

Evidence Obtained Through a Police Informant in a Non-Custodial Setting Must Be Suppressed If the Police Knew That the Defendant Was Represented by Counsel on a Pending, Unrelated Criminal Charge

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submitted that the *Weiner* decision aligns New York with the more progressive view of the employment relationship with no concomitant undue hardship on the employer.

Daniel P. Venora

Evidence obtained through a police informant in a noncustodial setting must be suppressed if the police knew that the defendant was represented by counsel on a pending, unrelated criminal charge

The New York Court of Appeals traditionally has afforded a broad construction to a criminal defendant's right to counsel.¹⁵¹ The right to counsel attaches when the accused requests the aid of an attorney, when formal proceedings against the defendant commence, or when an attorney enters the proceeding,¹⁵² and state-

to agree to this as a condition of their employment. *Id.* at 612, 292 N.W.2d at 891. The employer can protect himself by entering into a written contract explicitly stating that the employment is at will, *id.* at 612 n.24, 292 N.W.2d at 891 n.24; see *Novosel v. Sears, Roebuck & Co.*, 495 F. Supp. 344, 346 (E.D. Mich. 1980) (relying on the exception elicited in *Toussaint* to find no right of "just cause" dismissal for employers); DeGiuseppe, *supra* note 112, at 48, for "[i]f the employment agreement expressly permits a discharge for any reason whatsoever, courts would, under contract theory, be helpless to protect the employee from abusive discharge," HASTINGS Note, *supra* note 113, at 1455.

¹⁵¹ Note, *The Expanding Right to Counsel in New York*, 10 FORDHAM URB. L.J. 351, 351 (1982). The Court of Appeals has described as "a cherished principle" the right of the defendant under the state constitution to place an attorney between himself and the "awesome power of the sovereign." *People v. Settles*, 46 N.Y.2d 154, 160, 385 N.E.2d 612, 613, 412 N.Y.S.2d 874, 877 (1978); see N.Y. CONST. art. I, § 6. It is not surprising, therefore, that the right to counsel in New York has developed independently of the sixth amendment guarantee contained in the federal Constitution. 46 N.Y.2d at 161, 385 N.E.2d at 615, 412 N.Y.S.2d at 877. As a result, a defendant, in many respects, has a broader right to counsel under New York law than he does under federal law. See Galie, *State Constitutional Guarantees and Protection of Defendant's Rights: The Case of New York, 1960-1978*, 28 BURLINGAME L. REV. 157, 178 & n.149 (1979).

Exemplifying New York's broad interpretation of the right to counsel is the rule that once the right to counsel attaches, the defendant cannot effectively waive his privilege against self-incrimination or his right to counsel, unless the waiver is made in the presence of an attorney. *People v. Hobson*, 39 N.Y.2d 479, 484, 348 N.E.2d 894, 898, 384 N.Y.S.2d 419, 422 (1976). This principle has been said to "[breathe] life into the requirement that a waiver of a constitutional right must be competent, intelligent and voluntary." *Id.*; accord *People v. Skinner*, 52 N.Y.2d 24, 29, 417 N.E.2d 501, 503, 436 N.Y.S.2d 207, 209 (1980); *People v. Cunningham*, 49 N.Y.2d 203, 205, 400 N.E.2d 360, 361, 424 N.Y.S.2d 421, 422 (1980).

¹⁵² In the early 1960's, the Court of Appeals expansively defined the right to counsel and the privilege against self-incrimination as those rights are embodied in the state constitution. The Court held that upon the indictment of an accused, formal proceedings com-

ments thereafter made to police in the absence of an attorney are suppressible.¹⁵³ This "indelible" right to counsel has been extended

mence, prohibiting interrogation by police in the absence of the accused's lawyer. *People v. Di Biasi*, 7 N.Y.2d 544, 550-51, 166 N.E.2d 825, 827, 200 N.Y.S.2d 21, 25 (1960); *People v. Waterman*, 9 N.Y.2d 561, 565, 175 N.E.2d 445, 447-48, 216 N.Y.S.2d 71, 74-75 (1961); *see also* *People v. Meyer*, 11 N.Y.2d 162, 164, 182 N.E.2d 102, 104, 227 N.Y.S.2d 427, 428 (1962) (statements made by the defendant after arraignment and in the absence of counsel are inadmissible). *See generally* W. RICHARDSON, EVIDENCE § 547, at 539 (J. Prince 10th ed. 1973). Subsequently, the right to counsel was extended to interrogations taking place prior to the commencement of proceedings. In *People v. Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963), for example, the police interrogated the defendant but refused to allow the attorney, who had been retained by the family of the accused, to see the defendant. *Id.* at 150-51, 193 N.E.2d at 629, 243 N.Y.S.2d at 842. The Court excluded statements made by the accused after such access was denied. *Id.* at 151, 193 N.E.2d at 629, 243 N.Y.S.2d at 842. This rule was refined in *People v. Failla*, 14 N.Y.2d 178, 199 N.E.2d 366, 250 N.Y.S.2d 267 (1964), the Court holding that when an attorney is denied access to his client, all statements made by the defendant both prior to and after the denial are inadmissible; if, however, the police afford the attorney access to the accused, only those statements made subsequent to the attorney's entry into the proceedings may be suppressed if made in the absence of counsel. *Id.* at 182, 199 N.E.2d at 368, 250 N.Y.S.2d at 270. In *People v. Gunner*, 15 N.Y.2d 226, 205 N.E.2d 852, 257 N.Y.S.2d 924 (1965), the Court further extended the right to counsel, stating that any questioning of the defendant is impermissible once the attorney makes it known to the police, even through a telephone call, that he is representing the defendant. *Id.* at 232-33, 205 N.E.2d at 855, 257 N.Y.S.2d at 928; *see* *People v. Arthur*, 22 N.Y.2d 325, 329, 239 N.E.2d 537, 539, 292 N.Y.S.2d 663, 666 (1968) (appearance of attorney, regardless of lack of formal retainer, results in attachment of right to counsel).

The *Donovan-Arthur* cases were substantially overruled in *People v. Robles*, 27 N.Y.2d 155, 158, 263 N.E.2d 304, 305, 314 N.Y.S.2d 793, 795 (1970), and it was not until 1976 that the Court overruled *Robles* and reaffirmed its support for *Donovan-Arthur*. *See* *People v. Hobson*, 39 N.Y.2d 479, 485-86, 341 N.E.2d 894, 899-90, 384 N.Y.S.2d 419, 423-24 (1976); *see also* *The Survey*, 51 St. JOHN'S L. REV. 201, 218-19 (1976). Subsequent decisions expanded and defined the right to counsel when proceedings have not yet commenced. *See, e.g.,* *People v. Marrero*, 51 N.Y.2d 56, 59, 409 N.E.2d 980, 981, 431 N.Y.S.2d 508, 509 (1980); *People v. Garafolo*, 46 N.Y.2d 592, 600, 389 N.E.2d 123, 127, 415 N.Y.S.2d 810, 813-14 (1979); *People v. Pinzon*, 44 N.Y.2d 458, 461, 377 N.E.2d 721, 725, 406 N.Y.S.2d 268, 269 (1978). In addition, the post-arraignment/post-indictment rule was modified in *People v. Blake*, 35 N.Y.2d 331, 320 N.E.2d 625, 361 N.Y.S.2d 881 (1974), wherein the Court ruled that "a criminal action begins with the filing of an 'accusatory instrument.'" *Id.* at 339, 320 N.E.2d at 631, 361 N.Y.S.2d at 890; *see, e.g.,* *People v. Samuels*, 49 N.Y.2d 219, 222, 400 N.E.2d 1344, 1346, 424 N.Y.S.2d 892, 894 (1980) (felony complaint); *State v. Lanahan*, 55 N.Y.2d 711, 717, 431 N.E.2d 624, 627, 447 N.Y.S.2d 139, 142 (1981) (arrest warrant); *see also* CPL §§ 1.20(17), 100.05, 120.20(1) (McKinney Supp. 1982-1983).

¹⁵³ *See generally* R. PITLER, NEW YORK CRIMINAL PRACTICE §§ 10.65, 10.66, at 530-32 (1972). A violation of a defendant's right to counsel generally manifests itself in the form of an inadmissible confession. *See id.* § 10.65, at 530; CPL § 710.20(3) (McKinney Supp. 1982-1983); *infra* note 202 and accompanying text. Often, however, an improper pretrial identification may constitute grounds for finding a violation of the right to counsel. *See* CPL § 710.20(5) (McKinney Supp. 1982-1983); *infra* notes 201 & 203 and accompanying text. The suppression of either type of evidence also may result in the inadmissibility of "derivative evidence as fruit of the poisonous tree." R. PITLER, *supra*, at 531. It should be noted that a

to protect defendants who are represented by counsel in pending, unrelated criminal matters,¹⁵⁴ as well as to those who are questioned in noncustodial settings.¹⁵⁵ Recently, in *People v. Knapp*,¹⁵⁶

motion to suppress may be made at any time after the commencement of the action, CPL § 710.40(1) (McKinney Supp. 1982-1983), and sometimes can be made during the course of the trial, *id.* § 710.40(2); *cf. id.* § 440.10(h) (violation of the defendant's state or federal constitutional rights constitutes grounds for vacating a conviction).

¹⁵⁴ See *People v. Rogers*, 48 N.Y.2d 167, 173, 397 N.E.2d 709, 713, 422 N.Y.S.2d 18, 22 (1979). A long-standing exception to the *Donovan-Arthur* rule, see *supra* note 152, has been applied to defendants who were represented by counsel on unrelated charges. See, e.g., *People v. Taylor*, 27 N.Y.2d 327, 329, 266 N.E.2d 630, 632, 318 N.Y.S.2d 1, 3 (1971) (statements concerning a murder uttered by defendants while they were in jail and had been assigned counsel to represent them on unrelated robbery charge, held admissible); *People v. Hetherington*, 27 N.Y.2d 242, 245, 265 N.E.2d 530, 531, 317 N.Y.S.2d 1, 2 (1970) (although defendant informed police that he "had" a lawyer in another case, this does not cause right to counsel to attach). This exception was recognized when the *Donovan-Arthur* rule was reinstated. *People v. Hobson*, 39 N.Y.2d 479, 483, 348 N.E.2d 894, 897, 384 N.Y.S.2d 419, 421-22 (1976); see *supra* note 152. Subsequently, however, in *People v. Rogers*, 48 N.Y.2d 167, 397 N.E.2d 709, 422 N.Y.S.2d 18 (1979), the Court of Appeals eliminated the exception, holding that "even when the interrogation concerns unrelated matters," the accused has a right to the presence of counsel. *Id.* at 173, 397 N.E.2d at 713, 422 N.Y.S.2d at 22. The Court reasoned that an attorney's role is to protect his client's rights, and therefore, "[i]t cannot be assumed that an attorney would abandon his client" merely because the attorney represents him only on an unrelated matter. *Id.* After *Rogers*, several cases further defined when the right to counsel attaches for a defendant who is represented by an attorney on an unrelated charge. In *People v. Bartolomeo*, 53 N.Y.2d 225, 423 N.E.2d 371, 440 N.Y.S.2d 894 (1981), the Court determined that if an investigating officer knows that the defendant had been arrested in the recent past, the right to counsel attached, even though the officer was unaware that the defendant actually was represented on a separate, pending charge. *Id.* at 229, 423 N.E.2d at 373, 440 N.Y.S.2d at 896. Additionally, if the officer knew that the defendant had been arrested several months earlier, and assumed that the accused was represented by counsel on the earlier charge, statements made by the defendant in the absence of counsel are suppressible. *People v. Smith*, 54 N.Y.2d 954, 955-56, 429 N.E.2d 823, 824, 445 N.Y.S.2d 145, 146 (1981). In *People v. Servidio*, 54 N.Y.2d 951, 429 N.E.2d 821, 445 N.Y.S.2d 143 (1981), however, the Court held that statements made by the defendant in the absence of an attorney are admissible if the officer was unaware of the pending, unrelated charges. *Id.* at 952, 429 N.E.2d at 822, 445 N.Y.S.2d at 144. Furthermore, in *People v. Kazmarick*, 52 N.Y.2d 322, 420 N.E.2d 45, 438 N.Y.S.2d 247 (1981), the Court stated that the police could question the defendant in the absence of counsel since, although formal adversary proceedings against the defendant had begun on an unrelated charge, he was not in fact represented by a lawyer on that charge. *Id.* at 324, 420 N.E.2d at 46-47, 438 N.Y.S.2d at 248-49. See generally Note, *The Uncounselled Confession: A New York Variant*, 14 COLUM. J.L. & Soc. PROBS. 343, 369-72 (1979); Note, *supra* note 151, at 360-63.

¹⁵⁵ Under the post-arraignment/post-indictment rule, any questioning of the accused by the police after arraignment or indictment rendered the defendant's statements inadmissible, unless the interrogation took place in the presence of counsel. See *supra* note 152. No distinction was made between questioning which took place while the defendant was in custody and interrogation which occurred in a noncustodial setting. See, e.g., *People v. Roberston*, 41 N.Y.2d 106, 109, 359 N.E.2d 408, 410-11, 390 N.Y.S.2d 900, 902 (1976); *People v. Townes*, 41 N.Y.2d 97, 103, 359 N.E.2d 402, 406-07, 390 N.Y.S.2d 893, 898 (1970). In *People v. McKie*, 25 N.Y.2d 19, 250 N.E.2d 36, 302 N.Y.S.2d 534 (1969), however, an "in custody"

the Court of Appeals reaffirmed its commitment to interpret broadly the right to counsel as it exists under the state constitution, holding that evidence obtained through a police informant in a noncustodial setting must be suppressed if the police know that the defendant was represented by counsel on a pending, unrelated criminal charge.¹⁵⁷

In *Knapp*, Linda Velzy, an 18-year-old college student, disappeared from the small town of Oneonta, New York.¹⁵⁸ A missing person's investigation was initiated by the state, city and college campus police.¹⁵⁹ Over 100 persons were interviewed by the police, including the defendant, Ricky Knapp, who denied having knowledge of the missing girl's whereabouts.¹⁶⁰ At the time of his questioning, Knapp was under indictment on unrelated criminal charges, and was represented at his arraignment by John Owen, a

prerequisite to the attachment of the right to counsel was superimposed upon the *Donovan-Arthur* rule. *Id.* at 27-28, 250 N.E.2d at 41, 302 N.Y.S.2d at 540; see W. RICHARDSON, *supra* note 152, § 543, at 542-44; Note, *supra* note 154, at 360. The determination of whether the defendant was actually "in custody" depended upon whether he reasonably believed that he was free to leave. See *People v. Paulin*, 25 N.Y.2d 445, 449, 255 N.E.2d 164, 166, 306 N.Y.S.2d 929, 932 (1969).

Recently, the "in custody" requirement has been applied in a less rigid manner. In *People v. Skinner*, 52 N.Y.2d 24, 417 N.E.2d 501, 436 N.Y.S.2d 207 (1980), for example, the defendant's attorney had instructed the police not to speak with the defendant outside the presence of counsel. *Id.* at 27, 417 N.E.2d at 502, 436 N.Y.S.2d at 208. Two detectives, who had gone to the defendant's apartment to deliver an order to show cause, sensed the defendant's eagerness to speak and began to question him. *Id.* After being read his *Miranda* warnings, the defendant made admissions to the officers, which he later refused to repeat at police headquarters. *Id.* at 27-28, 417 N.E.2d at 502, 436 N.Y.S.2d at 208. The Court, recognizing that the defendant's retention of an attorney indicated his inability to deal with the situation alone, *id.* at 31-32, 417 N.E.2d at 505, 436 N.Y.S.2d at 211, stated that the "right [to counsel] is rendered illusory if the State's agents are permitted to subject an individual represented by counsel to questioning in a noncustodial setting," *id.* at 35, 417 N.E.2d at 505, 436 N.Y.S.2d at 213. Judge Jasen dissented, emphasizing that the defendant chose to invite the officers into his home and that the police did not actively interrogate the defendant. *Id.* at 35, 417 N.E.2d at 507, 436 N.Y.S.2d at 213 (Jasen, J., dissenting). Furthermore, Judge Jasen opined, though a retreat in the recent expansion of the right to counsel is not contemplated, there was no "demonstration that there is an imbalance or inadequacy in existing law which must be remedied by the creation of a broader rule." *Id.* at 33, 417 N.E.2d at 506, 436 N.Y.S.2d at 211-12 (Jasen, J., dissenting).

¹⁵⁶ 57 N.Y.2d 161, 441 N.E.2d 1057, 455 N.Y.S.2d 539 (1982).

¹⁵⁷ *Id.* at 175-76, 441 N.E.2d at 1062, 455 N.Y.S.2d at 544.

¹⁵⁸ *Id.* at 168, 441 N.E.2d at 1058, 455 N.Y.S.2d at 540.

¹⁵⁹ *Id.* The three police departments involved in the investigation coordinated their efforts through a central command post. *Id.* The search for Linda Velzy was an intensive investigation, 82 App. Div. 2d 971, 971, 440 N.Y.S.2d 416, 417 (3d Dep't 1981), receiving widespread publicity and massive media coverage, 57 N.Y.2d at 177, 441 N.E.2d at 1063, 455 N.Y.S.2d at 545 (Meyer, J., concurring).

¹⁶⁰ 57 N.Y.2d at 168, 441 N.E.2d at 1058, 455 N.Y.S.2d at 540.

public defender.¹⁶¹ As a result of a police request that the defendant undergo a polygraph test concerning the Velzy disappearance, Knapp contacted Owen, who advised the defendant not to submit to the test.¹⁶² The police questioned the defendant three more times,¹⁶³ until Owen telephoned Detective Angellotti, an Oneonta police detective, and requested that the police either arrest the defendant or cease questioning him.¹⁶⁴ Subsequently, an informant, Arthur Hitt,¹⁶⁵ agreed to aid the police in their investigation of the defendant's involvement in the Velzy disappearance.¹⁶⁶ Knapp later admitted to Hitt that he had killed Velzy, and requested Hitt's aid in moving the body.¹⁶⁷ Hitt alerted the police, who, after the defendant and Hitt returned to the latter's logging site with the body, arrested Knapp.¹⁶⁸ In addition to making inculpatory statements at the logging site,¹⁶⁹ Knapp waived his right to counsel

¹⁶¹ *Id.* at 169, 441 N.E.2d at 1058, 455 N.Y.S.2d at 540.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* Owen contacted Detective Angellotti on December 15 or 16, 1977. *Id.* In addition to directing the police to discontinue the questioning of his client, the defendant's attorney informed them he had told Knapp not to submit to the polygraph test. *Id.*

¹⁶⁵ *Id.*, 441 N.E.2d at 1059, 455 N.Y.S.2d at 541. Arthur Hitt owned a logging site and occasionally employed Knapp. *Id.* Hitt's attorney informed the police that his client had been asked by Knapp to provide an alibi for him for the night Linda Velzy disappeared. *Id.* At the time, Hitt was unaware of the reason for Knapp's request. *Id.* at 169-70, 441 N.E.2d at 1059, 455 N.Y.S.2d at 541.

¹⁶⁶ *Id.* at 170, 441 N.E.2d at 1059, 455 N.Y.S.2d at 541. On December 21, 1977, a conference was held at the county courthouse which was attended by the county court judge, the prosecutor, Hitt, and Hitt's attorney. *Id.* The resulting agreement was that, in exchange for Hitt's cooperation in the Velzy investigation, Hitt, who was facing felony charges, would be permitted to plead guilty to a reduced charge and would not be sentenced to incarceration, provided his cooperation led to the arrest of at least one person. *Id.*

¹⁶⁷ *Id.* at 170-71, 441 N.E.2d at 1059, 455 N.Y.S.2d at 541. Prior to the conversation in which the admission by Knapp was made, Hitt made several telephone calls and had several face-to-face meetings with Knapp. Each of these conversations was recorded by the State police. *Id.* On December 31, 1977, 10 days after the agreement between the prosecutor and Hitt was consummated, Knapp admitted to Hitt that he had killed the missing girl. *Id.* He related the details of the murder, explaining that he picked her up while she was hitchhiking, and that they had a sexual encounter. *Id.* Afterwards, she jumped out of the car and lay on the side of the road in a semiconscious state. *Id.* He put her back into the car and told her that he was going to take her to the hospital, but instead, drove her to a neighboring county, hit her in the throat three times with his fist and killed her. *Id.* The defendant also stated that he wanted to move the girl's body to Hitt's logging site, and Hitt agreed to assist him. *Id.* at 171, 441 N.E.2d at 1059, 455 N.Y.S.2d at 541. This entire conversation, unlike the earlier ones, was not recorded. *Id.* at 170, 441 N.E.2d at 1059, 455 N.Y.S.2d at 541.

¹⁶⁸ *Id.* at 171, 441 N.E.2d at 1059, 455 N.Y.S.2d at 541. Hitt alerted the State Police that he and the defendant were going to move the body and, on the basis of this information, the police set up a stakeout. *Id.*

¹⁶⁹ *Id.* There was police testimony to the effect that the defendant, as he was being

and made a full confession at the State Police station.¹⁷⁰ Based upon Hitt's sworn testimony of Knapp's admissions, the police obtained a warrant to search the defendant's car,¹⁷¹ where additional physical evidence was discovered.¹⁷²

The trial court denied suppression of the defendant's various admissions and his confession made to the police, as well as the evidence seized from the defendant's car.¹⁷³ The appellate division affirmed the admission of this evidence, except with respect to the typewritten confession obtained at the police station, holding that such confession had been obtained in violation of the defendant's right to counsel.¹⁷⁴ The conviction nevertheless was affirmed on a harmless error analysis.¹⁷⁵

On appeal, the Court of Appeals vacated the defendant's conviction and remanded the case,¹⁷⁶ holding that, in addition to the typewritten confession, Hitt's testimony as to Knapp's admissions and the physical evidence obtained from the defendant's car were inadmissible.¹⁷⁷ Judge Jones, speaking for a plurality of the Court,¹⁷⁸ initially stated that the State Police could be charged

wrestled to the ground, said "'I am sorry; I am sorry. I killed her. I am no good. Please shoot me.'" *Id.*

¹⁷⁰ *Id.* The defendant was taken to the State Police station where, after being given *Miranda* warnings, he waived his right to counsel and confessed to killing Linda Velzy. *Id.* The full confession was typed and signed by the defendant. *Id.* at 171, 441 N.E.2d at 1059-60, 455 N.Y.S.2d at 541-42.

¹⁷¹ *Id.*

¹⁷² *Id.*, 441 N.E.2d at 1060, 455 N.Y.S.2d at 542. Uncovered in the search of the defendant's car was a contact lens, wood chips, cat and dog hairs, blonde human hair, and "glitter." *Id.* All of this evidence subsequently was matched with items found on the dead girl's body. *See id.* at 171 n.1, 441 N.E.2d at 1060 n.1, 455 N.Y.S.2d at 542 n.1.

¹⁷³ *Id.* at 172, 441 N.E.2d at 1060, 455 N.Y.S.2d at 542. The tape recordings of the defendant's conversations with Hitt were not offered in evidence, although Hitt was permitted to testify, over objection, as to the statements that Knapp made to him the day before Knapp's arrest. *Id.*

¹⁷⁴ *See* *People v. Knapp*, 82 App. Div. 2d 971, 971, 440 N.Y.S.2d 416, 417 (3d Dep't 1981).

¹⁷⁵ *Id.* at 971-72, 440 N.Y.S.2d at 417. The appellate division held that there was "no reasonable possibility that [the] admission of [Knapp's signed] confession contributed to defendant's conviction." *Id.* Justice Mikoll dissented from the affirmation of the conviction, but nonetheless agreed that the confession should not have been admitted. *Id.* at 972, 440 N.Y.S.2d at 417 (Mikoll, J., dissenting).

¹⁷⁶ 57 N.Y.2d at 175-76, 441 N.E.2d at 1062, 455 N.Y.S.2d at 544.

¹⁷⁷ *Id.* at 173-74, 441 N.E.2d at 1061, 455 N.Y.S.2d at 543. The Court of Appeals held that the statements made by the defendant at the logging site were admissible since they were "spontaneous." *Id.* at 173, 441 N.E.2d at 1060, 455 N.Y.S.2d at 543.

¹⁷⁸ Judge Jones was joined in the opinion by Chief Judge Cooke and Judge Fuchsberg. In a separate opinion, Judge Meyer concurred in the result. Judge Wachtler wrote a dissent-

with knowledge that the Oneonta police had been directed by Knapp's attorney to stop questioning the defendant.¹⁷⁹ Thus, since Hitt was acting as an agent of the State Police,¹⁸⁰ the plurality concluded, the admissions made to Hitt as well as the physical evidence gathered pursuant to the search warrant issued on the basis of his testimony, were obtained in violation of the defendant's state constitutional right to counsel.¹⁸¹ Notably, Judge Jones declined to express any opinion as to the dissenting judges' proposed "emergency exception" to the right to counsel.¹⁸² The Court instead observed that since the issue was not addressed in the lower courts, an investigation of the "implications and ramifications of such an exception" was precluded.¹⁸³ Furthermore, the Court stated that the application of an "emergency exception" would depend upon a "preliminary factual determination," which the record of the case would not allow it to make as a matter of law.¹⁸⁴

Concurring, Judge Meyer opined that he "harbor[s] no doubt that there is an emergency exception to the constitutional right to counsel and when next presented with the opportunity to do so will vote in favor of such an exception."¹⁸⁵ Judge Meyer disagreed, however, with the contention of the dissenting judges that, as a matter of law, this case fell within that exception.¹⁸⁶ Rather, Judge

ing opinion in which Judge Gabrielli concurred. Judge Jasen dissented separately.

¹⁷⁹ 57 N.Y.2d at 173, 441 N.E.2d at 1061, 455 N.Y.S.2d at 543.

¹⁸⁰ *Id.* The Court concluded that Hitt was acting pursuant to the agreement made in the County Judge's chambers, and that the State Police directed and supervised Hitt in his role as informant. *Id.*

¹⁸¹ *Id.*; see *supra* note 152.

¹⁸² 57 N.Y.2d at 174, 441 N.E.2d at 1061, 455 N.Y.S.2d at 543; see *infra* notes 185-95 and accompanying text.

¹⁸³ 57 N.Y.2d at 175, 441 N.E.2d at 1061-62, 455 N.Y.S.2d at 544.

¹⁸⁴ *Id.* The information available to the Court as to whether the use of Hitt as an informant was in furtherance of the search for Miss Velzy, or whether it was in reality an effort to gather evidence of criminal activity on the part of the defendant, was not deemed by the Court to be "so overwhelming as to compel the conclusion that the purpose of the December 21 conference in the County Judge's chambers and the use of Hitt by the police" was primarily to find the missing girl. *Id.* In addition, the plurality, though acknowledging the extensive nature of the search for Miss Velzy, recognized that other factors, such as the time period from her disappearance to the subsequent agreement between Hitt and the police, as well as the nature of the agreement itself, may have indicated a less than hopeful attitude about finding her alive. *Id.*

¹⁸⁵ *Id.* at 176, 441 N.E.2d at 1062, 455 N.Y.S.2d at 544 (Meyer, J., concurring).

¹⁸⁶ *Id.* at 176-77, 441 N.E.2d at 1063, 455 N.Y.S.2d at 545 (Meyer, J., concurring). Judge Meyer stated that to hold as a matter of law that a "deliberate court-sponsored invasion" of one's right to counsel is justified merely because the purpose of an investigation is to find a missing person "is to permit the exception to swallow the rule and to violate Knapp's right

Meyer asserted that the defendant's right to due process entitles him to an opportunity to contest the factual basis upon which the emergency determination rests.¹⁸⁷

Judge Jasen dissented, contending that "a very real practical distinction" exists between an investigation which is designed to locate a missing person and one which simply is geared toward establishing a suspect's involvement in the commission of a crime.¹⁸⁸ He thus urged recognition of an emergency exception,¹⁸⁹ or at least a limitation upon a further broadening of the right to counsel in a noncustodial setting, where practical realities render a per se rule of inadmissibility inappropriate.¹⁹⁰ Similarly, Judge Wachtler, in a separate dissent, argued that an "emergency exception" to the right to counsel should be applied in cases involving a missing persons investigation.¹⁹¹ Judge Wachtler contended that a police investigation for a missing person is distinguishable from a criminal investigation,¹⁹² since the primary concern in the former is the vic-

to due process in order to justify the violation of his right to counsel." *Id.* (Meyer, J., concurring).

¹⁸⁷ *Id.* at 176, 441 N.E.2d at 1062, 455 N.Y.S.2d at 544 (Meyer, J., concurring). Judge Meyer indicated that "'due process'" clearly entitles [the defendant] to contest whether his [admission] of December 31st to Hitt, improperly obtained as it otherwise clearly was . . . , obtained in a manner within that emergency exception." *Id.* (Meyer, J., concurring) (citations omitted). Judge Meyer stated that the question of whether an "emergency" exists depends upon various factors, including whether there is in fact a missing person. *Id.*, 441 N.E.2d at 1063, 455 N.Y.S.2d at 545 (Meyer, J., concurring). The establishment of that fact alone, however, does not guarantee, according to Judge Meyer, that the designation of the situation as an "emergency" is warranted. *Id.* (Meyer, J., concurring).

¹⁸⁸ *Id.* at 179, 441 N.E.2d at 1064, 455 N.Y.S.2d at 546 (Jasen, J., dissenting). Judge Jasen observed that expanding the right to counsel in the missing person situation "[will] elevate the rights of the potential defendant above the compelling interests of the State." *Id.* (Jasen, J., dissenting).

¹⁸⁹ *Id.* at 178, 441 N.E.2d at 1063-64, 455 N.Y.S.2d at 545-46 (Jasen, J., dissenting). Judge Jasen agreed with Judge Wachtler that by reason of the designation of the police activity as a missing person investigation, an emergency existed as a matter of law. *Id.* at 178 n.**, 441 N.E.2d at 1063 n.**, 455 N.Y.S.2d at 545 n.** (Jasen, J., dissenting).

¹⁹⁰ *See id.* at 178, 441 N.E.2d at 1063-64, 455 N.Y.S.2d at 545-46 (Jasen, J., dissenting). Judge Jasen contended that an emergency exists in a missing person investigation since "the police [must] act expediently in the hope of finding a person whose life may be in danger and who may be in need of immediate assistance." *Id.*, 441 N.E.2d at 1064, 455 N.Y.S.2d at 546 (Jasen, J., dissenting).

¹⁹¹ *Id.* at 180, 441 N.E.2d at 1064-65, 455 N.Y.S.2d at 546-47 (Wachtler, J., dissenting). Judge Wachtler contended that the police should be permitted to use an informant when they are attempting to render assistance to a person in danger. *Id.* (Wachtler, J., dissenting). Furthermore, Judge Wachtler asserted, the police are justified in assuming that a person is in need of their assistance when there is a report of a missing person under unusual circumstances. *Id.* (Wachtler, J., dissenting).

¹⁹² *Id.* at 182, 441 N.E.2d at 1066, 455 N.Y.S.2d at 548 (Wachtler, J., dissenting). Judge

tim's rescue, and not merely the gathering of evidence for a subsequent prosecution.¹⁹³ Thus, Judge Wachtler stated, "[u]ntil the [victim] has been found, or conclusive evidence of death has been presented,"¹⁹⁴ the right to counsel may not be used "to frustrate or delay" the police investigation.¹⁹⁵

The emergency exception to the right to counsel, as proffered by four members of the *Knapp* Court, is based upon an analogy to the fourth amendment exception which permits the admission of evidence obtained through a warrantless search.¹⁹⁶ The fourth amendment's emergency exception is, in essence, an acknowledgment that a suspect's constitutional rights at times must yield to the state's interest in protecting life¹⁹⁷ or property.¹⁹⁸ Similarly, the

Wachtler noted the primacy of the police function of preventing crime and aiding those in danger, and placed the prosecutorial function of gathering evidence in a secondary position. *Id.* (Wachtler, J., dissenting).

¹⁹³ *Id.* at 183, 441 N.E.2d at 1066, 455 N.Y.S.2d at 548 (Wachtler, J., dissenting). Judge Wachtler distinguished several of the cases relied upon by the plurality, stating that none of them involved the threat of imminent danger to an innocent victim. *Id.* (Wachtler, J., dissenting).

¹⁹⁴ *Id.* at 187, 441 N.E.2d at 1069, 455 N.Y.S.2d at 551 (Wachtler, J., dissenting).

¹⁹⁵ *Id.* at 185, 441 N.E.2d at 1068, 455 N.Y.S.2d at 550 (Wachtler, J., dissenting).

¹⁹⁶ *See id.* at 183-84, 441 N.E.2d at 1067, 455 N.Y.S.2d at 549 (Wachtler, J., dissenting).

There are various exceptions to the fourth amendment's protection against unlawful searches and seizures. *See generally* Note, *The Emergency Doctrine, Civil Search and Seizure, and the Fourth Amendment*, 43 *FORDHAM L. REV.* 571, 571 (1975). The emergency doctrine is one such exception which recognizes that policemen at times must act in a manner reasonably necessary to promote their function as peace officers. *See United States v. Dunavan*, 485 F.2d 201, 204 (6th Cir. 1973). As an aspect of this function, the police, who are required to aid those in need, inadvertently may come upon evidence which normally would not come to their attention. *See, e.g., Id.* at 204; *United States v. Goldenstein*, 456 F.2d 1006, 1010 (8th Cir. 1972). This type of evidence is admissible, even though the police enter certain premises without a warrant, since the emergency justifies the entry. *See, e.g., People v. Kelly*, 83 App. Div. 2d 648, 649-50, 442 N.Y.S.2d 188, 189 (3d Dep't 1981).

¹⁹⁷ *See People v. Mitchell*, 39 N.Y.2d 173, 180, 347 N.E.2d 607, 611, 383 N.Y.S.2d 246, 250, *cert. denied*, 426 U.S. 953 (1976); Note, *supra* note 196, at 584. In *Mitchell*, the Court of Appeals recognized that "[c]onstitutional guarantees . . . must yield to paramount concerns for human life and the legitimate need of society to protect and preserve life." 39 N.Y.2d at 180, 347 N.E.2d at 611, 383 N.Y.S.2d at 250 (citations omitted). Thus, the Court concluded, a police search for a hotel maid in every room of the hotel was justified, even though no warrant was obtained, since it was not known at the time whether a crime had been committed. *Id.* at 177, 347 N.E.2d at 609, 383 N.Y.S.2d at 247.

¹⁹⁸ *See People v. Manzi*, 21 App. Div. 2d 57, 59, 248 N.Y.S.2d 306, 308 (1st Dep't 1964); Note, *supra* note 196, at 584-88. The emergency doctrine rarely has been held to apply in situations where the protection of property is the motivation for violating the fourth amendment right to privacy, Note, *supra* note 196, at 585, since such right usually is deemed the more important interest, *id.* at 584. In *Manzi*, the police witnessed a person breaking into the defendant's car. 21 App. Div. 2d at 58, 248 N.Y.S.2d at 308. Because the car window was broken, the police took the property which was inside the car to the police station for safe-

judges of the *Knapp* Court who believe that an emergency exception to the right to counsel should be recognized indicated that significant state interests might override a criminal defendant's right to counsel.¹⁹⁹ Whereas the fourth amendment merely protects against unreasonable searches and seizures,²⁰⁰ the sixth amendment right to counsel safeguards not only the right to representation, but also the right to a fair trial²⁰¹ and the privilege against self incrimination.²⁰² To be sure, the denial of the right to counsel prior to trial "[m]ight well settle the accused's fate and reduce the

keeping, and later determined that it had been stolen. *Id.* at 58-59, 248 N.Y.S.2d at 308. The evidence was held admissible. *Id.* at 59, 248 N.Y.S.2d at 308. See generally Note, *supra* note 196, at 586.

¹⁹⁹ See *supra* notes 191-93 and text accompanying notes 189 & 191.

²⁰⁰ See *Michigan v. Tyler*, 436 U.S. 499, 504 (1978); *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971). The Supreme Court has referred to the fourth amendment as a "safeguard of [the] privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). In fact, the right against unreasonable searches and seizures has been defined by the expectation of privacy concerning the area and property to be searched. See *Katz v. United States*, 389 U.S. 347, 351 (1967).

²⁰¹ *United States v. Wade*, 388 U.S. 218, 226-27 (1967); *Massiah v. United States*, 377 U.S. 201, 205 (1964); *In re Groban*, 352 U.S. 330, 345 (1957). In *Massiah*, the Court stated that a confession "deliberately elicited by the police after the defendant had been indicted, and thereafter at a time when he was clearly entitled to a lawyer's help," constituted grounds for reversal of the conviction. *Massiah*, 377 U.S. at 204 (citing *Spano v. New York*, 360 U.S. 315, 325 (Douglas, J., concurring)). After a lengthy discussion of *Spano*, the *Massiah* Court observed:

It was pointed out that under our system of justice the most elemental concepts of due process of law contemplate that an indictment be followed by a trial, "in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law." It was said that a Constitution which guarantees a defendant the aid of counsel at such a trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less, it was said, might deny a defendant "effective representation by counsel at the only stage when legal aid and advice would help him."

377 U.S. at 204 (quoting *Spano v. New York*, 360 U.S. 315, 327 (Stewart, J., concurring)). In *Wade*, the Supreme Court held that "the assistance of counsel at [a pre-trial identification] lineup was indispensable to protect [the defendant's] most basic right as a criminal defendant—his right to a fair trial at which the witnesses against him might be meaningfully cross-examined." *Wade*, 388 U.S. at 223-24. Indeed, stated the Court, "the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *Id.* at 226.

²⁰² See *Miranda v. Arizona*, 384 U.S. 436, 470 (1966); *People v. Donovan*, 13 N.Y.2d 148, 152, 193 N.E.2d 628, 629, 243 N.Y.S.2d 841, 843 (1963); see also *People v. Hobson*, 39 N.Y.2d 479, 484, 348 N.E.2d 894, 897, 384 N.Y.S.2d 419, 422 (1976); Note, *supra* note 154, at 370.

trial itself to a mere formality.”²⁰³ It therefore appears that the dissenters’ analogy to the fourth amendment²⁰⁴ is dubious in that a right-to-counsel emergency exception would be far more sweeping than its fourth amendment counterpart.²⁰⁵

The *Knapp* dissenters also implied that the potential for suppression of evidence obtained from a person who is represented by counsel will be a cause of concern to the police in their search for

²⁰³ *United States v. Wade*, 388 U.S. 218, 224 (1967). The constitutional guarantee of counsel means more than simply the effective assistance of counsel during trial and the availability of counsel to an indigent defendant. *Id.* at 224-25. It includes aid at critical stages prior to the trial itself, as well as “assistance whenever necessary to assure a meaningful ‘defence.’” *Id.* at 225.

²⁰⁴ *See* 57 N.Y.2d at 183, 441 N.E.2d at 1067, 455 N.Y.S.2d at 549 (Wachtler, J., dissenting). Judge Wachtler analogized the emergency exception, as it relates to the right to counsel, to situations in which an individual may be questioned without first being informed of his *Miranda* rights. *Id.* One of the cases cited in his dissent is *People v. Greer*, 42 N.Y.2d 170, 366 N.E.2d 273, 397 N.Y.S.2d 613 (1977), wherein a police officer came upon a couple having sexual relations in a secluded area. *Id.* at 172-73, 366 N.E.2d at 275, 397 N.Y.S.2d at 615. When the officer questioned them, the defendant replied that “this is my woman.” *Id.* at 173, 366 N.E.2d at 275, 397 N.Y.S.2d at 615. After being asked the woman’s name, however, he responded that he did not know. *Id.* At the subsequent rape trial, the statements made to the police officer were held admissible, even though the officer had not informed the defendant of his *Miranda* rights. *Id.* at 178, 366 N.E.2d at 277, 397 N.Y.S.2d at 617.

One similarity among the three types of situations presented—the fourth amendment emergency doctrine, the instances when *Miranda* warnings need not be given, and the proposed emergency exception to the right to counsel—apparently is that the nature of the particular inquiry was unknown to the officer at the time of the alleged violation. Moreover, in each situation, the officer seemingly had to ascertain the nature of the circumstances which he was confronting, and a possibility existed that a crime had not even been committed. It is suggested, however, that these mere factual similarities, though notable, do not justify recognition of a rule that could be applied in each situation.

²⁰⁵ *Compare* *United States v. Henry*, 447 U.S. 264, 272-73 (1980) with *Hoffa v. United States*, 385 U.S. 293, 300-02 (1966). In *Hoffa*, the Government used an informant to gather information about the defendant, who in turn contended that, *inter alia*, his fourth amendment right was violated. 385 U.S. at 300. The fourth amendment violation was said to have occurred as a result of the informant’s presence in the defendant’s hotel room at various times, thus rendering meaningless the consent to enter the room given by the defendant to the informant. *Id.* The Court noted that the “Fourth Amendment can certainly be violated by guileful as well as by forcible intrusions” and that the “protections of the Fourth Amendment . . . can extend . . . to oral statements.” *Id.* at 301. The Court stated, however, that no fourth amendment violation occurred since the amendment does not “[protect] a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.” *Id.* at 302. In *Henry*, on the other hand, the Court considered whether the Government’s use of an informant violated the defendant’s sixth amendment right to counsel, holding that the deliberate “eliciting” of statements after the right to counsel attached constituted a violation of the sixth amendment. *Id.* Aside from any fifth amendment considerations, the Court observed, the use of an informant during the actual trial frustrates the purpose of the right to counsel and the effective functioning of the adversary system. *See id.* at 273.

an endangered victim, and thus, will hinder their investigatory efforts.²⁰⁶ This reasoning, however, apparently undermines the dissenters' reliance upon police classification of their own activity as either investigatory, in which case the emergency exception will shield obtained evidence, or accusatory, where the exception would not apply.²⁰⁷ Indeed, if the police are concerned that information obtained from a party who is represented by counsel eventually will be suppressed, then it seems that the creation of an emergency exception to the right to counsel would encourage improper classification of police conduct as investigatory, rather than accusatory, in close factual situations.²⁰⁸ According to the police this kind of dis-

²⁰⁶ See 57 N.Y.2d at 183, 441 N.E.2d at 1066, 455 N.Y.S.2d at 548 (Wachtler, J., dissenting). Judge Wachtler sought to distinguish prior right to counsel cases on the ground that the police in those cases had knowledge and evidence that a crime had been committed. *Id.* at 182-83, 441 N.E.2d at 1066, 455 N.Y.S.2d at 548; see, e.g., *People v. Skinner*, 52 N.Y.2d 24, 27, 417 N.E.2d 501, 502, 436 N.Y.S.2d 208, 208 (1980). Judge Wachtler observed that, unlike the earlier cases, this case involved a "possibility that the life or safety of an innocent third party, perhaps in imminent danger, might depend upon the success of the police investigation." 57 N.Y.2d at 183, 441 N.E.2d at 1066, 455 N.Y.S.2d at 548. Thus, he concluded, "[i]mposing the same restrictions on the police when they are attempting to rescue a person potentially in danger may, and in many cases undoubtedly will, have the added consequence of contributing to the death or injury of the victim." *Id.* But see *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) ("it [cannot] lightly be assumed that, as a practical matter, adoption of the exclusionary rule fetters law enforcement").

²⁰⁷ See *supra* note 191; *infra* note 208 and accompanying text.

²⁰⁸ In *Escobedo v. Illinois*, 378 U.S. 478 (1964), the Supreme Court stated that "when the process shifts from investigatory to accusatory . . . our adversary system begins to operate, and . . . the accused must be permitted to consult with his lawyer." *Id.* at 492. The dissenters in *Knapp*, however, apparently were reluctant to require the police to determine precisely when an "investigation" becomes "accusatory." See 57 N.Y.2d at 178-79, 441 N.E.2d at 1064, 455 N.Y.S.2d at 546 (Jasen, J., dissenting). Rather, Judge Wachtler stated that the Court is not in a position to judge how the police investigation should be conducted until there is no hope of finding the missing person alive. *Id.* at 187, 441 N.E.2d at 1069, 455 N.Y.S.2d at 551 (Wachtler, J., dissenting). Judge Jasen also indicated that it is impractical to require the police to be aware that the investigatory process has become accusatory, especially since "good police work" often will uncover criminal activity as the investigation proceeds. *Id.* at 178, 441 N.E.2d at 1064, 455 N.Y.S.2d at 546 (Jasen, J., dissenting).

The employment of police discretion, at the time an act which may amount to a constitutional violation occurs, is prevalent in various areas of police procedure. For example, an officer may make an arrest without a warrant when, in his discretion, probable cause exists. See *Ker v. California*, 374 U.S. 23, 34-35 (1963). To minimize the harm caused by a mistaken belief by a police officer that there was probable cause for the arrest, there are statutory provisions, such as prompt arraignment statutes, e.g., CPL § 140.20(1) (1981), which reduce the potential harm resulting from an improper arrest, see *id.* § 140.20(3) (1981) (requiring pre-arraignment bail when unnecessary delay would result from awaiting arraignment). In addition, the use of police discretion might be disadvantageous to an accused in situations where decisions must be made as to whether, and how, to conduct a pre-trial identification procedure. See, e.g., *Stovall v. Denno*, 388 U.S. 293, 302 (1967) (one man

cretion would emasculate the very purpose of the right to counsel—protection of an individual defendant from abuse of power by the state.²⁰⁹ In addition, it is submitted that, given the urgency of a “missing person” investigation, the zealotness of police investigatory efforts will in no way be diminished. Therefore, it is suggested that the creation of an emergency exception in the right to counsel context is both unwarranted and unsound.

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showup in hospital room of witness acceptable even though highly suggestive). Notably, the Supreme Court expressly has ruled that the right to counsel attaches at such a critical pre-trial stage. *United States v. Wade*, 388 U.S. 218, 224 (1967). The right to counsel has been deemed necessary in the early stages of a criminal prosecution because courts have recognized that the police are in a position to infringe upon a suspect's constitutional rights whenever he is in custody. *See, e.g., Miranda v. Arizona*, 384 U.S. 436, 448 (1966).

²⁰⁹ *See Elkins v. United States*, 364 U.S. 206, 212 (1960). In *Elkins*, the Supreme Court stated that the “purpose [of the right to counsel] is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.” *Id.*