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Postindictment Waiver of Right to Counsel Ineffective in Absence of Attorney

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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

the absence of counsel are inadmissible, unless the defendant has waived his right to counsel, which could be waived without the advice of an attorney. *Id.* at 278-79, 213 N.E.2d at 443, 266 N.Y.S.2d at 107. Following the federal mandate enunciated by the Supreme Court in Kirby v. Illinois, 406 U.S. 682 (1972), that the right to counsel attaches at the commencement of adversary judicial proceedings initiated by "formal charge, preliminary hearing, indictment, information, or arraignment," *id.* at 689, the New York Court of Appeals, in People v. Blake, 35 N.Y.2d 331, 320 N.E.2d 625, 361 N.Y.S.2d 881 (1974), determined that the "presence of counsel at identification viewings is mandated after the filing of an accusatory instrument." *Id.* at 340, 320 N.E.2d at 631-32, 361 N.Y.S.2d at 891. Finally, in People v. Sugden, 35 N.Y.2d 453, 323 N.E.2d 169, 363 N.Y.S.2d 923 (1974), the Court held that a court order of removal was "sufficiently 'judicial' in nature" to invoke a defendant's right to counsel. *Id.* at 461, 323 N.E.2d at 174, 363 N.Y.S.2d at 929; *see* 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).

The requirement that a represented defendant have his attorney present to effectuate a waiver of his right to counsel developed in a series of cases which spanned more than a decade. In People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963), the Court suppressed a confession elicited from the defendant at an interrogation held after his arrest but before his arraignment, following a refusal to permit his retained counsel to speak with him. *Id.* at 151, 193 N.E.2d at 629, 243 N.Y.S.2d at 843. The Court condemned the "interrogation of an accused after he or the lawyer retained by him or his family has requested that they be allowed to confer together." *Id.* at 153, 193 N.E.2d at 630, 243 N.Y.S.2d at 844, Uncertainty as to what criteria needed to be satisfied to invoke the *Donovan* rule was alleviated somewhat by subsequent decisions of the Court. In People v. Gunner, 15 N.Y.2d 226, 205 N.E.2d 852, 257 N.Y.S.2d 924 (1965), it was held that "once a retained attorney contacts the police officer in charge and informs him . . . that he represents the suspect and does not want any statements taken from him, the police are precluded from . . . questioning him, or, if they do, from using against him any statements which he made in the absence of counsel." *Id.* at 232, 205 N.E.2d at 855, 257 N.Y.S.2d at 928. The parameters of the rule were further delineated in People v. Friedlander, 16 N.Y.2d 248, 212 N.E.2d 533, 265 N.Y.S.2d 97 (1965), wherein the Court suppressed statements made by a represented defendant outside the presence of her attorney notwithstanding that the defendant had not requested to have counsel present at the questioning. *See id.* at 250, 212 N.E.2d at 534, 265 N.Y.S.2d at 98-99. Finally, in People v. Arthur, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968), the Court held that "once the police know or have been apprised of the fact that the defendant is represented by counsel or that an attorney has communicated with the police for the purpose of representing the defendant, the accused's right to counsel attaches; and this right is not dependent upon the existence of a formal retainer." *Id.* at 329, 239 N.E.2d at 539, 292 N.Y.S.2d at 666. Once an attorney is involved in a criminal proceeding, therefore, the *Donovan-Arthur* rule prohibits the interrogation of the defendant in the absence of the attorney, unless the defendant first waives his right to counsel in the presence of his attorney. *Id.* at 329, 239 N.E.2d at 539, 292 N.Y.S.2d at 666. The *Arthur* Court also held that the rule does not require a request by the defendant or his attorney that the police permit them to confer. *Id.* Although the viability of the rule later came into question, *see* People v. Robles, 27 N.Y.2d 155, 263 N.E.2d 304, 314 N.Y.S.2d 793 (1970), *cert. denied,* 401 U.S. 945 (1971), the *Donovan-Arthur* rule was reaffirmed by the Court of Appeals in 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). Notwithstanding its reaffirmance of the rule, three exceptions to the doctrine were recognized by the *Hobson* Court. 39 N.Y.2d at 483, 348 N.E.2d at 897, 384 N.Y.S.2d at 422. The rule is inapplicable to situations where the defendant is represented by counsel "in a proceeding unrelated to the charges under investigation," *see, e.g.,* People v. Taylor, 27 N.Y.2d 327, 332, 266 N.E.2d 630, 633, 318 N.Y.S.2d 1, 5 (1971), where the defendant is not in custody, *see, e.g.*, People v. McKie, 25 N.Y.2d 19, 23-28, 250 N.E.2d 36, 37-41, 302 N.Y.S.2d 534, 536-41 (1969), and where statements are "spontaneously volunteered" by the defendant, *see, e.g.*, People v. Kaye, 25 N.Y.2d 139, 144-45, 250 N.E.2d 329, 331-32, 303 N.Y.S.2d 41, 46 (1969).

held that an unrepresented defendant could waive his right to counsel, which attached when a court ordered a prearraignment lineup, in the absence of counsel.[261] Following *Coleman*, uncertainty surrounded the point at which an unrepresented defendant would be unable to effectuate a waiver of his right to counsel in the absence of an attorney.[262] Clarifying this right, the Court of Appeals, in *People v. Settles*,[263] recently held that a "defendant under indict-

[260] 43 N.Y.2d 222, 371 N.E.2d 819, 401 N.Y.S.2d 57 (1977), *discussed in The Survey*, 52 ST. JOHN'S L. REV. 485, 505 (1978).

[261] 43 N.Y.2d at 226-27, 371 N.E.2d at 822, 401 N.Y.S.2d at 59-60. *Coleman* was an appeal from a conviction of two counts of robbery in the first degree. *Id.* at 224, 371 N.E.2d at 820, 401 N.Y.S.2d at 58-59. The defendant had been required to appear in a lineup pursuant to a court order directing his removal from a detention center in which he was incarcerated while awaiting trial on an unrelated charge. *Id.* The prosecution claimed that the defendant had waived his right to have counsel present at the lineup. *See id.* at 227, 371 N.E.2d at 822, 401 N.Y.S.2d at 60. Although he had retained an attorney for the unrelated charge, *id.* at 226, 371 N.E.2d at 821, 401 N.Y.S.2d at 59, he was not represented in the robbery investigation. *Id.* The *Coleman* Court determined that, while a judicial order of removal was sufficient to invoke the defendant's right to counsel, *id.* at 225, 371 N.E.2d at 821, 401 N.Y.S.2d at 59; *see* People v. Sugden, 35 N.Y.2d 453, 461, 323 N.E.2d 169, 174, 363 N.Y.S.2d 923, 929 (1974), the defendant effectively could waive his right in the absence of an attorney because he was not represented by counsel on the robbery charges. 43 N.Y.2d at 226-27, 371 N.E.2d at 822, 401 N.Y.S.2d at 60. It should be noted that notwithstanding this conclusion, the Court held that the prosecution had failed to establish that the defendant had voluntarily and intelligently waived his right to counsel. *Id.* at 227, 371 N.E.2d at 822, 401 N.Y.S.2d at 61-62.

[262] The *Donovan-Arthur* rule permits a defendant who has retained counsel to waive his right to counsel only in the presence of his attorney. *See* note 259 *supra*. Therefore, irrespective of the point at which a waiver is made, the represented defendant's abandonment of his right to counsel will be effective only if made with the advice of his attorney. In People v. Lopez, 28 N.Y.2d 23, 268 N.E.2d 628, 319 N.Y.S.2d 825, *cert. denied*, 404 U.S. 840 (1971), the Court upheld a postindictment waiver of counsel by an unrepresented defendant. *Id.* at 25-26, 268 N.E.2d at 628-29, 319 N.Y.S.2d at 826-27. The *Lopez* decision, however, was overruled by the Court in People v. Hobson, 39 N.Y.2d 479, 485-90, 348 N.E.2d 894, 899-902, 384 N.Y.S.2d 419, 423-27 (1976). Reaffirming the *Donovan-Arthur* rule, *id.* at 483-84, 348 N.E.2d at 897, 384 N.Y.S.2d at 421, the *Hobson* Court held that before indictment a defendant who has retained counsel may not waive his right to counsel outside the presence of his attorney. 39 N.Y.2d at 481, 348 N.E.2d at 896, 384 N.Y.S.2d at 420. Since the *Donovan-Arthur* rule had no application to cases where counsel had neither been appointed nor retained, *see* note 259 *supra*, and since Hobson was represented by counsel while, in contrast, Lopez was not, the propriety of the Court's overruling *Lopez* has been questioned. *See The Survey*, 51 ST. JOHN'S L. REV. 201, 216 (1976). In any event, the overruling of the *Lopez* case implied that a postindictment defendant, whether or not represented, could no longer waive his right to counsel in the absence of an attorney. *See* 39 N.Y.2d at 493, 348 N.E.2d at 904, 384 N.Y.S.2d at 428 (Gabrielli, J., concurring); 51 ST. JOHN'S L. REV. at 220. The Court's subsequent decision in People v. Coleman, 43 N.Y.2d 222, 371 N.E.2d 819, 401 N.Y.S.2d 57 (1977), which held that an unrepresented defendant in a preindictment setting could waive his right to counsel in the absence of an attorney, left uncertainty with respect to the Court's action in overruling *Lopez*.

[263] 46 N.Y.2d 154, 385 N.E.2d 612, 412 N.Y.S.2d 874 (1978), *rev'g* 59 App. Div. 2d 598, 398 N.Y.S.2d 10 (2d Dep't 1977) (mem.).

ment and in custody may not waive his right to counsel unless he does so in the presence of an attorney."[264]

In *Settles,* a Queens County grand jury indicted the defendant on charges stemming from the robbery of a Queens bar and the fatal wounding of a police officer.[265] After a warrant for his arrest was issued, Settles was apprehended in Georgia.[266] Immediately upon his return to New York, Settles was given his *Miranda* warnings and, unadvised of his indictment and unrepresented by counsel, agreed to appear in a lineup without the presence of an attorney.[267] At the lineup two witnesses identified the defendant as one of the participants in the crimes.[268] This evidence was introduced at trial, and Settles was subsequently convicted of robbery in the first degree.[269] The appellate division affirmed,[270] and the defendant appealed.

In an opinion written by Judge Cooke, a unanimous Court of Appeals reversed, declaring the filing of the indictment as the point at which the defendant's "right to counsel . . . indelibly attached."[271] In the absence of an attorney, therefore, the defendant could not have validly waived his right to have a lawyer present at the lineup.[272] Noting that when "an attorney has entered the proceedings," the right to counsel may be waived only in the presence of an attorney,[273] the Court "equate[d] the indictment with the entry of a lawyer in to the proceedings," triggering the rule against uncounselled waivers.[274] The Court distinguished its prior decision

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[264] 46 N.Y.2d at 162-63, 385 N.E.2d at 616, 412 N.Y.S.2d at 879 (citations omitted).

[265] *Id.* at 159-60, 385 N.E.2d at 614, 412 N.Y.S.2d at 876-77.

[266] *Id.* at 160, 385 N.E.2d at 614, 412 N.Y.S.2d at 877.

[267] *Id.*

[268] *Id.*

[269] *Id.* at 159, 385 N.E.2d at 613, 412 N.Y.S.2d at 876.

[270] 59 App. Div. 2d 598, 398 N.Y.S.2d 10 (2d Dep't 1977) (mem.).

[271] 46 N.Y.2d at 165, 385 N.E.2d at 618, 412 N.Y.S.2d at 880-81.

[272] *Id.* at 159, 385 N.E.2d at 613-14, 412 N.Y.S.2d at 876. The Court noted the possibility of upholding a postindictment waiver made in the absence of an attorney but only where "the most exigent of circumstances" were present. *Id.* at 164, 385 N.E.2d at 617, 412 N.Y.S.2d at 880.

[273] *Id.* at 165, 385 N.E.2d at 618, 412 N.Y.S.2d at 881; *see* note 259 and accompanying text *supra.* Judge Cooke observed that while the *Donovan-Arthur* rule previously had received inconsistent interpretations, *see* People v. Blake, 35 N.Y.2d 331, 320 N.E.2d 625, 361 N.Y.S.2d 881 (1974); People v. Lopez, 28 N.Y.2d 23, 268 N.E.2d 628, 319 N.Y.S.2d 825, *cert. denied,* 404 U.S. 840 (1971); People v. Vella, 21 N.Y.2d 249, 234 N.E.2d 422, 287 N.Y.S.2d 369 (1967); People v. Bodie, 16 N.Y.2d 275, 213 N.E.2d 441, 266 N.Y.S.2d 104 (1965), it was reaffirmed by the Court as embodying an established principle of law in People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976); *see* note 262 *supra.*

[274] 46 N.Y.2d at 166, 385 N.E.2d at 618, 412 N.Y.S.2d at 881. The *Settles* Court noted that its holding made "explicit that which was implicit in *Hobson.*" *Id.* at 162, 385 N.E.2d at 616, 412 N.Y.S.2d at 879; *see* note 262 *supra.* Thus, the inferences which were drawn from

in *Coleman*[275] by noting that Coleman had neither been indicted nor arraigned when he waived the assistance of counsel.[276] Consequently, although the court order of removal to appear in a lineup was sufficient to create the right to counsel in *Coleman*, the unrepresented defendant could waive his right outside the presence of an attorney.[277] The *Settles* Court reasoned that the right to counsel becomes "indispensible" after the indictment or arraignment, because at either of these points the investigatory stage is complete and "formal judicial proceedings" have begun, thereby increasing the defendant's need for the assistance of counsel.[278]

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the *Hobson* Court's action in overruling People v. Lopez, 28 N.Y.2d 23, 268 N.E.2d 628, 319 N.Y.S.2d 825, *cert. denied*, 404 U.S. 840 (1971), *see* note 262 *supra*, were verified by the *Settles* Court.

[275] 43 N.Y.2d 222, 371 N.E.2d 819, 401 N.Y.S.2d 57 (1977).

[276] 46 N.Y.2d at 165-66, 385 N.E.2d at 618, 412 N.Y.S.2d at 881. The Court stated that "[t]he distinction between *Coleman* and the present case lies not in the question of under what circumstances the right to counsel attaches, but rather at which point that right has indelibly attached to the extent that it can only be waived in the presence of a lawyer." *Id.* at 165, 385 N.E.2d at 618, 412 N.Y.S.2d at 880-81.

[277] *Id.* at 165, 385 N.E.2d at 618, 412 N.Y.S.2d at 881; *see* note 261 and accompanying text *supra*.

[278] 46 N.Y.2d at 163, 166, 385 N.E.2d at 616, 618, 412 N.Y.S.2d at 879, 881. The Court found that the transition in the duties of the police after indictment from investigatory to accusatory was the reason for the rule that the defendant be arraigned without delay so as to provide the defendant with legal advice as soon as possible. *Id.* at 163-64, 385 N.E.2d at 616-17, 412 N.Y.S.2d at 879; *see* People v. Alex, 265 N.Y. 192, 195, 192 N.E. 289, 290 (1934); People v. Mummiani, 258 N.Y. 394, 399-400, 180 N.E. 94, 96 (1932).

An additional issue addressed by the Court was whether, on remand, Settles would be permitted to introduce into evidence a document prepared by police investigators which summarized a statement made by Settles' codefendant, Boalds. 46 N.Y.2d at 166, 385 N.E.2d 618, 412 N.Y.S.2d at 881. In the statement, Boalds admitted committing the robbery, and implicated a person other than Settles as his "lone accomplice." *Id.* Since the statement constituted hearsay, the question arose whether it could be admitted as an exception to the general rule that hearsay is inadmissible as evidence at trial. *See* W. RICHARDSON, EVIDENCE § 200 (10th ed. J. Prince 1973). The *Settles* Court concluded that the statement could be admitted under the declaration against penal interest exception to the hearsay rule for the purpose of exculpating Settles, *see id.* at § 260, provided that the following four criteria were satisfied:

> [F]irst, the declarant must be unavailable as a witness at trial; second, when the statement was made the declarant must be aware that it was adverse to his penal interest; third, the declarant must have competent knowledge of the facts underlying the statement; and fourth, and most important, supporting circumstances independent of the statement itself must be present and attest to its trustworthiness and reliability . . . .

46 N.Y.2d at 167, 385 N.E.2d at 619, 412 N.Y.S.2d at 822 (citations omitted); *see* People v. Brown, 26 N.Y.2d 88, 257 N.E.2d 16, 308 N.Y.S.2d 825 (1970); *cf.* People v. Maerling, 46 N.Y.2d 289, 385 N.E.2d 1245, 413 N.Y.S.2d 316 (1978) (admission against penal interest used to inculpate defendant). Finding that the first three requirements were satisfied, 46 N.Y.2d at 167-68, 385 N.E.2d at 619, 412 N.Y.S.2d at 882, the Court left to the trial judge the determination whether there was any independent evidence sufficient to establish the relia-

By designating the time of indictment or arraignment as the junctures after which an unrepresented defendant may no longer waive his right to counsel in the absence of an attorney, the *Settles* Court has removed some of the uncertainty clouding this essential right that followed its decision in *Coleman*. The imminence of appointment or retention of counsel at the statutorily mandated arraignment, which must follow an indictment,[279] apparently led the Court to minimize the importance of the interim period, since the arraignment of an indicted defendant is "ministerial" only.[280] It is submitted that the same rationale could be applied with equal force to proceedings commenced by the filing of a criminal information, where the "ministerial act of arraignment" also must follow by statutory mandate.[281] It would seem illogical to discount the significance of the interim period between indictment and arraignment, and not that existing between the filing of an information and arraignment. The judicial action in both cases appears to shift the proceedings from investigatory to accusatory in nature.[282]

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bility of the hearsay declaration. The Court, however, did admonish that "[o]nly when there is other evidence tending to show that the declarant or someone he implicates as his accomplice actually committed a crime, may a declaration against penal interest be said to display the degree of reliability sufficient to overcome the dangers of admitting hearsay evidence" in order to exculpate the defendant. *Id.* at 169, 385 N.E.2d at 620, 412 N.Y.S.2d at 883.

[279] CPL § 210.10 (Supp. 1978-1979) provides in pertinent part that "[a]fter an indictment has been filed with a superior court, the defendant must be arraigned thereon." Moreover, "[t]he defendant has a right to the aid of counsel at the arraignment and at every subsequent stage of the action." CPL § 210.15(2) (Supp. 1978-1979). Should the defendant not be represented by an attorney at the time of his arraignment, CPL § 210.15(2)(c) the defendant must be given the opportunity to obtain counsel or "[t]o have counsel assigned by the court in any case where he is financially unable to obtain the same." *Id.*

[280] 46 N.Y.2d at 166, 385 N.E.2d at 618, 412 N.Y.S.2d at 881.

[281] CPL § 170.10(1) (Supp. 1978-1979) provides in pertinent part that "[f]ollowing the filing with a local criminal court of an information, a simplified information, a prosecutor's information or a misdemeanor complaint, the defendant must be arraigned thereon." This language closely tracks that of CPL § 210.10 (Supp. 1978-1979), which mandates that an arraignment follow an indictment. *See* note 279 *supra*. Furthermore, CPL § 170.10(3), which is analogous to CPL § 210.15(2), *see* note 279 *supra*, also requires that the defendant be permitted to retain an attorney or be assigned counsel if the defendant is indigent. It must be noted, however, that in cases involving a simplified information, CPL § 170.10(1)(a) does not compel arraignment where the statutory procedure governing the simplified information dispenses with an arraignment on the offenses charged in the instrument. The *Settles* formula could be employed, therefore, only in proceedings commenced by an information, a prosecutor's information, a misdemeanor complaint, or a simplified information whose method of enforcement requires an arraignment.

[282] *See* note 278 and accompanying text *supra*. Under New York law, the "critical stage" of the proceeding which invokes a defendant's right to counsel "begins with the filing of an accusatory instrument." People v. Blake, 35 N.Y.2d 331, 339, 320 N.E.2d 625, 631, 361 N.Y.S.2d 881, 890 (1974); *see* note 258 *supra*. CPL § 1.20(1) (Supp. 1978-1979) defines an

The *Settles* Court employed a novel formula of equating the filing of an indictment with the entry of an attorney into the case to afford the indicted defendant, represented or unrepresented, the same protection given a defendant in a traditional *Donovan-Arthur* setting.[283] In so doing, the Court has taken another step in providing an unrepresented defendant the same right to be protected against "the coercive power of the State"[284] as is a represented defendant. While distinctions still exist between the ability of represented and unrepresented defendants to waive counsel without an attorney present, it is suggested that a defendant's right to counsel should not depend upon such "fortuitous criteria"[285] as the speed with

accusatory instrument as "an indictment, an information, a simplified information, a prosecutor's information, a superior court information, a misdemeanor complaint or a felony compliant." It has been noted that once an indictment or information has been filed, the nature of the proceeding turns from investigatory to accusatory. *See* People v. Bodie, 16 N.Y.2d 275, 280-82, 213 N.E.2d 441, 444-45, 266 N.Y.S.2d 104, 108-10 (1965) (Fuld, J., dissenting). Furthermore, since the Supreme Court in Kirby v. Illinois, 406 U.S. 682 (1972), held that a defendant's right to counsel attaches upon the commencement of adversary judicial proceedings initiated by procedures which include the filing of an information, it would appear that the right to counsel could be viewed as indelibly attaching at this point.

It is submitted, however, that in enlarging the scope of the rule to embrace the filing of a criminal information, the Court should carefully weigh the desirability of a rule by which a defendant can waive his right to counsel only in the presence of an attorney at all post-critical stages of a criminal proceeding, against the possible adverse effects upon the efficiency of police investigatory procedures that such expansion may cause. In People v. Blake, 35 N.Y.2d 331, 320 N.E.2d 625, 361 N.Y.S.2d 881 (1974), Chief Judge Breitel stated:

> [I]t would be fine protection to defendants in criminal cases if they had counsel at every stage of investigation and the ensuing judicial proceeding. Equally obvious is it that such an arrangement would be impractical . . . . There is trenchant need for a quick verification of identity, cause for arrest and detention, and the desirability of early or even immediate release of those falsely accused of crime.

Id. at 336, 320 N.E.2d at 629, 361 N.Y.S.2d at 888. In People v. Bodie, 16 N.Y.2d 275, 213 N.E.2d 441, 266 N.Y.S.2d 104 (1965), the Court determined that, although the right to counsel attached following the filing of a criminal information, the right could be waived effectively, if such waiver were made intelligently and voluntarily. *Id.* at 279, 213 N.E.2d at 444, 266 N.Y.S.2d at 107. It is suggested that, for pragmatic reasons, the court may be compelled to revitalize these criteria in the postinformation, prearraignment context, when called upon to squarely address this issue.

[283] The object of the *Donovan-Arthur* rule is to prevent a defendant from being unwittingly deprived of his right to counsel and, concomitantly, to effectuate a criminal defendant's privilege against compulsory self-incrimination. *See* People v. Hobson, 39 N.Y.2d 479, 485, 348 N.E.2d 894, 897, 384 N.Y.S.2d 419, 423 (1976); note 259 *supra.* Since the operation of the rule was restricted to situations involving represented defendants, the unrepresented defendant in identical stages of a proceeding did not enjoy the protection of the doctrine. The *Settles* Court viewed this anomaly, at least insofar as an indicted defendant is concerned, as "a distinction without a difference." 46 N.Y.2d at 164, 385 N.E.2d at 617, 412 N.Y.S.2d at 880. The Court stated that "[t]o ground an indicted defendant's right to counsel upon such fortuitous criteria is to debase the right into nothing more than a race for the wary." *Id.*

[284] 46 N.Y.2d at 164, 285 N.E.2d at 617, 412 N.Y.S.2d at 880.

[285] *Id.* In *Settles,* the Court observed that an indicted defendant's right to counsel should

which counsel may be obtained. In any event, the *Settles* case represents another affirmative effort by the Court to "breathe life into the requirement that a waiver of a constitutional right . . . be competent, intelligent and voluntary."[286]

Gregory J. O'Connell

UNIFORM COMMERCIAL CODE

N.Y.U.C.C. § 3-419: Contract cause of action exists against bank for collecting an instrument over forged indorsement

Prior to the passage of the Uniform Commercial Code (UCC), the payee of a negotiable instrument possessed valid causes of action in contract and tort against a bank that had collected the instrument over a forged indorsement.[287] By exercising control through collection in such a situation, the bank converted the instrument, and its liability for the conversion was limited by the 3-year tort statute of limitations.[288] The payee, however, could elect to ratify the bank's collection of the instrument, thereby waiving the conversion remedy, and proceed under an implied contract for money had and received,[289] with the resultant benefit of the longer

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not depend on whether the defendant was represented. *Id.*

[286] People v. Hobson, 39 N.Y.2d 479, 484, 348 N.E.2d 894, 898, 384 N.Y.S.2d 419, 422 (1976).

[287] Henderson v. Lincoln Rochester Trust Co., 303 N.Y. 27, 100 N.E.2d 117 (1951) (contract); Hillsley v. State Bank, 24 App. Div. 2d 28, 263 N.Y.S.2d 578 (1st Dep't 1965) (tort), *aff'd*, 18 N.Y.2d 952, 223 N.E.2d 571, 277 N.Y.S.2d 148 (1966); Spaulding v. First Nat'l Bank, 210 App. Div. 216, 205 N.Y.S. 492 (4th Dep't) (tort), *aff'd mem.*, 239 N.Y. 586, 147 N.E 206 (1924); E. Moch Co. v. Security Bank, 176 App. Div. 842, 163 N.Y.S. 277 (1st Dep't 1917) (tort or contract), *aff'd*, 225 N.Y. 723, 122 N.E. 879 (1919). *See generally* Note, *Depositary Bank Liability Under § 3-419(3) of the Uniform Commercial Code*, 31 WASH. & LEE L. REV. 676 (1974) [hereinafter cited as *Depositary Bank Liability*].

[288] E. Moch Co. v. Security Bank, 176 App. Div. 842, 163 N.Y.S. 277 (1st Dep't 1917), *aff'd*, 225 N.Y. 723, 122 N.E. 879 (1919); *see* CPLR 214(4) (1972 & Supp. 1978-1979). Since the payee's indorsement had been forged, no title passed; therefore, when the bank processed the instrument for collection, it committed a conversion by wrongfully exercising control over a chattel to which it had no valid title. *See* E. Moch Co. v. Security Bank, 176 App. Div. at 846, 163 N.Y.S. at 280. The statute of limitations in tort runs from the date of the conversion. General Stencils, Inc. v. Chiappa, 18 N.Y.2d 125, 127, 219 N.E.2d 169, 170, 272 N.Y.S.2d 337, 339 (1966).

[289] E. Moch Co. v. Security Bank, 176 App. Div. 842, 846, 163 N.Y.S. 277, 280 (1st Dep't 1917), *aff'd*, 225 N.Y. 723, 122 N.E. 879 (1919). Since the collecting bank in *Hechter* had no title to the instrument because of the forged indorsement, *see* note 288 *supra*, by endeavoring to collect on the instrument, it became

> an agent [of the payee] for the purpose of collecting from the drawee bank the proceeds of the check delivered to it. When it [took] the check for collection, it