

# Rogers-Bartolomeo Rule Is Not Triggered by an Out-of-State Pending Charge

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It is hoped that the discussion of these issues in *The Survey* will be of interest and assistance to the bench and bar.

#### DEVELOPMENTS IN THE LAW

##### *Rogers-Bartolomeo rule is not triggered by an out-of-state pending charge*

In New York, a criminal defendant represented by counsel may not be questioned in the absence of his attorney<sup>1</sup> unless he waives his right to counsel in the presence of his attorney.<sup>2</sup> Under

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<sup>1</sup> *People v. Arthur*, 22 N.Y.2d 325, 329, 239 N.E.2d 537, 539, 292 N.Y.S.2d 663, 666 (1968). The *Arthur* court held that such questioning would constitute a "deprivation of a fundamental constitutional right." *Id.* The right to counsel during interrogations is "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." *People v. Hobson*, 39 N.Y.2d 479, 483, 348 N.E.2d 894, 897, 384 N.Y.S.2d 419, 421 (1976). Developing independently of the right to counsel as guaranteed by the sixth amendment of the United States Constitution, see U.S. CONST. amend. VI, the right to counsel under the New York Constitution, see N.Y. CONST. art. 1, § 6, often provides greater protection for defendants than its federal counterpart. See e.g., *Hobson*, 39 N.Y.2d at 483-84, 348 N.E.2d at 897, 384 N.Y.S.2d at 422; 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) ("Although State courts may not circumscribe rights guaranteed by the Federal Constitution, they may interpret their own law to supplement or expand them"), *cert. denied* 479 U.S. 1091 (1987).

In addition to providing the accused with legal advice at a crucial time, an attorney's presence at police interrogations can deter unlawful police conduct and coercion, as well as ensure the accuracy and trustworthiness of statements made by the accused. 31 N.Y. JUR. 2D *Criminal Law* § 41, at 159 (1983). Furthermore, the presence of counsel during police questioning "serves to equalize the positions of the accused and sovereign, mitigating the coercive influence of the State and rendering it less overwhelming." *People v. Rogers*, 48 N.Y.2d 167, 173, 397 N.E.2d 709, 713, 422 N.Y.S.2d 18, 22 (1979).

Once the "critical stage" of a criminal proceeding is reached, this indelible right to counsel attaches regardless of whether the defendant has requested counsel, and the police may then no longer question the defendant unless he waives counsel in his attorney's presence. *People v. Rowell*, 59 N.Y.2d 727, 730, 450 N.E.2d 232, 233, 463 N.Y.S.2d 426, 427 (1983). This right attaches upon the commencement of a criminal action or upon "significant judicial activity." See *People v. Samuels*, 49 N.Y.2d 218, 221, 400 N.E.2d 1344, 1345-46, 424 N.Y.S.2d 892, 894 (1980); *People v. Simpson*, 125 App. Div. 2d 347, 347-48, 508 N.Y.S.2d 613, 614-15 (2d Dep't 1986). Even if the police have not commenced a formal criminal action, a defendant's retention of an attorney on a criminal matter invokes his right not to be questioned on the matter outside his attorney's presence. See *People v. Skinner*, 52 N.Y.2d 24, 31-32, 417 N.E.2d 501, 505, 436 N.Y.S.2d 207, 211 (1980). A defendant's request for counsel is sufficient to trigger this right. *People v. Cunningham*, 49 N.Y.2d 203, 205, 400 N.E.2d 360, 361, 424 N.Y.S.2d 421, 422 (1980).

<sup>2</sup> *Arthur*, 22 N.Y.2d at 329, 239 N.E.2d at 539, 292 N.Y.S.2d at 666. By requiring that a defendant's attorney be present for a valid waiver, the Court of Appeals has sought to ensure that the "waiver of a constitutional right [is] competent, intelligent and voluntary." *Hobson*, 39 N.Y.2d at 484, 348 N.E.2d at 898, 384 N.Y.S.2d at 422. This requirement "simply recognizes the right and need of an individual to have a competent advocate at his or

New York's *Rogers-Bartolomeo* rule,<sup>3</sup> once the police are apprised of the fact that a defendant is represented by counsel in a pending criminal action, he cannot be questioned without his attorney being present—even as to subsequent *unrelated* charges.<sup>4</sup> This rule cannot be circumvented by the willful blindness of the police: When the police have actual knowledge of an unrelated pending charge against a defendant, they have an affirmative obligation to

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her side in dealing with the State." *Skinner*, 52 N.Y.2d at 29, 417 N.E.2d at 503, 436 N.Y.S.2d at 209.

<sup>3</sup> *Rogers*, 48 N.Y.2d 167, 397 N.E.2d 709, 422 N.Y.S.2d 18; *People v. Bartolomeo*, 53 N.Y.2d 225, 423 N.E.2d 371, 440 N.Y.S.2d 894 (1981). The holdings of these two cases are collectively referred to as the *Rogers-Bartolomeo* rule. *See, e.g.*, *People v. Bertolo*, 65 N.Y.2d 111, 116, 480 N.E.2d 61, 64-65, 490 N.Y.S.2d 475, 478-79 (1985) (rule recognized as "so-called indelible right to counsel as enunciated by this court in *People v. Rogers . . .* and *People v. Bartolomeo*").

<sup>4</sup> *Rogers*, 48 N.Y.2d at 173, 397 N.E.2d at 713, 422 N.Y.S.2d at 22. The *Rogers* court reasoned that "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.* The court in *Rogers* also noted that an attorney would not necessarily "abandon" his client during police questioning concerning an unrelated charge and that the defendant's attorney, rather than the state, should determine whether the questioning concerns an unrelated matter. *Id.* Subsequent Court of Appeals decisions have emphasized the *Rogers* court's concern with protecting the defendant's right to counsel vis-a-vis the prior unrelated charge for which the defendant had obtained counsel. *See, e.g.*, *People v. Robles*, 72 N.Y.2d 689, 697, 533 N.E.2d 240, 244, 536 N.Y.S.2d 401, 405 (1988) ("primary concern in *Rogers* was that questioning on unrelated charges might interfere with the attorney-client relationship that existed with respect to the pending charges"); *People v. Colwell*, 65 N.Y.2d 883, 885, 482 N.E.2d 1214, 1215, 493 N.Y.S.2d 298, 299 (1985) (mem.) ("primary concern underlying *Rogers* was that a defendant could incriminate himself on the pending charge, on which he is represented, even though the questions ostensibly concern unrelated charges"). However, if the defendant's right to counsel had attached on the prior unrelated charge, but he had not actually obtained an attorney, the defendant is not protected by the *Rogers-Bartolomeo* rule. *See People v. Kazmarick*, 52 N.Y.2d 322, 329, 420 N.E.2d 45, 48-49, 438 N.Y.S.2d 247, 251 (1981). A defendant invoking the protection of the *Rogers-Bartolomeo* rule bears the burden of proving that he was actually represented by counsel on the prior charge at the time of the interrogation. *People v. Rosa*, 65 N.Y.2d 380, 387, 482 N.E.2d 21, 26, 492 N.Y.S.2d 542, 547 (1985). Thus, this special right to counsel on the subsequent unrelated charge is not independent, but is derivative and "accordingly limited in scope" and functions to "protect the direct and full-fledged right to counsel in the pending proceeding." *Robles*, 72 N.Y.2d at 698, 533 N.E.2d at 244, 536 N.Y.S.2d at 405.

Furthermore, the *Rogers-Bartolomeo* rule applies only to custodial interrogations. *Bertolo*, 65 N.Y.2d at 116, 480 N.E.2d at 64-65, 490 N.Y.S.2d at 478-79. The test used to determine whether an interrogation is custodial is "whether a reasonable person, innocent of any crime, would have felt free to leave." *People v. Wroblewski*, 109 App. Div. 2d 39, 42, 489 N.Y.S.2d 797, 800 (4th Dep't 1985), (quoting *People v. Harris*, 48 N.Y.2d 208, 215, 397 N.E.2d 733, 736, 422 N.Y.S.2d 43, 45 (1979)) *aff'd*, 67 N.Y.2d 933, 493 N.E.2d 943, 502 N.Y.S.2d 719, *cert. denied*, 479 U.S. 845 (1986). The use of an inculpatory statement elicited under a noncustodial interrogation does not violate the defendant's right to counsel, even if the police know that the defendant is represented on a prior unrelated charge. *See People v. Farruggia*, 61 N.Y.2d 775, 777, 461 N.E.2d 295, 296, 473 N.Y.S.2d 158, 159 (1984).

inquire into the defendant's representational status.<sup>5</sup> Some New York courts have extended—expressly<sup>6</sup> or implicitly<sup>7</sup>—the applicability of the *Rogers-Bartolomeo* rule to situations where the defendant is represented by counsel on an unrelated prior charge pending in a foreign jurisdiction.<sup>8</sup> Recently, however, in *People v. Bing*,<sup>9</sup> the Appellate Division, Second Department, held that the rule extended only to cases where the defendant's unrelated prior

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<sup>5</sup> See *Bartolomeo*, 53 N.Y.2d at 231-32, 423 N.E.2d at 375, 440 N.Y.S.2d at 897. If the police fail to inquire into the defendant's representational status despite their actual knowledge of the pending unrelated charge, they are charged with the knowledge which such an inquiry would have disclosed. *Id.* at 232, 423 N.E.2d at 375, 440 N.Y.S.2d at 897. Thus, the police would be "foreclosed either from questioning defendant or from accepting his waiver of counsel's assistance unless his attorney was then present." *Id.*

In *Bertolo*, the Court of Appeals summarized the most "salient" factors in ascertaining whether legal representation on a pending charge prohibits the use of a custodial interrogation in the absence of counsel on a later unrelated charge. *Bertolo*, 65 N.Y.2d at 118, 480 N.E.2d at 66-67, 490 N.Y.S.2d at 480-81. These factors are: "the extent of the police knowledge; the proximity, severity and notoriety of the prior charges; and the good or bad faith of the police." *Id.* at 118, 480 N.E.2d at 67, 490 N.Y.S.2d at 481. Thus, in applying the *Rogers-Bartolomeo* rule, the Court of Appeals generally has not charged police with constructive knowledge of a pending unrelated charge. See, e.g., *People v. Johnson*, 61 N.Y.2d 932, 934, 463 N.E.2d 368, 370, 474 N.Y.S.2d 967, 969 (1984) (defendant's assertion that he had been denied his constitutional right to counsel was rejected as no evidence indicated that police had any knowledge of the prior criminal proceeding); *People v. Green*, 138 App. Div. 2d 516, 518, 525 N.Y.S.2d 905, 907 (2d Dep't 1988) (defendant had two charges pending in arresting officer's precinct, yet officer's lack of actual knowledge of charges precluded application of *Rogers-Bartolomeo* rule).

However, if various police agencies are conducting a joint investigation in which all had the same actual knowledge or notice, actual knowledge may be "constructively imputed." See *People v. Fuschino*, 59 N.Y.2d 91, 99, 450 N.E.2d 200, 203, 463 N.Y.S.2d 394, 397 (1983) (actual knowledge imputed when "two agencies are working so closely that it can be deemed a joint investigation"). In addition, when the police have actual knowledge of a pending charge they may not use an agent to question a defendant outside his counsel's presence in order to circumvent the *Rogers-Bartolomeo* rule. See *People v. Knapp*, 57 N.Y.2d 161, 173, 441 N.E.2d 1057, 1061, 455 N.Y.S.2d 539, 543 (1982) (informer of state police held to be agent of police), *cert. denied*, 462 U.S. 1106 (1983). There are circumstances, however, that do not warrant application of the *Rogers-Bartolomeo* rule, even though it is shown that the police had actual knowledge of a prior charge. See *infra* note 35 and accompanying text. *But see* Note, *Prior Representation and the Duty to Inquire: Breaching New York's "Once an Attorney" Rule*, 10 CARDOZO L. REV. 259 (1988) (arguing that police should presume that person with pending charge has counsel).

<sup>6</sup> See, e.g., *People v. Torres*, 137 Misc. 2d 29, 36, 519 N.Y.S.2d 613, 617 (Sup. Ct. N.Y. County 1987) ("inappropriate to hold that, merely because his other case was in a foreign jurisdiction, the defendant should be entitled to any less protection").

<sup>7</sup> See, e.g., *People v. Mehan*, 112 App. Div. 2d 482, 484, 490 N.Y.S.2d 897, 899 (3d Dep't 1985) (police obligated to inquire whether defendant had legal representation on unrelated pending charges in another state where police had actual knowledge).

<sup>8</sup> See *supra* notes 6-7.

<sup>9</sup> 146 App. Div. 2d 178, 540 N.Y.S.2d 247 (2d Dep't), *appeal granted*, 74 N.Y.2d 536, 543 N.E.2d 754, 545 N.Y.S.2d 111 (1989).

charge is pending in New York.<sup>10</sup>

In *Bing*, Nassau County police detectives received a tip suggesting that the defendant, Bruce Bing, had robbed the St. Joachim's Church in Cedarhurst.<sup>11</sup> In addition, the informant indicated that Bing was wanted by the police in Ohio.<sup>12</sup> After confirming the existence of an outstanding warrant for Bing's arrest on a burglary charge in Ohio, the Nassau County detectives arrested him on the basis of that warrant.<sup>13</sup> During the car ride to the precinct, Bing waived his right to counsel and made an inculpatory statement regarding the church robbery.<sup>14</sup> The detectives never inquired as to whether Bing had retained counsel on the Ohio charge.<sup>15</sup> At his preliminary hearing, Bing moved to suppress his inculpatory statement on the ground that the police failed to inquire into his representational status, despite their knowledge of the pending charge in Ohio.<sup>16</sup> The Supreme Court, Nassau County, denied the motion and Bing subsequently pleaded guilty to the church burglary.<sup>17</sup>

The Appellate Division, Second Department, unanimously affirmed Bing's conviction, holding that Bing's motion was properly

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<sup>10</sup> *Id.* at 179, 540 N.Y.S.2d at 247.

<sup>11</sup> *Id.* at 179, 540 N.Y.S.2d at 247-48. On May 17, 1985, money was stolen from the rectory safe and the rectory housekeeper herself was robbed. *Id.* at 179, 540 N.Y.S.2d at 247. While investigating the robbery, Detective Glenn Dowd received the tip regarding Bing from Cecil Scott, a known informant. *Id.* at 179, 540 N.Y.S.2d at 247-48.

<sup>12</sup> *Id.* at 179-80, 540 N.Y.S.2d at 248. Scott told Dowd that Bing had "recently arrived from Ohio and that 'he was wanted, he was hot out in Ohio.'" *Id.*

<sup>13</sup> *Id.* at 180, 540 N.Y.S.2d at 248. The police confirmed via teletype the existence of the outstanding warrant for Bing in Mansfield, Ohio. Brief for Respondent at 2.

<sup>14</sup> *People v. Bing*, 131 Misc. 2d 62, 63-64, 499 N.Y.S.2d 313, 315 (Sup. Ct. Nassau County 1985). The defendant waived his right to counsel after receiving his *Miranda* warnings. *Id.* Bing then admitted that he had committed the crime at St. Joachim's rectory and that he was wanted in Ohio. *Id.* at 64, 499 N.Y.S.2d at 315.

<sup>15</sup> *Bing*, 146 App. Div. 2d at 180, 540 N.Y.S.2d at 248.

<sup>16</sup> *Id.* The court, however, stated that such knowledge did not create a "duty to inquire further, nor should the police be bound by what they would have learned from such inquiry." *Bing*, 131 Misc. 2d at 65, 499 N.Y.S.2d at 316; *see also supra* note 5 (police are charged with knowledge that an inquiry into defendant's representational status would have disclosed). Bing's waiver of counsel would have been ineffective if the court had concluded that the *Rogers-Bartolomeo* rule was triggered by a pending, out-of-state charge. *See People v. Mehan*, 112 App. Div. 2d 482, 484, 490 N.Y.S.2d 897, 899 (3d Dep't 1985) (*Rogers-Bartolomeo* rule triggered by pending, out-of-state charge); *People v. Torres*, 137 Misc. 2d 29, 35-36, 519 N.Y.S.2d 613, 617 (Sup. Ct. N.Y. County 1987) (same).

<sup>17</sup> *Bing*, 146 App. Div. 2d at 180, 540 N.Y.S.2d at 248. The court concluded that "[t]he application of *Rogers-Bartolomeo* to the instant case would be an unreasonable overextension of that principle." *Bing*, 131 Misc. 2d at 66, 499 N.Y.S.2d at 316. Bing pleaded guilty to first degree burglary. *Bing*, 146 App. Div. 2d at 180, 540 N.Y.S.2d at 248.

denied, as the *Rogers-Bartolomeo* rule does not apply if the unrelated prior charge is pending in another jurisdiction.<sup>18</sup> Writing for the court, Justice Brown explained that the rule was designed to protect a defendant from divulging self-incriminating information, in the absence of counsel, regarding the unrelated pending charge, thereby compromising the defendant's right to counsel on that prior charge.<sup>19</sup> Thus, the right to counsel as contemplated by the *Rogers* decision "is not independent, but is instead derived from the existing attorney-client relationship, and is accordingly limited in scope."<sup>20</sup> Concluding that New York's "interest in protecting the defendant's rights vis-a-vis an unrelated case pending in a foreign jurisdiction is minimal" and thus outweighed by the State's important interest in law enforcement, the Appellate Division, Second Department, rejected the proposed extension of the *Rogers-Bartolomeo* rule previously advocated by the Third Department in *People v. Mehan*<sup>21</sup> and by a Supreme Court Justice within the First Department in *People v. Torres*.<sup>22</sup>

Because great importance is attached to the successful investigation and prosecution of criminal conduct, New York courts should avoid placing unreasonable restrictions on police interrogations.<sup>23</sup> Consistent with this principle, the Court of Appeals has weighed the State's law enforcement interest against the State's interest in expanding a criminal defendant's right to counsel when considering extensions of the *Rogers-Bartolomeo* rule.<sup>24</sup> It is sub-

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<sup>18</sup> *Bing*, 146 App. Div. 2d at 248, 540 N.Y.S.2d at 248.

<sup>19</sup> *Id.* at 183-84, 540 N.Y.S.2d at 250. The court relied on *People v. Colwell*, 65 N.Y.2d 883, 482 N.E.2d 1214, 493 N.Y.S.2d 298 (1985) (mem.), and *People v. Robles*, 72 N.Y.2d 689, 533 N.E.2d 240, 536 N.Y.S.2d 401 (1988), in determining the intent of the *Rogers* court.

<sup>20</sup> *Bing*, 146 App. Div. 2d at 183, 540 N.Y.S.2d at 250 (quoting *Robles*, 72 N.Y.2d at 697-98, 533 N.E.2d at 244, 536 N.Y.S.2d at 405). The court noted that the *Rogers* court intended to protect the defendant on the charge for which he has counsel, not the charge for which he is being questioned. *See id.*

<sup>21</sup> 112 App. Div. 2d 482, 490 N.Y.S.2d 897 (3d Dep't 1985).

<sup>22</sup> 137 Misc. 2d 29, 519 N.Y.S.2d 613 (Sup. Ct. N.Y. County 1987).

<sup>23</sup> *Cf. People v. Kazmarick*, 52 N.Y.2d 322, 328, 420 N.E.2d 45, 48-49, 438 N.Y.S.2d 247, 250-51 (1981) (charging police with knowledge of all warrants and accusatory instruments incident to unrelated charges would "unnecessarily and unrealistically limit police interrogation procedures"). The Court of Appeals has directed that, when considering the prerequisites of the right to counsel, "[w]hat is required must always be considered in light of what is practical under the circumstances." *People v. Pinzon*, 44 N.Y.2d 458, 464, 377 N.E.2d 721, 724, 406 N.Y.S.2d 268, 271 (1978).

<sup>24</sup> *People v. Colwell*, 65 N.Y.2d 883, 885, 482 N.E.2d 1214, 1216, 493 N.Y.S.2d 298, 300 (1985) (mem.). The *Colwell* court explained that when considering an extension of *Rogers*, "the State's significant interest in investigating and prosecuting criminal conduct" must be considered. *Id.* (quoting *Rogers*, 48 N.Y.2d at 173, 397 N.E.2d at 713, 422 N.Y.S.2d at 22).

mitted that the *Bing* court properly recognized that the extension proposed by the defendant did not meet this standard.

The proposed extension to the *Rogers-Bartolomeo* rule would sacrifice New York's important law enforcement interests by suppressing otherwise admissible evidence in a New York criminal proceeding in an attempt to protect the attorney-client relationship between a defendant charged with a crime in another state and his attorney in that jurisdiction.<sup>25</sup> It is submitted that the protection of such foreign attorney-client relationships should be left to the foreign jurisdiction's courts or legislature because the foreign jurisdiction has the greater interest in determining the extent to which a criminal defendant's right to counsel should be protected in its proceedings.<sup>26</sup> Furthermore, the United States Consti-

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The court concluded that any interest in expanding the *Rogers* rule to defendants represented by counsel throughout a protracted appeals process was "outweighed by the legitimate interest in law enforcement." *Id.* Similarly, in *People v. Lucarano*, 61 N.Y.2d 138, 148, 460 N.E.2d 1328, 1333, 472 N.Y.S.2d 894, 898 (1984), the Court of Appeals recognized that the "State's important interest in criminal investigations and the extent to which law enforcement efforts will be impeded by a contrary rule" must be considered in a decision regarding an expansion of *Bartolomeo*. *Id.* The court must balance the accused's right to counsel with "the ability of police officers to discharge their increasingly difficult job [of] protecting the law-abiding citizenry by obtaining voluntary confessions from suspects who wish to offer them." *People v. Patterson*, 85 App. Div. 2d 698, 701, 445 N.Y.S.2d 474, 477 (2d Dep't 1981) (Weinstein, J., dissenting); see also *Liberal Party of N.Y. v. Commission of Investigation*, 579 F. Supp. 755, 756 (E.D.N.Y. 1984) ("States, as a matter of law, have a compelling interest in enforcing provisions of their criminal laws").

<sup>25</sup> See *Bing*, 146 App. Div. 2d at 183-84, 540 N.Y.S.2d at 250 (*Rogers-Bartolomeo* designed to protect defendant with respect to unrelated prior charge as to which he is already represented by counsel).

<sup>26</sup> Cf. *In re Estate of Clark*, 21 N.Y.2d 478, 485-86, 236 N.E.2d 152, 156, 288 N.Y.S.2d 993, 998-99 (1968). The Court of Appeals has explained that "[a]s between two states, the law of that one which has the predominant, if not the sole, interest in the protection and regulation of the rights of the person or persons involved should, of course, be invoked." *Id.* The Court of Appeals has also noted that "the law of the jurisdiction having the greatest interest in the litigation [should] be applied." *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372, 382, 248 N.E.2d 576, 582, 300 N.Y.S.2d 817, 825 (1969) (quoting *Miller v. Miller*, 22 N.Y.2d 12, 15-16, 237 N.E.2d 877, 879, 290 N.Y.S.2d 734, 737 (1968)). This principle is applicable to criminal cases. See *People v. Benson*, 88 App. Div. 2d 229, 231, 454 N.Y.S.2d 155, 157 (3d Dep't 1982). It is submitted that a jurisdiction enforcing its laws through a criminal prosecution has the predominant interest in determining the extent to which the defendant's right to counsel should be protected. Thus, it is further submitted that by rejecting the proposed extension of the *Rogers-Bartolomeo* rule, New York would properly defer to the jurisdiction having the predominant interest in the matter.

Other jurisdictions have overwhelmingly rejected the rationale behind the *Rogers-Bartolomeo* rule and have concluded that a criminal defendant with counsel should not be afforded any additional protection when facing an interrogation on an unrelated subsequent charge. See Dillon, *The Case for Reversing "The Rogers Rule" on the Right to Counsel*, 58 N.Y. Sr. B.J. 36, 52 (July 1986); see e.g., *United States v. Masullo*, 489 F.2d 217, 223 (2d

tution provides safeguards against any state's abridgement of a criminal defendant's guaranteed right to counsel.<sup>27</sup> Thus, it is asserted that New York has only a minimal interest in protecting a defendant's right to counsel in a foreign jurisdiction and therefore the State should not attempt<sup>28</sup> to extend *Rogers-Bartolomeo* protection to jurisdictions that have chosen not to recognize such a rule.

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Cir. 1973) (“[t]he concept that professional criminals have ‘house counsel’ because of prior escapades and that therefore Government agents knowing the identity of prior counsel have an obligation of constitutional or even ethical dimension to contact counsel before questioning them, is hardly appealing”); *People v. Mack*, 89 Cal. App. 3d 974, 978-79, 152 Cal. Rptr. 882, 885 (1979) (defendant with counsel on prior unrelated crime can waive right to counsel outside presence of that counsel since “interrogation of suspects could be delayed indefinitely while the officers attempted to locate the suspect’s counsel, notify him of the proposed interview, and either obtain his consent thereto or permit his participation therein”) (quoting *People v. Wong*, 18 Cal. 3d 178, 187, 555 P.2d 297, 301, 133 Cal. Rptr. 511, 515 (1976)); *Lofton v. State*, 471 So.2d 665, 667 (Fla. Dist. Ct. App. 1985) (defendant’s statements were not inadmissible “merely because public defender representing defendant in a completely unrelated criminal matter was not notified prior to questioning”); *State v. Ture*, 353 N.W.2d 502, 511 (Minn. 1984) (rejected New York’s *Rogers* approach as it “turns on the fortuity that a suspect has been charged on an unrelated offense before interrogation takes place”); *State v. Porter*, 210 N.J. Super. 383, 393, 510 A.2d 49, 54 (1986) (“restrictions on interrogation should be no different merely because the defendant was represented in another matter”). Thus, the proposed extension of the *Rogers-Bartolomeo* rule would result in New York sacrificing its law enforcement interests to protect foreign attorney-client relationships, see *supra* notes 4 & 24, though foreign jurisdictions appear to be resoundingly opposed to providing such protection themselves. See *Dillon, supra*, at 52.

<sup>27</sup> See, e.g., *Arizona v. Roberson*, 486 U.S. 675, 687 (1988) (sixth amendment prohibits police from interrogating defendant after request for counsel, even if interrogation concerns separate investigation); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (in all criminal prosecutions, state or federal, accused shall have right to assistance of counsel). *But see* *Maine v. Moulton*, 474 U.S. 159, 180 (1985) (dictum) (“to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public’s interest in the investigation of criminal activities”).

<sup>28</sup> It is submitted that the proposed extension of the *Rogers-Bartolomeo* rule would not guarantee the intended protection to defendants. The rule does not bar questioning of a defendant concerning unrelated pending charges, but rather prohibits “the information obtained through that questioning in the absence of counsel” to be used against the defendant. *People v. Rogers*, 48 N.Y.2d 167, 173 n.2, 397 N.E.2d 709, 713 n.2 422 N.Y.S.2d 18, 22 n.2 (1979). Since *Rogers* and *Bartolomeo* are not binding on other states, it is suggested that a New York police officer could properly testify in another state regarding inculpatory statements made by a defendant concerning a prior charge in that state. However, this same police officer’s testimony as to a defendant’s inculpatory statements regarding a subsequent unrelated charge in New York would be inadmissible in New York because of the *Rogers-Bartolomeo* rule. See *id.* at 172-73, 397 N.E.2d at 712-13, 422 N.Y.S.2d at 21-22. Thus, it is submitted that New York would be sacrificing valuable evidence otherwise admissible in this State to “protect” the defendant’s right to counsel on the pending out-of-state charge, while that state may permit the admission of the very evidence the *Rogers-Bartolomeo* rule is designed to exclude.



Furthermore, it is submitted that practical difficulties would result from such an extension. An out-of-state attorney not admitted to practice in New York could not lawfully advise his client in New York.<sup>29</sup> In addition, requiring exhaustive nationwide searches to determine the representational status of an arrestee would unduly impede police investigations.<sup>30</sup> Moreover, the proposed extension would further immunize recidivist offenders from police questioning in subsequent investigations absent their counsel from the prior charge.<sup>31</sup>

Finally, it is suggested that the *Torres* court's reliance on "the established line of New York cases which strictly and scrupulously guard defendant's right to counsel"<sup>32</sup> as justification for extending the *Rogers-Bartolomeo* rule constituted an inappropriately broad reading of the rule. Though the New York courts have zealously protected the criminal defendant's right to counsel,<sup>33</sup> the Court of Appeals has repeatedly held that the *Rogers-Bartolomeo* rule is *not* absolute, and has refused to apply the rule in certain situations

<sup>29</sup> See *Spivack v. Sachs*, 16 N.Y.2d 163, 166, 211 N.E.2d 329, 330, 263 N.Y.S.2d 953, 955 (1965) ("settled that the practice of law forbidden in this State . . . includes legal advice and counsel"); 18 Int'l Ltd. v. Interstate Express, Inc., 116 Misc. 2d 66, 67, 455 N.Y.S.2d 224, 225 (Sup. Ct. N.Y. County 1982) (representation in New York by attorney not admitted and licensed in New York is, under most circumstances, unlawful); N.Y. JUD. LAW § 478 (McKinney Supp. 1989).

<sup>30</sup> *Abramovsky, The Rogers-Bartolomeo Rule*, N.Y.L.J., May 1, 1989 at 3, col. 3; see also *People v. Lucarano*, 61 N.Y.2d 138, 147, 460 N.E.2d 1328, 1332, 472 N.Y.S.2d 894, 898 (1984) (recognizing "practical limitations" to obligations imposed upon investigating authorities; police not required to undertake "exhaustive inquiries").

<sup>31</sup> See *supra* notes 6-8 and accompanying text. (*Mehan* and *Torres* courts advocate extending *Rogers-Bartolomeo* rule to situations where defendant's prior charge is pending in foreign jurisdiction, thereby preventing police from effectively interrogating any defendant they knew had pending charge in any other state unless defendant waived his right to counsel in presence of his attorney). In his dissenting opinion in *Bartolomeo*, Judge Wachtler stated, "[i]t is the common criminal, not the one-time offender, who nearly always will manage to have at least one serious charge pending, so that the attorney in the picture can provide him with virtual immunity from questioning in subsequent investigations." *Bartolomeo*, 53 N.Y.2d at 239, 423 N.E.2d at 379, 440 N.Y.S.2d at 902 (Wachtler, J., dissenting); see also *People v. Smith*, 54 N.Y.2d 954, 956, 429 N.E.2d 823, 824, 445 N.Y.S.2d 145, 146 (1981) (Wachtler, J., dissenting) (defendant enjoyed "special protection" because he had been charged with sodomy prior to committing murder).

<sup>32</sup> *People v. Torres*, 137 Misc. 2d 29, 35-36, 519 N.Y.S.2d 613, 617 (Sup. Ct. N.Y. County 1987). The *Torres* court reasoned that it would be "inappropriate" to limit the *Rogers-Bartolomeo* rule "merely because [defendant's] case was in a foreign jurisdiction" in light of this "established line" of cases. See *id.* The Appellate Division, Third Department, without any discussion or citation of authority, concluded that the rule should be extended. See *People v. Mehan*, 112 App. Div. 2d 482, 484, 490 N.Y.2d 897, 899 (3d Dep't 1985).

<sup>33</sup> See *supra* note 1.

despite a defendant's retention of counsel on an unrelated pending charge.<sup>34</sup>

While a defendant's right to counsel must be safeguarded, it also "must be tempered with reason and common sense."<sup>35</sup> Whereas New York has a significant interest in promoting proper criminal investigations, it has a minimal interest in protecting a defendant's right to counsel in a foreign state's proceeding.<sup>36</sup> New York investigations should not be unduly encumbered by pending prosecutions in foreign jurisdictions. Such foreign jurisdictions retain the right to determine—based on their own standards and those of the federal Constitution—whether a New York investigation violated the defendant's right to counsel. Keeping these considerations in mind, along with the practical difficulties associated with the proposed extension of the rule, it is urged that the New York Court of Appeals reject such an extension.<sup>37</sup>

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#### CIVIL PRACTICE LAW AND RULES

*CPLR 4504(a): A plaintiff in a personal injury action cannot effect a waiver of the defendant's physician-patient privilege by placing the defendant's physical condition "in controversy"*

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<sup>34</sup> See, e.g., *People v. Bertolo*, 65 N.Y.2d 111, 480 N.E.2d 61, 490 N.Y.S.2d 475 (1985) (police knew defendant had been arrested on minor charges several months earlier, but had no knowledge that charges were still pending and that defendant was represented by counsel on charges); *People v. Colwell*, 65 N.Y.2d 883, 482 N.E.2d 1214, 493 N.Y.S.2d 296 (1985) (mem.) (police were aware that defendant was represented on appeal for prior conviction); *People v. Lucarano*, 61 N.Y.2d 138, 460 N.E.2d 1328, 472 N.Y.S.2d 894 (1984) (defendant denied having counsel on pending unrelated charge, though defendant was in fact represented on charge); *People v. Krom*, 61 N.Y.2d 187, 461 N.E.2d 276, 473 N.Y.S.2d 139 (1984) (police were aware that defendant was represented but emergency situation existed).

<sup>35</sup> *Bing*, 131 Misc. 2d 62, 66, 499 N.Y.S.2d 313, 316 (Sup. Ct. Nassau County 1985). As Justice Cardozo noted: "[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 (1934).

<sup>36</sup> See *Bing*, 146 App. Div. 2d at 184, 540 N.Y.S.2d at 250.

<sup>37</sup> On March 20, 1990, the New York Court of Appeals heard oral argument on Mr. Bing's appeal from the Second Department's decision in *People v. Bing*, 146 App. Div. 2d 178, 540 N.Y.S.2d 111 (1989).