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New York Court of Appeals Commingles Two State Constitutional Provisions to Suppress Station-House Confession Procured Following an Illegal Arrest

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DEVELOPMENTS IN THE LAW

New York Court of Appeals commingles two state constitutional provisions to suppress station-house confession procured following an illegal arrest

Courts have often struggled with the long-standing principle that any evidence acquired by an illegal search or seizure must be suppressed as the "fruit of the poisonous tree."[1] Recognizing the genuine demands of law enforcement,[2] the United States Supreme Court has declined to extend this exclusionary rule to all evidence that would not have been procured "but for" an illegal search or

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[1] *See* Nardone v. United States, 308 U.S. 338, 341 (1939) ("trial judge must give opportunity . . . to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree"); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (exclusionary rule extends to indirect as well as direct products of illegality); Weeks v. United States, 232 U.S. 383, 398 (1914) (evidence seized during unlawful search suppressed). Justice Holmes stated in strict terms that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Silverthorne*, 251 U.S. at 392. *See generally* 4 W. LAFAVE, SEARCH AND SEIZURE § 11.4, at 369-72 (2d ed. 1987) (history of "fruit of poisonous tree" doctrine); Comment, *The Fruit of the Poisonous Tree: Recent Developments as Viewed Through Its Exceptions*, 31 U. MIAMI L. REV. 615, 615-17 (1977) (same).

The exclusionary rule of the fourth amendment was originally adopted in federal prosecutions to bar illegally seized primary evidence. *See Weeks*, 232 U.S. at 398. Primary evidence is obtained directly by virtue of the illicit conduct and hence becomes the "poisonous tree." *See* Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CALIF. L. REV. 579, 581 (1968). When primary evidence leads to other evidence, this secondary evidence becomes the "fruit" of the poisonous tree. *Id.*; *see also* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 9.3(a), at 734 (1985) ("poisonous tree" can be illegal arrest, search, interrogation procedures, or identification practices); R. MCNAMARA, CONSTITUTIONAL LIMITATIONS ON CRIMINAL PROCEDURE §§ 15.01 to 15.08, at 231-40 (1982) (devices to exclude evidence at trial).

Justice Holmes succinctly expressed the policy reasons behind the broad exclusionary rule: "[F]acts thus obtained [do not] become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." *Silverthorne*, 251 U.S. at 392.

The United States Supreme Court has incorporated the exclusionary rule into the requirements of due process and has therefore made the rule applicable to state courts by operation of the fourteenth amendment. *See* Mapp v. Ohio, 367 U.S. 643, 655-56 (1961). *See generally* Comment, *The Fourth Amendment and Tainted Confessions: Admissibility as a Policy Decision*, 13 HOUS. L. REV. 753, 753-55 (1976) [hereinafter Comment, *Fourth Amendment*] (history and development of exclusionary rule).

[2] *See* United States v. Crews, 445 U.S. 463, 474 (1980) (Constitution does not require that person illegally detained be forever granted immunity from prosecution); Brown v. Illinois, 422 U.S. 590, 608-09 (1975) (Powell, J., concurring) (rule's deterrent purposes do not outweigh its costs).

seizure.[3] Instead, the Court has suggested that three criteria be evaluated to determine whether a confession is the "fruit of the poisonous tree":[4] (1) the temporal proximity of the unlawful search or seizure and the confession;[5] (2) the presence of intervening cir-

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[3] *See Brown*, 422 U.S. at 603; Wong Sun v. United States, 371 U.S. 471, 487-88 (1963). The Court in *Brown* noted that "[i]t is entirely possible . . . that persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality." *Brown*, 422 U.S. at 603; *see also Wong Sun*, 371 U.S. at 487-88 (confession given by defendant who was released and who voluntarily returned to station house was untainted by his illegal arrest). *See generally* W. LAFAVE, *supra* note 1, § 11.4(a), at 372 (discussing extent of illegal taint and Supreme Court's rejection of "but for" test).

In determining whether derivative evidence is the fruit of the poisonous tree, the Court in *Wong Sun* posed the following question: "[G]ranting establishment of the primary illegality . . . has [the challenged evidence] been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint[?]" *See Wong Sun*, 371 U.S. at 488 (quoting MAGUIRE, EVIDENCE OF GUILT 221 (1959)); *see also* Broeder, Wong Sun v. United States: *A Study in Faith and Hope*, 42 NEB. L. REV. 483, 520 (1962) (Court in *Wong Sun* extended application of exclusionary rule to oral statements, but refused to declare unequivocally that all oral statements made by accused under unlawful arrest must be suppressed); Comment, *Fourth Amendment*, *supra* note 1, at 763 (*Wong Sun* Court perceived that there will be situations in which confession, constituting an act of free will, will be unaffected by illegality).

[4] *Brown*, 422 U.S. at 603-04; *accord* People v. Johnson, 66 N.Y.2d 398, 407, 488 N.E.2d 439, 445, 497 N.Y.S.2d 618, 624-25 (1985). *Wong Sun* marked the Supreme Court's first attempt at establishing guidelines for determining whether derivative evidence is the "fruit of the poisonous tree." *See Wong Sun*, 371 U.S. at 488; *see also* Comment, *Fourth Amendment*, *supra* note 1, at 761-63 (*Brown* praised for clarifying *Wong Sun* decision); *cf.* Note, *Criminal Procedure—Fourth Amendment Exclusionary Rule*—Miranda *Warnings Do Not Per Se Render Admissible a Confession Following an Arrest Which Violates Fourth Amendment*, 25 EMORY L.J. 227, 239-40 (1976) (critique of *Brown*). *See generally* Comment, *Fruit of the Poisonous Tree—A Plea for Relevant Criteria*, 115 U. PA. L. REV. 1136, 1148-51 (1967) (evaluating three criteria).

A number of courts have concluded that a confession that follows an illegal arrest is admissible if it passes the traditional voluntariness test of the fifth amendment. *See* W. LAFAVE, *supra* note 1, § 11.4(b), at 390 n.98. However, the Supreme Court has stated that the burden of proving admissibility rests on the prosecution and that compliance with the fifth amendment voluntariness test is merely a threshold requirement. *Wong Sun*, 371 U.S. at 504; *accord* People v. Martinez, 37 N.Y.2d 662, 668, 339 N.E.2d 162, 165, 376 N.Y.S.2d 469, 473-74 (1975) (burden on prosecution to demonstrate admissibility).

In addition to other factors, courts evaluating the validity of a confession will consider whether a suspect was given *Miranda* warnings. *See* Miranda v. Arizona, 384 U.S. 436, 467-73 (1966). Under the rule of *Miranda*, a suspect must be warned that he has a right to remain silent, that if he waives this right, any statement that he makes may be used against him, and that he has a right to an attorney, either retained or appointed. *Id.*; *see also Brown*, 422 U.S. at 603 (reading of *Miranda* warnings, though relevant, is not sole factor to consider in determining whether confession is obtained by exploitation of illegal arrest); *Mapp*, 367 U.S. at 648 (constitutional guarantee against unlawful searches and seizures would otherwise be reduced to "a form of words"). *But see* W. LAFAVE, *supra* note 1, § 11.4(b), at 390 n.100 (some courts adopt position that full compliance with *Miranda* makes confession admissible notwithstanding prior illegal arrest).

[5] *See Brown*, 422 U.S. at 603. This factor has been cited as the most ambiguous since a

cumstances;[6] and (3) the purpose and flagrancy of the police misconduct.[7] The New York Court of Appeals has similarly conceded that "at some point the chain of causation leading from the illegal activity to the challenged evidence may become so attenuated that the 'taint' of the original illegality is removed."[8] Recently, however, in *People v. Harris*,[9] the New York Court of Appeals held that a station-house confession obtained from a murder suspect approximately one hour after a warrantless entry into his apartment was inadmissible under article I, section 12 of the New York State Constitution.[10]

In *Harris*, a five-day murder investigation yielded probable cause to believe that the defendant had murdered his girlfriend.[11] The police arrested the defendant in his apartment without a warrant, thus violating the rule established in *Payton v. New York*.[12]

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prolonged detention may often be a more serious exploitation of an unlawful search and seizure than a brief one. *See* Dunaway v. New York, 442 U.S. 200, 220 (1979) (Stevens, J., concurring). The courts' decisions more often turn on events occurring during the time lapse, rather than on the time span itself. *See* Note, *supra* note 4, at 240-41.

Because of the ambiguity of the "temporal proximity factor," courts essentially resort to a balancing of the other two *Brown* factors. *See* W. LAFAVE, *supra* note 1, § 11.4(b), at 402; *see also Brown*, 422 U.S. at 612 (Powell, J., concurring) (voluntary confession after *Miranda* warning should be admitted).

[6] *See Brown*, 422 U.S. at 603-04; *see also* Johnson v. Louisiana, 406 U.S. 356, 365 (1972) (appearance before magistrate and setting of bail were sufficient intervening circumstances).

[7] *See* Brown v. Illinois, 422 U.S. 590, 604 (1975). Justice Powell determined that this factor is the most crucial. *Id.* at 611 (Powell, J., concurring); *see also Wong Sun*, 371 U.S. at 491 (defendant suggested no impropriety in interrogation itself); People v. Rogers, 52 N.Y.2d 527, 534, 421 N.E.2d 491, 493, 439 N.Y.S.2d 96, 98 (no indication that arrest was orchestrated in such manner as to provoke defendant to overcome his reluctance to communicate), *cert. denied*, 454 U.S. 898 (1981); Commonwealth v. Davis, 462 Pa. 27, 30, 336 A.2d 888, 889 (confession motivated by defendant's own sense of remorse, not by police interrogation), *cert. denied*, 423 U.S. 1019 (1975).

[8] *See Rogers*, 52 N.Y.2d at 533, 421 N.E.2d at 493, 439 N.Y.S.2d at 98. A defendant's request to suppress evidence will be denied if significant intervening events justify the conclusion that the evidence was not the product of the illegal activity. *See id.*; *see also* People v. Leary, 145 A.D.2d 732, 734, 535 N.Y.S.2d 471, 473 (3d Dep't 1988) (presentation to defendant of incriminating statements made by codefendant constituted sufficient intervening circumstance to purge taint of defendant's illegal arrest), *appeal denied*, 73 N.Y.2d 1017, 539 N.E.2d 600, 541 N.Y.S.2d 772 (1989).

[9] 77 N.Y.2d 434, 570 N.E.2d 1051, 568 N.Y.S.2d 702 (1991).

[10] *Id.* at 440, 570 N.E.2d at 1055, 568 N.Y.S.2d at 706.

[11] *Id.* at 435, 570 N.E.2d at 1051, 568 N.Y.S.2d at 702.

[12] 445 U.S. 573 (1980). The *Payton* rule states that the fourth amendment prohibits police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. *Id.* at 603. In *Harris*, the trial court found that the police had probable cause to arrest the defendant, that they went to his apartment intending to make a warrantless arrest, and that the defendant permitted them to enter only because he was submitting to their authority. *See* People v. Harris, 72 N.Y.2d 614, 617-18, 532 N.E.2d 1229,

Following the unlawful arrest, the defendant was taken to the station house, where he signed a written confession after repeated *Miranda* warnings.[13] Based partly on the station-house confession, the defendant was convicted of second-degree murder in the supreme court.[14]

The appellate division affirmed the conviction,[15] but the court of appeals reversed, concluding that the confession should have been suppressed on fourth amendment grounds because it was not shown to have been sufficiently attenuated from the warrantless arrest.[16] The United States Supreme Court granted certiorari and reversed the New York Court of Appeals' decision to suppress the defendant's confession.[17] In a five-to-four decision, the Court held that the illegal action was the officers' entry into the apartment, not their arrest of the defendant, and that their exit from the apartment broke the causal connection between the illegal entry and the subsequent inculpatory statement.[18] Satisfied that the sup-

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1231, 536 N.Y.S.2d 1, 3 (1988), *rev'd*, 110 S. Ct. 1640 (1990). Based on these findings, the trial court concluded that "no clearer violation of the *Payton* rule could be established." *Id.*

[13] *Harris*, 77 N.Y.2d at 435, 570 N.E.2d at 1051, 568 N.Y.S.2d at 702. Prior to executing the written statement in the station house, the defendant made an oral confession to the police in his apartment after pouring himself a glass of wine. *See Harris*, 72 N.Y.2d at 617, 532 N.E.2d at 1230, 536 N.Y.S.2d at 2. Subsequent to executing the written statement, the police required the defendant to make a videotaped confession despite his statement that he was tired and did not wish to speak anymore. *Id.* The apartment confession was suppressed as the direct product of the warrantless entry; furthermore, the videotaped confession was suppressed as involuntary. *Id.* at 617-18, 532 N.E.2d at 1230-31, 536 N.Y.S.2d at 2-3; *see also* Kelder & Lewin, *Criminal Procedure*, 40 SYRACUSE L. REV. 245, 273-74 (1989) (facts of *Harris* case complicated decision).

Miranda warnings were repeated to the defendant prior to each confession, although only the written confession was at issue on appeal. *See Harris*, 72 N.Y.2d at 617, 532 N.E.2d at 1230, 536 N.Y.S.2d at 2.

[14] *Harris*, 72 N.Y.2d at 614, 532 N.E.2d at 1229, 536 N.Y.S.2d at 1.

[15] People v. Harris, 124 A.D.2d 472, 472, 507 N.Y.S.2d 823, 823 (1st Dep't 1986), *rev'd*, 72 N.Y.2d 614, 532 N.E.2d 1229, 536 N.Y.S.2d 1 (1988), *rev'd*, 110 S. Ct. 1640 (1990).

[16] *Harris*, 72 N.Y.2d at 623, 532 N.E.2d at 1234, 536 N.Y.S.2d at 6. The court applied the factors delineated in *Brown*. *Id.* at 620, 532 N.E.2d at 1232, 536 N.Y.S.2d at 4; *see also supra* notes 4-7 and accompanying text (discussing *Brown* factors).

In a concurring opinion, Judge Titone questioned the application of the *Brown* analysis to cases involving *Payton* violations. *See Harris*, 72 N.Y.2d at 625, 532 N.E.2d at 1235, 536 N.Y.S.2d at 7 (Titone, J., concurring). He noted that "[a]lthough we sometimes use legal shorthand and refer to the police action as an 'illegal arrest,' the true wrong in *Payton* cases lies not in the arrest but in the unlawful *entry* into a dwelling without proper judicial authorization." *Id.* at 625-26, 532 N.E.2d at 1236, 536 N.Y.S.2d at 8 (footnote omitted; emphasis in original).

[17] New York v. Harris, 110 S. Ct. 1640, 1642, 1644-45 (1990). *See generally* Simien, *Search and Seizure*, 51 LA. L. REV. 405, 422-23 (1990) (discussing *New York v. Harris*).

[18] *Harris*, 110 S. Ct. at 1644.

pression of incriminating evidence acquired at the defendant's apartment was sufficient to deter violations of the *Payton* rule,[19] the Court declined to extend the rule's exclusionary reach to the statement given by the defendant at the police station.[20]

On remand, the New York Court of Appeals seized upon its authority to conduct an independent state review to determine whether evidence admissible under the United States Constitution should be suppressed under the state constitution.[21] Writing for the court, Judge Simons concluded that "the Supreme Court's rule does not adequately protect the search and seizure rights of citizens of New York."[22] Since the federal and state provisions regarding searches and seizures share identical language as well as a common history,[23] the court turned to another provision of the state

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[19] *Id.* at 1643; *see also* Simien, *supra* note 17, at 422 (*Harris* distinguishable from case in which officers obtain statement while present within unlawfully entered residence).

[20] *See Harris*, 110 S. Ct. at 1644. *See generally* Pitler, *supra* note 1, at 586 (justification for not invoking exclusionary rule). In rejecting the court of appeals' argument that suppression of the station-house confession would deter future *Payton* violations, the Supreme Court reasoned that since police may interrogate a suspect once they have probable cause, they have no incentive to violate the *Payton* rule in the hopes of securing an inculpatory statement. *See Harris*, 110 S. Ct. at 1644. The Supreme Court distinguished cases relied on by the court of appeals because in each of those cases the police lacked probable cause. *Id.* at 1643; *see also* Taylor v. Alabama, 457 U.S. 687, 688-89 (1982) (relied on by court of appeals in first *Harris* decision); Dunaway v. New York, 442 U.S. 200, 205 (1979) (same); Brown v. Illinois, 422 U.S. 590, 591 (1975) (same).

[21] *Harris*, 77 N.Y.2d at 437, 570 N.E.2d at 1052, 568 N.Y.S.2d at 703. "Sufficient reasons appearing, a State court may adopt a different construction of a similar State provision unconstrained by a contrary Supreme Court interpretation of the Federal counterpart." *Id.* at 437-38, 570 N.E.2d at 1053, 568 N.Y.S.2d at 704; *see also* Sibron v. New York, 392 U.S. 40, 60-61 (1968) (state free to develop its own law of search and seizure to meet needs of local law enforcement); People *ex rel.* Arcara v. Cloud Books, Inc., 68 N.Y.2d 553, 557, 503 N.E.2d 492, 494, 510 N.Y.S.2d 844, 846 (1986) (disputed conduct must satisfy both state and federal constitutions).

The New York Court of Appeals has declined to read the fourth amendment of the United States Constitution and article I, section 12 of the New York State Constitution as coextensive and has suppressed evidence on state grounds. *See* People v. Johnson, 66 N.Y.2d 398, 412, 488 N.E.2d 439, 449, 497 N.Y.S.2d 618, 628 (1985) (Titone, J., concurring); *see also* People v. P.J. Video, Inc., 68 N.Y.2d 296, 302, 501 N.E.2d 556, 560, 508 N.Y.S.2d 907, 911 (1986) (article I, section 12 requires more exacting standard for issuance of search warrants), *cert. denied*, 479 U.S. 1091 (1987). *But cf. Johnson*, 66 N.Y.2d at 408, 488 N.E.2d at 446, 497 N.Y.S.2d at 625 (Titone, J., concurring) (exclusion of evidence is not command of article I, section 12, but rather judicially declared rule of evidence that legislature is free to abrogate).

[22] *Harris*, 77 N.Y.2d at 437, 570 N.E.2d at 1052-53, 568 N.Y.S.2d at 703-04.

[23] *See P.J. Video*, 68 N.Y.2d at 304 n.4, 501 N.E.2d at 561 n.4, 508 N.Y.S.2d at 912 n.4; *see also Johnson*, 66 N.Y.2d at 406, 488 N.E.2d at 445, 497 N.Y.S.2d at 624 (historically, New York courts have designed their rules to promote consistency in interpretation given to both clauses). The language of the two provisions is identical:

constitution.[24] Specifically, the court focused on the New York State Constitution's right-to-counsel clause,[25] which provides protections extending "well beyond the right to counsel afforded by the Sixth Amendment of the United States Constitution and other State Constitutions."[26]

Under New York law, after a felony complaint is filed and an arrest warrant is issued, the defendant's right to counsel indelibly attaches and may not be waived unless in the presence of counsel.[27] Under federal law, however, criminal proceedings do not necessarily commence upon the issuance of an arrest warrant, and the police may therefore interrogate a suspect in the absence of his lawyer without violating the suspect's right to counsel.[28] The court of appeals, raising this issue for the first time on remand, feared that police would be enticed to arrest a criminal suspect without a

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> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV; N.Y. CONST. art. I, § 12. This identical language supports a policy of uniform construction by federal and state courts. *See* People v. Ponder, 54 N.Y.2d 160, 165, 429 N.E.2d 735, 737, 445 N.Y.S.2d 57, 59 (1981).

[24] *See Harris*, 77 N.Y.2d at 438, 570 N.E.2d at 1053, 568 N.Y.S.2d at 704. To determine whether the state constitution should be interpreted differently from the federal Constitution, the court of appeals has suggested that the following factors be considered: (1) any preexisting state statutory or common law defining the scope of the individual right in question; (2) history and traditions of the state in its protection of that right; (3) any identification of that right as being one of peculiar state or local concern; and (4) distinctive attitudes of state citizenry toward the definition, scope, or protection of that right. *See P.J. Video*, 68 N.Y.2d at 302-03, 501 N.E.2d at 560, 508 N.Y.S.2d at 911.

[25] *Harris*, 77 N.Y.2d at 439-40, 570 N.E.2d at 1054, 568 N.Y.S.2d at 705 (citing N.Y. CONST. art. I, § 6).

[26] People v. Davis, 75 N.Y.2d 517, 521, 553 N.E.2d 1008, 1011, 554 N.Y.S.2d 460, 463 (1990); *accord* People v. Hobson, 39 N.Y.2d 479, 483-84, 348 N.E.2d 894, 897, 384 N.Y.S.2d 419, 422 (1976).

[27] *See* People v. Samuels, 49 N.Y.2d 218, 223, 400 N.E.2d 1344, 1347, 424 N.Y.S.2d 892, 895 (1980); People v. Settles, 46 N.Y.2d 154, 162-63, 385 N.E.2d 612, 616, 412 N.Y.S.2d 874, 879 (1978); *see also* People v. Skinner, 52 N.Y.2d 24, 32, 417 N.E.2d 501, 505, 436 N.Y.S.2d 207, 211 (1980) (waiver of right to counsel ineffective when defendant who was known to have retained legal counsel prior to commencement of formal proceeding was questioned in noncustodial setting).

[28] *Harris*, 77 N.Y.2d at 439-40, 570 N.E.2d at 1054, 568 N.Y.S.2d at 705; *see also* United States v. Gouveia, 467 U.S. 180, 188 (1984) (federal right to counsel attaches when judicial proceedings initiated, not necessarily when arrest warrant issued); Brewer v. Williams, 430 U.S. 387, 398 (1977) (same). *See generally* W. LAFAVE & J. ISRAEL, *supra* note 1, § 6.4, at 277-79 (controversy exists concerning when federal right to counsel attaches).

warrant in order to circumvent the protective right to counsel.[29] The interplay between New York's unique right-to-counsel rule and the state's search and seizure provision furnished what the court perceived as a compelling reason for deviating from the Supreme Court's judgment.[30] The court therefore concluded that the state constitution compels the suppression of statements obtained from an accused following an arrest made in violation of *Payton*, absent a showing of attenuation.[31]

In a scathing dissent, Judge Bellacosa, joined by Chief Judge Wachtler, attacked the majority for "metamorphosiz[ing] the *Payton* private dwelling sanctuary into the public precinct house," and for further distorting the jurisprudence by converting *Payton*'s fourth amendment dwelling right into a state version of the personal right to counsel.[32] Of his seven caustic observations regarding the majority opinion, Judge Bellacosa was most disconcerted by the majority's implication that the police were legally and constitutionally required to commence a criminal proceeding as soon as they believed that they had probable cause.[33]

In reaching its decision, the *Harris* court relied on *People v. Samuels*,[34] which established that a defendant's right to counsel attaches when a felony complaint is filed and an arrest warrant is issued.[35] Judge Bellacosa argued that this rule was inapplicable on its face because Harris was arrested without the issuance of a warrant, the filing of a felony complaint, or the commencement of a

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[29] *See Harris*, 77 N.Y.2d at 440, 570 N.E.2d at 1055, 568 N.Y.S.2d at 706. The court emphasized that the police "should not enjoy greater latitude simply because they neglected to obtain a warrant, as *Payton* requires, and entered the apartment illegally." *Id.*

[30] *See id.* at 439-41, 570 N.E.2d at 1054-55, 568 N.Y.S.2d at 705-06.

[31] *See id.*

[32] *Id.* at 447, 570 N.E.2d at 1059, 568 N.Y.S.2d at 710 (Bellacosa, J., dissenting). Judge Bellacosa asserted that the majority's approach was fundamentally flawed because it considered "the infringement of some artificially triggered right to counsel," rather than a pure fourth amendment *Payton* right. *Id.* at 445, 570 N.E.2d at 1057, 568 N.Y.S.2d at 708 (Bellacosa, J., dissenting).

[33] *Id.* at 442-43, 570 N.E.2d at 1056, 568 N.Y.S.2d at 707 (Bellacosa, J., dissenting). "The police were under no constitutional or legal obligation to obtain a warrant and thus commence the criminal proceeding at a particular time which some court might thereafter determine to be the precise moment of truth." *Id.* at 445, 570 N.E.2d at 1057, 568 N.Y.S.2d at 708 (Bellacosa, J., dissenting); *see also* Hoffa v. United States, 385 U.S. 293, 309-10 (1966) (defendant did not have constitutional right to be arrested).

[34] 49 N.Y.2d 218, 400 N.E.2d 1344, 424 N.Y.S.2d 892 (1980).

[35] *Id.* at 223, 400 N.E.2d at 1346, 424 N.Y.S.2d at 895; *accord Harris*, 77 N.Y.2d at 439-40, 570 N.E.2d at 1054, 568 N.Y.S.2d at 705.

criminal proceeding.[36] Furthermore, he could not understand how the objective of deterring violations of *Payton*'s private dwelling protection was served by suppressing a subsequent station-house confession.[37] In conclusion, Judge Bellacosa condemned the majority for disregarding the Supreme Court's wisdom and experience in the interpretation and application of *Payton*, thus "relegat[ing] th[e] Supreme Court's work to an academic judicial exercise with no consequence for the real outcome of this case."[38]

It is submitted that the court of appeals' suppression of the station-house confession was improper. The court's decision is not only inconsistent with federal law, but also with the state's own historical precedents. Furthermore, the court erroneously applied New York's special right-to-counsel rules to a strict *Payton* violation case. Finally, the court's decision unduly burdens law enforcement activities and inadequately protects society from admitted murderers.

Based on New York's peculiar historical precedents, the court of appeals perceived a need for a more stringent search and seizure policy to discourage New York officials from violating *Payton* in their efforts to secure incriminating statements before the right to counsel attaches.[39] It is unlikely, however, that suppressing subsequent station-house confessions will deter future *Payton* violations, or that the police in *Harris* even intended to deprive the defendant of his right to counsel.[40] Moreover, the court's decision actually appears to be inconsistent with New York's historical

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[36] *See Harris*, 77 N.Y.2d at 444, 570 N.E.2d at 1057, 568 N.Y.S.2d at 708 (Bellacosa, J., dissenting); *see also Samuels*, 49 N.Y.2d at 223, 400 N.E.2d at 1347, 424 N.Y.S.2d at 895 (statements obtained in absence of counsel after filing of felony complaint must be suppressed).

[37] *See Harris*, 77 N.Y.2d at 445, 570 N.E.2d at 1057, 568 N.Y.S.2d at 708 (Bellacosa, J., dissenting).

[38] *Id.* at 447, 570 N.E.2d at 1059, 568 N.Y.S.2d at 710 (Bellacosa, J., dissenting).

[39] *See id.* at 440, 570 N.E.2d at 1055, 568 N.Y.S.2d at 706.

[40] *See id.* at 445, 570 N.E.2d at 1057, 568 N.Y.S.2d at 708 (Bellacosa, J., dissenting). "It is speculative that the police intended to violate defendant's *Payton* right and even more speculative that they intended to evade any of his New York counsel rights." *Id.*; *see also* People v. Drain, 73 N.Y.2d 107, 107, 535 N.E.2d 630, 631, 538 N.Y.S.2d 500, 501 (1989) (relevant evidence not suppressed if little or no deterrent benefit anticipated from exclusion).

The Supreme Court recognized that because the police had justification to question Harris prior to his arrest, his subsequent statement was not an exploitation of the illegal entry into his home. *See* New York v. Harris, 110 S. Ct. 1640, 1644 (1990); *see also* United States v. Crews, 445 U.S. 463, 471 (1980) (no need to suppress evidence not acquired through exploitation of defendant's rights).

precedents.[41] New York courts have carved out various exceptions to the *Payton* rule and, in certain instances, have refused to suppress evidence notwithstanding a failure by police to obtain an arrest warrant.[42] Furthermore, the court of appeals has refused to recognize a deliberate attempt by police to circumvent a defendant's right to counsel as grounds for suppressing testimony.[43] Thus, the protection provided by New York's right-to-counsel clause has actually been subject to judicial constriction rather than expansion.[44]

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[41] *See generally* Shechtman, *Harris' Expansion of Defendant's Rights At Odds With State's History, Practice*, N.Y.L.J., Mar. 7, 1991, at 1, col. 1 (criticizing court of appeals' decision in *Harris* as inconsistent with prior New York law).

[42] *See, e.g.*, People v. Kozlowski, 69 N.Y.2d 761, 762-63, 505 N.E.2d 611, 612-13, 513 N.Y.S.2d 101, 102-03 (1987) (police may approach private home by public walkway, knock on front door, and make inquiries of owner who answered); People v. Minley, 68 N.Y.2d 952, 953, 502 N.E.2d 1002, 1003, 510 N.Y.S.2d 87, 88 (1986) (arrest made after suspect "directed" to come out of his home did not constitute *Payton* violation) People v. Thomas, 164 A.D.2d 874, 874, 559 N.Y.S.2d 380, 381 (2d Dep't 1990) (defendant's arrest in his home resulting from continuous pursuit by police that originated in public place did not violate *Payton*), *appeal denied*, 77 N.Y.2d 883, 571 N.E.2d 96, 568 N.Y.S.2d 926 (1991); People v. Marzan, 161 A.D.2d 416, 416, 555 N.Y.S.2d 345, 345 (1st Dep't) (warrantless arrest of defendant in hallway of apartment building did not constitute *Payton* violation), *appeal denied*, 76 N.Y.2d 860, 561 N.E.2d 900, 560 N.Y.S.2d 1000 (1990); People v. Roe, 136 A.D.2d 140, 143, 525 N.Y.S.2d 966, 967-68 (3d Dep't 1988) (use of deception that did not entail coercion to lure arrestee from home did not violate *Payton*), *aff'd*, 73 N.Y.2d 1004, 539 N.E.2d 587, 541 N.Y.S.2d 759 (1989).

Some commentators have observed that the exceptions to *Payton* may be swallowing up the rule. *See* Kelder & Lewin, *supra* note 13, at 276-77 n.176 (exceptions to *Payton* caused disparity between *Harris* majority and dissenters).

[43] *See* People v. Robles, 72 N.Y.2d 689, 692, 533 N.E.2d 240, 240-41, 536 N.Y.S.2d 401, 401-02 (1988) (authorities waited until disposition of prior unrelated charges before questioning defendant); *see also* People v. Caviano, 148 Misc. 2d 426, 437, 560 N.Y.S.2d 932, 939 (Sup. Ct. N.Y. County 1990) (despite existence of probable cause, police intentionally delayed obtaining arrest warrant so that they could question defendant before right to counsel attached).

[44] *See* People v. Bing, 76 N.Y.2d 331, 337, 558 N.E.2d 1011, 1014, 559 N.Y.S.2d 474, 477 (1990). In *Bing*, the suspect was represented by counsel in Ohio on prior pending charges, but waived his right to counsel while being questioned in New York on unrelated charges. *Id.* at 335, 558 N.E.2d at 1012-13, 559 N.Y.S.2d at 475-76. The *Bing* court overruled People v. Bartolomeo, 53 N.Y.2d 225, 423 N.E.2d 371, 440 N.Y.S.2d 894 (1981), which held that a suspect represented by counsel on a prior pending charge may not waive his rights in the absence of counsel and answer questions on new, unrelated charges. *Id* at 229, 423 N.E.20 at 373, 440 N.Y.S.2d at 896. The *Bing* court held that the right to counsel did not require exclusion of statements made to police in response to inquiries about crimes unrelated to those on which the suspect had representation. *Bing*, 76 N.Y.2d at 351, 558 N.E.2d at 1022-23, 559 N.Y.S.2d at 485. As Judge Bellacosa indicated in his dissenting opinion, the *Bing* case may have been miscited by the majority. *See Harris*, 77 N.Y.2d at 444, 570 N.E.2d at 1057, 568 N.Y.S.2d at 708 (Bellacosa, J., dissenting). *See generally* W. LaFave & J. Israel, *supra* note 1, § 6.4(e), at 278 (criticizing New York's right-to-counsel clause).

New York's right-to-counsel clause encompasses two distinct situations.[45] First, the right to counsel indelibly attaches when formal proceedings have commenced.[46] This rule was not directly applicable to the facts of *Harris*,[47] and the court's concern that police would delay the institution of proceedings in order to secure a statement before the right to counsel attaches is speculative at best.[48] Second, the right to counsel attaches when an uncharged individual in police custody has retained or requested an attorney.[49] Because the defendant in *Harris* had neither retained nor requested legal counsel, this rule was also inapplicable.[50] It is asserted that at the time Harris signed his written confession in the police station, his right to counsel had not yet attached, and that his waiver was therefore recognizable. Since New York's peculiar right-to-counsel clause had not yet been invoked, no compelling reason existed for the court of appeals to deviate from the United States Supreme Court's decision.[51] The *Harris* case involved a pure

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[45] *See Bing*, 76 N.Y.2d at 339, 558 N.E.2d at 1015, 559 N.Y.S.2d at 478; *Robles*, 72 N.Y.2d at 695-96, 533 N.E.2d at 243, 536 N.Y.S.2d at 404; People v. Cunningham, 49 N.Y.2d 203, 208, 400 N.E.2d 360, 363, 424 N.Y.S.2d 421, 424 (1980).

[46] *See supra* notes 34-35 and accompanying text.

[47] *See supra* note 36 and accompanying text; *cf.* People v. Gloskey, 105 A.D.2d 871, 872, 482 N.Y.S.2d 82, 84 (3d Dep't 1984) (declining to extend *Samuels* to situation in which police officer was under mistaken belief that criminal proceedings had commenced).

[48] *See supra* notes 20 and 43 and accompanying text.

[49] *See, e.g., People v. Bing*, 76 N.Y.2d 331, 340, 558 N.E.2d 1011, 1015, 559 N.Y.S.2d 474, 478 (1990) (statements admissible because suspect was represented by counsel only on unrelated charges); *Cunningham*, 49 N.Y.2d at 206, 400 N.E.2d at 365, 424 N.Y.S.2d at 423 (defendant unequivocally stated desire to consult with attorney before speaking); People v. Rogers, 48 N.Y.2d 167, 169, 397 N.E.2d 709, 710-11, 422 N.Y.S.2d 18, 19 (1979) (once attorney has been retained, police should cease questioning defendant in custody unless attorney is present); People v. Hobson, 39 N.Y.2d 479, 483, 348 N.E.2d 894, 897, 384 N.Y.S.2d 419, 421-22 (1976) (representation on unrelated charge not sufficient to invoke right to counsel); People v. Taylor, 27 N.Y.2d 327, 332, 266 N.E.2d 630, 633, 318 N.Y.S.2d 1, 5 (1971) (inculpatory statements admitted because defendant neither requested counsel nor had one been retained or appointed).

[50] *See Harris*, 77 N.Y.2d at 443, 570 N.E.2d at 1056, 568 N.Y.S.2d at 707 (Bellacosa, J., dissenting). The defendant not only waived his right to an attorney while being questioned, but also expressly requested that he be tried without defense counsel. *Id.*

[51] *See supra* note 32 and accompanying text. The New York State Supreme Court, Appellate Division, has relied on the United States Supreme Court decision in *Harris* in several recent cases. *See, e.g.*, People v. Tariq, 170 A.D.2d 716, 565 N.Y.S.2d 614, 616 (3d Dep't 1991) (incriminating statements made by defendant after he was shown physical evidence obtained pursuant to valid search warrant admissible despite *Payton* violation); People v. Ayala, 165 A.D.2d 875, 879, 560 N.Y.S.2d 656, 657-58 (2d Dep't 1990) (*Payton* violation did not require suppression of inculpatory statement made at police station two hours later and after two *Miranda* warnings), *appeal denied*, 77 N.Y.2d 903, 572 N.E.2d 618, 569 N.Y.S.2d 935 (1991); People v. Marzan, 161 A.D.2d 416, 416, 555 N.Y.S.2d 345, 345 (1st

Payton violation issue, and the court's analysis should have focused on whether the defendant's confession was sufficiently attenuated from his illegal arrest.[52]

Although the state has a compelling interest in protecting the rights of criminal suspects, it has a superior interest in protecting society from an admitted murderer. The *Payton* rule, intended to protect the sanctity of a suspect's home, is preserved by suppressing any evidence acquired while in the home. The effect of suppressing a defendant's voluntary, station-house confession is to burden criminal prosecutions without providing a corresponding deterrent to illegal police action. The *Harris* court, citing the interplay between two separate and distinct state constitutional provisions, suppressed a station-house confession despite the existence of probable cause to arrest the defendant. As the dissent correctly exhorted, "[t]he history of [the] NY Constitution . . . and its proud right to counsel tradition . . . do not support leapfrogging beyond the United States Supreme Court's decision in this procedurally convoluted case."[53]

Maryann Gianchino

New York Court of Appeals concludes law enforcement officials must have reasonable suspicion that a residence contains illegal drugs before conducting a "canine sniff" of the premises

The fourth amendment of the United States Constitution, as well as its New York State Constitution counterpart, is designed to safeguard against unreasonable searches and seizures.[1] Exactly

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Dep't) (en route to Central Booking and before *Miranda* warnings given, defendant spontaneously made admissible statements), *appeal denied*, 76 N.Y.2d 860, 561 N.E.2d 900, 560 N.Y.S.2d 1000 (1990).

[52] *See Harris*, 77 N.Y.2d at 446, 570 N.E.2d at 1058, 568 N.Y.S.2d at 709 (Bellacosa, J., dissenting). Judge Bellacosa cites a key chain of attenuating events: change of scene from "protected" dwelling to "unprotected" precinct; passage of about one hour; and renewed *Miranda* warnings and waivers. *Id.* (citing People v. Harris, 124 A.D.2d 472, 475, 507 N.Y.S.2d 823, 824 (1st Dep't 1986), *rev'd*, 72 N.Y.2d 614, 532 N.E.2d 1229, 536 N.Y.S.2d 1 (1988), *rev'd*, 110 S. Ct. 1640 (1990)).

[53] *Id.* at 447, 570 N.E.2d at 1059, 568 N.Y.S.2d at 710 (Bellacosa, J., dissenting).

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[1] *See* U.S. CONST. amend. IV. The fourth amendment provides the following:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but on probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.