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Police Failure to Permit Defendant to Contact Mother Violates Right to Assistance of Counsel, Requiring Suppression of Confession

Andrew A. Peterson

is attributable to its ruling that the *Goggins* standard was satisfied, or whether it believed that such interest is minimal, must, regrettably, await further clarification.

Alan Sorkowitz

Police failure to permit defendant to contact mother violates right to assistance of counsel, requiring suppression of confession

Prearraignment or indictment statements elicited from an unrepresented defendant who voluntarily has waived his right to counsel[219] in the absence of an attorney are admissible against him.[220]

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the appropriate authorities and to cooperate in efforts to apprehend criminals. *See* Roviaro v. United States, 353 U.S. 53, 59 (1957); M. HARNEY & J. CROSS, THE INFORMER IN LAW ENFORCEMENT 100-06 (2d ed. 1968); 2 COLUM. J. OF L. & SOC. PROB. 47 (1966). While many informants volunteer their aid to law enforcement officials in return for plea bargaining concessions or recommendations for lighter sentences, *see* HARNEY & CROSS, *supra,* at 41-42, it also is true that law-abiding citizens quite frequently serve as informants. *Id.* at 31-41. Indeed, this tactic has proven particularly effective in the legal offensive against narcotics. *See id.* at 26; *Informant's Identity, supra* note 188, at 562.

[219] *See* U.S. CONST. amend. VI. The defendant's right to counsel attaches upon the commencement of "adversary judicial criminal proceedings" against him. Kirby v. Illinois, 406 U.S. 682, 689 (1972). In New York, this critical stage of the prosecution has been held to commence at the time of indictment, People v. DiBiasi, 7 N.Y.2d 544, 549-51, 166 N.E.2d 825, 828-29, 200 N.Y.S.2d 21, 24-25 (1960), arraignment, People v. Meyer, 11 N.Y.2d 162, 164, 182 N.E.2d 103, 104, 227 N.Y.S.2d 427, 428 (1962), and court-ordered prearraignment lineups, Coleman v. Alabama, 399 U.S. 1, 7 (1970); People v. Coleman, 43 N.Y.2d 222, 225-26, 371 N.E.2d 819, 822, 401 N.Y.S.2d 57, 59-60 (1977). *See generally The Survey,* note 258 *infra.* Moreover, the Supreme Court has held that a defendant must be afforded the right to counsel in any pretrial confrontation after indictment where there is a "potential [for] substantial prejudice to defendant's rights . . . and . . . counsel [would be able] to help avoid that prejudice." United States v. Wade, 388 U.S. 218, 227 (1967); *see* Gilbert v. California, 388 U.S. 263 (1967).

[220] In Miranda v. Arizona, 384 U.S. 436 (1966), the Court held that the prosecution may not use statements elicited from a defendant under custodial interrogation unless, prior to the questioning, the defendant had been advised of his sixth amendment right to counsel and his fifth amendment privilege against self-incrimination. *Id.* at 444. According to *Miranda,* however, a defendant may waive these rights outside the presence of an attorney if the waiver is made voluntarily, intelligently and knowingly. *Id.* at 475; *see* Brewer v. Williams, 430 U.S. 387, 404 (1977); Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

Under New York law, however, once an attorney has entered the proceedings, a waiver by the defendant may be made only in the presence of his lawyer. People v. Hobson, 39 N.Y.2d 479, 481-82, 348 N.E.2d 894, 896, 384 N.Y.S.2d 419, 420 (1976), *discussed in The Survey,* 51 ST. JOHN'S L. REV. 201, 216 (1976); *see* People v. Arthur, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968); People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963). Furthermore, following indictment or arraignment, the defendant may not waive his right to counsel in the absence of an attorney. People v. Settles, 46 N.Y.2d 154, 162-63, 385 N.E.2d 612, 616, 412 N.Y.S.2d 874, 879 (1978), *discussed in The Survey,* notes 258-286 and accompanying text *infra.*

Deliberate efforts to conceal a defendant from likely avenues to the assistance of an attorney constitute a denial of his right to counsel, however, and require the suppression of any statements elicited from him during such concealment.[221] Recently, in *People v. Bevilacqua*,[222] the Court of Appeals broadened this rule when it held that, despite an express waiver of his right to counsel, an unrepresented defendant's oral confession must be suppressed where the police had ignored his requests to call his mother and seemingly had schemed to isolate him from the assistance of an attorney.[223]

Bevilacqua, the 18-year-old defendant, was arrested at 7:15 p.m. for a murder which occurred in Greenburgh, New York.[224] Due

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[221] *See* People v. Townsend, 33 N.Y.2d 37, 41, 300 N.E.2d 722, 724, 347 N.Y.S.2d 187, 190 (1973). In *Townsend*, the 17-year-old defendant voluntarily went into the police station where he was held for questioning. *Id.* at 39, 300 N.E.2d at 723, 347 N.Y.S.2d at 188. During the interrogation, the defendant's mother repeatedly telephoned the police station in an attempt to contact her son. Each time, the police informed her that the defendant was not at the station. *Id.* at 39-40, 300 N.E.2d at 723-24, 347 N.Y.S.2d at 189. Meanwhile, the defendant, without the benefit of *Miranda* warnings, made three incriminating statements which subsequently were suppressed. *Id.* at 39 & n.2, 300 N.E.2d at 723 & n.2, 347 N.Y.S.2d at 188-89 & n.2. At the trial for robbery and murder, a fourth written statement, signed by the defendant after he had been given his *Miranda* warnings, was admitted into evidence against him, and he was convicted. *Id.* at 40-41, 300 N.E.2d at 724, 347 N.Y.S.2d at 189-90. The appellate division affirmed the conviction, 36 App. Div. 2d 749, 320 N.Y.S.2d 891 (2d Dep't 1971), but the Court of Appeals reversed and ordered a new trial, 33 N.Y.2d at 41-42, 300 N.E.2d at 724-25, 347 N.Y.S.2d at 190-91.

The Court of Appeals held that the written statement should have been excluded from the evidence. *Id.* According to the *Townsend* Court,

> [I]t [was] impermissible for the police to use a confession, even if it [were] otherwise voluntary, obtained from a 17-year-old defendant when, in the course of extracting such confession, they [had] sealed off the most likely avenue by which the assistance of counsel may [have] reach[ed] him by means of deception and trickery.

Id. at 41, 300 N.E.2d at 724, 347 N.Y.S.2d at 190. The *Townsend* Court was careful to distinguish People v. Hocking, 15 N.Y.2d 973, 207 N.E.2d 529, 259 N.Y.S.2d 859 (1965), and People v. Taylor, 16 N.Y.2d 1038, 213 N.E.2d 321, 265 N.Y.S.2d 913 (1965), where the confessions of the respective defendants were admitted notwithstanding that the police had refused to permit the defendants to see their families. The *Townsend* Court noted that the families in both *Hocking* and *Taylor* knew where the defendants were being questioned and were free to obtain counsel for them and that the police had not schemed "to conceal the presence of the defendant[s] or to deceive the famil[ies] when inquiry was made." 33 N.Y.2d at 42, 300 N.E.2d at 725, 347 N.Y.S.2d at 191 (quoting the dissenting opinion of the appellate division at 36 App. Div. 2d 749, 750, 320 N.Y.S.2d 891, 892 (2d Dep't 1971) (Hopkins, J., dissenting)).

[222] 45 N.Y.2d 508, 382 N.E.2d 1326, 410 N.Y.S.2d 549 (1979).

[223] *Id.* at 514-15, 382 N.E.2d at 1329, 410 N.Y.S.2d at 552-53.

[224] *Id.* at 511-12, 382 N.E.2d at 1327, 410 N.Y.S.2d at 550-51. The defendant and three other men allegedly had planned to rob the owner of a liquor store. *Id.* at 511, 382 N.E.2d at 1327, 410 N.Y.S.2d at 550. The owner was shot and killed after he had been persuaded to drive the defendant and one of the other men home. *Id.* at 511, 382 N.E.2d at 1327, 410 N.Y.S.2d at 551.

to an alleged lack of processing facilities in Greenburgh, the defendant was taken to a police station in the neighboring community of Elmsford.[225] There, the defendant was given *Miranda* warnings, and although he did not demand the presence of a lawyer, he asked twice to contact his mother.[226] The police ignored his requests and Bevilacqua made an oral confession between 10:00 and 10:15 p.m.[227] In the meantime, a former attorney of the defendant[228] learned of his arrest[229] and telephoned the Greenburgh police station between 10:15 and 10:30 p.m., leaving instructions to refrain from any interrogation of his client.[230] At 11:15 p.m., the defendant signed a written confession at the Elmsford station.[231]

At a pretrial suppression hearing only the written confession was suppressed.[232] Bevilacqua subsequently was convicted of two counts of murder in the second degree.[233] The Appellate Division,

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[225] *Id.* at 512, 382 N.E.2d at 1327, 410 N.Y.S.2d at 551. The defendant and the other suspects were arrested in White Plains 11 days after the shooting had occurred. *Id.* The alleged lack of facilities for processing multiple defendants caused the defendants to be taken to Elmsford while the other men were sent to the Tarrytown police station. *Id.; see id.* at 518, 382 N.E.2d at 1331, 410 N.Y.S.2d at 555 (Jasen, J., dissenting).

[226] *Id.* at 512, 382 N.E.2d at 1327, 410 N.Y.S.2d at 551.

[227] *Id.*, 382 N.E.2d at 1328, 410 N.Y.S.2d at 551.

[228] The lawyer had represented the defendant as well as his family several times in the past. *Id.* at 518, 382 N.E.2d at 1331, 410 N.Y.S.2d at 555 (Jasen, J., dissenting).

[229] *Id.* at 512, 382 N.E.2d at 1328, 410 N.Y.S.2d at 551. After the attorneys of two of the other suspects had been notified of the arrests and had located their clients, one of the lawyers telephoned the defendant's attorney to inform him of the defendant's arrest. *Id.*

[230] *Id.* The exact location of the defendant had no bearing on the effectiveness of his attorney's directive to another police station to cease interrogation. 45 N.Y.2d at 514, 382 N.E.2d at 1329, 410 N.Y.S.2d at 552; *see* People v. Gunner, 15 N.Y.2d 226, 232, 205 N.E.2d 852, 855, 257 N.Y.S.2d 924, 928 (1965); note 232 *infra.*

[231] *Id.* at 512, 382 N.E.2d at 1328, 410 N.Y.S.2d at 551. After the defendant's statement had been signed and verified, the police telephoned the defendant's parents. *Id.* Meanwhile, the defendant's lawyer had arrived at the Greenburgh headquarters at 11:00 p.m., but was not told that the defendant was in Elmsford. *Id.* He was instructed to wait while the defendant was processed. *Id.* At around midnight, the defendant was taken to the Greenburgh station and at 12:37 a.m., he met with his attorney. *Id.* at 513, 382 N.E.2d at 1328, 410 N.Y.S.2d at 551.

[232] *Id.* It was determined at the pretrial hearing that only the written statement should be suppressed since it had been obtained after the police deliberately had interfered with the defendant's lawyer's attempts to consult with his client. *Id.; see* note 220 *supra.* Once the attorney contacted the Greenburgh station, *see* note 12 and accompanying text *supra,* he was involved in the proceeding, and the defendant could not waive his right to counsel unless the attorney was present. *See* note 220 *supra.* Thus, the written statement had to be suppressed notwithstanding that it was given in Elmsford. *See* People v. Garofolo, 46 N.Y.2d 592, 600, 389 N.E.2d 123, 126, 415 N.Y.S.2d 810, 813-14 (1979); People v. Pinzon, 44 N.Y.2d 458, 463-65, 377 N.E.2d 721, 724-25, 406 N.Y.S.2d 268, 270-71 (1978).

[233] 45 N.Y.2d at 513, 382 N.E.2d at 1328, 410 N.Y.S.2d at 551. The defendant was tried separately from the other suspects. *Id.*

Second Department, affirmed, and the defendant appealed.[234]

The Court of Appeals reversed, holding that the conduct of the police required suppression of the prior oral confession.[235] Chief Judge Breitel, writing for the majority,[236] stated that Bevilacqua's constitutionally protected right to counsel had been denied since the effect of the police conduct was to isolate him "from two of his most likely avenues of assistance, his mother and his lawyer."[237] In so concluding, the *Bevilacqua* majority found its earlier decision in *People v. Townsend*[238] analogous.[239] The *Townsend* Court suppressed a confession made after the police, "through deception and trickery," had concealed the whereabouts of a 17-year-old defendant from his mother.[240] Although admitting that the comparison to *Townsend* was not "perfect,"[241] the *Bevilacqua* Court determined that the police tactics as a whole exacerbated their failure to comply with the defendant's requests to contact his mother.[242] The Court also acknowledged that Bevilacqua's lawyer did not become involved in the proceedings until after the defendant had confessed orally.[243] Nevertheless, the Court concluded that the statement had to be suppressed since the "seemingly conscious scheme" by the police to prevent the defendant from receiving legal advice[244] caused

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[234] 56 App. Div. 2d 605, 391 N.Y.S.2d 641 (2d Dep't 1977).

[235] 45 N.Y.2d at 515, 382 N.E.2d at 1329, 410 N.Y.S.2d at 553.

[236] Chief Judge Breitel was joined by Judges Gabrielli, Jones, Wachtler, Fuchsberg and Cooke. Judge Jasen dissented in a separate opinion.

[237] 45 N.Y.2d at 511, 382 N.E.2d at 1327, 410 N.Y.S.2d at 550. The actions of the police were deemed to have eliminated any prospect of Bevilacqua's obtaining legal advice before submitting to interrogation. The Court noted that, after the police had refused to contact the defendant's mother, adequate representation was foreclosed since "[i]t was only natural that [the defendant, 18 years old at the time,] should regard his mother, rather than a lawyer, as a primary source of help and advice." *Id.* at 513, 382 N.E.2d at 1328, 410 N.Y.S.2d at 552.

[238] 33 N.Y.2d 37, 300 N.E.2d 722, 347 N.Y.S.2d 187 (1973).

[239] 45 N.Y.2d at 513-14, 382 N.E.2d at 1328, 410 N.Y.S.2d at 552.

[240] 33 N.Y.2d at 41, 300 N.E.2d at 724, 347 N.Y.S.2d at 190; *see* note 221 *supra.*

[241] 45 N.Y.2d at 513, 382 N.E.2d at 1328, 410 N.Y.S.2d at 552. The Court noted three distinctions. The defendant in *Townsend* was a minor while Bevilacqua was not; Townsend's mother was deliberately lied to while Bevilacqua's mother simply was not contacted; and Townsend never received proper preinterrogation warnings. *Id.* at 513-14, 382 N.E.2d at 1328-29, 410 N.Y.S.2d at 552.

[242] *Id.* at 514, 382 N.E.2d at 1329, 410 N.Y.S.2d at 552.

[243] *Id.* The Court found that, although the defendant's lawyer was not involved in the proceedings until after the oral confession was made, he "undoubtedly" would have been involved earlier even if the defendant's latest request to see his mother had been honored. *Id.*

[244] *Id.* The *Bevilacqua* Court noted that the essential element of the scheme involved "the isolation of Bevilacqua, his transportation to a police station different from that to which the other perpetrators had been taken, [the] failure to honor the defendant's request to see his mother, and [the] refusal to allow the [defendant's] lawyer . . . to see his client." *Id.* at 514-15, 382 N.E.2d at 1329, 410 N.Y.S.2d at 553.

the "nice distinctions separating the first confession from the second [to] lose much of their validity."[245]

Judge Jasen, dissenting, declared that the dispositive issue was whether Bevilacqua "was fully capable of voluntarily and intelligently waiving his right to counsel without prior notification to his mother."[246] Focusing on Bevilacqua's personal rather than his legal capacity to effectively waive his right to counsel,[247] the dissent noted that Bevilacqua had reached his majority and was "not a novice to the criminal justice system."[248] Judge Jasen maintained that, instead of requiring suppression, the police misconduct was only one factor to consider in determining whether the defendant knowingly waived his right to counsel and voluntarily confessed to the crimes.[249] Stating that the police activities "did not offend established notions of fundamental fairness,"[250] the dissent found unpersuasive the analogy to the *Townsend* case since the police had not affirmatively prevented Bevilacqua's mother from communicating with him.[251] Judge Jasen concluded that the evidence supported the suppression court's finding of voluntariness and therefore should have been upheld.[252]

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[245] *Id.* at 514, 382 N.E.2d at 1329, 410 N.Y.S.2d at 552.

[246] *Id.* at 515, 382 N.E.2d at 1329, 410 N.Y.S.2d at 553 (Jasen, J., dissenting).

[247] *Id.* at 516-17, 382 N.E.2d at 1330, 410 N.Y.S.2d at 554 (Jasen, J., dissenting).

[248] *Id.* at 516, 382 N.E.2d at 1330, 410 N.Y.S.2d at 554 (Jasen, J., dissenting).

[249] *Id.* at 516-17, 382 N.E.2d at 1330, 410 N.Y.S.2d at 554 (Jasen, J., dissenting). Judge Jasen referred to People v. Carbonaro, 21 N.Y.2d 271, 234 N.E.2d 433, 287 N.Y.S.2d 385 (1967), wherein a 28-year-old defendant confessed to participating in an armed robbery after the police had refused to allow him to telephone his wife. *Id.* at 275-76, 234 N.E.2d at 435, 287 N.Y.S.2d at 388-89. The *Carbonaro* Court found that the police misconduct did not per se render the defendant's confession involuntary. *Id.* at 277, 234 N.E.2d at 436, 287 N.Y.S.2d at 390-91 (citing People v. Hocking, 18 N.Y.2d 832, 833, 222 N.E.2d 600, 601, 275 N.Y.S.2d 838, 839 (1965)). Rather, noting the defendant's age, prior arrests and convictions, the Court stated that "[t]his, of course, [did] not mean that he may not have had a right to speak to his family; rather, it [was] relevant in considering the effect upon him of the denial of that right." 21 N.Y.2d at 278, 234 N.E.2d at 437, 287 N.Y.S.2d at 391; *see* note 253 *infra*.

[250] 45 N.Y.2d at 519, 382 N.E.2d at 1332, 410 N.Y.S.2d at 555 (Jasen, J., dissenting).

[251] *Id.* at 518-19, 382 N.E.2d at 1331, 410 N.Y.S.2d at 555; (Jasen, J., dissenting); *see generally* notes 221, 240, & 241 *supra*. Judge Jasen found the police behavior to be more egregious in *Townsend* since, in that case, "the police secured the critical confession only after long hours of interrogation and after three oral confessions, inadmissible because of a failure to advise defendant of his rights, had been extracted from the defendant." 45 N.Y.2d at 518-19, 382 N.E.2d at 1331, 410 N.Y.S.2d at 555 (Jasen, J., dissenting). Judge Jasen also noted that Townsend "was not as criminally experienced as" Bevilacqua. *Id.*

[252] 45 N.Y.2d at 515, 382 N.E.2d at 1329, 410 N.Y.S.2d at 553. Since the question of voluntariness is one of fact, the dissent stated that the suppression court's determination should not be reversed unless predicated "on clearly insufficient evidence." *Id.* (citations omitted).

It is submitted that the *Bevilacqua* majority imprudently expanded the "denial of access" theory implemented in *Townsend.*[253] Unlike the deliberate efforts to conceal the defendant and the concomitant failure to administer *Miranda* warnings in *Townsend,*[254] the police never denied having Bevilacqua in custody and did advise him of his right to the assistance of counsel.[255] The *Bevilacqua* Court apparently has ruled that, where the police activity may have severed a possible path to legal advice, notwithstanding an otherwise knowing and voluntary waiver of the right to counsel, any statement subsequently elicited must be suppressed.[256] Moreover, the decision comes dangerously close to equating a request to contact a family member to a request for counsel.[257] It is suggested that, if Bevilac-

[253] *See generally* note 221 and accompanying text *supra.*

[254] *See* notes 221 & 241 *supra.* An additional distinction between *Townsend* and *Bevilacqua* is that *Townsend* involved the admissibility of a written confession, preceded by *Miranda* warnings, which had been given subsequent to oral statements that were clearly inadmissible in the absence of prior *Miranda* warnings. *See* 33 N.Y.2d at 40-41, 300 N.E.2d at 724, 347 N.Y.S.2d at 189-90. In such a case, the voluntariness issue is further complicated by the fact that the defendant may feel constrained to be consistent with the statements he made in response to police interrogation prior to the *Miranda* admonitions. *See, e.g.,* United States v. Bayer, 331 U.S. 532 (1947); People v. Chapple, 38 N.Y.2d 112, 341 N.E.2d 243, 378 N.Y.S.2d 682 (1975); People v. Valerius, 31 N.Y.2d 51, 286 N.E.2d 254, 334 N.Y.S.2d 871 (1972); People v. Tanner, 30 N.Y.2d 102, 282 N.E.2d 98, 331 N.Y.S.2d 1 (1972). In *Bevilacqua,* where the issue was the admissibility of an oral statement given prior to an inadmissible written statement, there was no problem with the possible coercive effect of the pressure to be consistent. *See* People v. Byrne, 47 N.Y.2d 117, 122, 390 N.E.2d 760, 763, 417 N.Y.S.2d 42, 44 (1979); People v. Chapple, 38 N.Y.2d 112, 115, 341 N.E.2d 243, 245-46, 378 N.Y.S.2d 682, 685 (1975); People v. Gunner, 15 N.Y.2d 226, 232-33, 205 N.E.2d 852, 855-56, 257 N.Y.S.2d 924, 929 (1965).

[255] 45 N.Y.2d at 512, 382 N.E.2d at 1327-28, 410 N.Y.S.2d at 551.

[256] *See id.* at 513, 382 N.E.2d at 1327-28, 410 N.Y.S.2d at 552.

[257] Prior to *Bevilacqua,* the Court of Appeals had indicated that the denial of access to a family member was not, of itself, sufficient to exclude a subsequent confession. *See* People v. Anderson, 42 N.Y.2d 35, 40-41, 364 N.E.2d 1318, 1321-22, 396 N.Y.S.2d 625, 629 (1977); People v. Townsend, 33 N.Y.2d 37, 41, 300 N.E.2d 722, 725, 347 N.Y.S.2d 187, 191 (1973); People v. Carbonaro, 21 N.Y.2d 271, 278, 234 N.E.2d 433, 437, 287 N.Y.S.2d 385, 390-91 (1967); People v. Taylor, 16 N.Y.2d 1038, 1039-40, 213 N.E.2d 321, 321, 265 N.Y.S.2d 913, 913 (1965); People v. Hocking, 15 N.Y.2d 973, 974-75, 207 N.E.2d 529, 529, 259 N.Y.S.2d 859, 860 (1965); note 249 *supra.* The *Bevilacqua* Court, however, concluded that, by preventing the defendant from communicating with his mother, the police effectively denied the defendant the assistance of counsel. 45 N.Y.2d at 513, 382 N.E.2d at 1328, 410 N.Y.S.2d at 552; *see* notes 235-245 and accompanying text *supra.*

It is interesting to note the strict requirement in the federal courts of a request for an attorney as a condition precedent to the invocation of *Miranda* protections and fifth amendment rights. In Fare v. Michael C., 99 S. Ct. 2560 (1979), the Supreme Court held that the 16-year-old defendant's request to see his probation officer did not warrant suppression of the fruits of the continued interrogation. *Id.* at 2571. The Court based its conclusion on the observations that the rigidity of the *Miranda* rule is justified by the "specificity" of its instructions to law enforcement officials and the unique role of the attorney as protector of

qua's waiver was indeed voluntary and his request to contact his mother unequivalent to a request for counsel, the oral confession should not have been suppressed.

Apparently implicit in the *Bevilacqua* holding is an admonishment to law enforcement officials to refrain from conducting interrogations in any manner that would give even the appearance of an effort to deny an unrepresented defendant access to a lawyer. It is suggested that this underlying policy consideration, while laudatory in principle, was accorded disproportionate weight in *Bevilacqua* and thereby produced an unfortunate precedent.

Andrew A. Peterson

Postindictment waiver of right to counsel ineffective in absence of attorney

New York courts long have recognized that a represented defendant can waive his right to counsel only in the presence of his attorney, and that any statements elicited in his attorney's absence must be suppressed.[259] In *People v. Coleman*,[260] the Court of Appeals

the defendant's legal rights. *Id.* at 2568-71. The proposition that a defendant's request to speak with a family member is to be deemed a request for counsel stands in stark contrast to the Supreme Court's critical observation: "If it were otherwise, a juvenile's request for almost anyone he considered trustworthy enough to give him reliable advice would trigger the rigid rule of *Miranda*." *Id.* at 2571.

[259] People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976). The right to counsel in New York was developed in a series of cases, along with the point at which the defendant could waive that right without the advice of an attorney. In the first of these decisions, the Court held that statements made by a defendant in the absence of his attorney at an interrogation following his indictment were inadmissible. People v. DiBiasi, 7 N.Y.2d 544, 551, 166 N.E.2d 825, 828, 200 N.Y.S.2d 21, 28 (1960). In People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961), the Court unequivocally found that the return of an indictment is the point at which the right to counsel attaches since it "marks the formal commencement of the criminal action against the defendant." *Id.* at 565, 175 N.E.2d at 447-48, 216 N.Y.S.2d at 74-75. A year later, the Court declared that a "post-arraignment statement should not be treated any differently than a post-indictment statement," and is inadmissible when elicited from a defendant in either situation in the absence of counsel. People v. Meyer, 11 N.Y.2d 162, 164, 182 N.E.2d 103, 104, 227 N.Y.S.2d 427, 428 (1962). The right to counsel was found to exist at the preindictment or prearraignment stages of a criminal proceeding in People v. Donovan, 13 N.Y.2d 148, 152-53, 193 N.E.2d 628, 630, 243 N.Y.S.2d 841, 844 (1963). The Court seemingly equated the filing of a criminal information with the return of an indictment in People v. Bodie, 16 N.Y.2d 275, 213 N.E.2d 441, 266 N.Y.S.2d 104 (1965). The Court concluded that post-information statements elicited from a defendant in