oth incidents involved the kidnapping of young, petite women to remote, wooded areas" and "also involved subduing the women by applying force at their neck and throat areas." 682 N.W.2d at 612.

Given that Clark's past misconduct is relatively remote in time from the alleged rape of B.B. and the two incidents as described to the jury do not arguably share a "marked similarity," the past misconduct is of modest probative value in establishing a common scheme or plan. But under the last of the five factors identified in our recent *Spreigl* evidence cases, we must nonetheless determine whether that misconduct's probative value, however modest, outweighs its potential to unfairly prejudice Clark. *See e.g., Ness*, 707 N.W.2d at 685-86. Here, the jury learned relatively few details surrounding the past incident. Further, the length of time between the past incident and Clark's trial lessened the danger that the jury would use the *Spreigl* evidence for improper purposes. These two factors make the potential prejudice to Clark slight.

We conclude that whether to admit Clark's 1994 conviction for substantive purposes in this case is a close call and therefore, the district court abused its discretion when it admitted the evidence. *Id.* at 685 (stating that if the admissibility of *Spreigl* evidence presents "a close call," the evidence should not be admitted).

But we will nonetheless affirm the court unless Clark establishes that he was prejudiced by the abuse of discretion. *See State v. Bolte*, 530 N.W.2d 191, 198 (Minn. 1995). "[Our] role is to examine the entire trial record and determine whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict * * *." *Id.* (quotation marks omitted). Several factors support a conclusion that in this case, there is no reasonable possibility that the *Spreigl* evidence significantly affected the jury's finding that Clark committed or attempted to commit criminal sexual conduct. As the state asserts, the district court gave a cautionary jury instruction before the *Spreigl* evidence was admitted and before closing argument. Further, the *Spreigl* evidence was introduced to the jury not through compelling live testimony from past victims, but through an assistant county attorney's reading of a 1994 plea hearing transcript — a presentation that

Page 348

comprised just a few minutes of approximately 9 days of witness testimony. Finally, the state did not refer to the *Spreigl* evidence in its closing argument.

For all of the foregoing reasons, we hold that while the district court abused its discretion when it admitted the *Spreigl* evidence, a new trial is not warranted because Clark did not establish that he was prejudiced by the admission of that evidence.

Affirmed.

[fn1] The indictment charged Clark with first-degree murder while committing or attempting to commit aggravated robbery, kidnapping, or first-or second-degree criminal sexual conduct, and second-degree intentional murder with respect to Foster, and attempts to commit each of these four crimes with respect to B.B. See Minn.Stat. §§ 609.185(a)(2), (3); 609.16, subd. 1(1); 609.17(2006).

[fn2] B.B. moved in with Foster approximately two months before Foster's murder. In the interest of simplicity, however, we use descriptions such as "Foster's apartment" and "Foster's bedroom."

[fn3] Boo and Taboo are different persons.

[fn4] Clark initially testified that he called Taboo, but moments later, he said that he "had to keep calling Boo for him to pick up his phone." The subsequent exchange between Clark and his lawyer confirms that Clark meant to say "Boo."

[fn5] Life imprisonment without the possibility of parole is the mandatory sentence for a conviction of first-degree murder in the course of kidnapping. Minn.Stat. § 609.106, subd. 2(2) (2006).

[fn6] The cited part of each of these cases addresses the issue of whether a confession, not a *Miranda* waiver, is voluntary. But courts based on the *Linder* factors, to decide both of use a totality of the circumstances analysis, these issues. *Williams*, 535 N.W.2d at 287.

[fn7] The record suggests — and Clark does not appear to dispute — that the withdrawal symptoms were present on July 26 but not August 3. Clark testified at the *Rasmussen* hearing that he was high on August 3 on heroin he smuggled into the LEC. But Clark has not argued that this testimony should be considered in determining whether he voluntarily confessed that day.

[fn8] Clark argues in the alternative that if the district court properly admitted the July 26 statements, it nonetheless erred under *State v. Anderson*, 247 Minn. 469, 78 N.W.2d 320 (1956) by failing to give a cautionary instruction as to the weight of the statements in light of Clark's withdrawal symptoms. But Clark never requested such an instruction. Consequently, he is not entitled to relief unless he establishes that the district court's error satisfies the elements of the plain error doctrine. *See, e.g., State v. Goodloe*, 718 N.W.2d 413, 422 (Minn. 2006). Clark did not attempt to establish plain error on appeal.

[fn9] We note that in an apparent effort to balance personal autonomy, protection of personal interests, and public safety considerations, at least one state has adopted a version of the no-contact rule that exempts under certain circumstances communication between represented persons and government lawyers engaged in civil or criminal law enforcement. Under Utah R. Prof. Conduct 4.2(c)(4), such communication is exempt if the represented person initiates the communication and "if prior to the communication the represented person has given a written or recorded voluntary and informed waiver of counsel, including the right to have substitute counsel, for that communication." *See also Pierce, supra*, at 707.

[fn10] We recognize that one undesirable consequence of our interpretation of Rule 4.2 may be that the police — in order to avoid a potential obstacle to admissibility of a statement under the Rule — will be less likely to obtain legal advice before proceeding to interview a represented defendant who has expressed the desire to speak with them. In light of this possible consequence and the other concerns we have articulated in this opinion, we invite a review by the appropriate committee(s) of Rule 4.2 as it relates to government lawyers' contact with represented criminal defendants.

[fn11] While we made reference to Rule 4.2 in a footnote in *Lefthand*, we did not base our decision to suppress the inculpatory statement on the state's violation of the Rule. Rather, we cited our inherent supervisory power:

[I]n the exercise of our supervisory power to insure the fair administration of justice in this and future cases, we decide that in custody interrogation of a formally accused person who is represented by counsel should not proceed prior to notification of counsel or the presence of counsel. Statements obtained *without notice to or the presence of counsel* are subject to exclusion at trial.

Lefthand, 488 N.W.2d at 801-02 (footnote omitted) (emphasis added).

[fn12] Based on the record, we do not agree with the dissent's contention that Balck believed he was required only to "attempt to contact" Clark's lawyer before authorizing the police to grant Clark's repeated requests to speak with them. Before Balck gave the particular testimony that the dissent cites in support of this contention, Balck indicated to the court that he made contact with someone in the public defender's office before every meeting other than the one on August 3. Balck testified:

To the best of my recollection, each time that I was contacted by Sergeant Frazer, 1 attempted and did contact, or attempted to contact in the case of the evening of August 3, someone from the Public Defender's Office to inform them that [Clark] had made contact [with] the police * * * and wanted to talk to the police.

Moreover, the testimony on which the dissent relies does not establish that Balck authorized the police to speak to Clark "whether the contact was made or not"; rather, the testimony establishes only that Balck regularly kept Frazer abreast of his efforts to contact Clark's lawyer.

[fn13] Even though Iverson's comment was made on August 4, the day after the police interviewed Clark, we find her comment to be informative as to the degree of mutual frustration that surrounded the communications between the county attorney's office and the public defender's office.

[fn14] *See State v. Spreigl*, 272 Minn. 488, 491, 139 N.W.2d 167, 169 (1965).

[fn15] Argument from the state and defense counsel *outside the presence of the jury* indicated that Clark's prior misconduct, like the alleged rape of B.B., occurred in the early morning hours and targeted an acquaintance of Clark's. But the argument also revealed that the prior misconduct, unlike the alleged rape of B.B., did not involve a robbery, occurred after Clark and two others broke into the victim's home, and involved oral as well as vaginal penetration. Another distinguishing feature between the offenses is that Clark apparently told the victim of his past misconduct that she owed him money, and he disabled two telephones before leaving her home.

Before granting the state's motion to admit the *Spreigl* evidence in this case, the district court expressly found that the alleged rape *differed* from the past misconduct "because in this case [Clark] deliberately, according to [B.B.'s] testimony, washed the victim's genital area, [and] used a condom to prevent any finding of DNA evidence or semen on the victim." It therefore appears that the district court did not apply the proper analysis in deciding to admit the evidence.

HANSON, Justice (dissenting).

I respectfully dissent. I would hold that the district court erred in admitting Clark's post-arraignment statements to police because those statements were obtained through a violation of Rule 4.2 of the Minn. R. Prof. Conduct that was sufficiently egregious to warrant suppression. And, if we need to reach the issue of the denial of Clark's constitutional right to counsel, and his related right against compelled self-incrimination, I would also hold that Clark's constitutional rights were violated.

Perhaps my disagreement with the majority opinion begins, fundamentally, with the supposition that Clark's requests to the jailers that he be able to talk with police created some urgency for the state, which necessitated that the state respond immediately and imposed a similar burden of urgency on defense counsel. Such requests created no greater urgency for the state than a defendant's requests to his jailers that he be let free. There is no basis in the law to conclude that the state has any obligation to act on the request of a defendant to go around his own counsel and initiate conversations with police, especially where the police have improperly urged him to do just that. If there was any urgency here, it was one the police created because the police wanted to talk to Clark without counsel present.

I.

I agree with the principles formulated in the majority opinion concerning Rule 4.2, that, absent a communication that is authorized by law or by a specific court order, the state must obtain counsel's explicit consent before communicating with a represented defendant. I also agree that the state violated those principles when it conducted post-arraignment communications with Clark without counsel's consent. But I disagree with the conclusion of the majority opinion that the post-arraignment communications were not sufficiently egregious to warrant suppression.

First, the police adopted a clear strategy to undermine Clark's relationship with his counsel, even before counsel was appointed. In their pre-arraignment interview with Clark, the police were fully aware of and obviously concerned about the limitations they would face in getting access to Clark after counsel was appointed. To avoid those limitations, police persuaded Clark to go around his counsel, misleading Clark into believing that the police would be more attuned to Clark's best interests than would his counsel. During the very first interview, which was going to be brief because Clark was about to be taken to court and would be provided with counsel, Frazer and Doran engaged in this persistent effort to persuade Clark to waive his right to counsel for future interrogations:

Frazer: They're gonna come and ask to talk to ya in a few minutes and — and you're gonna have to go to court. And if you want to talk to us — lawyer or no lawyer — you can always talk to us. Okay? You know how to get a hold of Mike, and you know how to get a hold of me. But if they interrupt us in a few minutes, and you

Page 349

gotta go, and you have a lawyer saying, "You don't want to talk to those guys because of the case". What you're telling me piques my curiosity. `Cause this stuff happened in St. Paul. Mike knows ya from the past and — and that's why we're working together, okay? And the only way for you to get this whole story out is gonna be if you call us and ask to talk to us. If we get interrupted and you haven't told the whole story, okay? So what I'm gonna leave you is my card and you're gonna know how to get a hold of me. And you already know how to get a hold of Mike. And we'll keep going.

* * * *

Frazer: Do you understand what I'm saving about if we get interrupted though?

Defendant: Yeah [inaudible] his — his people. You know what I'm saving?

Frazer: But you can call us back to tell this story. We can't come and talk to us once you have a lawyer. You would have to call us. Do you understand that?

Defendant: Why is that?

Frazer: Well, it's just the rules. But you're gonna have a lawyer here in a little bit when you go to court.

Defendant: Right.

Doran: And that lawyer might tell you not to talk to us. I can't tell you what to do, you know, that's — that's your choice, but if — if they ask you not to talk to us, and you still want to, you can call either of us.

* * * *

Frazer: Your attorney's coming — remember — you can talk to us at anytime if they interrupt us, okay? If you want to talk to us, well, you're gonna have to say that you want to talk to us.

Defendant: All right.

Frazer: Even if they tell us you don't want to talk to us, you can still talk to us if you choose to do that.

* * * *

Frazer: But you gotta call him or me and ya gotta ask us to come see you. You know all ya have to do is tell the jailer, "I want to see Mike Dorn [sic] with Minneapolis and Steve Frazer: with St. Paul."

Defendant: I've been —

Frazer: And we'll help you clear it up, but if you don't ask that — we can't come back and see you.

Defendant: All right.

* * * *

Frazer: [inaudible] deal with them, I'll talk to you with Mike as much as you would like, but from here out, in a few minutes, you're gonna go into court, and it's gonna be up to you if you call us. And if you don't call us, Mike and I we'll just have to proceed with what we already know, okay? And what other people are saying.

Doran: We can't reach out to you, okay?

Defendant: If I don't call — the only thing I'm going through these withdrawals right now. You know what I'm saying? And I gotta get this out.

Frazer: But if you don't —

Defendant: I'm not feeling right.

Doran: Time's of essence.

Frazer: Yup.

Doran: Time's of essence.

Frazer: Just so you know — if you don't call — then we have to do our job and keep plugging ahead with what other people have told us. And I think you have a lot of important stuff to tell us. `Cause you're one of the people

Page 350

who was actually there. Okay? Finish up your smoke and when we're done we'll turn off, and we'll head out, but I thank you for being — you know, straight with Mike. You and I just met, but if we can do something for ya to straighten all this mess out — we'll do it. You don't belong in here if you didn't do this.

* * * *

Frazer: We're not going anywhere.

You have to call us —

Doran: Yeah.

Frazer: As soon as you're done with court, as soon as you're done, if you say to the jailer "I need to talk to Mike and Steve from St. Paul and Minneapolis" — they'll call us on those numbers and we'll come right back.

Doran: Over here. I give you my word.

Defendant: All right.

These conversations had particular significance because Clark had a pre-existing relationship with Doran as a confidential informant and wrongly assumed that Doran would look out for his interest. Doran reinforced that assumption, and attempted to establish a further divide between Clark and any counsel he might obtain, when, according to Clark's unrebutted testimony, he said "I'm your attorney. I can prove better than your attorney. Just do what I'm telling you to do." It is no surprise that Clark later ignored his counsel's advice and sought to talk directly to Doran, who by then had successfully subverted Clark's relationship with any counsel. Although the police thereafter contacted Balck each time Clark asked to

speak with them, the use of this protocol cannot be divorced from the prior efforts by police to induce Clark to ignore his counsel, as detailed above.

As will be discussed in section II below, these comments by police violated Clark's right to counsel equally as much as would attempts to persuade a defendant to continue with an interrogation without counsel after the defendant has asked to speak to a lawyer. *See e.g. State v. Harmon*, 636 N.W.2d 796, 806 (Minn. 2001) (holding that the police made impermissible inducements by telling a defendant that his side of the story would never be told if he asked for a lawyer); *State v. Munson*, 594 N.W.2d 128, 140-43 (Minn. 1999) (holding that police made impermissible inducements by telling a defendant that a window of opportunity would close if he asked for a lawyer).

Second, Frazer testified that Balck played a role in assisting the police to implement their strategy to get access to Clark after counsel was appointed. Frazer said that, because he knew that "once [Clark] had counsel appointed to him, that there were procedures we had to go through before we could talk to him," he "put some things in motion prior to [Clark's post-arraignment request to speak to police]" by contacting Balck to seek his advice on how to proceed after counsel was appointed.

Third, Balck had little specific recall of his attempts to contact defense counsel. He could only say that each time he was contacted by Frazer, he attempted to contact someone from the public defender's office. He did not testify to the content of any specific contact or what response he received from defense counsel. Most importantly, he did not say that he made any attempt to contact counsel on August 2 or before 8:40 p.m. on August 3. In fact, Balck said he could not specifically recall whether Handley or Iversen ever told him that Clark did not want to speak to the police. Obviously, from the testimony of Iversen, we know that she, both directly and through Frazer, told Balck at least
Page 351
twice that Clark did not want to speak to the police.

The state attempted to fill the gap of Balck's recollection by relying on the hearsay testimony of Frazer, who described his communications with Balck and what Balck told him about Balck's communications with defense counsel. But Frazer's second-hand descriptions actually identified problems with Balck's communications with defense counsel. Frazer reported that Balck told him on July 28[fn1] that Balck and Iversen had set a time for police to talk to Clark that day and that Iversen had been told that she could be present. Frazer then reported that when he arrived for the interview, Iversen was present and told Frazer that Clark was not going to be interviewed and said, "You're not going anywhere near my client."

Frazer said that he explained this situation fully to Balck when Clark again asked to meet with police on August 2. He then described Balck's advice on the evening of August 3 as follows:

He told me that a notification had been made to the public defender's office and they were aware of the time, and he said that I could expect to maybe or maybe not — he couldn't answer that — see someone from their office there again, like the earlier date, on the [28th] with Miss Iversen [sic], and irregardless of whether they were there or not there, that I should proceed with the interview.

Of course, we know from Balck's testimony that the only notification he gave before the 9 p.m. August 3 interview was a phone message left at the public defender's main telephone number at 8:40 p.m. Balck

had no basis to believe that defense counsel were actually aware of the time or to expect that they might be present.

Fourth, the majority excuses Balck's failure to comply with Rule 4.2 on the grounds that "Balck could reasonably have believed that his obligation under Rule 4.2 was to provide Clark's lawyer with notice and an opportunity to be present at the post-arraignment interviews." But Balck did not testify that he held such a belief. More importantly, Balck acknowledged that he did not fulfill even this lesser obligation, testifying that:

Each time that I received a call from Sergeant Frazer, I would tell him that I was going to make the call to the Public Defender's Office to inform them; and to the best of my recollection, after making that attempt, *whether the contact was made or not*, I would call Sergeant Frazer back and inform him that I had made the attempt or made that contact.

(Emphasis added). Of course, an attempt to contact counsel, by itself, does not constitute actual notice and provides no opportunity to be present.

Balck described his responsibility to be to "attempt to contact" defense counsel. Balck acknowledged that the only time he told Frazer not to talk to Clark was on his first phone call from Frazer on July 26, when he asked Frazer to "wait until I *attempted* to make the call to * * * defense counsel." He did not tell Frazer to hold off interviewing Clark on the evening of August 3rd because he considered that "at 8:40 at night, I made every *attempt* I could to contact the defense attorney or attorneys by leaving a message on the main number, by talking to someone from the answering service."

It is obvious from the extremely short notice, given after hours to a generic main
Page 352
office telephone, and the authorization for Frazer to proceed even though defense counsel had not actually been contacted, Balck had no intention of providing adequate notice or a real opportunity for counsel to be present for the evening meeting on August 3, but instead considered his responsibility to be over when he attempted contact, no matter how futile that attempt might have been. Balck clearly knew on the evening of August 3 that defense counsel would not have any opportunity to be present for an interview that was to begin only 20 minutes after Balck left the 8:40 p.m. telephone message at the main office. That interview was nearly completed before Balck talked to the public defender's answering service at 10:40 p.m. Thus, any confusion Balck may have had about the precise scope of his legal responsibility does not excuse him because he not only failed to secure defense counsel's consent, he failed to even provide defense counsel with notice and an opportunity to be present.

Fifth, the majority suggests that Balck may have grown frustrated by what he "perceived to have been a lack of responsiveness by the public defender's office." But Balck did not testify to either frustration or lack of responsiveness. To the contrary, he recognized that each time he had contacted defense counsel before August 3, defense counsel had rushed to the jail and persuaded Clark not to meet with police. If Balck was frustrated, it could only be because each time he provided defense counsel with notice and an opportunity to be present, defense counsel did their job and were successful in blocking the interview.

Sixth, I can find no support for the statement of the majority that "there was poor communication between both offices that may have led to frustration on both sides and this frustration may have led to

Balck's lapse in judgment when he did not attempt to prevent the 9 p.m. interview on August 3." I find no basis in the record to suggest that defense counsel communicated poorly with the state or were not timely in their responses to Balck.

It should be remembered that the police contact with Clark spanned only nine days from beginning to end. Although Balck's recall was not specific, from the testimony of Frazer, Handley, and Iversen we can account for the activity of each day and can see that defense counsel responded immediately to every call that provided adequate notice of a proposed meeting with Clark.

On Tuesday, July 26, the day of the arraignment, Clark asked to talk to police after the arraignment and Frazer called Balck, who then talked to Handley. Handley made it clear to Balck that he did not want his client interviewed. He told Balck it would be the better practice to not speak with Clark because it would only create problems later. Of course, Handley could have been more forceful, but his answer was responsive and it did not provide the requisite consent.

On Wednesday, July 27, Clark asked to talk to police and Frazer called Balck, who then called Iversen. Iversen responded immediately by visiting Clark at the jail. Iversen met with Clark for an hour and, when she left, Clark no longer wished to talk to police. Iversen left a message for Balck to that effect on the evening of the 27th.

On Thursday, July 28, Clark called police, Frazer called Balck, Balck called Iversen, and Iversen again visited Clark in Jail. Balck told Frazer that he and Iversen had arranged for a meeting with Clark and police later that day. But after Iversen met with Clark, Clark no longer wanted to meet with police. Iversen found Frazer, who was waiting to interview Clark, and

advised him that Clark did not want to talk to him.

Clark did not make any request to talk to police on Friday, July 29, Saturday, July 30, Sunday, July 31, or Monday, August 1. Clark apparently made such a request on August 2, and Frazer testified that he called Balck, but as the majority notes, it is unclear from Balck's testimony whether he made any attempt to contact defense counsel that day. Balck did not testify to initiating any specific contact and Iversen did not testify to receiving any contact on August 2. The only other attempt to contact defense counsel that Balck described was at 8:40 p.m. on August 3, when he left a telephone message at the main office number, about a 9 p.m. interview of Clark.

Balck did not contradict any of the testimony of Handley and Iversen. Prior to the evening of August 3, defense counsel had responded to each contact from Balck by visiting Clark and reporting to Balck that Clark no longer wished to meet with police. Defense counsel was completely responsive and was not even slightly at fault for any lack of effective communication. In fact, their communication was quite effective in consistently preventing police from meeting with Clark privately. Defense counsel were clear that if police proposed to meet with Clark, defense counsel would intervene, would attempt to persuade Clark not to meet, or would be present if Clark insisted on having a meeting. Of course, the statement attributed to Iversen, that she was "washing her hands" of Clark, was said to have been made on August 4, after the last of Clark's damaging interviews had already been concluded and Iversen was simply responding to the telephone message that Balck had left for her on the evening of August 3.

Finally, I do not share the concern expressed by the majority about the possible infringement on a defendant's "personal autonomy." To the contrary, I believe that both defense counsel and the court have an obligation to safeguard a defendant from the unknowing, unintelligent, or involuntary exercise of personal autonomy that results in the waiver of significant rights. When a defendant wishes to exercise personal autonomy to waive the right to be represented by counsel, he must do so before the court on the record, not in a private meeting with police, and only after being fully advised by the court of the disadvantages. Minn.R.Crim.P. 5.02, subd. 1(4). When a defendant wishes to exercise his personal autonomy to plead guilty to an offense, the court cannot accept that plea without making an extensive record to assure that the plea is knowing, intelligent, and voluntary. Minn. R.Crim. P. 15.01. When a defendant wishes to exercise his personal autonomy to agree to a trial on stipulated facts, the court cannot allow him to do so without making a record to be sure that his waiver of his right to testify is knowing, intelligent, and voluntary. Minn. R.Crim.P. 26.01, subd. 3.

All of these protections against the unwise exercise of personal autonomy are meaningless if a defendant, who has accepted counsel, can be persuaded by the police, in private meetings from which counsel has effectively been excluded, that he need not listen to the advice of counsel, that the police know better than counsel, and that he should talk to the police without counsel present.

I would not compare this situation to that present in *State v. Ford*, 539 N.W.2d 214 (Minn. 1995). There, the defendant was truly the party who initiated the contact with police. Here, Clark initiated contact only after having been induced to do so by police, who had undermined his confidence in counsel. In *Ford*, the defendant suggested that he wanted to talk about "a
Page 354
matter of urgency and a life and death situation," suggesting that he wanted to talk about something other than his involvement in the crime and that some emergency might exist. *Id.* at 223. Clark, on the other hand, was clearly asking to talk to police to follow-up on their invitation to "call us back to tell this story" so they could "help [him] clear it up." Clark's case is more akin to *State v. Lefthand*, 488 N.W.2d 799 (Minn. 1992), where the facts were egregious and the administration of justice had been compromised. And Clark's case is even more egregious than *State v. Miller*, 600 N.W.2d 457 (Minn. 1999), because the state effectively precluded Clark's counsel from attending a custodial interrogation, whereas in *Miller* the state only prevented counsel from attending a voluntary, noncustodial interrogation.[fn2] *See* 600 N.W.2d at 461.

I would hold that the violation of Rule 4.2 was sufficiently egregious to warrant suppression of Clark's post-arraignment statements to police.

II.

Even if we were not to suppress Clark's post-arraignment statements to police because of the violation of Rule 4.2, I would hold that the statements should be suppressed because the state also violated Clark's right to counsel, under the Sixth Amendment of the United States Constitution and art. I, § 6 of the Minnesota Constitution. The police engaged in persistent efforts to undermine the role of Clark's defense counsel from the beginning to the end of the state's contacts with Clark. The police began those contacts by urging Clark to ignore his counsel and speak directly to police, suggesting the precise mechanism that Clark needed to use to avoid the involvement of his counsel and misleading Clark into believing that the police were protecting his best interests. And when defense counsel interfered with that strategy, by

intervening to protect Clark whenever they were given notice of a proposed meeting, the county attorney took defense counsel out of the picture by authorizing to meet with Clark at a time when defense counsel had not received actual notice and thus was not able to be present. These efforts to bypass defense counsel effectively eliminated Clark's right to counsel.

The efforts of the police to induce Clark to waive his right to have counsel present for future interrogations are also violations of the defendant's related right against compelled self-incrimination under the Fifth Amendment of the United States Constitution and art. I, § 7 of the Minnesota Constitution. The United States Supreme Court has held that police violate a defendant's right against compelled self-incrimination by continuing interrogation after a defendant asserts his right to counsel. *Smith v. Illinois*, 469 U.S. 91, 94-95, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984) (citing *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)). And we have held that, after a defendant requests counsel, the interrogating officers must cease all questions except "ones designed to clarify the [defendant's] desires regarding the presence of counsel," and

Page 355

that police statements "designed to induce [defendant] to continue talking [are] improper." *State v. Harmon*, 636 N.W.2d at 806. In fact, we have condemned, as improper inducements, statements that are similar to, and even less offensive, than statements made by Frazer and Doran to Clark. In *Munson*, we said that the detective's reference to a "window of opportunity" that would be closing if the defendant did not continue to answer questions was an impermissible attempt to induce the defendant's waiver of his right to counsel. 594 N.W.2d at 140-43. And in *Hannon*, we said that the police statements that a defendant's "side of [the] story [would] never be known" was an impermissible inducement. 636 N.W.2d at 806. Here, Frazer and Doran were far more forceful than the officers in *Hannon* or *Munson*, stating:

"And the only way for you to get this whole story out is gonna be if you call us and ask to talk to us.

* * * *

But you can call us back to tell this story.

* * * *

And if you don't call us, [Doran] and I we'll just have to proceed with what we already know, okay? And what other people are saving.

Time's of essence.

* * * *

Just so you know — if you don't call — then we have to do our job and keep plugging ahead with what other people have told us."

If the police are precluded from making these types of statements to induce an unrepresented defendant to continue talking without asserting his right to have counsel present, then police are equally precluded from making these types of statements to induce a represented defendant to agree to a later interrogation without his counsel present.

Given the egregious violations of Rule 4.2, I would suppress the second July 26 statement and the August 3 statement of Clark to police. If necessary, I would reach the same result for violations of Clark's constitutional rights to be represented by counsel and to be free of compelled self-incrimination. I would further hold that the admission of those statements was prejudicial error, necessitating a new trial.

[fn1] Frazer originally said this event occurred on the 29th, but amended his testimony to the 28th.

[fn2] In *Miller*, we recognized that Rule 4.2 focuses on the conduct of the prosecuting attorney, but we also confirmed that the prosecuting attorney will be held responsible for the conduct of police if the attorney ordered or ratified it. 600 N.W.2d at 464. It could be argued here that the most egregious conduct was that of the police in their pre-arraignment inducements of Clark to ignore his counsel. But the testimony that Frazer contacted Balck even before defense counsel was appointed and that Balck authorized the August 3 interview knowing that defense counsel did not have notice or an opportunity to attend, is sufficient to show that Balck ordered or ratified the conduct of police.

PAGE, Justice (dissenting).

I join in the dissent of Justice Hanson.

MEYER, Justice (dissenting).

I join in the dissent of Justice Hanson.

PAGE, Justice (dissenting).

I join in Justice Hanson's dissent. I write separately to make a number of additional points. The court excuses the state's misconduct stating that "based on our existing case law, Balck could reasonably have believed that his obligation under Rule 4.2 was to provide Clark's lawyer with notice and an opportunity to be present at the post-arraignment interviews." The court makes that statement without any explanation as to why Balck's belief could be reasonable. Given the plain, clear, and unambiguous language of Rule 4.2, any belief that the rule required only notice and the opportunity to be present could not be reasonable. The rule provides:

In representing a client, *a lawyer shall not communicate* about the subject of the representation *with a person the lawyer knows to be represented* by another lawyer in the matter, *unless* the lawyer *has* the *consent* of the other lawyer

Page 356

or is authorized to do so *by law or a court order.*

Minn. R. Prof. Conduct. 4.2 (emphasis added). Comment three to the rule further clarifies: "The rule applies *even though* the represented person initiates or consents to the communication." Minn. R. Prof. Conduct. 4.2 cmt. 3 (emphasis added).

The rule, in its simplicity, cannot be read to require only that the state was obligated to provide notice and the opportunity to be present to Clark's counsel. Nor can our case law. In *Miller;* we clearly stated that "only the party's attorney can approve the direct contact and only the party's attorney can waive the

attorney's right to be present during a communication between the attorney's client and opposing counsel." *State v. Miller*, 600 N.W.2d 457, 464 (Minn. 1999). This language requires that opposing counsel obtain both the party's attorney's approval for direct contact with the unattorney's client and the attorney's waiver of the right to be present during the communication with the attorney's client. Approval and waiver necessarily require the party's attorney to affirmatively act. No affirmative action would be required if mere notice by opposing counsel and the opportunity to be present were sufficient. Here, there is nothing in the record that would support the conclusion that Clark's attorney approved Frazier's and Doran's direct contact with Clark or that Clark's attorney waived the right to be present during any of the communications at issue.

Even if there were some legitimate basis for Balck to have reasonably believed that under Rule 4.2 only notice along with the opportunity to be present was required, indeed, if in fact that was all the rule actually required, the state nonetheless engaged in serious misconduct. Although there is some indication in the record that Clark's attorney may have had notice[fn1] of the second July 26 communication between Clark, Frazer, and Doran, there has been no showing that Clark's counsel had the *opportunity* to be present. Furthermore, there is nothing in the record before us that would support the conclusion that Clark's counsel ever received adequate notice along with the opportunity to be present during the August 3 communications. Thus, there was no demonstrated compliance with what Balck allegedly thought the rule to be.

There are two final points that must be made. First, the court focuses on the "poor communication" on both sides and Balck's "repeated□ attempt[s] to meet what he reasonably believed to be his professional obligations." To the extent that the court's opinion may be read to suggest that Clark's attorneys' failure to respond to the purported notice and opportunity to be present during the communications at issue constitutes consent sufficient to mitigate the misconduct, there is no basis in the law for such a suggestion. Second, I feel compelled to state explicitly that the state's violation of Rule 4.2 cannot be excused or mitigated by the fact that Balck may have been frustrated by the manner in which Clark's attorneys responded or the substance of those responses to the state's efforts to communicate with Clark. In fact, comment six to Rule 4.2 specifically provides that a lawyer may seek a court order to authorize communication with a represented person if "uncertain" whether such communication would be permissible or in "exceptional circumstances." Minn. R. Prof. Conduct. 4.2 cmt. 6. Counsel's

frustration does *not* mitigate a violation of the rule; rather, counsel's failure to seek a court order aggravates the misconduct.

For these additional reasons, I respectfully dissent.

[fn1] Neither Handley nor Balck positively remember whether they spoke on the day of Clark's arraignment.

Minnesota Reports

STATE v. LEFTHAND, 488 N.W.2d 799 (Minn. 1992)

STATE of Minnesota, Respondent, v. Michael Shane LEFTHAND, Appellant.

No. C2-91-1937.

Supreme Court of Minnesota.

August 28, 1992.

Appeal from the District Court, St. Louis County, David S. Bouschor, J.

Syllabus by the Court

1. Where appellant neither asserted an insanity defense nor presented any psychiatric evidence, use of his statements made in a court-ordered mental examination was in clear violation of Rule 20 of the Minnesota Rules of Criminal Procedure.

2. In-custody interrogation of a formally accused person who is represented
Page 800
by counsel should not proceed prior to notification of counsel or the presence of counsel.

John M. Stuart, State Public Defender, Melissa Sheridan, Asst. State Public Defender, St. Paul, for appellant.

Hubert H. Humphrey, III, Atty. Gen., St. Paul, and Alan L. Mitchell, St. Louis County Atty., Mark S. Rubin, Asst. St. Louis County Atty., Duluth, for respondent.

Heard, considered and decided by the court en banc.

WAHL, Justice.

Appellant, Michael Shane Lefthand, was convicted, following a jury trial in St. Louis County District Court, of first-degree murder[fn1] in connection with the deaths of John Loons and Ronald St. Germain and sentenced to life imprisonment. Appellant challenges the admission of statements made in the course of a court-ordered psychiatric examination and other statements obtained by police without notice to or the presence of his court-appointed public defender. We reverse.

The relevant facts, briefly stated, are these. In the late afternoon of October 5, 1990, the bodies of John Loons and Ronald St. Germain were found on the living room floor of Loons' Duluth apartment. Within

hours, police officers arrested appellant and Charles Bluebird.[fn2] At appellant's first appearance in District Court, a public defender was appointed to represent him. When appellant refused to leave the jail cell area or even his bed to talk to his public defender, out of concern over appellant's mental competence to proceed, the public defender moved for suspension of the criminal proceedings pending a mental health evaluation pursuant to Minn.R.Crim.P. 20. Following a hearing on October 22, 1990, appellant's motion was granted by order dated October 26, 1990. Meanwhile, on October 24, 1990, with permission from the prosecutor assigned to the case, but without notification to appellant's public defender, Duluth police obtained a taped statement from appellant. Appellant was subsequently examined by a court-appointed psychiatrist who found him competent to stand trial. Over objection at trial, the state was allowed to cross-examine appellant with statements he had made during the court-ordered Rule 20 examination. Also over objection in its case in chief, the state was allowed to use statements obtained without notice to appellant's court-appointed attorney on October 24, 1990.

Rule 20 prescribes detailed procedures to be followed when it appears a defendant may be incompetent to stand trial (Rule 20.01) and when the defense of not guilty by reason of mental illness or mental deficiency is asserted. (Rule 20.02). An order for a compulsory mental examination under Rule 20.01, subd. 2 is authorized when there is reason to doubt the competency of the defendant; but an order for a compulsory mental examination under Rule 20.02, subd. 1 is activated only by a defense notice under Rule 9.02, subd. 1(3)(a) of an intention to rely on the defense of mental illness or mental deficiency or when the defendant offers evidence at trial of mental illness or mental deficiency. Rule 20.01, subd. 8 provides for the admissability of statements made in the course of a court-ordered competency examination only at the proceedings to determine competency. Rule 20.02, subd. 5 provides that evidence derived from an examination to determine sanity is inadmissable unless the defendant has previously made his mental condition an issue; and Rule 20.02, subd. 6 provides a procedure for limited admissability of a defendant's statements made in the Rule 20 examination on the sanity issue.

The state argues appellant had made his mental condition an issue, thereby justifying use of his mental examination statements. We think not. Appellant had asserted an intoxication defense; and it is fairly evident from the transcript that his testimony was directed solely to refuting certain elements of the crimes with which he had been charged, not to advance a

Page 801

defense of mental illness or mental deficiency. Furthermore, the state's expansive gloss would effectively eviscerate the carefully drawn procedures of Rule 20.02 for protecting of the privilege against self-incrimination.

In the alternative, the state argues that the statements were properly used for impeachment purposes. On its face, Rule 20 precludes the use of statements made by defendants in the course of the court-ordered mental examinations upon the issue of guilt. The rule reflects a clear intent that such statements will only be used on the issues of sanity or competence. In addition to securing the defendant's Fifth Amendment right against self-incrimination, it is rather obvious that a contrary rule would undercut the usefulness of the Rule 20 examination. The psychiatric inquiry into a defendant's competency cannot succeed unless the defendant cooperates; a defendant's true mental condition would not be discovered in many instances unless the psychiatrist can engage in a candid conversation with the defendant.

Here, the trial court ordered a mental examination but statements made in the course of that examination were used by the state for a much broader objective than was permitted by the rules. Where

appellant neither asserted an insanity defense nor presented any psychiatric evidence, use of his statements made in a court-ordered mental examination was in clear violation of Rule 20 of the Minnesota Rules of Criminal Procedure.

Also at issue is the interrogation of appellant, in the absence of — and without notice to — his court-appointed public defender, at the time appellant's competency was in question. Both the federal[fn3] and state[fn4] constitutions guarantee anyone who is charged with a criminal offense the right to the assistance of counsel in his defense. We in Minnesota have jealously guarded this right, recognizing even before the United States Supreme Court did, a right to counsel even for so-called minor offenses. *State v. Borst*, 278 Minn. 388, 397, 154 N.W.2d 888, 894 (1967); *State v. Collins*, 278 Minn. 437, 437, 154 N.W.2d 688, 689 (1967); *State v. Illingworth*, 278 Minn. 434, 435, 154 N.W.2d 687, 688 (1967).[fn5] Certainly, as the state argues, the United States Supreme Court has said that a criminal defendant is free to waive his right to counsel, *Patterson v. Illinois*, 487 U.S. 285, 293, 108 S.Ct. 2389, 2395, 101 L.Ed.2d 261 (1988); *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 1140, 89 L.Ed.2d 410 (1986), but waiver is not the problem here.

Long ago we gave notice of our "strong[ ] disapprov[al] of in-custody interrogations if the defendant is represented by counsel and counsel has not had an opportunity to be present at the questioning." *State v. Renfrew*, 280 Minn. 276, 280, 159 N.W.2d 111, 113 (1968). Subsequently, we have reiterated our disapproval of the practice "in the strongest of terms" in *State v. Fossen*, 312 Minn. 414, 255 N.W.2d 357, 362 (1977), and again in *Giddings v. State*, 290 N.W.2d 595, 597 n. 3 (Minn. 1980), a case out of St. Louis County. Appellant says the state has not taken these admonishments seriously. Indeed, at argument, counsel for the state indicated that his office did not feel compelled to heed our views expressed in *Renfrew, Fossen*, or *Giddings*, characterizing what we wrote as mere dicta and not the law. It is incomprehensible that the attorney-client relationship in the context of a criminal proceeding would be so cavalierly disregarded.[fn6] As the highest court of this state, we are independently responsible for safeguarding the rights of our citizens. Accordingly, lest there be any doubt, in the exercise of our supervisory power to insure the fair administration of justice in this and future cases, we decide that in-custody interrogation

Page 802

of a formally accused person who is represented by counsel should not proceed prior to notification of counsel or the presence of counsel.[fn7] Statements obtained without notice to or the presence of counsel are subject to exclusion at trial. We are mindful this requirement may cause some delay in the interrogation process; but the importance of the attorney-client relationship makes it necessary. This decision applies retroactively only to those cases pending on the date of the release of this opinion in which there has been a proper challenge in district court to the admission of statements obtained by police from a counseled defendant without notice to or the presence of counsel.

Of grave concern to us here is what we can only perceive as an emerging pattern of conduct, calculated to subvert the intent of our criminal rules which is to "provide for the just, speedy determination of criminal proceedings." Minn. Rule Crim.P. 1.02. In this case, the prosecution allowed the in-custody interrogation of appellant without notice to or the presence of appellant's court-appointed counsel and with full knowledge that a competency examination had been ordered, and later used statements appellant made in the course of that examination at trial in plain violation of Rule 20.[fn8] "We have on occasion warned the prosecution in our opinions that it has used improper tactics. However, these warnings appear to have been to no avail." *State v. Merrill*, 428 N.W.2d 361, 373 (Minn. 1988). Justice is a process, not

simply a result. Where the prosecution persists in skirting our rules and disregarding our admonitions, we are left with no option but to reverse. *Cf. State v. Gegen*, 275 Minn. 568, 569, 147 N.W.2d 925, 926 (1967).[fn9]

Reversed and remanded for a new trial.

KEITH, C.J., and COYNE, J., took no part in the consideration or decision of this case.

[fn1] Minn.Stat. § 609.185(1) and (3) (1990).

[fn2] A third individual, Donald Genung, was arrested several days later.

[fn3] U.S. Const. amend. VI.

[fn4] Minn. Const. art. I, § 6.

[fn5] We have also established a right to counsel in civil contempt and paternity proceedings. *Cox v. Slama*, 355 N.W.2d 401, 403 (Minn. 1984); *Hepfel v. Bashaw*, 279 N.W.2d 342, 348 (Minn. 1979).

[fn6] We are also somewhat dismayed by state's counsel's belief that prosecutors are beyond the reach of our professional conduct rules, specifically Rule 4.2, Minn.R.Pro.Conduct. We note that the majority of jurisdictions presented with the issue have held that communicating with defendants who are represented by counsel violates the applicable rules of professional conduct. *See, e.g., United States v. Hammad*, 858 F.2d 834, 839-40 (2d Cir. 1988), *cert. denied*, ___ U.S. ___, 111 S.Ct. 192, 112 L.Ed.2d 154 (1990); *United States v. Foley*, 735 F.2d 45, 48 (2d Cir. 1984), *cert. denied*, 469 U.S. 1161, 105 S.Ct. 915, 83 L.Ed.2d 928 (1985); *United States v. Killian*, 639 F.2d 206, 210 (5th Cir.), *cert. denied*, 451 U.S. 1021, 101 S.Ct. 3014, 69 L.Ed.2d 394 (1981); *United States v. Sam Goody, Inc.*, 518 F. Supp. 1223, 1224 n. 3 (E.D.N.Y. 1981); *State v. Ford*, 793 P.2d 397, 399-400 (Utah Ct. App. 1990); *State v. Riley*, 216 N.J. Super. 383, 523 A.2d 1089, 1092 (App.Div. 1987); *People v. Green*, 405 Mich. 273, 274 N.W.2d 448, 452-53 (1979); *People v. Hobson*, 39 N.Y.2d 479, 384 N.Y.S.2d 419, 348 N.E.2d 894, 898-99 (1976).

[fn7] Even the United States Supreme Court has acknowledged states are free to adopt "different requirements for the conduct of its employees and officials as a matter of state law." *Moran*, 475 U.S. at 428, 106 S.Ct. at 1144.

[fn8] Also, in *State v. Genung*, 481 N.W.2d 130 (Minn.Ct.App. 1992), (pre-trial appeal) in the name of "conscientious advocacy," the prosecution violated the indictment process set out in Rule 8.01.

[fn9] Given our disposition of the matter, we need not reach the merits of appellant's remaining issues, namely the admission of *Spriegl* evidence and the reasonableness of restraints. On retrial, however, should the issues be revisited, we strongly urge that the procedural safeguards for admission of *Spriegl* evidence, including that the decision on admissability be deferred until after the state has presented its case, be closely followed. *State v. DeWald*, 464 N.W.2d 500 (Minn. 1991). As for the use of restraints, factors that bear consideration on the issue are contained in *State v. Stewart*, 276 N.W.2d 51 (Minn. 1979) and were observed by the trial court.

South Dakota Supreme Court
Reports

STATE v. WIEGERS, 373 N.W.2d 1 (1985)

STATE of South Dakota, Plaintiff and Appellee, v. Donald WIEGERS, Defendant and Appellant.

No. 14304.

Supreme Court of South Dakota.

Argued April 18, 1984.

Decided July 31, 1985.

Appeal from the Circuit Court, Eighth Judicial Circuit, Lawrence County, Scott C. Moses, J.

Page 2

[EDITORS' NOTE: THIS PAGE CONTAINS HEADNOTES. HEADNOTES ARE NOT AN OFFICIAL PRODUCT OF THE COURT, THEREFORE THEY ARE NOT DISPLAYED.]

Page 3

Mark Smith, Asst. Atty. Gen., Pierre, for plaintiff and appellee; Mark V. Meierhenry, Atty. Gen., Pierre, on brief.

Kenn A. Pugh, Northern Hills Public Defender, Deadwood, for defendant and appellant.

WOLLMAN, Justice.

Defendant appeals from his conviction by a Brule County jury of two counts of conspiracy to commit premeditated murder and of the lesser included offense of manslaughter in the second degree.[fn1] We affirm in part and remand in part.

The charges against defendant arose out of the killing of Russell Keller of Deadwood on October 22, 1981. On January 28, 1983, a Lawrence County grand jury returned an indictment charging defendant as follows:

[T]hat Donald Wiegers did:

Ct.I: CONSPIRACY TO COMMIT PREMEDITATED MURDER:

Willfully, unlawfully and feloniously, between the months of March and November, 1981, conspire with Timothy J. Holmes, to commit the offense of premeditated murder, an offense against the State of South Dakota, and that said Timothy J. Holmes, did the following overt acts, to-wit: Timothy J. Holmes, did, with the intent to effect the death of Russell Keller, lure and entice said Russell Keller to the Pahasapa Campground located in Lawrence County, South Dakota. Contrary to SDCL 22-3-8.

Ct.II: CONSPIRACY TO COMMIT PREMEDITATED MURDER:

Willfully, unlawfully and feloniously, between the months of March and November, 1981, conspire with Scott Whitesell and David Waff, to commit the offense of premeditated murder, an offense against the State of South Dakota, and that David Waff did the following overt acts, to-wit: David Waff did, on or about the 22nd day of October, 1981, without authority of law, perpetrate and with a premeditated design to effect the death of the person killed, kill Russell Keller in Lawrence County, South Dakota. Contrary to SDCL 22-3-8.

Ct.III: PREMEDITATED MURDER:

Willfully, unlawfully and feloniously on or about the 22nd day of October, 1981, without authority of law, perpetrate and with a premeditated design to effect the death of the person killed, kill Russell Keller. Contrary to SDCL 22-16-4 and 22-3-3.

Keller and Melvin Brown, who was the stepfather of Keller's wife, were partners in a business in Deadwood known as B & K Wrecker Service. In early 1981, Brown called Keith Iwan, whom he had known for some sixteen or seventeen years, and asked whether Iwan knew of anyone who could perform a murder. Iwan in turn called defendant, whom Iwan had known for fifteen to seventeen years, at his appliance store in Rapid City and told defendant that he, Iwan, had a man who "wanted someone knocked off," and then asked defendant if he was interested. Defendant replied that he would get back to Iwan. Within two weeks defendant informed Iwan that the job could be done and that he wanted $2,500 for it. Iwan then called Brown, who told Iwan that he would give him $1,500 at the outset and "the rest when it was over with." Sometime in April or May of 1981, Brown brought $1,500 in cash to Rapid City and gave it to Iwan, along with a picture of Russell Keller and a telephone number. Iwan kept $1,000 for himself and gave defendant $500, along with the picture and telephone number.

In the meantime, defendant had contacted Timothy Holmes to determine whether Holmes was interested in performing the murder. After Holmes agreed that he would do the job, defendant gave him $500, a picture of Keller, and a sawed-off shotgun. Defendant also suggested to Holmes that the best way to set up the killing would be to call Keller out on a fake wrecker call.

Some two weeks later, Holmes, who had made some repairs on the shotgun, accompanied by one Chuck Kirschenmann, whom Holmes had bailed out of jail with some of the money he had received from defendant, set up an ambush near a Girl Scout camp in the Black Hills. When Keller arrived at the scene in response to a fake wrecker call, however, Holmes could not go through with the killing.

Two or three weeks later, after discussing the matter with defendant, Holmes again set up another ambush for Keller. Armed with a .44 caliber handgun, Holmes lay in wait while Keller responded to the

fake wrecker call. Again, however, Holmes made no attempt to kill Keller when Keller appeared on the scene.

After calling Iwan a half dozen times to inquire why the murder had not been committed, Brown finally demanded the return of his money. Iwan in turn asked defendant to return the $500. Defendant repaid Iwan out of his own funds, telling Iwan that Holmes "had stiffed him [defendant] for $500." Iwan then returned the $1,500 to Brown in late June or early July of 1981.

In September of 1981, defendant called Iwan saying that he had a man who would do the job and that Iwan should get the money again. Iwan then called Brown and told him that it would cost a total of $3,000 to have Keller killed. Brown then met Iwan in Rapid City and gave him $2,000, with the understanding that the balance of $1,000 would be paid after Keller had been killed. A day or two later Iwan called defendant and told him that he had obtained the money, to which defendant replied, "Okay, we'll go ahead."

Defendant had contacted Scott Whitesell in April or May of 1981 to determine whether Whitesell was interested in performing the murder. Whitesell had been selling stolen guns and television sets to defendant for approximately two years in order to obtain money to support his drug habit. Whitesell contacted David Waff, his principal drug supplier, about performing the murder. Waff said that he was not interested in doing the job. Sometime later, however, Waff asked Whitesell if Whitesell's friend still wanted someone killed. Whitesell in turn inquired of defendant whether he still wanted the person killed, to which defendant replied in the affirmative. Defendant then told Whitesell that it was Russell Keller who was to be killed and that the price to be paid was $2,000. Defendant gave Keller's business and home phone numbers to Whitesell, offered a gun to be used, and suggested that the person who was to perform the murder should call Keller out on a wrecker call in a secluded area, shoot him, and then "plant a bag of bad grass on him." Whitesell passed this information on to Waff. A week or so later Waff told Whitesell that he had gone up to check the area where Keller might be killed. Waff also told Whitesell that he needed some money because he was broke. Whitesell then went to defendant's appliance store and obtained $1,000 from defendant, which Whitesell gave to Waff. Waff in turn gave $500 of the money back to Whitesell. In addition to the $500 that he received from Waff, Whitesell received from defendant a power booster, some speaker wire, and a discount on a stereo for Whitesell's part in the planned murder.

At some point during his conversations with Whitesell, Waff showed Whitesell a .25 caliber pistol. He also showed Whitesell a bullet, on the tip of which he had inscribed an "x," with the explanation that the bullet would explode upon impact and would therefore be untraceable.

Waff also told Whitesell that he had called Keller to the scene of the planned murder but that Brown had appeared in Keller's place. The two men discussed the Keller's place. The two men discussed the

Page 5

planned killing, with Brown telling Waff that a good day to commit the murder would be at a time when Brown and his wife were out of town. Brown and Waff then agreed upon a suitable date.

With respect to this last incident, Iwan testified that Brown had called him approximately ten days before Keller was killed and told him that he had responded to Waff's call because Keller's wrecker truck had broken down. Brown also told Iwan that when he arrived at the scene of Waff's allegedly disabled van he called out that he was Mel Brown and then had a conversation with Waff. Brown told Iwan to deliver

$1,000 because he was confident that the job would be done. Iwan then gave defendant $1,000 with instructions to pass the money on to the persons who were to commit the murder, to which defendant replied that he had been told that those persons were to receive $1,000.

At approximately 8:00 p.m., October 21, 1981, Mrs. Russell Keller answered a telephone call at their residence. The caller requested that a wrecker be sent to the location of his disabled vehicle, some two miles outside Rochford. Mrs. Keller gave the phone to her husband, who then talked to the caller. Russell Keller then went out on the call, never to return.

On the morning of October 23, 1981, law enforcement officers found Keller's wrecker parked on Highway 385 approximately 19 miles south of Deadwood. There were blood stains on the highway behind the vehicle. Following drag marks and blood stains, the investigating officers discovered Keller's body lying in a wooded area some 200 feet from the wrecker. Keller had been shot once in the head from a distance of less than six inches and also had been stabbed eight times in the chest and abdomen. A forensic pathologist testified that either the gunshot wound or the stab wounds could have been sufficient to cause death.

On October 23, 1981, Waff told Whitesell that he had killed Keller by shooting him in the head and that he had dragged Keller's body into the ditch. Waff asked Whitesell for the remainder of his payment. Whitesell in turn contacted defendant. Defendant contacted Iwan, asking for the rest of the money. Iwan gave $1,000 to defendant, who later gave it to Whitesell. Whitesell in turn delivered the money to Waff.

A .25 caliber bullet with an "x" inscribed on the tip was removed from Keller's skull during the autopsy. A spent cartridge was found on the roadway behind Keller's vehicle. The bullet and cartridge were identified as having been fired from a .25 caliber pistol that Waff had pawned at a gun shop in Rapid City on November 6, 1981.

Whitesell, who was only some 20 years of age at the time this case was tried in June and July of 1983, had had a long history of drug and alcohol abuse, starting when he was yet in junior high school. In December of 1981 he admitted himself to an alcohol treatment facility, where he ultimately told his counselors about his involvement in the murder of Keller. Whitesell was later charged with conspiracy to commit premeditated murder and with premeditated murder. Following his testimony before a grand jury, Whitesell entered into a plea agreement with the State, under the terms of which he entered a plea of guilty to a charge of first-degree manslaughter with the understanding that the State would recommend that he receive no more than forty years and no less than thirty years in the state penitentiary. At the time of trial in the instant case, Whitesell's guilty plea had not yet been formally accepted by the court, and Whitesell still stood charged with the counts of conspiracy to commit murder and murder.

Iwan was granted immunity in exchange for his testimony at trial. Holmes was granted use immunity in exchange for his testimony at trial.

Melvin Brown committed suicide in the Lawrence County jail in May of 1982 after being placed in protective custody at his own request.

On August 3, 1983, a jury found Waff guilty of conspiracy to commit murder in the first degree and of first-degree murder

based upon charges arising out of Keller's death. We have this day affirmed those convictions. *State v. Waff,* 373 N.W.2d 18 (S.D. 1985).

Defendant's account of the events that led to the charges against him was that he had purchased five or six guns from Whitesell in 1981. He also acknowledged that he had purchased a ring from Whitesell and testified that he had traded an in-dash automobile stereo system, a set of speakers, and some speaker wire to Whitesell for an automatic rifle. Defendant also acknowledged purchasing a used television set from Whitesell.

Defendant acknowledged that in late January or early February of 1981 Iwan had asked him if he knew of anyone who would be interested in killing someone for money. Defendant testified that he thought that Iwan was joking and that he had then told Iwan that he knew of no one who would do this. Defendant testified that some two weeks later Iwan again brought up the subject of a contract killing, to which defendant replied that he did not know of anyone who did those things.

Upon defendant's return from a vacation trip to Mexico in late March of 1981, Iwan again asked defendant if he had given any more thought to the matter of the contract killing, to which defendant replied in the negative. Defendant testified that in early April of 1981 Iwan and he had a conversation at the appliance store during which Iwan handed defendant a sealed white envelope and asked that he give it to Holmes the next time that Holmes came to the store. Defendant delivered the envelope to Holmes either that same evening or the next morning.

Defendant also testified that sometime in February of 1981 a truck driver who was en route to Wisconsin stopped at defendant's appliance store to have his C.B. radio repaired. Holmes was present at the time, and in the presence of defendant and Holmes the truck driver, in defendant's words, "[D]id bring up a similar offer like Keith Iwan brought up. However, this offer was like he said a $50,000 deal." Defendant testified that the truck driver stopped to pick up his C.B. radio several days later and told defendant that he would stop by in a couple of weeks to see defendant. Defendant replied that he would be down in Mexico. Defendant testified that upon his return from Mexico one of his employees told him that a man who fit the description of the trucker had stopped and left an envelope for defendant. Within the envelope were five one hundred dollar bills and a twenty dollar bill. Defendant testified that he placed the envelope and money in his safe, where they remained until August or September of 1982, when defendant turned them over to the then Lawrence County State's Attorney at the latter's request and at the advice of defendant's then attorney, Randall Connelly.

With respect to the sawed-off shotgun that Holmes testified defendant had given him to use in killing Keller, defendant testified that he had acquired the shotgun in the fall of 1980 by trading a used C.B. radio for it. Defendant then placed the shotgun, which was in very poor condition, in the back room of his appliance store, where it remained until April or May of 1981. At that time Holmes told defendant that he, Holmes, wanted to take the shotgun home and repair it. Holmes kept the shotgun until sometime in June of 1981, when he returned it to defendant saying that he could not get it fixed.

ISSUES

Defendant's initial brief raises five issues. We will discuss them in the order presented.

I.

Intimidation of Defense Witnesses

After a recess for the three-day Independence Day holiday weekend, the trial resumed on Tuesday, July 5, 1983, with the defense continuing with its witnesses. That afternoon, defense counsel called one Pete Helmey to the stand. In response to defense counsel's question whether Helmey recalled talking to defense counsel on the

telephone on Saturday, July 2, Helmey, on the advice of his attorney, who had been appointed by the court that same afternoon, declined to answer on the ground that his answer might incriminate him. There then followed a hearing out of the presence of the jury during which defense counsel informed the court that he had received a telephone call from Helmey's wife on Friday night, July 1, which caused defense counsel to call Helmey on Saturday morning. Helmey told defense counsel that Whitesell, who had been returned to the Lawrence County jail on Friday evening, had said after watching the news on television, "I lied about him on the witness stand and hung the son of a bitch." Helmey then informed defense counsel that he had two other witnesses in the jail who had heard the same statement. Defense counsel then held separate telephone conversations with these two persons, Dave Ventling and Mike Downen, who both informed him that they had heard Whitesell say, "I lied about him on the witness stand and I'm going to hang the son of a bitch." Defense counsel then subpoenaed Helmey, Ventling, and Downen as defense witnesses.

Defense counsel then informed the trial court that he had learned from Ventling on July 5 that after the subpoenas had been served on the three in the Lawrence County jail Helmey had received a call from someone whom Helmey referred to as "Jeff," following which a jailer came and took Helmey from his cell. Ventling testified that he was taken downstairs, where he talked to Deputy Russell, who read Ventling his *Miranda* rights and then asked him "what was going on up there." Ventling replied, "Dwane, really I don't — I just don't know anything." Ventling was taken back upstairs and placed in the drunk tank with Helmey. Ventling was later taken back downstairs, where he was interviewed by Agent Litschewski of the State Division of Criminal Investigation. During cross-examination by the deputy state's attorney regarding what he had been told about perjury, Ventling testified:

They said that if I get on the stand and lied — with my other sentence I get out tomorrow, and that being on probation, if I was charged and convicted of perjury — and I says, "That's lying on the stand." And he said, "Yes." And he says if I'm tried and convicted of perjury, he said, "You'll spend 15 years down at Sioux Falls plus another five that you're on probation."

In response to the deputy state's attorney's question about what he had heard Whitesell say about lying at the trial, Ventling replied, "Honestly, I didn't hear a thing. The only thing that I — I just heard something in the background where he said something, but I couldn't make out what he said. I can't sit here on this stand and say I heard anything."

Defense counsel then called Downen to the stand. Although Downen denied hearing Whitesell make any statement on Friday night, July 1, he admitted that he had told defense counsel that he had heard Whitesell make a statement. Downen testified that after he was served with a subpoena he was interviewed by Deputy Russell in the sheriff's office. Downen exercised his constitutional right not to

make any statement, after which he was sent back upstairs and placed in the drunk tank with Helmey and Ventling. After discussing with Helmey and Ventling what had happened to them, Downen asked the jailer to take him back downstairs so that he could again speak with Deputy Russell. Downen then told Russell that it was not true that Whitesell had made any statement in front of the television set regarding the fact that he had lied on the stand concerning defendant. Downen testified that he had told defense counsel that he had heard such a statement only because Helmey and Ventling had asked him to do so, based upon their opinion that defendant was not guilty. Downen testified that Russell had advised him that making a false statement on the witness stand was perjury and "that it normally carried an equal sentence as to the person being tried." Defense counsel then asked, "For instance, you could get life, is that —, " to which

Page 8

Downen answered, "Right, that's what he told me."

At the conclusion of the in-camera hearing, the trial court denied defendant's motion for a mistrial based upon his claim that the State had interfered with and intimidated his witnesses.

South Dakota Constitution, Article VI, § 7 provides:

In all criminal prosecutions the accused shall have the right to defend in person and by counsel; to demand the nature and cause of the accusation against him; to have a copy thereof; to meet the witnesses against him face to face; to have compulsory process served for obtaining witnesses in his behalf, and to a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

In discussing the right to compulsory process for obtaining witnesses guaranteed by the Sixth Amendment to the United States Constitution, the United States Supreme Court has held:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019, 1023 (1967).

In *Webb v. Texas,* 409 U.S. 95, 95-96, 93 S.Ct. 351, 352, 34 L.Ed.2d 330, 332 (1972), the trial court had admonished the defendant's only witness as follows:

"Now you have been called down as a witness in this case by the Defendant. It is the Court's duty to admonish you that you don't have to testify, that anything you say can and will be used against you. If you take the witness stand and lie under oath, the Court will personally see that your case goes to the grand jury and you will be indicted for perjury and the liklihood [sic] is that you would get convicted of perjury and that it would be stacked onto what you have already got, so that is the matter you have got to make up your mind on. If you get on the witness stand and lie, it is probably going to mean several years and at least more time that you are going to have to serve. It will also be held against you in the penitentiary when you're up for parole and the Court wants you to thoroughly understand the chances you're taking by

getting on that witness stand under oath. You may tell the truth and if you do, that is all right, but if you lie you can get into real trouble. The court wants you to know that. You don't owe anybody anything to testify and it must be done freely and voluntarily and with the thorough understanding that you know the hazard you are taking."

In responding to the claim that the defendant's Sixth Amendment rights, as guaranteed by the Fourteenth Amendment to the United States Constitution, had been violated, the United States Supreme Court, in a per curiam opinion, held:

In the circumstances of this case, we conclude that the judge's threatening remarks, directed only at the single witness for the defense, effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment. The admonition by the Texas Court of Criminal Appeals might well have given the trial judge guidance for future cases, but it did not serve to repair the infringement of the petitioner's due process rights under the Fourteenth Amendment.

Id. 409 U.S. at 98, 93 S.Ct. at 353-54, 34 L.Ed.2d at 333.

In *United States v. Morrison,* 535 F.2d 223 (3rd Cir. 1976), the prosecutor on at least three occasions sent messages to a defense witness through defense counsel warning the witness that she was liable to

be prosecuted on drug charges, that any testimony she gave would be used as evidence against her, and that because she had turned eighteen it would be possible to bring federal perjury charges against her. The prosecutor also subpoenaed the potential witness to appear before him in his office, where, in the presence of the three undercover agents whose testimony the witness would contradict, advised her that if she testified falsely she could subject herself to a perjury charge. When the witness was called to the stand the following morning, she refused to answer some thirty questions on the ground that the answers might incriminate her. Citing the *Washington* and *Webb* cases, the Court of Appeals for the Third Circuit held that in view of the fact that the trial court had indicated on the first day of trial that it would warn the defense witness of her right against self-incrimination:

The actions of [the prosecutor] were totally unnecessary. Ms. Bell could have made a knowing choice of whether to testify or not on the basis of the formal warning from the court. The pressure brought to bear on her by the Assistant United States Attorney interfered with the voluntariness of her choice and infringed defendant's constitutional right to have her freely-given testimony.

This case seems clearly ruled by *Webb.* True, it was the trial judge in that case who "effectively drove that [the defendant's] witness off the stand." 409 U.S. at 98, 93 S.Ct. at 353, 34 L.Ed.2d at 333. Here, it was the influence of the Assistant United States Attorney, . . ., a figure somewhat lower in the hierarchy than the trial judge but nonetheless the symbol of the Government's power to prosecute offenders. However good the trial judge found the intentions of [the prosecutor], his bizarre conduct toward a witness for the defense is not to be condoned. It was without doubt responsible for the course pursued by Sally Bell in refusing to testify and to that extent deprived Mr. Boscia of due process of law under the Fourteenth Amendment. Under such circumstances the order of the United States District Court for the Western District of Pennsylvania filed August 12, 1975 denying the motion for a new trial will be reversed.

Id. at 228.

In order to ensure that the defendant be afforded a fair trial on remand, the Court of Appeals directed that a judgment of acquittal be entered unless the government requested use immunity for the witness's testimony in the event she was called to the stand and invoked her Fifth Amendment right not to testify. *Id.* at 229.

In *United States v. Thomas,* 488 F.2d 334 (6th Cir. 1973), an acquitted codefendant who had been called as a witness by the remaining defendants was approached during a recess by a secret service agent at the request of the prosecutor. The agent told the witness that he would be prosecuted for misprison of a felony if he testified in the case. The witness later indicated that he would testify only under subpoena, which was not requested. The Court of Appeals for the Sixth Circuit, citing *Washington* and *Webb,* held that the government's action had substantially interfered with the witness's free and unhampered determination whether to testify and also interfered with the content of such testimony.

In *State v. Ammons,* 208 Neb. 797, 305 N.W.2d 808 (1981), a witness who had admitted to the prosecutor that it was he who had committed the robbery with which the defendant was being charged refused to testify after the prosecutor refused to comply with the terms of a plea bargain under which the witness had pleaded guilty to an assault charge and informed the witness that if he testified charges would be filed against him. The Supreme Court of Nebraska reversed the defendant's conviction, holding that he had been clearly prejudiced by the state's interference with his Sixth Amendment right to compulsory process as established in *Washington.*

In *People v. Pena,* 383 Mich. 402, 175 N.W.2d 767 (1970), the prosecuting attorney sent a letter written on official stationery

to defendant's alibi witnesses, informing them of elements of the offense of perjury and the possible penalties upon being convicted of perjury. In reversing the defendant's conviction, the Supreme Court of Michigan stated:

> The Constitutional right of a defendant to call witnesses in his defense mandates that they must be called without intimidation. The manner of testifying is often more persuasive than the testimony itself.
>
> A prosecutor may impeach a witness in court but he may not intimidate him — in or out of court.

Id. 383 Mich. at 406, 175 N.W.2d at 768 (footnote omitted).

Although not reversing the conviction in the case before it because it concluded that the defendant had not been prejudiced by the State's misconduct in improperly threatening defense witnesses with criminal prosecution, the Supreme Court of Iowa accepted the rationale of the *Pena* case in *State v. Ivy,* 300 N.W.2d 310 (Iowa 1981).

In addition to the conferring upon a defendant the right to call witnesses on his behalf, South Dakota Constitution Article VI, § 7, also guarantees a defendant the right to impeach the state's key witnesses by showing bias on their part. *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *State v. Layton,* 337 N.W.2d 809 (S.D. 1983); *State v. Volk,* 331 N.W.2d 67 (S.D. 1983); *State v. Wounded Head,*

305 N.W.2d 677 (S.D. 1981). Whitesell's testimony was essential to satisfy the State's burden of proof on Count I and was powerful evidence with respect to Count III. He was clearly a crucial witness on those counts. Accordingly, defendant should have been given great latitude in seeking to impeach his testimony.

Likewise, the common law rules of evidence, and, we conclude, our court-adopted rules of evidence, *see, e.g.,* SDCL 19-12-1; 19-12-2; 19-14-8; 19-14-9; 19-14-10; and 19-14-19, permit a party to impeach a witness by showing his bias. *United States v. Abel,* ___ U.S. ___, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984); *State v. Volk, supra; State v. Wounded Head, supra; State v. Goff,* 79 S.D. 138, 109 N.W.2d 256 (1961); *State v. Kenstler,* 44 S.D. 446, 184 N.W. 259 (1921). This does not mean, of course, that there are no restrictions on the type of evidence that a defendant may use to impeach a witness, for impeachment evidence must also satisfy the general test of admissibility. The testimony of Helmey, Ventling, and Downen regarding Whitesell's alleged jail-cell statement would have satisfied this test.

We conclude that there is a serious question whether defendant's right to call witnesses on his own behalf and to confront the witnesses against him as guaranteed to him by South Dakota Constitution Article VI, § 7, was violated by the State's threats to bring perjury charges against Helmey, Ventling, and Downen if they testified regarding the statement that they allegedly heard Whitesell make in the Lawrence County jail on the evening of July 1.

Although we are satisfied that defendant has made out a prima facie claim that the State interfered with his right to call witnesses on his behalf, we conclude that outright reversal is not necessary. We reach this conclusion because it may very well be that Ventling's and Downen's testimony during the in-camera hearing on July 5 persuaded the trial court that their earlier statements to defense counsel were nothing more than fabrications induced by Helmey's desire to aid Whitesell. *Cf. Marshall v. State,* 305 N.W.2d 838 (S.D. 1981); *Pickering v. State,* 260 N.W.2d 234 (S.D. 1977). Likewise, it may very well be that Helmey, had he not exercised his right against self-incrimination, would likewise have voluntarily recanted the statement that he had made to defense counsel concerning Whitesell's statement. Accordingly, we will remand the case with directions that the trial court hold a hearing and then enter specific findings of fact and conclusions of law with respect to the proposed testimony of Helmey, Ventling, and Downen. The State will bear the burden of

Page 11

establishing that its conduct was not the cause of Helmey's refusal to testify or of Ventling's and Downen's recantations. If the trial court finds that the three witnesses voluntarily recanted their earlier statements, the convictions on Count II and of second-degree manslaughter will be affirmed. Otherwise, the trial court is directed to grant a new trial with respect to those convictions.[fn2]

We are aware that the procedure we have outlined is unorthodox and perhaps without precedent in this state. If the State chooses to interfere with a defendant's constitutional right to call witnesses, however, then it must be prepared to live with the consequences of that course of action. We would remind prosecutors that it is the jury's function — not the prosecutor's — to determine the credibility of witnesses. *Washington v. Texas, supra.* The prosecutor should be content to subject the testimony of defense witnesses to the crucible of the courtroom. It is the prosecutor's duty "not simply to prosecute, but to obtain justice with a fair trial." *State v. Brandenburg,* 344 N.W.2d 702, 705 (S.D. 1984).

II.

Ineffective Assistance of Counsel Claim

Defendant claims that he was denied his constitutional right to the effective assistance of counsel by reason of his counsel's failure to make a pretrial motion to suppress the statements that defendant made to agents of the State in Spokane, Washington. We agree.

Defendant was arrested in Spokane on a federal charge of unlawful flight to avoid prosecution following the return of the indictment by the grand jury. At 12:17 a.m., January 30, 1983, Deputy Sheriff Dwane Russell, Lawrence County State's Attorney Roger Tellinghuisen, and Lawrence County Deputy State's Attorney Jeffry Bloomberg interrogated defendant in the sheriff's office in Spokane. The interrogation was recorded by means of a tape recording. In response to defense counsel's motion for discovery, the State filed a written disclosure on March 2, 1983, that stated in part:

That the State has no written statements of the Defendant within it's [sic] possession, custody or control relating to the above-entitled matter. With respect to recorded statements, the State has in it's [sic] possession a tape recorded interview of the defendant made during an interview of the Defendant while in Spokane, Washington, which the Defendant or his counsel will be permitted to listen to at the Lawerence County Sheriff's Office.

On April 1, 1983, the State served upon defense counsel a memorandum that stated in part:

That the State has within it's [sic] possession the tape recorded statement made by the Defendant on January 30, 1983 and the same is available for review by the Defendant or his counsel. A copy of the transcription of said tape is attached hereto and hereby incorporated by this reference.

Defendant filed no pretrial motion with respect to the tape recording or the transcript of the interrogation.

After the State had presented the testimony of some thirteen witnesses during its case in chief, it called Deputy Russell to identify the tape recording of the Spokane interrogation and then offered the recording into evidence. Defense counsel then asked for a five-minute recess so that he could reread the transcript of the recording. There then followed proceedings out of the presence of the jury during which defense counsel objected to the admission of the tape recording on the grounds, inter alia, that the State had failed to establish that defendant had adequately been advised of his *Miranda* rights and that the admissions had been voluntarily given.

Page 12

The State responded by pointing out that defense counsel had been notified of the existence of and been given a transcript of the tape recording well before trial and yet had failed to file a motion to suppress the recording pursuant to SDCL 23A-8-3, which provides in pertinent part:

Any defense, objection or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

. . . .

(4) Motions to suppress evidence; . . .

In response to the deputy state's attorney's statement that the State's pretrial memorandum had put defendant on notice to make a timely motion to suppress, defense counsel stated:

MR. RENSCH: I just want to say that's probably the funniest thing I ever heard a lawyer say in a courtroom. He wants — he thinks that because this statement — I was told about this tape recording that therefore it suddenly becomes admissible.

. . . .

What counsel is saying is that because I didn't make some kind of a ridiculous motion to suppress the introduction of Tim Holmes' statement, Keith Iwan's statement, everybody else's statement, that he can traipse somebody up there on the stand and say, "Yes, I took a statement from Keith Iwan and I'm going to introduce it into evidence because counsel has not moved to suppress it." Now, it's just as simple as that. Everybody in this courtroom that's got a law degree knows that this tape recording is not admissible, especially at this moment.

Defense counsel then went on to argue that SDCL 23A-8-3 applies only when a defendant has positive knowledge that the State intends to introduce certain evidence.

After listening to Russell's testimony regarding the voluntariness of defendant's statements, the trial court admitted those statements made by defendant up to the point where he requested that he be allowed to talk to his attorney.

Although the preferred procedure is to examine claims of ineffective assistance of counsel only in the context of post-conviction proceedings, we make exceptions to that rule in cases where the representation was so casual that on the face of the record it appears that there was a manifest usurpation of the defendant's constitutional rights. *See State v. Tchida,* 347 N.W.2d 338 (S.D. 1984), and cases cited therein.

We conclude that the record before us manifests on its face that defense counsel's representation of defendant on this particular issue fell below an objective standard of reasonableness. *Strickland v. Washington,* ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). SDCL 23A-8-3(4) was adopted as part of the criminal code revision in 1978. *See* 1978 S.D.Sess.Laws ch. 178, § 108. The procedure mandated by that statute carries out the intent expressed in *State v. Thundershield,* 83 S.D. 414, 160 N.W.2d 408 (1968), that the admissibility of confessions and incriminating statements should be made in an independent hearing outside the presence of the jury. Here, defense counsel had full knowledge several months before trial that the State possessed a recording of the Spokane interrogation. It was incumbent upon him to file a pretrial motion to suppress this recording if he had any intention of objecting to its being introduced into evidence. We know of no possible strategic advantage that could have been obtained by defendant's refusal to comply with the dictates of the statute. Accordingly, we agree with defendant that defense counsel's representation in this regard constituted the ineffective assistance of counsel. *Lufkins v. Solem,* 716 F.2d 532 (8th Cir. 1983).

There remains the question whether defendant was prejudiced as a result of counsel's ineffectiveness. We turn, then, to defendant's next issue.
Page 13

III.

The Trial Court's Failure to Make A Ruling On the Voluntariness of Defendant's Statements

Following the colloquy between the trial court and counsel regarding defense counsel's failure to make a pretrial motion to suppress, the in-camera hearing proceeded with the State's examination of Russell regarding the circumstances under which he and the prosecutors had interrogated defendant in Spokane. Russell testified, and his testimony is borne out by the transcript of the interrogation, that he advised defendant of his *Miranda* rights, that defendant replied that he understood those rights, and that in response to Russell's question whether he wished to waive those rights and talk to Russell and the prosecutors, defendant replied, "Sure. I mean, I've always been fair with you before haven't I?" Defense counsel then cross-examined Russell with respect to the giving of the *Miranda* warnings. Following an off-the-record discussion, defense counsel continued as follows:

Q. (By Mr. Rensch) Dwane, my client just told me that every time he has ever talked to you guys he always had his lawyer with him, Randy Connelly, and he tells me that you knew he had a lawyer in this proceeding. Is that true?

A. Yes.

Q. And how many times did you talk to Randy Connelly and Don Wiegers before you went out to Washington?

A. Together?

Q. Yeah.

A. Once.

Q. Once? Now, you had been advised that Randy was his lawyer however, we're not going to quarrel about that. You knew that, didn't you?

A. Yes.

Q. Roger Tellinghuisen knew that Don Wiegers was represented by Randy Connelly, didn't he?

A. Yes.

Russell also acknowledged that attorney Connelly had been contacted about and was aware of the polygraph examination that had earlier been administered to defendant. On redirect examination, Russell testified as follows:

Well, I talked to him [defendant], as far as my records show, four times. On 8/2 of '82 we was in Randy Connelly's office where I talked to everyone. And then on 12/22 of '82 I stopped into Mr. Wiegers' store and talked to him briefly. And I had talked to Randy Connelly beforehand and asked him if it's all right if I go down and visit, and he said yes.

During recross-examination Russell testified:

[By Mr. Rensch]

Q. So each time during this period of time before you talked to Mr. Wiegers you got Randy Connelly's permission, is that it?

A. Except for the last time in Spokane I didn't talk to Mr. Connelly, no.

Defense counsel then renewed his motion to suppress the tape recording, expanding the motion to include the objection that the interrogation in Spokane had been conducted by the State with full knowledge that defendant was being represented by attorney Connelly. The trial court denied the motion and admitted the tape recording up to the point where defendant said, "I think, I'd like to have Randy Connelly around here before I continue." (We note that the written transcript of the recording goes on for some eight or nine more pages following this request for Connelly's assistance.)

South Dakota Constitution Article VI, § 9 states in part: "No person shall be compelled in any criminal case to give evidence against himself. . . ."

The State argues that defendant waived his right against self-incrimination and that therefore his Spokane statements were voluntary within the meaning of *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) and *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). We do not agree. In

Page 14

State v. Holland, 346 N.W.2d 302 (S.D. 1984), we held that the State had failed to meet its heavy burden of showing a waiver of the right against self-incrimination where the record was clear that a police officer and an assistant attorney general had interviewed the defendant in an Oregon jail knowing that the defendant was represented by a South Dakota attorney and being aware that there was a prior agreement that the defendant would not speak unless his South Dakota attorney was present. We are satisfied that the record in the case before us manifests with equal clarity the fact that the agents of the State knew that defendant was represented by an attorney with respect to the charges against him and that the attorney had either been present during all prior interrogations or had given permission for interrogation to take place in his absence. We conclude that to permit the State to introduce the recording of the Spokane interrogation would make a mockery of the right against self-incrimination guaranteed by South Dakota Constitution Article VI, § 9. By no stretch of the imagination can it be said that defendant initiated the Spokane interrogation. *Cf. Oregon v. Bradshaw,* 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983).[fn3]

We also conclude that the Spokane interrogation violated defendant's constitutional right to the effective assistance of counsel guaranteed him by South Dakota Constitution Article VI, § 7, quoted in full above.

Defendant had been indicted on January 28, 1983. He was being represented by counsel with respect to the matter that led to the indictment. That being the case, the post-indictment conduct of the State's agents in interrogating defendant in the absence of and without notice to his counsel constituted a violation of the principles set forth by the United States Supreme Court in *Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964); *Brewer v. Williams,* 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); *United States v. Henry,* 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980); *Estelle v. Smith,* 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).

In reaching our conclusion regarding the violation of defendant's rights under §§ 7 and 9 of Article VI of the South Dakota Constitution, we point out, as noted in Justice Henderson's special concurrence in *State v. Holland, supra,* 346 N.W.2d at 309, that the South Dakota Code of Professional Responsibility forbids unconsented communication between a lawyer and a represented party. Canon 7, Disciplinary Rule 7-104, provides in part:

(A) During the course of his representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so. . . .

SDCL 16-18 (Appx.).

The protection afforded a criminal defendant by Article VI, §§ 7 and 9, must be held to be at least co-extensive with that provided by the Code of Professional Responsibility to a party in a civil action.

We offer no opinion whether the Spokane interrogation violated defendant's rights under the Fifth and Sixth Amendments to the United States Constitution. We hold only that defendant's right to the effective assistance of counsel and his privilege against self-incrimination as guaranteed to him by South Dakota Constitution Article VI, §§ 7 and 9, were transgressed by the State. Accordingly, the trial court should not have admitted the tape recording.

There remains the question whether the trial court's failure to suppress the tape

recording requires a reversal of the convictions. We conclude that it does not.

The statements made by defendant in Spokane were not in the nature of a confession. At most, they constituted only an admission by defendant that he had been approached by Iwan. The relevant portions of the transcript are as follows:

Russell: Well Don, let me finish okay. Awright, now I understand you know, this here is kind of a deal among friends. It got started off with Melvin Brown using Keith Iwan. Keith Iwan is a friend of his. Your [sic] a friend of Keith Iwan's and so he comes to you. It's kind an abusing of friendships here wouldn't you say so?

Defendant: (no verbal response)

Russell: Uh? Can you tell me a little bit about how Keith talked you into this?

Defendant: I'll tell you it wasn't Keith who talked me into it.

Russell: Who talked you into it?

Defendant: Is [sic] was that truck guy and he didn't talk me into it, he talked to Tim Holmes. He didn't talk to me you know.

. . . .

Defendant: I never gotten [sic] the money.

. . . .

Defendant: There's still something that I can't figure out about it. There's alot of it I can't figure out.

Russell: How did Keith approach you on this? Do you remember?

Defendant: I can't remember how they did this? He wasn't the only one of them.

Russell: Well, for right now let's just say that Keith approached ya okay. He was the first time.

Defendant: I don't know if it was he the first time or the second time. I don't know which one it was. But there wasn't no (inaudible).

Defendant: I can't remember.

Russell: Well, Don you had to pass out the information. You had to give it to Holmes. The telephone number, you had to pass on to Whitesell what the name was.

Defendant: I'll tell you one thing, I wasn't, I wasn't (inaudible).

. . . .

As can be readily seen, defendant's answers were far less incriminatory than was his testimony before the jury regarding his involvement with Iwan, Holmes, Whitesell, and the unnamed, unknown truck driver. True, the interrogation included Tellinghuisen's summary of the State's evidence against defendant and Tellinghuisen's opinion that defendant was "a screwed pooch," but defendant did not acknowledge the truth of Tellinghuisen's statements. Accordingly, when considered in the light of the totality of the evidence, defendant's tape recorded statements were so innocuous that we conclude that it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty even if the recording had not been admitted into evidence. *See, e.g., United States v. Hasting,* 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983); *Milton v. Wainwright,* 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972); *State v. Bittner,* 359 N.W.2d 121 (S.D. 1984); *High Elk v. State,* 344 N.W.2d 497 (S.D. 1984); *State v. Waller,* 338 N.W.2d 288 (S.D. 1983).

IV.

Corroboration of Accomplice Testimony

Defendant next argues that the trial court erred in denying his motion for judgment of acquittal based on the ground that there was insufficient evidence to corroborate the testimony of the accomplices. We do not agree.

The trial court instructed the jury that Iwan, Holmes, and Whitesell were accomplices as a matter of law.

SDCL 23A-22-8 provides:

A conviction cannot be had upon the testimony of an accomplice unless it is corroborated by other evidence which tends to connect the defendant with the commission of the offense. The corroboration is not sufficient if it merely shows

Page 16

the commission of the offense, or the circumstances thereof.

We have set forth the standard for testing the sufficiency of corroborating evidence as follows:

The testimony of an accomplice need not be corroborated by evidence sufficient to sustain a conviction. *State v. Martin,* 287 N.W.2d 102 (S.D. 1980); *State v. Moellar,* 281 N.W.2d 271 (S.D. 1979); *State v. Willers,* 75 S.D. 356, 64 N.W.2d 810 (1954). But, the corroborating evidence must tend to: (1) affirm the truth of the testimony of the accomplice; and (2) establish the guilt of the defendant. *State v. Martin, supra; State v. Moellar, supra.* The testimony of the State's corroborating witnesses meets these requirements.

State v. Nelson, 310 N.W.2d 777, 778 (S.D. 1981).

Circumstantial evidence can supply the necessary corroboration. *Id.* at 779.

Corroborating evidence can come from the defendant. *State v. Feuillerat,* 292 N.W.2d 326 (S.D. 1980).

The testimony of one accomplice cannot be regarded as corroborating the testimony of another accomplice within the meaning of SDCL 23A-22-8. *State v. Dominiack,* 334 N.W.2d 51 (S.D. 1983); *State v. Stecker,* 79 S.D. 79, 108 N.W.2d 47 (1961); *State v. Quinn,* 69 S.D. 574, 13 N.W.2d 50 (1944).

We conclude that the corroborating evidence introduced by the State, though not overwhelming, was sufficient to satisfy the requirements of SDCL 23A-22-8, and our cases cited above. In addition to the evidence we have already detailed above, the State introduced testimony from Keller's widow that corroborated the false wrecker call that lured Keller to the scene of the aborted murder attempt. Whitesell described accurately the weapon that Waff had shown to him and which was used to kill Keller. He described in detail the "x" that Waff had placed on the bullet that was later removed from Keller's skull. A bank officer testified that Brown had borrowed $2,000 in mid-September of 1981 for the ostensible purpose of building a lean-to to his mobile home.

Moreover, defendant's own testimony tended to prove the truth of the accomplices' testimony that defendant was part of the conspiracy to murder Keller. Without repeating that testimony in detail, we note, as set forth more fully above, that he acknowledged being approached by Iwan in February and March of 1981; that Iwan had given him an envelope to give to Holmes; that Holmes had taken a shotgun from the store in April or May of 1981 (identified by Holmes as the one he took with him on his first attempt to kill Keller); and that he had given Whitesell some speaker wire, some speakers, and a stereo unit in exchange for some personal property.

There was testimony from an individual who had been employed by defendant during 1981 that Holmes, Whitesell, and Iwan had been in defendant's store from time to time during that year.

We conclude, therefore, that the State's corroborating evidence was sufficient to affirm the truth of the accomplices' testimony and to establish defendant's guilt.

V.

First and Second Degree Manslaughter Instructions

As stated above, defendant was found guilty of second-degree manslaughter as well as of the two counts of conspiracy to commit murder.

We note that when the trial court proposed the instructions on first and second degree manslaughter the State objected, arguing that the evidence supported, if anything at all, only a conviction of first-degree murder. Defense counsel, however, not only did not object to the proposed instructions but stated, "[M]y client would prefer to leave those lesser included offenses in the lawsuit." Accordingly, defendant failed to preserve any error for

appeal. *See, e.g., State v. White Mountain,* 332 N.W.2d 726 (S.D. 1983).

Likewise, if the court erred in giving the lesser included offense instructions it was error that was invited by defendant and thus not subject to appeal. *State v. Johnson,* 272 N.W.2d 304 (S.D. 1978); *State v. Parker,* 263 N.W.2d 679 (S.D. 1978).

Defendant's Issues

Defendant has raised four issues in his *pro se* brief, which was filed with our permission. We have carefully examined these issues and conclude that they raise no issue of reversible error.

CONCLUSION

The judgment of conviction entered on Count I is affirmed. Pursuant to SDCL 15-26A-12, *State v. Stumes,* 90 S.D. 382, 241 N.W.2d 587 (1976), and *State v. Faller,* 88 S.D. 685, 227 N.W.2d 433 (1975), we remand the case to the circuit court for further proceedings as outlined above with respect to the convictions on Count II and of second-degree manslaughter. If the trial court determines that there is no need to grant a new trial for the purpose of permitting a jury to hear the testimony of Helmey, Ventling, or

Downen, the judgment of conviction will be affirmed in all respects. Otherwise, the trial court shall grant a new trial with respect to Count II and the conviction of second-degree manslaughter.

FOSHEIM, C.J., MORGAN, J. and DUNN, Retired J., concur.

HENDERSON, J., concurs in part, specially concurs in part, and dissents in part.

DUNN, Retired J., participating.

WUEST, Acting J., not participating.

[fn1] Venue was changed from Lawrence County to Brule County.

[fn2] Under SDCL 23A-14-29, the State may not grant immunity from a prosecution for perjury arising out of false testimony given under a grant of immunity. Accordingly, it is not within our power to direct that the State confer such immunity in order to obtain Helmey's testimony on remand. *Cf. State v. Abraham,* 318 N.W.2d 775 (S.D. 1982).

[fn3] In *State v. Adkins,* 88 S.D. 571, 225 N.W.2d 598 (1975), we held that the defendant had effectively waived his right to have his counsel present during interrogation. *Adkins* was, of course, decided prior to the decision in *Edwards.* Also, we noted that defense counsel had agreed to having the polygraph examination that led to the confession conducted in his absence.

HENDERSON, Justice (concurring in part, specially concurring in part, and dissenting in part).

I join this opinion in affirming the conviction on conspiracy to commit murder Count I.

I further specially join this opinion for remand of this case on conspiracy to commit murder Count II. My special concurrence on this conviction is simply this: It appears that defendant's constitutional right to call witnesses on his own behalf and his constitutional right to confront witnesses against him have been violated; the State has a heavy burden, in my opinion, of overcoming a transgression of these constitutional rights; and finally, the trial court's findings of fact and conclusions of law in this matter are subject to appellate scrutiny with the attendant scope of review that they are presumed to be correct but can be determined to be clearly erroneous. *State v. Brim,* 298 N.W.2d 73 (S.D. 1980).

However, I dissent on the second-degree manslaughter conviction. Second-degree manslaughter is a reckless killing of another human being. SDCL 22-16-20. Reckless imports

a conscious and unjustifiable disregard of a substantial risk that the offender's conduct may cause a certain result or may be of a certain nature. A person is reckless with respect to circumstances when he consciously and unjustifiably disregards a substantial risk that such circumstances may exist[.]

SDCL 22-1-2(1)(d). There was nothing reckless about this killing. It can hardly be termed reckless when several individuals plot to kill the victim over seven to eight months' time; money and weapons are procured and exchanged; a plan is devised; three failed attempts are made and on the fourth and fatal attempt, the victim is shot in the head at a distance of six inches or less, he is stabbed eight times, and his

body is dragged into the woods. The facts are an antithesis to second-degree manslaughter and it is oxymoronic that a jury found defendant guilty of both conspiracy to commit premeditated murder and second-degree manslaughter.

Under the plain error rule, SDCL 23A-44-15, I would reverse the conviction for second-degree manslaughter.[fn*]

Page 18

The trial court can only instruct the jury on matters supported by the evidence. *See State v. Fender,* 358 N.W.2d 248 (S.D. 1984); *Miller v. State,* 338 N.W.2d 673 (S.D. 1983); *State v. Chamley,* 310 N.W.2d 153 (S.D. 1981); *State v. Oien,* 302 N.W.2d 807 (S.D. 1981); *State v. Curtis,* 298 N.W.2d 807 (S.D. 1980); *State v. Wilson,* 297 N.W.2d 477 (S.D. 1980); *State v. Bean,* 265 N.W.2d 886 (S.D. 1978); and *State v. Kafka,* 264 N.W.2d 702 (S.D. 1978). In first-degree murder trials, the trial court can instruct the jury on first- or second-degree manslaughter, only if the evidence presented could rationally have supported a conviction of the latter offenses. *State v. Waff,* 373 N.W.2d 18, 21 (S.D. 1985). Here, construing the evidence most favorably for the defendant, it is impossible to conclude that the evidence presented could rationally support a second-degree manslaughter conviction. The defendant, as in *Waff,* was guilty of premeditated murder or he was guilty of nothing. Thus, the trial court erred in giving the second-degree manslaughter instructions.

[fn*] The present case is dissimilar to *State v. White Mountain,* 332 N.W.2d 726 (S.D. 1983), wherein this Court refused to apply the plain error rule where counsel had ample opportunity to object to the proffered instructions but failed to do so. Here, even though defendant invited the second-degree manslaughter instructions, the evidence weighs so heavily against the instruction that it was incumbent on the trial court not to give those instructions.

United States 9th Circuit Court of Appeals Reports

U.S. v. LOPEZ, 4 F.3d 1455 (9th Cir. 1993)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT, v. JOSE ORLANDO LOPEZ,

DEFENDANT-APPELLEE.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT, v. JOSE ORLANDO LOPEZ,

DEFENDANT-APPELLEE.

Nos. 91-10274, 91-10393.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 12, 1992.

Decided March 17, 1993.

As Amended September 22, 1993.

Motion to Strike, Correct or Amend Denied September 22, 1993.

Page 1456

Joseph Douglas Wilson and F. Dennis Saylor, IV, U.S. Dept. of Justice, Washington, DC, for plaintiff-appellant.

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Philip M. Brooks, Deputy State Public Defender, San Francisco, CA, for amicus curiae Office of the CA State Public Defender.

John T. Philipsborn, San Francisco, CA, for amicus curiae CA Attys. for Crim. Justice.

Appeal from the United States District Court for the Northern District of California.

Before: FLETCHER, POOLE, and T. G. NELSON, Circuit Judges.

POOLE, Circuit Judge:

I.

[1] Jose Lopez was indicted for conspiracy to distribute and distribution of cocaine and heroin in violation of 21 U.S.C. § 846 and 841(a)(1), and for aiding and abetting in violation of 18 U.S.C. § 2. While awaiting trial, Lopez was detained with a codefendant, Antonio Escobedo, at the Federal Correctional Institution at Pleasanton.

[2] Lopez retained attorney Barry Tarlow to represent him. Tarlow informed Lopez that he believed that the defendants had a viable entrapment defense and that, in any case, it was his general policy not to negotiate a plea with the government in exchange for cooperation.

[3] Attorney James A. Twitty, who represented codefendant Escobedo, had agreed with Tarlow to coordinate a joint investigation on behalf of the defendants. In so doing, he often spoke to both Escobedo and Lopez by telephone and in person during visits to Pleasanton. In March or April of 1990, Escobedo telephoned Twitty and expressed his interest in reopening negotiations with the government. Concerned about his children, who he feared were being abused while in the custody of their mother, Lopez was anxious to be released from Pleasanton and thus echoed Escobedo's interest in a possible plea bargain.

[4] Without informing Tarlow, Twitty twice traveled to Pleasanton in order to discuss the possibility of a plea bargain with Escobedo and Lopez. He spoke to both men about this possibility from five to nine times on the phone.
Page 1457

[5] Lopez apparently did not want to retain another lawyer to negotiate with the government because he feared that doing so would cost him Tarlow's services, and Lopez wanted Tarlow to represent him in the event the case went to trial. Lopez also was concerned about the additional expense of having Tarlow conduct plea negotiations. Twitty accordingly contacted Lyons on behalf of both Lopez and Escobedo. Lyons claims that Twitty informed him that Lopez did not want Tarlow present at any meetings with the government because "Tarlow didn't represent his best interest in this particular context." Lyons avers that he did not press Twitty on this point, but instead assumed that Lopez was connected to a drug ring which was paying Tarlow's fees, and which would endanger his family if Tarlow learned about the negotiations with the government.

[6] Twitty, however, maintains that during his first phone conversation with the prosecutor about the proposed negotiations, he emphasized that Lopez's reasons for excluding Tarlow had nothing to do with concerns about the safety of his family. He stressed that Tarlow's fees were not being paid by anyone with whom Lopez was in the drug business. According to Twitty, he informed the prosecutor that Lopez simply feared that if Tarlow knew about the plea negotiations, he would resign as Lopez's lawyer.

[7] Recognizing the sensitivity of a meeting with Lopez without Tarlow's knowledge or consent, Lyons contacted the district court *ex parte.* The court referred the matter to a magistrate judge, who conducted an *in camera* interview of Lopez on May 21, 1990. The magistrate judge warned Lopez of the dangers of self-representation, informed him that he could have other counsel, and cautioned him that Twitty, as Escobedo's lawyer, could not represent him. Lopez insisted on going forward with the meeting, and signed a waiver prepared by the government. Lopez, along with Escobedo and his attorney Twitty, met with Lyons in the prosecutor's office.

[8] On May 30, 1991, Lopez was taken once again before the magistrate judge, who verified that Lopez wanted to meet with the government a second time without Tarlow. The second meeting also took place in Lyons' office, and was again attended by Lyons, Lopez, Escobedo, and Twitty. Following this second meeting, Lyons sent Twitty a proposed plea agreement for Escobedo, a copy of which Twitty provided to Lopez. After talking with Twitty, the two men rejected the proposal.

[9] Tarlow found out about his client's discussions with the government indirectly. In August 1990, Lyons talked with Harold Rosenthal, who was the attorney for a third codefendant. Lyons alerted Rosenthal to the fact that the government had been negotiating with Lopez without Tarlow's knowledge. Rosenthal contacted Twitty, who urged him to refrain from informing Tarlow for fear that doing so would "mess up the deal." Nevertheless, Rosenthal called Tarlow. On August 15, 1990, Tarlow was permitted by the district court to withdraw as Lopez's counsel.

[10] Having retained substitute counsel, Lopez filed a motion to dismiss the indictment on September 27, 1990. Lopez alleged that the government infringed upon his Sixth Amendment rights as well as Rules of Professional Conduct of the State Bar of California Rule 2-100 (1988). Binding pursuant to Local Rule 110-3 in the Northern District of California, Rule 2-100 generally prohibits a lawyer from communicating with another party in the case without the consent of that party's lawyer.

[11] After extensive briefing and six hearings at which Twitty, Lopez, and Lyons testified, the district court concluded that Lyons had violated Rule 2-100. *United States v. Lopez,* 765 F. Supp. 1433, 1456 (N.D.Cal. 1991). The court rebuffed the government's attempts to invoke the "Thornburgh Memorandum," a Justice Department policy statement which purports to exempt federal litigators from compliance with the rule against communicating with represented individuals without the consent of their lawyers. *Id.* at 1445-50; *see* Memorandum from Dick Thornburgh, Attorney General, to All Justice Department Litigators (June 8, 1989). The court also determined that Lyons had not insulated himself from blame by obtaining the approval of the district court before each meeting, since he had "effectively misled" the court

Page 1458

regarding Lopez's reasons for requesting to speak with him. *Id.* at 1452.

[12] Since Lopez had been able to obtain competent replacement counsel for Tarlow, the court declined to say that the government's misconduct rose to the level of a Sixth Amendment violation. *Id.* at 1456. It also found, however, that Lopez had been significantly prejudiced, since he was effectively deprived of the counsel of his choice. *Id.* at 1461. Refusing to evaluate Lyons's actions apart from the Thornburgh memorandum which he invoked in his defense, the court condemned both as an egregious and flagrant "frontal assault on the legitimate powers of the court." *Id.* Rejecting less drastic remedies as ineffective,

the district court invoked its supervisory powers in order to dismiss the indictment against Jose Lopez. *Id.* at 1464.

[13] The government, on appeal, has prudently dropped its dependence on the Thornburgh Memorandum in justifying AUSA Lyons' conduct, and has thereby spared us the need of reiterating the district court's trenchant analysis of the inefficacy of the Attorney General's policy statement. *See* 765 F. Supp. at 1445-1450. The government instead argues that Rule 2-100 was not intended to apply to prosecutors pursuing investigations, that the contact with Lopez was authorized by law, that Rule 2-100 did not apply since Lopez was exercising his constitutional right of self-representation, and that Lopez waived his rights under Rule 2-100. Finally, the government contends that dismissal of the indictment was improper, even if Lyons did violate the ethical rule.

II.

[14] We review *de novo* the district court's conclusion that specific conduct violated court rules. *In re Dresser Indus. Inc.,* 972 F.2d 540, 543 (5th Cir. 1992); *cf. Golden Eagle Dist. Corp. v. Burroughs Corp.,* 801 F.2d 1531, 1538 (9th Cir. 1986) (district court's imposition of sanctions for violation of Rule 11 reviewed for abuse of discretion). The court's findings of fact, however, are reviewed for clear error. *United States v. Barrera-Moreno,* 951 F.2d 1089, 1091 (9th Cir. 1991), *cert. denied,* ___ U.S. ___, 113 S.Ct. 417, 121 L.Ed.2d 340 (1992).

[15] Rule 110-3 of the local rules of the Northern District of California requires that:

> Every member of the bar of this court and any attorney permitted to practice in this court under Local Rule 110-2 shall be familiar with and comply with the standards of professional conduct required of members of the State Bar of California and contained in the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and decisions of any court applicable thereto; maintain the respect due courts of justice and judicial officers; [and] perform with the honesty, care, and decorum required for the fair and efficient administration of justice.

[16] Rule 2-100 of the Rules of Professional Conduct of the State Bar of California governs communications with a represented party:

> (A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.
>
> . . . .
>
> (C) This rule shall not prohibit:
>
> (1) Communications with a public officer, board, committee, or body;
>
> (2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party's choice; or

(3) Communications otherwise authorized by law.

[17] Rule 2-100's prohibition against communicating with represented parties without the consent of their counsel is both widely accepted and of venerable heritage. The California rule tracks the language of Rule 4.2 of the American Bar Association's Model Rules of Professional Conduct, which in turn is nearly identical to its predecessor in the Model Code of Professional Responsibility, Disciplinary Rule 7-104(A)(1). A similar prohibition appears under Canon 9 of the ABA's Canons of Professional Ethics, which were promulgated in 1908. Not simply an American

invention, the prohibition has roots which can be traced back to English common law. *See, e.g., In Re Oliver,* 2 Adm. & Eccl. 620, 622, 111 Eng.Rep. 239, 240 (1835) ("When it appeared that Mrs. Oliver had an attorney, to whom she referred, it was improper to obtain her signature, with no attorney present on her part. If this were permitted, a very impure, and often a fraudulent, practice would prevail.") (Lord Denman, C.J.). Today some version of the rule is in effect in all fifty American states.

[18] The rule against communicating with a represented party without the consent of that party's counsel shields a party's substantive interests against encroachment by opposing counsel and safeguards the relationship between the party and her attorney. As Tarlow's withdrawal upon discovering the secret communication between Lopez and the government exemplifies all too well, the trust necessary for a successful attorney-client relationship is eviscerated when the client is lured into clandestine meetings with the lawyer for the opposition. As a result, uncurbed communications with represented parties could have deleterious effects well beyond the context of the individual case, for our adversary system is premised upon functional lawyer-client relationships.

A.

[19] The government argues, however, that Rule 2-100 was not intended to apply to prosecutors pursuing criminal investigations. Decisions of the state courts of California, which are binding on attorneys practicing in the Northern District of California through Local Rule 110-3, however, have held prosecutors to the rules prohibiting communications with represented parties. In *People v. Sharp,* 150 Cal.App.3d 13, 197 Cal.Rptr. 436 (1983), decided under the predecessor of Rule 2-100, the court noted that:

[b]ecause the prosecutor's position is unique — he represents authority and the discretion to make decisions affecting the defendant's pending case — his contact carries an implication of leniency for cooperative defendants or harsher treatment for the uncooperative. Such contact intrudes upon the function of defense counsel and impedes his or her ability to negotiate a settlement and properly represent the client, whose interests the rule is designed to protect.

[20] *Id.* 197 Cal.Rptr. at 439-40. The court thus concluded that, by directing police agents to conduct a lineup without notifying the defendant's attorney, the prosecutor violated his professional ethical responsibilities. *Id.* at 440; *see also People v. Manson,* 61 Cal.App.3d 102, 132 Cal.Rptr. 265, 301 (1976) (holding prosecutor to ethical rules because he "is no less a member of the State Bar than any other admitted lawyer"), *cert. denied,* 430 U.S. 986, 97 S.Ct. 1686, 52 L.Ed.2d 382 (1977); *see also Triple A Mach. Shop, Inc. v. State,* 213 Cal.App.3d 131, 261 Cal.Rptr. 493, 499 (1989) (assuming Rule 2-100 can

apply to prosecutors).[fn1]
Page 1460

[21] The cases advanced by the government in support of its position are largely irrelative. Starting with *United States v. Lemonakis,* 485 F.2d 941 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 989, 94 S.Ct. 1587, 39 L.Ed.2d 885 (1974), a number of courts have held that there is no breach of a prosecutor's ethical duty to refrain from communication with represented parties when investigating officers question or contact suspects prior to their indictment. *See, e.g., id.* at 956; *United States v. Kenny,* 645 F.2d 1323, 1339 (9th Cir.), *cert. denied,* 452 U.S. 920, 101 S.Ct. 3059, 69 L.Ed.2d 425 (1981), *and cert. denied,* 454 U.S. 828, 102 S.Ct. 121, 70 L.Ed.2d 104 (1981); *United States v. Ryans,* 903 F.2d 731, 740 (10th Cir.) *cert. denied,* 498 U.S. 855, 111 S.Ct. 152, 112 L.Ed.2d 118 (1990); *United States v. Sutton,* 801 F.2d 1346, 1366 (D.C. Cir. 1986). Such cases have reasoned that criminal suspects should not be permitted to insulate themselves from investigation simply by retaining counsel. *See, e.g., United States v. Jamil,* 707 F.2d 638, 646 (2d Cir. 1983); *United States v. Hammad,* 858 F.2d 834, 839 (2d Cir. 1988); *see also* Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel,* 105 Harv.L.Rev. 670, 701 (1992) ("A broad interpretation of the no-contact rule would provide a powerful incentive for criminal actors to seek relational representation because having an ongoing relationship with an attorney could insulate them from several of the most effective law enforcement techniques for investigating complex crime."). In addition, they have noted that during investigation of the case and prior to indictment,

> the contours of the "subject matter of the representation" by [the suspect's] attorneys, concerning which the code bars "communication," [are] less certain and thus even less susceptible to the damage of "artful" legal questions the Code provisions appear designed in part to avoid.

[22] *Lemonakis,* 485 F.2d at 956; *compare* Rule 2-100 (barring communication "about the subject of the representation").[fn2]

[23] The government's insistence that there are no salient differences between the pre- and post-indictment contexts for purposes of Rule 2-100 is puzzling. The prosecutor's ethical duty to refrain from contacting represented defendants entifies upon indictment for the same reasons that the Sixth Amendment right to counsel attaches:

> 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.

[24] *Kirby v. Illinois,* 406 U.S. 682, 689, 92 S.Ct. 1877, 1882, 32 L.Ed.2d 411 (1972) (plurality opinion). In addition to focusing "the subject of the representation," indictment gives rise to a defendant's "right to rely upon counsel as a `medium' between him and the State." *Maine v. Moulton,* 474 U.S. 159, 176, 106 S.Ct. 477, 487, 88 L.Ed.2d 481 (1985). Thus,
Page 1461
the Sixth Amendment guarantee would be rendered fustian if one of its "critical components," a lawyer-client "`relationship characterized by trust and confidence,'" could be circumvented by the prosecutor under the guise of pursuing the criminal investigation. *United States v. Chavez,* 902 F.2d 259, 266 (4th Cir. 1990) (quoting *Morris v. Slappy,* 461 U.S. 1, 21, 103 S.Ct. 1610, 1621, 75 L.Ed.2d 610 (1983)

(Brennan, J., concurring)); *see also Patterson v. Illinois,* 487 U.S. 285, 290 n. 3, 108 S.Ct. 2389, 2393 n. 3, 101 L.Ed.2d 261 (1988) ("Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect."). Thus, beginning at the latest upon the moment of indictment, a prosecuting attorney has a duty under ethical rules like Rule 2-100 to refrain from communicating with represented defendants.

B.

[25] The government next adopts the position that Lyons' conduct falls within the "communications otherwise authorized by law" exception to the rule against attorney communication with represented parties. *See* Rule 2-100(C)(3). The government argues that Lyons' contact with Lopez was authorized by statutes enabling prosecutors to conduct criminal investigations, and that the meetings were authorized by the magistrate judge's approval.

1.

[26] The government reasons that federal prosecutors operate pursuant to a "statutory scheme" that permits them to communicate with represented parties in order to detect and prosecute federal offenses. Citing 28 U.S.C. § 509, 515(a) and (c), 516, 533 and 547, the government argues that Justice Department attorneys fall within the "authorized by law" exception to California Rule 2-100 and its counterparts.

[27] The comment to California Rule 2-100 notes that:

> Rule 2-100 is intended to control communications between a member [of the bar] and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. There are a number of *express statutory schemes* which authorize communications between a member and person who would otherwise be subject to this rule. . . . *Other applicable law also includes the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law.*

[28] (Emphasis supplied). Thus, the "authorized by law" exception to Rule 2-100 requires that a statutory scheme expressly permit contact between an attorney and a represented party. While recognizing the statutory authority of prosecutors to investigate crime, however, Rule 2-100 is intended to allow no more contact between prosecutors and represented defendants than the case law permits. We agree with the district court that the statutes cited by the government are nothing more than general enabling statutes. Nothing in these provisions expressly or impliedly authorizes contact with represented individuals beyond that permitted by case law. As discussed above, "the authority of government prosecutors and investigators to conduct criminal investigations" is "limited by the relevant decisional law" to contacts conducted prior to indictment in a non-custodial setting. Lyons' discussions with Lopez were not so authorized.

2.

[29] The government also maintains that by obtaining the prior approval of a magistrate judge, Lyons brought his conversations with Lopez within the realm of the "authorized by law" exception to California Rule 2-100. We agree that in an appropriate case, contact with a represented party could be excepted from

the prohibition of Rule 2-100 by court order. *See* Rule 2-100 cmt. (Rule 2-100 forbids communication with represented persons "unless . . . case law will override the rule."). But, as in other areas of the law, judicial approval cannot absolve the government from responsibility for wrongful acts when the government has misled the court in obtaining its sanction. *See United States v. Leon,* 468 U.S. 897, 914, 104 S.Ct. 3405, 3416, 82 L.Ed.2d 677 (1984) ("[T]he deference accorded to a magistrate's finding of probable

Page 1462

cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which the determination was based."); *Franks v. Delaware,* 438 U.S. 154, 165, 98 S.Ct. 2674, 2681, 57 L.Ed.2d 667 (1978) (warrant affidavit must be truthful "so as to allow the magistrate to make an independent evaluation of the matter"). When seeking the authorization of the district court, the prosecutor had an affirmative duty to avoid misleading the court. Rules of Professional Conduct of the State Bar of California Rule 5-200(B) (1988) ("In presenting a matter to a tribunal, a member . . . [s]hall not seek to mislead the judge, judicial officer or jury by an artifice or false statement of fact or law.").

[30] The district court concluded that the magistrate judge approved the meeting between Lyons and Lopez in the mistaken belief, fostered by Lyons, that:

> Tarlow□ was being paid by a third party with interests inimical to those of Lopez and that Lopez feared that if Tarlow became aware of his client's interest in cooperating with the government, he would pass the information on to others who would harm Lopez and/or his family.

[31] 765 F. Supp. at 1452. The district court thus concluded that the magistrate judge's approval could not legally authorize Lyons to meet with Lopez.

[32] The district court found that Lyons materially misled the magistrate judge regarding the facts surrounding Lopez's request to speak directly with the prosecutor. We agree that the magistrate judge apparently did not have a full understanding of the facts surrounding Lopez's request. Without that understanding, she could not have made an informed decision to authorize the communications.

[33] Although it is not necessary to our determination in this case to decide whether the district court erred in its finding that Lyons materially misled the magistrate judge, we suggest that the finding is not sustainable without resolving certain conflicts in the testimony of Twitty, Lyons, and Lopez as to what Lyons knew and when he knew it (the district court, for whatever reason, said it was not necessary to resolve these conflicts). On remand, were the district court to consider lesser sanctions than dismissal of the indictment, resolution of these conflicts would be essential.

C.

[34] The government makes several related arguments regarding the effect of Lopez's waiver on its ethical obligations. We note initially that it would be a mistake to speak in terms of a party "waiving" her "rights" under Rule 2-100. The rule against communicating with represented parties is fundamentally concerned with the *duties* of attorneys, not with the *rights* of parties. Lyons' duties as an attorney practicing in the Northern District of California extended beyond his obligation to respect Lopez's rights. Consequently, as the government concedes, ethical obligations are personal, and may not be vicariously waived.

[35] The government also argues, however, that Lopez created a form of "hybrid representation" by waiving his right to counsel for the limited purpose of negotiating with the government, while retaining Tarlow as his counsel for all other purposes. Since Lopez would be unrepresented for purposes of discussions with the government, it would presumably not be a violation of Rule 2-100 for the government to communicate with him directly. We have in the past held, however, that "[i]f the defendant assumes any of the `core functions' of the lawyer, . . . the hybrid scheme is acceptable only if the defendant has voluntarily waived counsel." *United States v. Turnbull,* 888 F.2d 636, 638 (9th Cir. 1989) (quoting *United States v. Kimmel,* 672 F.2d 720, 721 (9th Cir. 1982)), *cert. denied,* 498 U.S. 825, 111 S.Ct. 78, 112 L.Ed.2d 51 (1990). Representing a client in negotiations with the government is certainly one of the core functions of defense counsel, and there is no question that Lopez did *not* waive his right to counsel. In fact, the magistrate judge, following the hearing with Lopez, clearly communicated to Lyons that while Lopez was waiving his right to have counsel present while inquiring about the possibility of cooperating with the government, he was not waiving his right to counsel. The district court found Lopez did not wish to waive his

Page 1463

right to have an attorney present. In *Kimmel,* we explained that:

> [w]hen the accused assumes functions that are at the core of the lawyer's traditional role . . . he will often undermine his own defense. Because he has a constitutional right to have his lawyer perform core functions, he must knowingly and intelligently waive that right.

[36] 672 F.2d at 721. While we are not immediately concerned with the constitutional dimensions of Lopez's communications with the government, it is clear that the magistrate judge's intervention could not, as a matter of law, have created a form of "hybrid representation." To the contrary, Lyons was notified by the court that Lopez was still represented by Tarlow, and consequently he could not evade his duty under Rule 2-100 on this basis.

[37] For the same reason, we reject the government's claim that enforcing the ethical prohibition against communication with represented parties would interfere, under these circumstances, with the party's constitutional rights. The government relies on the doctrine established in *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), that it is unconstitutional to require a criminal defendant to be represented by an attorney. We see no conflict between *Faretta* and Rule 2-100. Of course, Rule 2-100 does not bar communications with persons who have waived their right to counsel, for by its express terms the rule only applies to "communications with a *represented* party." (Emphasis supplied). Because Lopez did not waive his right to counsel, *Faretta* is immaterial.

D.

[38] We therefore conclude that the district court was correct in holding that Lyons had an ethical duty to avoid communicating directly with Lopez regarding the criminal prosecution so long as Lopez was represented by Tarlow.

III.

[39] The district court dismissed the indictment under its inherent supervisory powers. Finding the government's conduct "flagrant and egregious," and believing that Lopez had been prejudiced through loss

of his attorney of choice, the district court reasoned that no lesser sanction could adequately preserve judicial integrity and deter future governmental misconduct. 765 F. Supp. at 1461-64. We review the district court's exercise of its supervisory powers for an abuse of discretion. *Barrera-Moreno,* 951 F.2d at 1091.

[40] There are three legitimate grounds for a court's exercise of supervisory power: "to implement a remedy for the violation of a recognized statutory or constitutional right; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and to deter future illegal conduct." *United States v. Simpson,* 927 F.2d 1088, 1090 (9th Cir. 1991). We have recognized that exercise of supervisory powers is an appropriate means of policing ethical misconduct by prosecutors. *United States v. McClintock,* 748 F.2d 1278, 1285-86 (9th Cir. 1984), *cert. denied,* 474 U.S. 822, 106 S.Ct. 75, 88 L.Ed.2d 61 (1985); *see also United States v. Williams,* ___ U.S. ___, ___, 112 S.Ct. 1735, 1742, 118 L.Ed.2d 352 (1992) ("[T]he court's supervisory power . . . may be used as a means of establishing standards of prosecutorial conduct before the courts themselves."). We also have expressly recognized the authority of the district court to dismiss actions where government attorneys have "willfully deceived the court," thereby interfering with "the orderly administration of justice." *United States v. National Medical Enters., Inc.,* 792 F.2d 906, 912 (9th Cir. 1986) (quotations omitted).

[41] It was therefore within the discretion of the district court to act in an appropriate manner to discipline Lyons if he subverted of the attorney-client relationship. We have no doubt but that federal courts are empowered to deal with such threats to the integrity of the judicial process. In the words of the Supreme Court, "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat v. United States,*
Page 1464
486 U.S. 153, 160, 108 S.Ct. 1692, 1697-98, 100 L.Ed.2d 140 (1988).

[42] At the same time, however, even assuming that Lyons did act unethically, we question the prudence of remedying that misconduct through dismissal of a valid indictment. To justify such an extreme remedy, the government's conduct must have caused substantial prejudice to the defendant and been flagrant in its disregard for the limits of appropriate professional conduct. *Barrera-Moreno,* 951 F.2d at 1093.

[43] In *United States v. Owen,* 580 F.2d 365 (9th Cir. 1978), we adopted the view that, in order to justify dismissal of the indictment under the court's supervisory powers, there must "be some prejudice to the accused by virtue of the alleged acts of misconduct." *Id.* at 367. We explained that the idea of prejudice entails that the government's conduct "had at least some impact on the verdict and thus redounded to [the defendant's] prejudice." *Id.* at 368 (quoting *United States v. Acosta,* 526 F.2d 670, 674 (5th Cir.), *cert. denied,* 426 U.S. 920, 96 S.Ct. 2625, 49 L.Ed.2d 373 (1976)); *see also United States v. Larrazolo,* 869 F.2d 1354, 1358 (9th Cir. 1989) ("a defendant must be *actually* prejudiced in order for the court to invoke its supervisory powers to dismiss an indictment for prosecutorial misconduct." (emphasis added)). Thus, in *Owen,* we found no grounds for dismissal where the defendant could not show any effect from the government's actions "beyond the vague claim of a strain in his relationship with" his attorney. 580 F.2d at 368.

[44] The district court specifically found that the attorney Lopez found to replace Tarlow following his withdrawal "is very able and will provide him with outstanding representation." 765 F. Supp. at 1456.

Without in any way wishing to disparage the importance of a criminal defendant's choice of counsel, we fail to see how Tarlow's withdrawal in these circumstances could be said to have substantially prejudiced Lopez in his defense.

[45] Consequently, even if the district court's finding that Lyons misled the court is correct, we conclude that the district court abused its discretion in dismissing the indictment. We are sensitive to the district court's concerns that none of the alternative sanctions available to it are as certain to impress the government with our resoluteness in holding prosecutors to the ethical standards which regulate the legal profession as a whole. *See* 765 F.2d at 1461-64. At the same time, we are confident that, when there is no showing of substantial prejudice to the defendant, lesser sanctions, such as holding the prosecutor in contempt or referral to the state bar for disciplinary proceedings, can be adequate to discipline and punish government attorneys who attempt to circumvent the standards of their profession.

[46] Accordingly, the order dismissing the indictment is VACATED. The case is REMANDED for proceedings consistent with this opinion.

[fn1] The government has speculated for the first time on appeal that the California Rules of Professional Conduct were not validly adopted by the Northern District of California, and that Local Rule 110-3 as adopted predates California's adoption of Rule 2-100. The government concedes that they failed to raise this issue before the district court, but argues that we may dispense with the rule that the issue is waived because it is a purely legal issue. We decline to do so, however, for the government's argument rests on the claim that the Northern District has not specifically adopted Rule 2-100, and that Local Rule 110-3 was adopted without proper notice and comment. Both of these claims are factual in nature, and we decline to review them without the proper development of a record. *See Consolidated Marketing, Inc. v. Marvin Properties, Inc.,* 854 F.2d 1183, 1187 (9th Cir. 1988). In any event, we have previously upheld the Northern District's adoption of the California Rules of Professional Conduct, and rejected the argument that attorneys practicing in the Northern District are not subject to the ABA Model Code because the district's rules did not specifically adopt the code. *Paul E. Iacono Structural Eng'r, Inc. v. Humphrey,* 722 F.2d 435, 438-39 (9th Cir.), *cert. denied,* 464 U.S. 851, 104 S.Ct. 162, 78 L.Ed.2d 148 (1983). Moreover, Rule 7-103 of the California Rules of Professional Conduct, which was in effect prior to the adoption of Rule 2-100, also prohibited communications with represented parties in almost identical terms.

The government has called our attention to *Baylson v. Disciplinary Bd.,* 975 F.2d 102 (3d Cir. 1992), which held that it was beyond the rule-making authority of the district court to adopt a state disciplinary rule governing the ability of federal prosecutors to obtain a grand jury subpoena. *Id.* at 111. The Third Circuit's decision was founded on the fact that the rule in question was inconsistent with Fed.R.Crim.P. 17. *See* Fed.R.Crim.P. 57 (district court may adopt rules "not inconsistent with" the Federal Rules of Criminal Procedure). At the same time, the Third Circuit recognized that "[a]mong the rules which fall under the local rule-making authority of the district courts are rules regulating the conduct of attorneys practicing before them." 975 F.2d at 107. *Baylson* is thus not in conflict with our holding that Rule 2-100 is applicable via Local Rule 110-3, since requiring prosecutors to refrain from communicating with represented defendants is not only consistent with the rules of criminal procedure, but implied by them. *See* Fed.R.Crim.P. 11(e)(1) (plea negotiations may be conducted between attorney for the government and attorney for the defendant).

[fn2] Although we do not reach the issue, we note that courts have been divided over whether the rule applies even in a pre-indictment setting. Three circuits have held that in *custodial* situations, the ethical rule prohibits prosecutors from interviewing defendants in the absence of and without the consent of their counsel: *United States v. Thomas,* 474 F.2d 110, 112 (10th Cir.), *cert. denied,* 412 U.S. 932, 93 S.Ct. 2758, 37 L.Ed.2d 160 (1973), *United States v. Killian,* 639 F.2d 206, 210 (5th Cir.), *cert. denied,* 451 U.S. 1021, 101 S.Ct. 3014, 69 L.Ed.2d 394 (1981), and *United States v. Durham,* 475 F.2d 208, 211 (7th Cir. 1973). *See also United States v. Hammad,* 858 F.2d 834, 839 (2d Cir. 1988) (refusing to "bind□ the Code's applicability to the moment of indictment" since "an indictment's return lies substantially within the control of the prosecutor").
[47] FLETCHER, Circuit Judge, with whom Circuit Judge T.G. NELSON, joins, concurring:

[48] At issue in this case is the conduct of the government. Because it does not seem to me that the story began or ended with the prosecutor's misbehavior, I feel compelled to say a few words about the actions of Mr. Tarlow, Mr. Twitty, and the magistrate judge.

[49] Tarlow told Lopez at the outset of the representation that it was his "general policy" not to represent clients in plea negotiations that contemplate cooperation with the government. *United States v. Lopez,* 765 F. Supp. 1433, 1438-39 (N.D.Cal. 1991). In a declaration submitted to the district court, Tarlow elaborated that he considers such negotiations "personally morally and ethically offensive," and that, while he would have conveyed an offer of cooperation to Lopez, "another attorney would be willing and better able to arrange his informant activities." *Id.* at 1440 n. 12. Although Tarlow apparently did not say so explicitly, Lopez took Tarlow's policy statement to mean that if Lopez wanted to negotiate, Tarlow would withdraw from representing him altogether. *See id.* at 1439-40.

[50] Concerned about the welfare of his children because he thought his wife might not be caring for them properly, Lopez decided
Page 1465
that he wanted to explore the possibility of an earlier release by cooperating with the government. Lopez also wanted Tarlow to try the case if it went to trial. Faced with a difficult dilemma that he may not have anticipated when he retained Tarlow as counsel, Lopez decided to meet with the government unrepresented. I question whether Tarlow's "general policy" was in the best interests of his clients generally, and Lopez's specifically.

[51] A criminal attorney who is bound by the Rules of Professional Conduct of the State Bar of California ("California Rules") and California's standards of professional conduct, as was Tarlow by virtue of the Northern District's Local Rule 110-3, is not free to terminate his or her representation of a client at will, or for mere personal considerations, or without the permission of the court. *People v. Castillo,* 233 Cal.App.3d 36, 284 Cal.Rptr. 382, 392 (1991), *review denied,* 1991 Cal. LEXIS 5144 (Cal. Nov. 14, 1991) (citing *People v. Murphy,* 35 Cal.App.3d 905, 111 Cal.Rptr. 295, 304 (1974)); *see also* N.D.Cal. Local Rule 110-3 (attorneys practicing in Northern District must comply with "the standards of professional conduct required of members of the State Bar of California and contained in the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and decisions of any court applicable thereto"). Notably, although under the ABA Model Rules of Professional Conduct ("ABA Model Rules") an attorney may withdraw from representation if the client "insists upon pursuing an objective that the lawyer considers repugnant or imprudent," no comparable provision appears in the California Rules. *Compare* ABA Model Rule 1.16(b)(3) *with* Cal. Rule 3-700(C). *See also Morris v.*

Slappy, 461 U.S. 1, 24 n. 6, 103 S.Ct. 1610, 1623 n. 6, 75 L.Ed.2d 610 (1983) (Brennan, J., concurring) (noting that continuous representation of a criminal defendant throughout trial court proceedings "`affords the best opportunity for the development of a close and confidential attorney-client relationship'") (quoting ABA Standards for Criminal Justice); Harold S. Lewis, Jr., *Commentary: Shaffer's Suffering Client, Freedman's Suffering Lawyer,* 38 Cath.U.L.Rev. 129, 133 n. 13 (criticizing Model Rule 1.16(b)(3) for allowing an attorney to withdraw for reasons of conscience because it "unfairly disappoints the client's reasonable expectations.") Because moral repugnance is not listed in the California Rules as a ground for permissive withdrawal, and because a criminal defense lawyer may not be entitled to assert moral repugnance to plea bargaining in any event, it is not certain, were a court to consider the matter, that Tarlow's general policy would prevail over a client's wish to pursue preliminary plea discussions with the government. *See* John W. Hall, Jr., *Professional Responsibility of the Criminal Lawyer* § 14.2, at 472 (1987) ("If the nature of the case warrants it, defense counsel should explore plea discussions with the prosecutor."); *cf. Mason v. Balcom,* 531 F.2d 717 (5th Cir. 1976) (ineffective assistance in part due to counsel's failure to plea bargain when his client may have benefitted); *People v. Frierson,* 39 Cal.3d 803, 218 Cal.Rptr. 73, 78-79, 705 P.2d 396, 401-03 (1985) (listing fundamental decisions over which the defendant, rather than his or her counsel, retains ultimate control; "the decision whether to plead guilty to a lesser offense . . . frequently reflects strategic concerns, but a defendant nonetheless retains personal control over such a plea."); Cal. Rule 3-510(A)(1) ("A member [of the state bar] shall promptly communicate . . . [a]ll terms and conditions of any offer made to the client in a criminal matter."); ABA Model Rule 1.4 comment ("A lawyer who receives . . . a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable.")

[52] Ideally, sufficient candor and trust are present in an attorney-client relationship such that a defendant does not feel compelled to resort to clandestine meetings with the government. Indeed, the model of a successful attorney-client relationship, as expounded in *Strickland v. Washington,* is one in which "[c]ounsel's actions are . . . based . . . on informed strategic choices made by the defendant and on information supplied by the defendant." 466 U.S. 668, 691, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984); *see also Campbell v. Kincheloe,* 829 F.2d 1453, 1463

Page 1466

(9th Cir. 1987) ("The client's wishes are not to be ignored entirely."), *cert. denied,* 488 U.S. 948, 109 S.Ct. 380, 102 L.Ed.2d 369 (1988). Tarlow's relationship with Lopez fell far short of the ideal.

[53] As for Twitty, counsel for codefendant Escobedo, his conduct was, undeniably, less than exemplary. Twitty had access to Lopez at Pleasanton correctional facility, where Escobedo was also incarcerated, because Twitty was responsible for what may have been an ill-conceived "joint investigation" of the two defendants' cases. In view of Lopez's problem with Tarlow, Twitty may have intervened in Lopez's affairs with benign intentions, but ultimately he ended up representing two defendants who had potentially conflicting interests. Although he informed Lopez that he could not act as his lawyer, Twitty nonetheless apparently advised both Lopez and Escobedo during the first meeting with the government, and may have pressured Lopez to provide information to the prosecutor during the second. 765 F. Supp. at 1442-43.

[54] The Sixth Amendment contemplates that the assistance of counsel be "untrammeled and unimpaired by . . . requiring that one lawyer should simultaneously represent conflicting interests." *Glasser v. United States,* 315 U.S. 60, 70, 62 S.Ct. 457, 465, 86 L.Ed. 680 (1942); *see also* Cal. Rule 3-310(B) ("A member [of the state bar] shall not concurrently represent clients whose interests conflict, except with their

informed written consent."); ABA Model Rule 1.7(b) ("A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyers' responsibilities to another client . . . unless . . . the lawyer reasonably believes the representation will not be adversely affected□ and . . . the client consents after consultation.") When an attorney represents defendants with conflicting interests, "the evil . . . is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations. . . . [T]o assess the impact of a conflict of interest on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible." *Holloway v. Arkansas,* 435 U.S. 475, 490-91, 98 S.Ct. 1173, 1181-82, 55 L.Ed.2d 426 (1978).

[55] Significantly, the government had apparently taken the position that a plea agreement would be possible only in the event that both Lopez and Escobedo agreed to cooperate. *Id.* at 1439. Assuming he felt that such cooperation was in his own best interest, Escobedo thus had an incentive to pressure Lopez to cooperate as well. Under these circumstances, Twitty was the wrong person to be acting on Lopez's behalf during plea discussions with the government.

[56] Finally, there are the actions of the magistrate judge to consider. Although at the hearing before the magistrate the prosecutor apparently did not say anything about his suspicion regarding the source of payment for Tarlow's fees, the district court found that the magistrate "was operating under the mistaken assumption" that Tarlow was "being paid by a third party with interests inimical to those of Lopez." 765 F.2d at 1452. Because the prosecutor had previously communicated such a theory to the presiding district judge and because he failed to disabuse the magistrate of her erroneous assumption, the district court found that the government "effectively misled" the magistrate. The district court further found that the magistrate did not ask Lopez certain critical questions when he appeared before her, namely, whether Tarlow's fees were in fact being paid by someone with a conflicting interest, or whether Lopez feared for his or his family's safety should Tarlow learn of the pending plea negotiations. *Id.* at 1442 n. 13, 1452 n. 38.

[57] The magistrate was confronted with a difficult situation. Unfortunately, her decision to allow Lopez to meet with the government ultimately led to Lopez's losing Tarlow as his counsel, the very result Lopez had sought to avoid. Although, as the district court found, her actions may have been "understandable" in view of her assumption that Tarlow was being paid by an interested third party, *id.* at 1452, her judgment may have benefitted from a more thorough questioning of Lopez regarding the fee arrangement with Tarlow. Some different options might have presented themselves had she been convinced that the safety of Lopez and his family were not at stake.
Page 1467

[58] In this era of guideline sentencing, when the applicable guideline often assumes more importance than the crime of conviction, it is not unreasonable that a defendant would want to find out what the government might offer. Various forces conspired to render that inquiry exceedingly difficult for Lopez. Contrary to the intent of the Sixth Amendment, he was left to face the "`prosecutorial forces of organized society'" alone. *Moran v. Burbine,* 475 U.S. 412, 430, 106 S.Ct. 1135, 1146, 89 L.Ed.2d 410 (1986) (quoting *Maine v. Moulton,* 474 U.S. 159, 170, 106 S.Ct. 477, 484, 88 L.Ed.2d 481 (1985)). Others besides the prosecutor contributed to this regrettable result.

CERTIFICATE OF FILING AND SERVICE

I certify that on December 5, 2014, I filed the original of this BRIEF ON THE MERITS OF *AMICI CURIAE* OREGON JUSTICE RESOURCE CENTER with the State Court Administrator by the eFiling system.

I further certify that on December 5, 2014, I served a copy of the BRIEF ON THE MERITS OF *AMICI CURIAE* OREGON JUSTICE RESOURCE CENTER on the following parties by electronic service via the eFiling system:

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