St. John's Law Review

Volume 52, Spring 1978, Number 3 Article 9

# Right to Counsel Triggered by Court-Ordered Lineup Appearnace May Be Waived in Attorney's Absence

Richard F. Markert

in earlier territorial concepts of jurisdiction.[95] Such a provincial attitude, however, has little viability as a principle of modern law.[96] Recognition of an in personam foreign decree that adjudicates the rights of the parties in real property, wherever located, would not appear to jeopardize the interests of the forum state and would obviate the need for unnecessary relitigation. It is hoped that the questionable policy of making judicial relief hinge solely on the language of the complaint or the terms of the foreign court's decree will be abandoned in future cases.

*Frederick J. Dorchak*

## CRIMINAL PROCEDURE LAW

### *Right to counsel triggered by court-ordered lineup appearance may be waived in attorney's absence*

New York courts uniformly recognize that the filing of an accusatory instrument marks the commencement of formal adversary proceedings[97] and thus the time at which a criminal defendant's general right to counsel attaches.[98] Following the Court of Appeals'

---

husband executed a deed under threat of contempt, the conveyance would have passed title to the wife, and New York would have been required to recognize that conveyance. *See* Fall v. Eastin, 215 U.S. 1, 10-12 (1909); Deschenes v. Tallman, 248 N.Y. 33, 37-38, 161 N.E. 321, 322 (1928) (Cardozo, C.J.); GOODRICH, *supra* note 67, at 410, 412; notes 72 & 88 *supra*. Thus, it seems the real objection is not that a foreign court may cause some ramifications within the boundaries of a sister state by its judgment. Rather, the opposition appears to be founded on due process grounds. Just as "[a]n attempt to render a personal judgment where there is no jurisdiction [over the person] is a violation of due process . . . [rendering the judgment] void in the state where rendered and not entitled to recognition elsewhere," GOODRICH, *supra* note 67, at 396 (citing Hanson v. Denckla, 357 U.S. 235 (1958)) (footnote omitted), so, too, an exercise of power over land not within the rendering state is seen as "a 'forbidden infringement' of the interests of the situs state." Reese, *supra* note 67, at 200.

[95] Courts resent infringements on their jurisdiction and, as a result, are quite often solicitous of other states' sovereignty as well. *See, e.g.*, Davis v. Tremain, 205 N.Y. 236, 98 N.E. 383 (1912); Ames v. Coirre, N.Y.L.J., Oct. 25, 1977, at 13, col. 5 (Sup. Ct. Queens County); Chesny v. Chesny, 197 Misc. 768, 94 N.Y.S.2d 674 (Sup. Ct. Nassau County), *modified on other grounds mem.*, 277 App. Div. 879, 98 N.Y.S.2d 151 (2d Dep't 1950); 1 WK&M ¶ 301.02, at 3-10. In addition to maintaining respect for a sister state's sovereignty, the local forum may be better able to settle disputes pertaining to realty. 7A WK&M ¶ 6301.26.

[96] *Cf.* STUMBERG, *supra* note 67, at 125 (there has been a "decided tendency in the direction of giving full faith and credit to foreign decrees granted in connection with divorce" in recent years).

[97] *E.g.*, People v. Sugden, 35 N.Y.2d 453, 461, 323 N.E.2d 169, 173-74, 363 N.Y.S.2d 923, 929-30 (1974); People v. Blake, 35 N.Y.2d 331, 339, 320 N.E.2d 625, 631, 361 N.Y.S.2d 881, 890 (1974); People v. Poywing, 90 Misc. 2d 197, 200, 393 N.Y.S.2d 888, 890 (Sup. Ct. N.Y. County 1977).

[98] *See* People v. Blake, 35 N.Y.2d 331, 339-40, 320 N.E.2d 625, 631-32, 361 N.Y.S.2d 881, 890-91 (1974). Initially, the Court of Appeals determined that the right to counsel attached

decision in *People v. Hobson*,[99] it was thought that once this right has attached, a waiver at subsequent critical stages of a prosecution[100] could only be effectuated in the presence of an attorney.[101]

---

after indictment by a grand jury. People v. DiBiasi, 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960). In *DiBiasi*, the Court held that postindictment statements elicited during a police interrogation in the absence of defendant's attorney were inadmissible at trial. *Id.* at 549-51, 166 N.E.2d at 828-29, 200 N.Y.S.2d at 24-25. In People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961), the postindictment right to counsel was held to attach whether or not the defendant had already secured an attorney. One year after the *Waterman* decision, the Court of Appeals held that for purposes of the right to counsel no distinction could be made between postarraignment and postindictment statements, People v. Meyer, 11 N.Y.2d 162, 164, 182 N.E.2d 103, 104, 227 N.Y.S.2d 427, 428 (1962), and in People v. Bodie, 16 N.Y.2d 275, 278-79, 213 N.E.2d 441, 443, 266 N.Y.S.2d 104, 107 (1965), the Court concluded that postinformation statements were inadmissible if made in the absence of counsel.

The right to counsel was first extended to the preindictment stage in People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963). The *Donovan* Court noted previous decisions in which postarraignment and postindictment statements were suppressed due to counsel's absence at the time they were obtained, and extended the rule to "condemn . . . 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 152-53, 193 N.E.2d at 630, 243 N.Y.S.2d at 844. Subsequently, the Court applied this principle where the police knew of defendant's representation but questioned him during a period when his attorney's presence was physically impossible. People v. Gunner, 15 N.Y.2d 226, 205 N.E.2d 852, 257 N.Y.S.2d 924 (1965). In People v. Friedlander, 16 N.Y.2d 248, 212 N.E.2d 533, 265 N.Y.S.2d 97 (1965), it was held that statements made after defendant was known to be represented by counsel were inadmissible although no specific request to have counsel present at the questioning had been made. *Id.* at 250-51, 212 N.E.2d at 534, 265 N.Y.S.2d at 98. Finally in People v. Arthur, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968), defendant was unaware that an attorney with whom he had dealt in the past had requested to see him during interrogation. In suppressing defendant's statements made after the attorney's request, the Court noted that the right to counsel attaches once the police know or have reason to know that a defendant is represented by counsel, and that "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. Thus, the *Donovan-Arthur* rule renders inadmissible any statements elicited in the absence of counsel, from a represented defendant who is in custody, unless counsel is waived in an attorney's presence. *Id.* at 329, 239 N.E.2d at 539, 292 N.Y.S.2d at 666. Although characterized at one time as "merely a theoretical statement," People v. Robles, 27 N.Y.2d 155, 158, 263 N.E.2d 304, 305, 314 N.Y.S.2d 793, 795 (1970), *cert. denied*, 401 U.S. 945 (1971), this rule recently has been revitalized. *See* People v. Hobson, 39 N.Y.2d 479, 481-82, 348 N.E.2d 894, 895, 384 N.Y.S.2d 419, 420 (1976). While the *Donovan-Arthur* rule generally applies whenever a defendant has retained or been appointed counsel, there are three recognized exceptions. *See* People v. Taylor, 27 N.Y.2d 327, 332, 266 N.E.2d 630, 633, 318 N.Y.S.2d 1, 5 (1971) (counsel must be secured for specific charges under investigation); People v. McKie, 25 N.Y.2d 19, 250 N.E.2d 36, 302 N.Y.S.2d 534 (1969) (statements made by represented defendant while not in custody held admissible); People v. Kaye, 25 N.Y.2d 139, 250 N.E.2d 329, 303 N.Y.S.2d 41 (1969) (spontaneous statements admissible); *cf.* People v. Vella, 21 N.Y.2d 249, 234 N.E.2d 422, 287 N.Y.S.2d 369 (1967) (confession made after waiver of right to counsel suppressed on grounds that investigation was related to that for which represented defendant was previously arraigned).

[99] 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976).

[100] In Kirby v. Illinois, 406 U.S. 682 (1972), the Supreme Court determined that the commencement of adversary judicial proceedings against a defendant signals the beginning

Recently, the Court in *People v. Coleman,*[102] apparently expanding the definition of "formal proceedings,"[103] determined that a court order of removal directing the appearance of a defendant at a prearraignment lineup is "sufficiently 'judicial' in nature" to invoke a right to counsel.[104] The *Coleman* Court went on to hold, however, that where counsel had not been retained or appointed, this right could be waived at a lineup, despite the absence of an attorney.[105]

In *Coleman,* two witnesses to a robbery in Queens County identified defendant from police photographs as the perpetrator. Several days later, Coleman was placed in two lineups and positively identified by both witnesses.[106] Since he had been incarcerated pending trial on an unrelated charge at the time the lineups were conducted, defendant's presence at the viewings was secured pursuant to an ex parte order of removal issued by the New York City Criminal Court.[107] Coleman was represented by counsel on the unrelated charge, but, it was claimed, had waived his right to have an attorney present at the lineups.[108] On the basis of the photograph and lineup identifications, Coleman was indicted.[109] He was thereafter convicted of two counts of robbery in the first degree. A divided appellate division affirmed, and defendant appealed.[110]

---

of the critical stage of a prosecution. *Id.* at 688-89. *See* Coleman v. Alabama, 399 U.S. 1, 7-9 (1970).

[101] *See* notes 119-120 and accompanying text *infra.*

[102] 43 N.Y.2d 222, 371 N.E.2d 819, 401 N.Y.S.2d 57 (1977), *rev'g* 51 App. Div. 2d 1058, 381 N.Y.S.2d 692 (2d Dep't 1976).

[103] *See* notes 112 & 116 *infra.*

[104] 43 N.Y.2d at 225-26, 371 N.E.2d at 822, 401 N.Y.S.2d at 59-60.

[105] *Id.* at 227, 371 N.E.2d at 822, 401 N.Y.S.2d at 60.

[106] *Id.* at 224, 371 N.E.2d at 820, 401 N.Y.S.2d at 58.

[107] *Id.*

[108] *Id.* at 226-27, 371 N.E.2d at 822, 401 N.Y.S.2d at 59-60. Defendant Coleman nodded affirmatively when he was informed of his right to counsel and "nodded negatively" when asked if he wished to have an attorney present. *Id.* at 227, 371 N.E.2d at 822, 401 N.Y.S.2d at 60. Despite these indications of waiver, however, Coleman refused to sign a statement acknowledging that he had been offered access to counsel. *Id.* It should be noted that the decision of the Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966), applies only to protect the fifth amendment privilege against self-incrimination and has no application to lineups. Kirby v. Illinois, 406 U.S. 682, 687-88 (1972). *See also* United States v. Wade, 388 U.S. 218 (1967); Schmerber v. California, 384 U.S. 757 (1966). The right to counsel at lineups is actually derived from the due process requirements embodied in the sixth and fourteenth amendments. *See* People v. Blake, 35 N.Y.2d 331, 335, 320 N.E.2d 625, 629, 361 N.Y.S.2d 881, 887 (1974).

[109] 43 N.Y.2d at 224, 371 N.E.2d at 820, 401 N.Y.S.2d at 58. Following the indictment a hearing was held to determine the admissibility of both identifications. The photographic identifications were suppressed as suggestive, while the lineup identifications were held to be admissible. *Id.* at 224, 371 N.E.2d at 820, 401 N.Y.S.2d at 59.

[110] *Id.*

The *Coleman* Court, in an opinion written by Judge Jasen, observed that "the filing of an instrument other than one forming the basis of an arraignment or issuance of an arrest warrant, may . . . constitute a 'formal' proceeding triggering" the right to counsel.[111] Characterizing the order of removal as one such instrument, the Court concluded that a right to counsel attached at the lineups conducted after its issuance.[112]

In approaching the question whether this right could be waived in the absence of counsel, the Court declined to hold that its previous decision in *Hobson* required the suppression of the corporeal viewing identifications.[113] Distinguishing *Hobson* from the instant action, the Court noted that, in the former, defendant had been represented by an attorney at the time of the purported waiver.[114] Judge Jasen concluded that since Coleman was not represented on the charge under investigation, there was no basis for invoking the rule reestablished in *Hobson* that " '[o]nce a lawyer has entered a criminal proceeding . . . the defendant in custody may not waive his right to counsel in the absence of the lawyer.' "[115]

It is significant that the *Coleman* Court determined that an effective waiver of the right to counsel could be made in the absence of an attorney after the right had attached by virtue of the judicial order of removal. Assuming the Court intended to equate a court-

---

[111] *Id.* at 225, 371 N.E.2d at 821, 401 N.Y.S.2d at 59; *see* note 112 *infra.*

[112] 43 N.Y.2d at 225, 371 N.E.2d at 821, 401 N.Y.S.2d at 59. The Court relied on People v. Sugden, 35 N.Y.2d 453, 323 N.E.2d 169, 363 N.Y.S.2d 923 (1974). In *Sugden,* the Court recognized that "the issuance of a court order of removal is not the type of formal proceeding requiring the presence of counsel," but determined that the right to counsel "exists at 'critical stages' held after that order is issued." *Id.* at 461, 323 N.E.2d at 174, 363 N.Y.S.2d at 929 (citations omitted). That Court, however, never resolved the question whether a defendant whose presence is secured by a court order of removal could effectively waive the right to counsel in the absence of an attorney.

[113] 43 N.Y.2d at 226, 371 N.E.2d at 821, 401 N.Y.S.2d at 60. In *Hobson,* the court-appointed attorney departed at the conclusion of the lineup. Defendant was then interrogated without his attorney present. The statements elicited during the attorney's absence were held to be inadmissible. 39 N.Y.2d at 481, 348 N.E.2d at 896, 384 N.Y.S.2d at 420.

[114] 43 N.Y.2d at 226, 371 N.E.2d at 821, 401 N.Y.S.2d at 60.

[115] *Id.* at 226, 371 N.E.2d at 821, 401 N.Y.S.2d at 60 (quoting 39 N.Y.2d 479, 481, 348 N.E.2d 894, 895, 384 N.Y.S.2d 419, 420 (1976)) (citation omitted). The Court's use of the reaffirmed *Donovan-Arthur* rule in determining the permissibility of waiver seems anomalous if the lineups were in fact a critical stage. Postcritical stage waivers are controlled by a different standard, and although *Hobson* addressed this area as well, the *Coleman* Court ignored that portion of the *Hobson* opinion which seems applicable. *See* note 119 *infra.* Despite its apparently improper use of a precritical stage rule in a postcritical stage situation, however, the Court found that, as a matter of law, the prosecution had failed to carry the burden of showing a voluntary and intelligent waiver of the right to counsel. 43 N.Y.2d at 227, 371 N.E.2d at 822, 401 N.Y.S.2d at 60-61 (citing People v. Paulin, 25 N.Y.2d 445, 450, 255 N.E.2d 164, 166, 306 N.Y.S.2d 929, 933 (1969)).

ordered removal with other procedures which begin the critical stage of a prosecution,[116] the situation in *Coleman* is clearly analogous to the postcritical stage situation presented to the Court of Appeals in *People v. Lopez.*[117] In *Lopez,* the Court held that an unrepresented defendant against whom formal proceedings had commenced could waive his right to counsel at interrogation without the presence of an attorney.[118] A careful reading of *Hobson,* however, supports the conclusion that *Lopez* was overruled.[119] Consequently, the striking implication of *Hobson* is that a postcritical stage right to counsel cannot be effectively waived in the absence of an attorney, whether the defendant is represented or unrepresented.[120]

---

[116] *See* note 112 and accompanying text *supra.* In his dissent in People v. Lopez, 28 N.Y.2d 23, 26, 268 N.E.2d 628, 629, 319 N.Y.S.2d 825, 827, *cert. denied,* 404 U.S. 840 (1971), Judge Breitel observed that "[a]fter criminal action is begun, it is no longer a general inquiry . . . but rather a form of pretrial discovery . . . . In short, the defendant is the all but irrevocable target and the preparation for his trial has begun." *Id.* at 28-29, 268 N.E.2d at 631, 319 N.Y.S.2d at 829 (Breitel, J., dissenting). It is difficult to equate Judge Breitel's remarks with the situation that faced defendant Coleman. Moreover, since the *Coleman* Court indicated that the lineups were merely part of a "normal, good faith investigation," 43 N.Y.2d at 226, 371 N.E.2d at 822, 401 N.Y.S.2d at 60, Coleman's appearance at the viewings can hardly be characterized as a stage at which the "government [had] committed itself to prosecute." Kirby v. Illinois, 406 U.S. 682, 689 (1972).

[117] 28 N.Y.2d 23, 268 N.E.2d 628, 319 N.Y.S.2d 825, *cert. denied,* 404 U.S. 840 (1971).

[118] The *Lopez* Court followed People v. Bodie, 16 N.Y.2d 275, 213 N.E.2d 441, 266 N.Y.S.2d 104 (1965), wherein it was held that an unrepresented defendant could waive his right to counsel without counsel's presence during an interrogation held subsequent to the filing of an information and issuance of an arrest warrant. 28 N.Y.2d at 25, 268 N.E.2d at 629, 319 N.Y.S.2d at 826. Although *Lopez* involved an indicted defendant, the *Lopez* Court found no reason to apply a different rule than that applied in *Bodie. Id.* at 25, 268 N.E.2d at 629, 319 N.Y.S.2d at 826-27; *see* 16 N.Y.2d at 279-80, 213 N.E.2d at 443, 266 N.Y.S.2d at 107-08.

[119] *See* People v. Hobson, 39 N.Y.2d 479, 492-93, 348 N.E.2d 894, 904, 384 N.Y.S.2d 419, 427 (1976) (Gabrielli, J., concurring); People v. Reyes, N.Y.L.J., Nov. 18, 1976, at 11, cols. 5-6 (Sup. Ct. N.Y. County), *aff'd mem.,* 57 App. Div. 2d 738, 393 N.Y.S.2d 630 (1st Dep't 1977); 5 FORDHAM URB. L. J. 401, 409 (1977); *The Survey,* 51 ST. JOHN'S L. REV. 201, 216-22 (1976). *See also* People v. Cole, 41 N.Y.2d 944, 363 N.E.2d 364, 394 N.Y.S.2d 640 (1977) (mem.).

[120] *See* 39 N.Y.2d at 491-92, 348 N.E.2d at 903-04, 348 N.Y.S.2d at 427-28 (Gabrielli, J., concurring); People v. Reyes, N.Y.L.J., Nov. 18, 1976, at 11, cols. 5-6 (Sup. Ct. N.Y. County), *aff'd mem.,* 57 App. Div. 2d 738, 393 N.Y.S.2d 630 (1st Dep't 1977). Although *Lopez* involved statements made by an unrepresented defendant who had waived his right to counsel without knowledge that he had been indicted, a careful comparison of Judge Breitel's dissent in that case with his opinion in *Hobson* reveals that defendant's unawareness of the indictment was not the basis upon which *Lopez* was overruled. The essence of the *Lopez* dissent was that by "permitting a theory of waiver of counsel by an uncounselled defendant held incommunicado to be imported into this stage of the proceedings . . . the right to counsel [is] debased or negated . . . ." 28 N.Y.2d at 29, 268 N.E.2d at 632, 319 N.Y.S.2d at 830.

One court has held that the *Hobson* decision, as it pertains to unrepresented defendants, only applies to postindictment situations. People v. Babcock, 91 Misc. 2d 921, 399 N.Y.S.2d 103 (Albany County Ct. 1977). In light of the Court of Appeals' determination that formal

Thus, it is difficult to discern the *Coleman* Court's purpose in distinguishing *Hobson* if, as the opinion suggests, the lineups were critical stages.[121] It is suggested, therefore, that Judge Jasen's opinion leaves *Coleman* open to several interpretations. For example, by allowing Coleman to waive his right to counsel, the Court may have intended to limit the *Hobson* decision to those situations in which a defendant is already represented. In that event, the *Lopez* holding would seemingly be reinstated.[122] Conversely, it may be argued that by permitting the waiver, the Court was implying that a court-ordered removal is not the equivalent of other procedures which usher in the critical stage of a prosecution.[123] Read in this way, *Coleman* does not affect previous interpretations of *Hobson*, but does indicate an unwillingness on the part of the Court to leave a defendant in Coleman's position wholly unprotected from the abuses that may occur during a lineup.[124] Thirdly, although New

---

proceedings begin 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), there seems to be little justification for so restricting application of the *Hobson* decision.

[121] *See* note 112 *supra*. *But see* note 116 *supra*.

[122] The reinstatement of *Lopez* would end the differentiation between precritical and postcritical stage waivers of the right to counsel by unrepresented defendants, with the result that an accused without counsel could waive that right at any time in the proceedings against him without the presence of an attorney.

[123] *See* note 112 *supra*.

[124] The right of a criminal defendant to have counsel present at police lineup procedures was established by the Supreme Court in United States v. Wade, 388 U.S. 218 (1967). The *Wade* Court emphasized that eyewitness identifications were recognized as being particularly untrustworthy. *Id.* at 228-29; *see* Levine & Trapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 U. PA. L. REV. 1079, 1095-1103 (1973); O'Connor, *"That's the Man": A Sobering Study of Eyewitness Identification and the Polygraph*, 49 ST. JOHN'S L. REV. 1, 1-14 (1974). Additionally, the Court reasoned that since suggestive conditions during a lineup procedure could go unnoticed by either the defendant or the witness, 388 U.S. at 230-31, a subsequent "conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial . . . ." *Id.* at 235. The *Wade* Court thus concluded that a lineup is a critical stage of the prosecution and must be conducted in the presence of the defendant's attorney. *Id.* at 240.

In Kirby v. Illinois, 406 U.S. 682 (1972), the Supreme Court imposed a severe limitation on the *Wade* decision by holding that the right to counsel does not extend to a prearraignment lineup, but rather attaches only after the commencement of formal criminal proceedings. *Id.* at 689. The decision has been criticized on the ground that the *Wade* reasoning should apply to any lineup, whether conducted before or after the critical stage has begun. *See, e.g.*, Kirby v. Illinois, 406 U.S. 682, 691-705 (Brennan, J., dissenting); Note, *Right to Counsel at Lineups — A Pro Forma Right?*, 7 SUFFOLK U.L. REV. 587, 606-08 (1973).

Consistent with the decision in *Kirby*, the New York Court of Appeals has determined that the value of counsel's presence at a lineup conducted prior to the commencement of formal proceedings is outweighed by the need for quick identity verifications, since delay may detract from a witness' memory. People v. Blake, 35 N.Y.2d 331, 336-37, 320 N.E.2d 625, 629-30, 361 N.Y.S.2d 881, 888 (1974). Accordingly, no right to counsel attaches at corporeal

York courts have not clearly differentiated between identification and interrogation situations,[125] the *Coleman* decision may signal a step towards developing an independent right to counsel applicable only to corporeal viewing procedures.[126]

By recognizing that defendant Coleman was not the target of a criminal prosecution[127] but nevertheless was in some jeopardy as a result of his involuntary appearance at the lineups, the Court's decision to recognize a right to counsel is consistent with the view that an accused is entitled to representation at any procedure where the absence of an attorney may prejudice his rights as a defendant.[128] Although it is unfortunate that the decision may be interpreted in the future as limiting the reach of *Hobson,* the *Coleman* decision does represent an affirmative effort by the Court of Appeals to delineate further the rights of the criminal defendant and may serve to motivate a more circumspect judicial approach to identification procedures.[129]

*Richard F. Markert*

---

viewing procedures involving an unrepresented defendant which are conducted before formal proceedings have begun. *E.g.,* People v. Gladman, 41 N.Y.2d 123, 130, 359 N.E.2d 420, 425, 390 N.Y.S.2d 912, 917 (1976); People v. Morales, 37 N.Y.2d 262, 272, 333 N.E.2d 339, 346, 372 N.Y.S.2d 25, 34 (1975). New York courts have acknowledged, however, the application of the *Donovan-Arthur* rule to prearraignment corporeal viewing procedures. *See, e.g.,* People v. Blake, 35 N.Y.2d 331, 338-40, 320 N.E.2d 625, 629-31, 361 N.Y.S.2d 881, 889-91 (1974); People v. Burwell, 26 N.Y.2d 331, 258 N.E.2d 714, 310 N.Y.S.2d 308 (1970) (per curiam); People v. Poywing, 90 Misc. 2d 197, 201, 393 N.Y.S.2d 888, 890 (Sup. Ct. N.Y. County 1977). *But see* People v. Perez, 42 N.Y.2d 971, 367 N.E.2d 867, 398 N.Y.S.2d 269 (1977) (mem.), wherein denial of defendant's request that an attorney be present at a prearraignment lineup was found to be proper. *Cf.* People v. Gursey, 22 N.Y.2d 224, 239 N.E.2d 351, 292 N.Y.S.2d 416 (1968) (represented defendant had right of access to his attorney during blood test).

[125] Although the Court of Appeals has acknowledged that "the need for and right to a lawyer at an identification lineup is insignificant compared to the need in an ensuing interrogation," People v. Hobson, 39 N.Y.2d 479, 485, 348 N.E.2d 894, 899, 384 N.Y.S.2d 419, 423 (1976), no express distinction has been drawn between the rights of a defendant at the two procedures. Moreover, at least one court has determined that a waiver of the right to counsel at a lineup is analogous to a waiver at interrogation. People v. Poywing, 90 Misc. 2d 197, 201, 393 N.Y.S.2d 888, 891 (Sup. Ct. N.Y. County 1977). A careful reading of the *Blake* decision lends support to the conclusion that interrogations and lineups are treated alike where waiver of counsel is at issue. *See* 35 N.Y.2d at 338-40, 320 N.E.2d at 629-31, 361 N.Y.S.2d at 889-91.

[126] Effective safeguards are particularly important during identification procedures. In United States v. Wade, 388 U.S. 218 (1967), the Supreme Court observed that a pretrial identification may be more critical in determining a defendant's fate than the actual trial: "[W]ith the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, . . . [he has] . . . little or no effective appeal from the judgment there rendered by the witness—'that's the man.'" *Id.* at 235-36.

[127] *See* note 116 *supra.*

[128] *See* Coleman v. Alabama, 399 U.S. 1, 7 (1970); United States v. Wade, 388 U.S. 218, 226 (1967); note 126 *supra.*

[129] Although *Coleman* may be intended to apply only to a rather narrow set of circum-

*Unrelated charge exception to* Donovan-Arthur *right to counsel held inapplicable where same policemen interrogate defendant on both charges*

Under the *Donovan-Arthur* rule,[130] once the police are aware that a defendant is represented by counsel, they may not interrogate him out of the presence of his attorney. Generally, this protection is not available when the defendant is questioned in connection with a charge that is unrelated to the charge for which he has obtained representation.[131] The courts have recognized an exception to the

---

stances, the decision raises a number of questions. Can an unrepresented defendant faced with a lineup effectively waive his right to counsel in the absence of an attorney after the filing of an accusatory instrument? Would the Court's determination as to the permissibility of waiver have been the same if the defendant had been involved in an interrogation rather than a lineup? Is the Court liberalizing the standard for determining when formal adversary proceedings commence, or has it begun to develop a broader right to counsel at lineups than that enunciated in Kirby v. Illinois, 406 U.S. 682 (1972)?

[130] In People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963), the Court of Appeals held that statements made by a defendant in custody are inadmissible if made after his request for counsel has been denied or after his attorney has been denied access to him. This rule was extended in People v. Arthur, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968), wherein the Court held that once the police learn that a defendant is represented by counsel or an attorney has informed the police that he intends to represent the defendant, a right to counsel attaches and the police may not question him without the attorney present. Furthermore, the *Arthur* Court expanded the right to counsel by holding that after the right attaches it cannot effectively be waived in the absence of defendant's attorney. *Id.* at 329, 239 N.E.2d at 539, 292 N.Y.S.2d at 666. In 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), and 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 of Appeals appeared inclined to weaken the *Donovan-Arthur* rule. Its vitality was reaffirmed, however, in People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976), wherein the Court expressly overruled *Robles* and *Lopez. See The Survey,* 51 ST. JOHN'S L. REV. 201, 218 (1976). *See generally* People v. Clark, 41 N.Y.2d 612, 363 N.E.2d 319, 394 N.Y.S.2d 593 (1977); People v. Ramos, 40 N.Y.2d 610, 357 N.E.2d 955, 389 N.Y.S.2d 299 (1976).

The *Donovan-Arthur* rule does not require the suppression of statements made while the defendant is not in custody. People v. McKie, 25 N.Y.2d 19, 250 N.E.2d 36, 302 N.Y.S.2d 534 (1969). In addition, the spontaneous statements of a detained defendant are admissible even when made in the absence of counsel. People v. Kaye, 25 N.Y.2d 139, 250 N.E.2d 329, 303 N.Y.S.2d 41 (1969).

[131] *See, e.g.,* People v. Taylor, 27 N.Y.2d 327, 266 N.E.2d 630, 318 N.Y.S.2d 1 (1971); People v. Hetherington, 27 N.Y.2d 242, 265 N.E.2d 530, 317 N.Y.S.2d 1 (1970); People v. Stanley, 15 N.Y.2d 30, 203 N.E.2d 475, 255 N.Y.S.2d 74 (1964), *cert. dismissed,* 382 U.S. 802 (1965); *cf.* People v. Coleman, 43 N.Y.2d 222, 371 N.E.2d 819, 401 N.Y.S.2d 57 (1977) (represented suspect not protected by *Donovan-Arthur* rule at lineup for unrelated charge); People v. Simons, 22 N.Y.2d 533, 240 N.E.2d 22, 293 N.Y.S.2d 521 (1968), *cert. denied,* 393 U.S. 1107 (1969) (defendant held for parole violation may be questioned outside attorney's presence in connection with criminal charge). The unrelated charge rule was recently reiterated in People v. Clark, 41 N.Y.2d 612, 363 N.E.2d 319, 394 N.Y.S.2d 593 (1977), wherein the Court of Appeals stated that "[r]epresentation by counsel in a proceeding unrelated to the investigation is insufficient to invoke the [*Donovan-Arthur*] protections." *Id.* at 615, 363 N.E.2d at 321, 394 N.Y.S.2d at 596 (citations omitted).