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New York Court of Appeals Overrules Bartolomeo, Allowing a Suspect Represented by Counsel on a Prior Pending Charge to Answer Questions on New Unrelated Charges in the Absence of Counsel

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jury selection procedures in New York. Although *Kern* applies only to the exercise of race-based peremptory challenges, the principles promoted therein can and should be extended to prohibit the use of peremptory challenges based upon factors other than race. New York courts have already supported the application of *Batson* to bar the prosecution's peremptory excusal of jurors based on characteristics such as gender and hearing impairment.[43] A further extension of *Batson* to prohibit such challenges by defense counsel would be appropriate and consistent with the spirit of the *Kern* decision.

The New York Court of Appeals in *Kern* properly recognized the rights of New York citizens participating in jury selection to be free of racial discrimination by the defense as well as the prosecution.[44] Confronted with the task of balancing the equal protection rights of criminal defendants against the equal protection rights of prospective jurors, the *Kern* decision reflects New York's determination to eliminate discrimination from jury selection procedures. Mindful of the abundant measures embodied in our criminal justice system to protect the rights of criminal defendants,[45] the *Kern* court properly resolved this issue in favor of the rights of New York's jury-participating citizens. The decision could trigger other states to broaden their state constitutions to surpass the protections presently afforded prospective jurors under *Batson*'s interpretation of the fourteenth amendment's equal protection clause. Such results may then induce the Supreme Court to end its perennial silence on this issue.[46]

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New York Court of Appeals overrules Bartolomeo, *allowing a suspect represented by counsel on a prior pending charge to answer questions on new unrelated charges in the absence of counsel*

Traditionally, the New York Court of Appeals, relying on New

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[43] *See* People v. Blunt, 162 A.D.2d 86, 89, 561 N.Y.S.2d 90, 93 (2d Dep't 1990) (applying *Batson* to gender-based discrimination); People v. Irizarry, 560 N.Y.S.2d 279, 280 (1st Dep't 1990) (same); People v. Green, 561 N.Y.S.2d 130, 131 (Westchester Co. Ct. 1990) (applying *Batson* to prosecutor's peremptory excusal of hearing impaired juror).

[44] *See Kern*, 75 N.Y.2d at 653-56, 554 N.E.2d at 1243-45, 555 N.Y.S.2d at 655-57.

[45] *See* U.S. CONST. amends. IV, V, VI, and XIV; *see also* 4 W. BLACKSTONE COMMENTARIES, *supra* note 27 (describing peremptory challenge as "a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous").

[46] *See supra* note 4.

York State constitutional and statutory provisions, has provided criminal defendants with legal protections that are far more expansive than required by the United States Constitution.[1] Prior to *Miranda v. Arizona*,[2] New York applied its own constitutional standards in determining the admissibility of a defendant's uncounseled statements.[3] In this tradition, the state has developed

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[1] *See* People v. Davis, 75 N.Y.2d 517, 520-21, 553 N.E.2d 1008, 1010-11, 554 N.Y.S.2d 460, 462-63 (1990). The New York Court of Appeals has isolated itself from federal court review by restricting the "foundation" of its decisions to the New York State Constitution and statutes. *See* People v. Cunningham, 49 N.Y.2d 203, 207, 400 N.E.2d 360, 363, 424 N.Y.S.2d 421, 423 (1980). In *Cunningham*, the Court of Appeals found it "unnecessary to anticipate how the [United States] Supreme Court would decide . . . [a] case under existing principles of Federal constitutional law, for . . . [the court] conclude[d] that the issue presented . . . may be resolved by application of principles that are firmly rooted in [the] State's constitutional and statutory guarantees of due process of law." *Id.* The United States Supreme Court traditionally has declined to review state court decisions that are based upon adequate and independent state grounds. *See* Herb v. Pitcairn, 324 U.S. 117, 125 (1945) (citing Enterprise Irr. Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 163-65 (1917)). The most common example of such an adequate and independent state ground is a state court decision based in whole or in part on that state's constitution. G. GUNTHER, CONSTITUTIONAL LAW 57 (11th ed. 1985). The court, however, more recently has required state courts to be extremely clear in basing its decisions on "bona fide separate, adequate and independent state grounds." Michigan v. Long, 463 U.S. 1032, 1033 (1983). If, however, the state court is less than clear on this point and "the adequacy and independence of any possible state law ground is not clear from the face of the opinion [the Court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 1040-41.

It is well-settled that a state may expand but not restrict the rights and protections afforded individuals by the United States Constitution. *Compare* Cooper v. California, 386 U.S. 58, 62 (1967) ("state[] [has] power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so") *with* Sibron v. New York, 392 U.S. 40, 61 (1968) (state "may not, however, authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct"). Additionally, interpretations of state law which are made by a state's highest court are binding on the United States Supreme Court. *See* O'Brien v. Skinner, 414 U.S. 524, 531 (1974).

[2] 384 U.S. 436 (1966). In *Miranda*, the Supreme Court embarked on a mission to provide "concrete constitutional guidelines for law enforcement agencies and courts to follow" in order to safeguard the privilege against self-incrimination embodied in the fifth amendment to the United States Constitution. *Id.* at 441-42. "[T]he privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'" *Id.* at 460 (citation omitted). The Court held that in order to protect the "privilege," proper warnings informing the arrestee of his rights and an effective waiver of those rights by the arrestee are both prerequisites to the admissibility at trial of any statement made by the arrestee. *Id.* at 476-77.

[3] *See* People v. Di Biasi, 7 N.Y.2d 544, 550-51, 166 N.E.2d 825, 828, 200 N.Y.S.2d 21, 25 (1960). Prior to the Supreme Court's ruling in Malloy v. Hogan, 378 U.S. 1, 8 (1964), where the Court held that the fifth amendment privilege against self-incrimination is applicable to both state and federal prosecutions, the New York Court of Appeals held that a post-indictment interrogation in the absence of the defendant's counsel violated the state's constitu-

rules independent of its federal counterparts[4] to govern the right to counsel and the privilege against self-incrimination.[5] Specifically, the Court of Appeals has declared that once an attorney has entered a criminal proceeding, the right to counsel "indelibly" attaches and may only be waived in the presence of counsel.[6] A decade ago, in *People v. Bartolomeo*,[7] the Court of Appeals ruled that police not only were prohibited from questioning a suspect on a pending charge to which the right to counsel had attached, but were also precluded from questioning that suspect on new, unrelated charges on which he had purportedly waived his right to

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tional privilege against self-incrimination. *Di Biasi*, 7 N.Y.2d at 550-51, 166 N.Y.2d at 829, 200 N.Y.S.2d at 26.

[4] *See* People v. Donovan, 13 N.Y.2d 148, 151, 193 N.E.2d 628, 629, 243 N.Y.S.2d 841, 842-43 (1963). The New York Court of Appeals has relied on the state constitution for many of the rights it has afforded defendants because the Supreme Court either has not recognized, or has expressly rejected those rights. *Compare* People v. Failla, 14 N.Y.2d 178, 182, 199 N.E.2d 366, 368, 250 N.Y.S.2d 267, 270 (1964) (upon request of attorney, police required to afford access to accused) *with* Moran v. Burbine, 475 U.S. 412, 424-25 (1985) (police under no duty to inform defendant that attorney is attempting to make contact). *Compare* People v. Cunningham, 49 N.Y.2d 203, 210, 400 N.E.2d 360, 364-65, 424 N.Y.S.2d 421, 425-26 (1980) (once accused invokes right to counsel, subsequent waiver outside presence of counsel is without legal effect) *with* Edwards v. Arizona, 451 U.S. 477, 485-86 (1981) (once accused invokes right to counsel, he can be subjected to further interrogation if he himself initiates communication).

[5] *See* N.Y. CONST. art. 1, § 6. "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions. . . . No person shall be . . . compelled in any criminal case to be a witness against himself . . . ." *Id.*; *see also* CPL §§ 60.45 (admissibility of defendant's statements), 170.10(3)-(4) (right to counsel), 210.15(2)-(3) (same) (McKinney 1981 & Supp 1988).

[6] *See* People v. Skinner, 52 N.Y.2d 24, 28-29, 417 N.E.2d 501, 503, 436 N.Y.S.2d 207, 209 (1980). Once the right to counsel "indelibly attaches" there can be "no effective waiver of counsel unless made in the presence of counsel." *Id.* (citations omitted). In New York, there are "two well-defined situations in which the right to counsel is [found] . . . to attach indelibly" and may not be waived even though the defendant has not retained or requested an attorney. People v. Davis, 75 N.Y.2d 517, 521, 553 N.E.2d 1008, 1011, 554 N.Y.S.2d 460, 463 (1990). The first situation arises where "formal proceedings have [been] commenced" against a suspect. *See id.* Courts have interpreted the term "formal proceedings" to include indictment, arraignment, and charge in a felony complaint. *Id.* (citing *Cunningham*, 49 N.Y.2d at 207-08, 400 N.E.2d at 364, 424 N.Y.S.2d at 424). The second situation arises where uncharged individuals have retained or requested counsel to represent them on the specific charge for which they are being held. *See Davis*, 75 N.Y.2d at 521, 553 N.E.2d at 1010-11, 554 N.Y.S.2d at 462-63. Once an individual has requested counsel, the police are precluded from further questioning in the absence of counsel. *See id.*; *see also Cunningham*, 49 N.Y.2d at 207-08, 400 N.E.2d at 364, 424 N.Y.S.2d at 424 (defendant may not waive representation in absence of counsel). *But see* People v. Farruggia, 61 N.Y.2d 775, 777, 461 N.E.2d 295, 296, 473 N.Y.S.2d 158, 159 (1984) (taping non-custodial conversation of defendant not violative of right to counsel despite awareness of representation for unrelated charge).

[7] 53 N.Y.2d 225, 423 N.E.2d 371, 440 N.Y.S.2d 894 (1981).

counsel.[8] The court established a protection distinct from any right recognized under federal law. To give substance to this new protection, the court imposed on the police an affirmative duty to inquire as to whether a defendant is represented by counsel on the pending charge.[9] Recently, however, in *People v. Bing*,[10] the New York Court of Appeals expressly overruled *Bartolomeo*, holding that a suspect represented by counsel on a prior pending charge could—even in the absence of his attorney—waive his right to counsel with respect to new, unrelated charges.[11]

Bing involved three cases consolidated for appeal. In *People v. Bing*,[12] the defendant was a suspect in a church burglary.[13] Upon confirmation that Bing was wanted for a burglary in Ohio, the Nassau County police arrested him on the outstanding Ohio warrant.[14] At the time of his arrest, Bing was represented by counsel on the pending Ohio charge, but the New York police failed to inquire into this fact.[15] After waiving his right to counsel, Bing, dur-

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[8] *Id.* at 231-32, 423 N.E.2d at 374-75, 440 N.Y.S.2d at 897. In *Bartolomeo*, the defendant was taken into custody for questioning during a murder investigation. *Id.* at 230-31, 423 N.E.2d at 374-75, 440 N.Y.S.2d at 896-97. Only nine days earlier, the defendant had been arrested on an arson charge, and although the police were aware of this prior arrest, they were unaware the defendant had retained counsel. *Id.* While in custody in connection with the murder investigation, the defendant voluntarily waived his *Miranda* rights and made statements incriminating himself in the murder. *Id.* The Court of Appeals found that although the detectives had no actual knowledge of the defendant's representation on the prior charge, the detectives, aware that defendant had been arrested only nine days earlier, had a duty to inquire into the defendant's representation on that charge. *Id.* at 231-32, 423 N.E.2d at 374-75, 440 N.Y.S.2d at 897. The court ruled that because the detectives had failed to make the inquiry, they were "chargeable with what such an inquiry would have disclosed—namely, that the defendant did have an attorney acting on his behalf." *Id.* at 231-32, 423 N.E.2d at 375, 440 N.Y.S.2d at 897. Thus, the court held that the statements made by the defendant would have to be suppressed, on the grounds that a suspect represented by counsel on a prior charge cannot effectively waive his rights in the absence of counsel. *Id.* at 231-32, 423 N.E.2d at 375, 440 N.Y.S.2d at 897-98.

[9] *See Bartolomeo*, 53 N.Y.2d at 231-32, 423 N.E.2d at 374-75, 440 N.Y.S.2d at 897. The police, however, are not charged with constructive knowledge of a defendant's representation. *Id.* For example, a defendant's right to counsel is not violated where that defendant falsely indicates to police that he has no representation on an unrelated charge. *See* People v. Nanni, 114 A.D.2d 592, 592-93, 494 N.Y.S.2d 201, 202 (3d Dep't 1985). *But see* People v. Knapp, 57 N.Y.2d 161, 173, 441 N.E.2d 1057, 1061, 455 N.Y.S.2d 539, 543 (1982) (knowledge of informer imputed to state police), *cert. denied*, 462 U.S. 1106 (1983).

[10] 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990).

[11] *Id.* at 349-51, 558 N.E.2d at 1022, 559 N.Y.S.2d at 485.

[12] 146 A.D.2d 178, 540 N.Y.S.2d 247 (2d Dep't 1989), *aff'd*, 76 N.Y.2d 331, 558 N.E.2d 1011-13, 559 N.Y.S.2d 474 (1990).

[13] *Id.* at 179, 540 N.Y.S.2d at 248.

[14] *Bing*, 76 N.Y.2d at 335, 356, 558 N.E.2d at 1013, 1026, 559 N.Y.S.2d at 475-76, 489.

[15] *Id.* at 335, 558 N.E.2d at 1012-13, 559 N.Y.S.2d at 475-76. Although the police had

ing interrogation, acknowledged his participation in the burglary.[16] In the second case, *People v. Cawley*, after arraignment on robbery charges for which the defendant was represented by counsel, the court admitted the defendant to bail.[17] He absconded and remained a fugitive until he was returned to the state on a bench warrant.[18] He subsequently waived his *Miranda* rights and, upon interrogation made inculpatory statements regarding new, unrelated charges.[19] In the third case, *People v. Medina*, the defendant was questioned on homicide charges by a detective who erroneously assumed that a court had dismissed prior charges of assault.[20] After waiving his *Miranda* rights, the defendant made inculpatory statements which ultimately led to his conviction on the homicide charges.[21]

Relying on *Bartolomeo*, all three defendants moved to suppress the inculpatory statements, but only the defendant in *Cawley* was successful,[22] the appellate courts affirming in each case.[23] The Court of Appeals however, in a five-to-four decision, overruled *Bartolomeo*, affirmed *Bing* and *Medina*, and reversed *Cawley*.[24]

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confirmed by teletype the existence of the Ohio action, the police never asked the Ohio authorities or the defendant if he had retained counsel on the Ohio charge. *Id.* at 335, 356, 558 N.E.2d at 1013, 1026, 559 N.Y.S.2d at 476, 489. Under *Bartolomeo*, the police were chargeable with whatever knowledge a reasonable inquiry would have disclosed. *See Bartolomeo*, 53 N.Y.2d at 231-32, 423 N.E.2d at 375, 440 N.Y.S.2d at 897. Accordingly, *Bing* contended that pursuant to *Bartolomeo*, his representation as a matter of fact must be imputed to the New York police. *See Bing*, 146 A.D.2d at 184, 540 N.Y.S.2d at 251.

[16] *See Bing*, 76 N.Y.2d at 335, 356, 558 N.E.2d at 1013, 1026, 559 N.Y.S.2d at 476, 489.

[17] *Id.* at 335, 558 N.E.2d at 1013, 559 N.Y.S.2d at 476.

[18] *Id.*

[19] *Id.* The police were unaware of Cawley's prior representation and after allowing him to waive his *Miranda* rights, obtained inculpatory statements regarding two crimes unrelated to the charge on which he had been arraigned. *Id.*

[20] *Id.* When the detective inquired about the assault charge, the defendant responded that he had been "let go." *Id.* The detective therefore concluded that the charge had been dismissed, when in actuality it had not. *Id.*

[21] *Id.*

[22] *Id.* at 335-37, 558 N.E.2d at 1012-13, 559 N.Y.S.2d at 475-76.

[23] *Id.*

[24] *Id.* at 337, 558 N.E.2d at 1014, 559 N.Y.S.2d at 477. In justifying its abandonment of the *Bartolomeo* precedent, the court stated that the recurring problems inherent in *Bartolomeo* demanded this drastic remedy, "notwithstanding [the] compelling concerns of *stare decisis*." *Id.* "The modern doctrine of stare decisis with the *flexibility essential if it is to be a socially useful* one has never been better stated than by Chief Judge Cardozo . . . ." Baden v. Staples, 45 N.Y.2d 889, 893, 383 N.E.2d 110, 112, 410 N.Y.S.2d 808, 810 (1978) (citing B. Cardozo, NATURE OF THE JUDICIAL PROCESS 149-52 (5th ed. 1925) (emphasis added)). The United States Supreme Court has recognized that the doctrine of stare decisis has "a limited application in the field of constitutional law . . . . Otherwise, the Constitution

Writing for the court, Judge Simons stated that permitting a suspect currently represented in a pending criminal case to be questioned on unrelated charges when unrepresented on the charge for which he is presently in custody, offends neither the state constitution nor ethical principles surrounding the attorney-client relationship.[25] The court noted that the "right to counsel rules are based on 'common sense and fairness' and are intended to '[breathe] life into the requirement that the waiver of a constitutional right [is] competent, intelligent and voluntary.' "[26] The majority explained, however, that while the right to counsel is an important means of protection against police harassment, the *Bartolomeo* rule imposed too heavy a burden upon law enforcement at too great a cost to society.[27]

Judge Kaye, concurring in part and dissenting in part, asserted that the court was "break[ing] with its proud tradition"[28] of protecting a defendant's constitutional right to counsel and that the cases before the court provided inadequate justification for the

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[would] lose[] the flexibility necessary . . . to serve the needs of successive generations." New York v. United States, 326 U.S. 572, 590-91 (1946). *See generally* Wachtler, *Stare Decisis and a Changing New York Court of Appeals*, 59 ST. JOHN'S L. REV. 445, 446 & n.4, 448 (1985) (discussing flexiblity of stare decisis).

[25] *Bing*, 76 N.Y.2d at 349-50, 558 N.E.2d at 1022, 559 N.Y.S.2d at 485. Judge Simon explained that:

> The Constitution relates the right to counsel in criminal proceedings to that applying in civil actions . . . but in a civil case an attorney representing a party is not precluded from speaking to an adverse party on an unrelated matter . . . and there is no ethical reason why law enforcement officers should be foreclosed from doing so in a criminal case.

Id. at 350, 558 N.E.2d at 1022, 559 N.Y.S.2d at 485 (citation omitted). The court's statement, however, is limited to situations where counsel has not already entered the proceedings. *Id.* The court noted that there is a "bright-line rule preventing police from questioning defendant about those charges" on which the right to counsel has been enlisted. *Id.* (citing People v. Rogers, 48 N.Y.2d 167, 169, 397 N.E.2d 709, 710-11, 422 N.Y.S.2d 18, 19 (1979)).

[26] *Id.* The court explained that underlying those situations where the right to counsel is said to indelibly attach is a "recognition of the imbalance between a suspect and the agents of the State [and] the coercive influences the State may bring to bear on one suspected of crime." *Id.* at 339, 558 N.E.2d at 1015, 559 N.Y.S.2d at 478. Judge Simons noted, however, the illogic that exists in a rule which forecloses a second-time offender, "who presumably has received prior advice on how to deal with the authorities and has voluntarily chosen a different course of action on the new charge, . . . from waiving his rights on the matter for which he was detained." *Id.* at 342, 558 N.E.2d at 1017, 559 N.Y.S.2d at 480.

[27] *Id.* at 348, 558 N.E.2d at 1021, 559 N.Y.S.2d at 484. Judge Simons declared that *Bartolomeo* cannot be justified in light of the people's election "to strike a balance between society's need to investigate and prosecute crime and the right of individuals to be free from the police intimidation and harassment that can result from it." *Id.*

[28] *Id.* at 351-52, 558 N.E.2d at 1023, 559 N.Y.S.2d at 486 (Kaye, J., concurring in part, dissenting in part).

"overruling of a significant recent precedent, by now fully a part of the law."[29] Arguing that the Court of Appeals successfully molded the principles of *Bartolomeo* to advance a defendant's right to counsel while avoiding absurd applications, Judge Kaye stated that a "natural fear" should exist for the "immediate family" of cases which are at the foundation of *Bartolomeo*.[30]

The New York Court of Appeals correctly recognized that the *Bartolomeo* rule was "unworkable,"[31] and properly abandoned the often criticized, mercurial precedent.[32] At the foundation of the *Bartolomeo* decision was the court's desire to protect the defendant's right to counsel, however, it is submitted that other well-

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[29] *Id.* at 361, 558 N.E.2d at 1029, 559 N.Y.S.2d at 492 (Kaye, J., concurring in part, dissenting in part). Judge Kaye believed that in a reasonable application of the *Bartolomeo* rule, the convictions of both Bing and Medina should be affirmed. *Id.* at 356, 558 N.E.2d at 1026, 559 N.Y.S.2d at 489 (Kaye, J., concurring in part, dissenting in part). Judge Kaye suggested that as to *Bing*, there existed "perfectly good reasons for refusing to extend *Bartolomeo* beyond New York State borders." *Id.* at 356-57, 558 N.E.2d at 1026-27, 559 N.Y.S.2d at 489-90 (Kaye, J., concurring in part, dissenting in part). As to *Medina*, Judge Kaye stated that "a straightforward application of the rule that a confession elicited from a suspect represented by counsel on unrelated charges will not be excluded if the police reasonably believe those charges are no longer pending" would have sufficed to dispose of the case without overruling *Bartolomeo*. *Id.* at 358, 558 N.E.2d at 1027-28, 559 N.Y.S.2d at 490-91 (Kaye, J., concurring in part, dissenting in part) (citing People v. Bertolo, 65 N.Y.2d 111, 120-21, 480 N.E.2d 61, 68, 490 N.Y.S.2d 475, 481-82 (1985)). Judge Kaye, however, explained that *Cawley* fit squarely within *Bartolomeo*. *Id.* at 358-59, 558 N.E.2d at 1028, 559 N.Y.S.2d at 491 (Kaye, J., concurring in part, dissenting in part).

[30] *Id.* at 361, 558 N.E.2d at 1024, 559 N.Y.S.2d at 492 (Kaye, J., concurring in part, dissenting in part). Judge Kaye reasoned that because *Bartolomeo* was merely an outgrowth of the application of principles clearly contained in a number of prior cases, it would be reasonable to doubt the court's continued dedication to those principles. *Id.* at 354, 361, 558 N.E.2d at 1025, 1029, 559 N.Y.S.2d at 488, 492 (Kaye, J., concurring in part, dissenting in part). For example, People v. Rogers, 48 N.Y.2d 167, 397 N.E.2d 709, 422 N.Y.S.2d 18 (1979), stood at the foundation of *Bartolomeo*, and in fact, the resulting rule of law has been coined the "*Rogers—Bartolomeo* rule." *Bing*, 76 N.Y.2d at 361, 558 N.E.2d at 1029, 559 N.Y.S.2d at 492 (Kaye, J., concurring in part, dissenting in part) (citation omitted).

[31] *Bing*, 76 N.Y.2d at 350, 558 N.E.2d at 1022, 559 N.Y.S.2d at 485.

[32] *See Bartolomeo*, 53 N.Y.2d at 236, 423 N.E.2d at 377, 440 N.Y.S.2d at 900 (Wachtler, J., dissenting). Judge Wachtler stated in dissent that the *Bartolomeo* majority developed a rule which benefits the repeat offender and serves as an obstacle to law enforcement. *Id.*; *see also* Note, *The Expanding Right to Counsel in New York*, 10 FORDHAM URB. L.J. 351, 366-72 (1982) (criticizing *Bartolomeo*). The courts have exhibited what might be termed a general lack of adherence to the *Bartolomeo* rule. *See, e.g.*, People v. Lucarano, 61 N.Y.2d 138, 146, 460 N.E.2d 1328, 1332, 472 N.Y.S.2d 894, 898 (1984) (limiting officer's duty of inquiry); People v. Brennan, 129 A.D.2d 892, 893, 514 N.Y.S.2d 528, 630 (3d Dep't 1987) (conviction affirmed notwithstanding police's knowledge of pending charges and failure to inquire about representation). Many exceptions to the *Bartolomeo* rule have developed, resulting in a rule which "cannot be applied uniformly." *Bing*, 76 N.Y.2d at 350, 558 N.E.2d at 1022, 559 N.Y.S.2d at 485.

reasoned decisions by the court will continue to provide substantial safeguards against the "zeal" of the police. Originally, the *Bartolomeo* rule simply appeared to be a logical extension of *People v. Rogers*,[33] which held that where a defendant had invoked his right to counsel on the charges for which he was taken into custody the police were prohibited from questioning him on the current, and any unrelated charges.[34] The essence of *Rogers*, however, was that the police must not be "permitted to undo a request for counsel."[35] In contrast, the *Bartolomeo* court refused to recognize what one would otherwise consider to be a voluntary waiver of the assistance of counsel.[36] The *Rogers* decision provided substance to the state constitutional right to counsel.[37] The right to counsel protected by the *Bartolomeo* court's extension of the law, however, rested on no more than 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."[38]

In abandoning *Bartolomeo* and reaffirming *Rogers*, the *Bing* court struck the necessary balance between the state's interest in effective law enforcement and an individual's right to be free from police intrusion absent the assistance of counsel.[39] Under

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[33] 48 N.Y.2d 167, 397 N.E.2d 709, 422 N.Y.S.2d 18 (1979).

[34] *Id.* at 169, 397 N.E.2d at 711, 422 N.Y.S.2d at 19.

[35] *Bartolomeo*, 53 N.Y.2d at 238, 423 N.E.2d at 378, 440 N.Y.S.2d at 901 (Wachtler, J., dissenting). The assertion of the right to counsel on the charge for which the defendant is in custody would indicate the defendant's belief that he is unable to deal with the authorities without the assistance of counsel. *See id.* (Wachtler, J., dissenting); People v. Cunningham, 49 N.Y.2d 203, 209, 400 N.E.2d 360, 364, 424 N.Y.S.2d 421, 425 (1980) (citing Michigan v. Mosely, 423 U.S. 96, 110 n.2 (1975)).

[36] *See Bartolomeo*, 53 N.Y.2d at 238-39, 423 N.E.2d at 378-79, 440 N.Y.S.2d at 901 (Wachtler, J., dissenting). Judge Wachtler wrote that basic fairness does not require all police interrogations in all circumstances to take place in the presence of counsel. *Id.* (Wachtler, J., dissenting). "[T]here is no need for the *paternalistic* view that the police should assure the assertion of a defendant's right to counsel, *despite his own expressed wishes to the contrary.*" *Id.* (Wachtler, J., dissenting) (emphasis added).

[37] *See supra* note 24.

[38] *See Bing*, 76 N.Y.2d at 349, 558 N.E.2d at 1021-22, 559 N.Y.S.2d at 484-85. The attorney-client relationship which existed in *Rogers* remains protected. *Id.* In *Rogers*, the attorney had entered the proceeding relating to the defendant's arrest. *Id.* at 350, 558 N.E.2d at 1022, 559 N.Y.S.2d at 485. There is a present and real duty to assist a client who has indicated his inability to cope with the overwhelming powers of the state on the present charge or any other matter. *Id.* The decision to retain counsel rests with the client, and where no attorney appears and the defendant voluntarily foregoes representation, the "courts are fully capable of protecting the defendant['s] rights on both the prior pending charges and the new charges." *Id.*

[39] *Id.* at 348-50, 558 N.E.2d at 1021-22, 559 N.Y.S.2d at 484-85.

Bartolomeo, the one most benefited was the career criminal—the criminal most threatening to society—who likely had retained an attorney on prior pending charges and therefore had immunized himself from questioning regarding his most recent criminal acts,[40] leading to an unintended and harmful result.[41]

The overturning of *People v. Bartolomeo* does not indicate a retreat from New York's celebrated history of providing broad protections to suspects of crimes. To the contrary, the court's adherence to and reaffirmation of *People v. Rogers* confirms a laudable dedication to protecting the rights of criminal defendants by adequately protecting them from self-incrimination and preserving the attorney-client relationship.

Steven E. Rindner

BUSINESS CORPORATION LAW

Business Corporation Law § 626(e): Two-person close corporation does not deter New York Court of Appeals from steadfast application of statutory rule of recovery in shareholder derivative suits

In shareholder derivative suits, the established rule of recovery states that pecuniary awards are most commonly returned to the corporation, rather than the shareholder-plaintiff.[1] New York's

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[40] *See id.* at 342, 558 N.E.2d at 1017, 559 N.Y.S.2d at 480; *Bartolomeo*, 53 N.Y.2d at 239, 423 N.E.2d at 379, 440 N.Y.S.2d at 902 (Wachtler, J., dissenting).

[41] *See Bing*, 76 N.Y.2d at 348, 558 N.E.2d at 1021, 559 N.Y.S.2d at 484. Because interrogation is a valuable source of information for law enforcement authorities, unnecessary extensions of *Rogers* seriously impedes effective crime control. *See Miranda*, 384 U.S. at 477-78; *see also* People v. Skinner, 52 N.Y.2d 24, 34-35, 417 N.E.2d 501, 506, 436 N.Y.S.2d 207, 212 (1980) (Jasen, J., dissenting) (for centuries law enforcement has relied heavily upon statements of guilty persons).

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[1] *See* Ross v. Bernhard, 396 U.S. 531, 538 (1970) (citing Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 522 (1947)); Bokat v. Getty Oil Co., 262 A.2d 246, 249 (Del. Super. Ct. 1970); Keenan v. Eshleman, 23 Del. Ch. 234, 2 A.2d 904, 911-12 (1938); Wolff v. Wolff, 67 N.Y.2d 638, 641, 490 N.E.2d 532, 533, 499 N.Y.S.2d 665, 667 (1986); Isaac v. Marcus, 258 N.Y. 257, 264, 179 N.E. 487, 489 (1932); *see also* 6 Z. CAVITCH, BUSINESS ORGANIZATIONS § 119.05, at 119-106 (1990) [hereinafter Z. CAVITCH] (because derivative suit enforces corporate right, recovery belongs to corporation).

The rationale underlying this rule is that the shareholder is actually seeking relief for a corporate injury and any recovery should properly benefit the corporation. *See* Gordon v. Fundamental Invs. Inc., 362 F. Supp. 41, 44-46 (S.D.N.Y. 1973) (injury to corporation rather than individual); Liken v. Shaffer, 64 F. Supp. 432, 438 (N.D. Iowa 1946) (action stemming from corporate injury belongs to corporation not individual shareholder); *see also* H. HENN