Retention of Counsel in Connection with Grand Jury Inquiry Does Not Preclude Subsequent Investigation, in the Absence of Counsel, Which Uncovers New Crimes

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prosecutorial abuse of the power to subpoena. As a result, witnesses will be forced to rely upon the prosecutor's good faith judgment as to relevancy and comply with the subpoena duces tecum, or be subject to criminal contempt proceedings. It is submitted that this stricture provides an additional reason for placing the burden to establish the relevancy of requested items upon the prosecutor.

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The fulcrum of the New York courts' enforcement of a crimi-
nal defendant’s right to counsel is the notion that the right, once deemed to have “attached,” cannot be waived outside the presence of counsel. This concept of “indelible attachment” has been developed to prohibit custodial police interrogation, outside the presence of counsel, of a suspect who is represented on a pending charge, as to that charge or other, unrelated charges. A further


223 See People v. Arthur, 22 N.Y.2d 325, 329, 239 N.E.2d 537, 539, 292 N.Y.S.2d 663, 666 (1968); People v. Donovan, 13 N.Y.2d 148, 153, 193 N.E.2d 628, 630, 243 N.Y.S.2d 841, 844 (1963). Once an attorney enters a proceeding on behalf of a defendant, the right to counsel attaches and may not be waived outside the attorney’s presence. See People v. Settles, 46 N.Y.2d 154, 165, 385 N.E.2d 612, 618, 412 N.Y.S.2d 874, 881 (1978). The nonwaiver rule is based on the notion that a criminal defendant faced with the “awesome prosecutorial machinery of the State” must have the advice of counsel before he forfeits the essential right to the assistance of counsel. People v. Grimaldi, 52 N.Y.2d 611, 616, 422 N.E.2d 493, 495, 439 N.Y.S.2d 833, 835 (1981). Indeed, the guidance of counsel may be more important in the waiver decision than at the trial itself. Id.

The nonwaiver rule articulated in Donovan and Arthur was at one point held to be “merely a theoretical statement” and “not the New York law.” People v. Robles, 27 N.Y.2d 155, 158, 263 N.E.2d 304, 305, 314 N.Y.S.2d 793, 795, cert. denied, 401 U.S. 945 (1970). Since Robles and Arthur were factually almost identical, future application of the right to counsel in New York was left uncertain. See W. Richardson, supra note 197, § 545, at 545-46. This confusion persisted until the Court, in People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976), reaffirmed the basis of the Donovan-Arthur rule. Id. at 483, 384 N.E.2d at 897, 384 N.Y.S.2d at 421.

224 The Court first articulated the concept of “indelible attachment,” or nonwaivability, of the right to counsel as triggered by commencement of a formal criminal proceeding or “at an earlier stage if there has been sufficient judicial activity.” People v. Samuels, 49 N.Y.2d 218, 221, 400 N.E.2d 1344, 1345-46, 424 N.Y.S.2d 892, 894 (1980); see People v. Settles, 46
extension of the right to counsel precludes noncustodial interrogation about matters with respect to which a suspect has not been charged but has retained counsel.\textsuperscript{235} Recently, in \textit{People v. Ferrara},\textsuperscript{236} the Court of Appeals held that the right to counsel cannot be invoked to shield a suspect who has retained counsel from police investigation into new crimes that are still in the planning stages.\textsuperscript{237}

In \textit{Ferrara}, the defendant, a laundry and linen supplier, was subpoenaed to appear before a grand jury investigating kickbacks to nursing home operators.\textsuperscript{238} At his second grand jury appearance, the defendant testified that he neither knew of nor participated in any kickback schemes.\textsuperscript{239} The prosecutor shortly thereafter came

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\item[236] During the period that the Donovan-Arthur rule was in doubt, see note 233 supra, additional confusion arose on the application of the right to counsel to custodial questioning on matters unrelated to those for which the defendant was represented. See People v. Rogers, 48 N.Y.2d 167, 171, 397 N.E.2d 709, 712-13, 422 N.Y.S.2d 18, 20 (1979). This problem was resolved when the Court held that information obtained by such questioning, when police know of the representation, could not be used against the defendant. \textit{Id.} at 173, 397 N.E.2d at 713, 422 N.Y.S.2d at 22. The \textit{Rogers} Court emphasized the role of the attorney, rather than the state, as the ultimate arbiter of permissible questioning. \textit{Id.}
\item[237] People v. Skinner, 52 N.Y.2d 24, 31-32, 417 N.E.2d 501, 505, 436 N.Y.S.2d 207, 211 (1980). In \textit{Skinner}, the defendant, in response to repeated police contacts concerning a recent murder, retained counsel who instructed the police not to question the defendant in his absence. \textit{Id.} at 27, 417 N.E.2d at 502, 436 N.Y.S.2d at 208. Subsequently, detectives who were assigned to serve the defendant with an order to show cause encouraged him to make damaging admissions which were admitted at trial. \textit{Id.} at 28, 417 N.E.2d at 502-03, 436 N.Y.S.2d at 208-09. The Court of Appeals reversed the conviction, noting that the defendant's waiver of his right to counsel in the absence of his attorney was ineffective, notwithstanding the fact that he was not in custody and no formal action had been commenced against him. \textit{Id.} at 31-32, 417 N.E.2d at 505, 436 N.Y.S.2d at 211.

The \textit{Skinner} Court observed that whether the defendant was in custody at the time of questioning was not controlling. \textit{Id.} at 30, 417 N.E.2d at 504, 436 N.Y.S.2d at 210. The pivotal fact, noted the majority, was that by retaining counsel, the defendant had "unequivocally indicated" that he was incompetent to deal with the authorities on his own. \textit{Id.} at 32, 417 N.E.2d at 505, 436 N.Y.S.2d at 211. The Court concluded that any waiver of the right to counsel is ineffective where the accused is known by police to have retained counsel on the matter about which he is questioned. \textit{Id.}
\item[239] \textit{Id.} at 503, 430 N.E.2d at 1276, 446 N.Y.S.2d at 226.
\item[237] \textit{Id.} at 502-03, 430 N.E.2d at 1276, 446 N.Y.S.2d at 223. The defendant testified before three grand juries, and was granted immunity for each appearance. \textit{Id.} at 502-03, 505, 430 N.E.2d at 1276-77, 446 N.Y.S.2d at 223-24. He appeared without counsel before the first grand jury only. \textit{Id.} at 503, 430 N.E.2d at 1276, 446 N.Y.S.2d at 223.
\item[239] \textit{Id.} When the defendant was subpoenaed before the second grand jury, he was in-
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into possession of evidence sufficient to indict Ferrara for perjury during the second grand jury appearance. Contemporaneous with this development was an offer by Alex Sreter, a nursing home operator, to cooperate in the investigation. Sreter subsequently attended a meeting set up by Ferrara’s partner, and recorded both Ferrara’s offers of kickbacks and his references to similar arrangements made by him in the past. The defendant was subpoenaed before a third grand jury and, unaware of the recorded conversations, denied involvement in kickback schemes with Sreter or others. Based on this testimony, he was indicted for perjury. A motion to suppress the tapes, based on violation of the right to counsel, was denied, and defendant’s subsequent conviction was affirmed by the Appellate Division, Second Department.

A unanimous Court of Appeals affirmed. Writing for the Court, Chief Judge Cooke summarily dismissed the alleged violation of right to counsel since, ab initio, no right to counsel had attached. A defendant who has been neither indicted nor subpoenaed that there was reason to believe that he had perjured himself during his first appearance.

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240 Id. Although the defendant categorically had denied, in his two grand jury appearances, any knowledge of or involvement in wrongdoing, the prosecutor nevertheless elected not to indict him for perjury, and subpoenaed him before a third grand jury to “give him an opportunity to testify truthfully and aid the investigation.” Id. at 505, 430 N.E.2d at 1277, 446 N.Y.S.2d at 224.

241 Id. at 503-04, 430 N.E.2d at 1276, 446 N.Y.S.2d at 223. Sreter’s offer of cooperation was made in return for a reduction in criminal charges that were about to be brought against him. Id.

242 Id. at 504, 430 N.E.2d at 1277, 446 N.Y.S.2d at 224. Sreter was contacted by the defendant’s partner, Solomon, about servicing one of Sreter’s homes. Id. at 504, 430 N.E.2d at 1276, 446 N.Y.S.2d at 223. Solomon, however, only attended the initial meeting; all subsequent meetings were between Ferrara and Sreter. Id., 430 N.E.2d at 1277, 446 N.Y.S.2d at 224.

243 Id. The defendant explained his methods for distributing the kickback and assured Sreter that he was very careful and would never get caught. Id. Ultimately, Sreter refused the kickback and terminated all business with the defendant’s company. Id.

244 Id. at 505, 430 N.E.2d at 1277, 446 N.Y.S.2d at 224. At the grand jury hearing, the defendant was asked specific questions concerning his dealings with Sreter. Id.

245 Id.

246 78 App. Div. 2d 904, 435 N.Y.S.2d 201 (2d Dep’t 1980) (mem.). The defendant was indicted on four counts of perjury and was convicted of the three counts based on the Sreter conversations. 54 N.Y.2d at 505, 430 N.E.2d at 1277, 446 N.Y.S.2d at 224.

247 54 N.Y.2d at 509, 430 N.E.2d at 1279, 446 N.Y.S.2d at 226.

248 Id. at 505-06, 430 N.E.2d at 1277, 446 N.Y.S.2d at 224. Chief Judge Cooke observed that retention of counsel in response to a grand jury inquiry does not foreclose police from securing, from a defendant who is not in custody, an indication of intent to commit a new
jected to custodial interrogation was found to enjoy no constitutional right to representation.\textsuperscript{249} The Court emphatically declined to find such a right triggered by a meeting with police or police informants in which future criminal activity is planned.\textsuperscript{250} The Court relied heavily on the fact that the defendant’s partner, and not the police informant, initiated the meeting in which the defendant solicited a new crime, and suggested that it might have held differently if the informant had affirmatively encouraged the defendant to reveal past crimes.\textsuperscript{251} The defendant’s citation of the noncustodial right to counsel upheld in \textit{People v. Skinner}\textsuperscript{252} was thus deemed inapposite, since the defendant in \textit{Skinner} was in fact interrogated about a past crime for which he had engaged counsel.\textsuperscript{253} The Court noted that the right to counsel exists to offset the inequality of position between one accused of a crime and the state; it was never intended to preclude police investigation into new crimes.\textsuperscript{254}

The decision in \textit{Ferrara} resists categorization as another in the line of cases which have explored the ambit of right to counsel in custodial and noncustodial settings.\textsuperscript{255} A characterization of the ev-

\textsuperscript{249} \textit{Id.} at 506, 430 N.E.2d at 1277-78, 446 N.Y.S.2d at 224-25. The Court found no attachment of the right to counsel under the United States or the New York Constitutions. \textit{Id.; see U.S. Const. amend. VI; N.Y. Const. art. 1, § 6.} The Court relied on several federal cases which required charges to be filed against a defendant in custody before his constitutional right to an attorney attached. \textit{See 54 N.Y.2d at 506, 430 N.E.2d at 1278, 446 N.Y.S.2d at 225 (citing Rhode Island v. Innis, 446 U.S. 291, 299-300 & n.4 (1980); Kirby v. Illinois, 406 U.S. 682, 688-89 (1972); Miranda v. Arizona, 384 U.S. 436, 469-70 (1966)).}

\textsuperscript{250} \textit{Id.} at 505-06, 430 N.E.2d at 1277, 446 N.Y.S.2d at 224. The Court stated that \textit{United States v. Henry, 447 U.S. 264 (1980), and Massiah v. United States, 377 U.S. 201 (1963),} were inapposite since those cases involved evidence of prior crimes elicited by police informers for which the defendants already had been indicted, \textit{see 447 U.S. at 265-66; 377 U.S. at 201, while the Sreter tapes constituted evidence of future crimes. 54 N.Y.2d at 505-06, 430 N.E.2d at 1277, 446 N.Y.S.2d at 224.}

\textsuperscript{251} \textit{Id.} at 508, 430 N.E.2d at 1279, 446 N.Y.S.2d at 226. The Court simply did not find the sixth amendment implicated by covert police investigation into an uncommitted crime with which the suspect ultimately is charged. \textit{Id.} at 508, 430 N.E.2d at 1278, 446 N.Y.S.2d at 225.

\textsuperscript{252} \textit{52 N.Y.2d 24, 417 N.E.2d 501, 436 N.Y.S.2d 207 (1980); see note 235 supra.}

\textsuperscript{253} \textit{54 N.Y.2d at 508, 430 N.E.2d at 1279, 446 N.Y.S.2d at 226.}

\textsuperscript{254} \textit{Id.}

\textsuperscript{255} The two factors upon which the New York cases dealing with attachment of an accused’s right to counsel have focused are: (1) whether the suspect was in custody when questioned; and (2) whether the questioning related to the same subject matter for which he had retained counsel. \textit{See People v. Skinner, 52 N.Y.2d 24, 30-31, 417 N.E.2d 501, 504-05, 436
idence obtained in the Sreter meetings as “unrelated” to the grand jury investigation into kickbacks is tenuous. Yet if these tape-recorded conversations, elicited in a noncustodial setting, did indeed refer to the same crime for which Ferrara was being investigated and had retained counsel, the case would seem to fall squarely within the *Skinner* rule, and the Court’s failure to apply it might be labeled retrogressive. It is suggested, however, that the *Ferrara* Court’s use of the phrase “new crime” is a temporal, rather than a substantive distinction, which focuses on the as yet uncommitted nature of the crime. The decision is thus not subject to analysis under cases dealing with interrogation about “related” or “unrelated” crimes which already have been committed.

The thrust of *Ferrara* is instead the wholesale exception from the right to counsel rule of an uncommitted crime still in the planning stage, regardless of whether such crime would, as a matter of substantive law, be classified as related to the crime for which the accused is represented.

Viewed in this light, *Ferrara* presents less of an anomaly, but the defendant’s peculiar status may justify a limitation of the holding to the grand jury context. As an immunized witness, Ferrara

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N.Y.S.2d 207, 210-11 (1980); People v. Rogers, 48 N.Y.2d 167, 172-73, 397 N.E.2d 709, 713-14, 422 N.Y.S.2d 18, 21-22 (1979); notes 233-235 and accompanying text supra. The *Ferrara* Court, faced with a noncustodial situation, apparently has moved beyond the established construct of “related” and “unrelated” questioning, and has isolated questioning about “new crimes” as a category to which right to counsel does not attach. See 54 N.Y.2d at 505, 430 N.E.2d at 1277, 446 N.Y.S.2d at 224.

It may be argued that there is no logical basis for distinguishing between the subject matter of the grand jury investigation which prompted Ferrara to retain an attorney and the subject matter of the Sreter conversations, since both dealt with the defendant’s dealings with nursing homes. See 54 N.Y.2d at 504, 430 N.E.2d at 1277, 446 N.Y.S.2d at 224; note 235 supra.

See 52 N.Y.2d at 32, 417 N.E.2d at 505, 436 N.Y.S.2d at 211; note 235 supra.

See note 255 supra. The *Ferrara* Court distinguished the line of cases which determine when the right to counsel attaches, observing that none of the decisions “support the novel theory advanced by defendant.” 54 N.Y.2d at 506, 430 N.E.2d at 1278, 446 N.Y.S.2d at 225.

54 N.Y.2d at 508, 430 N.E.2d at 1279, 446 N.Y.S.2d at 226. The *Ferrara* Court expressed a blanket refusal to recognize a defendant’s right to counsel during questioning which reveals a new crime “merely because the individual has retained counsel during the investigation of earlier criminality.” *Id.*

But see People v. Middleton, 54 N.Y.2d 474, 479, 430 N.E.2d 1264, 1267, 446 N.Y.S.2d 211, 214 (1981). In *Middleton*, a ruling similar to *Ferrara* was applied in a criminal case arising outside the sphere of a grand jury proceeding. A noncustodial defendant offered a bribe to police officers after he had requested counsel. During further questioning concerning the bribe, statements were elicited which resulted in discovery of cocaine in the defendant’s possession. *Id.* at 477-78, 430 N.E.2d at 1265-66, 446 N.Y.S.2d at 212-13. The Court
could not have been prosecuted for statements relating to either past or future crimes; his reference to past crimes, made in the context of a new kickback offer, was passed over by the Court as merely a fortuitous occurrence. In the case of a criminal suspect who enjoys no such grant of immunity, the Ferrara holding presents a danger. While statements pertaining to past related crimes, elicited through noncustodial police interrogation of a suspect who has retained counsel, would clearly be inadmissible, statements that relate to new crimes, whether related or not, would, under Ferrara, form a basis for prosecution. Admissibility would thus turn on what a suspect happened to say in a particular police encounter, leading courts to work backward from the result of the encounter to justify the initial investigatory technique. It is submitted that the propriety of police contact with

upheld the defendant's conviction on both charges, noting that even though the defendant had requested an attorney, he was not permitted to invoke the right to counsel with respect to a "new crime committed in the presence of the officers." Id. at 479, 430 N.E.2d at 1267, 446 N.Y.S.2d at 214. The Court further observed that any statements elicited during questioning about the "new crime" were admissible, regardless of whether they referred to previous criminal activity. Id. at 482, 430 N.E.2d at 1269, 446 N.Y.S.2d at 216. Thus, as noted in the dissent, the majority ruling effectively deprives the defendant of his right to counsel because he has "committed a substantively unrelated and independent crime." Id. at 484, 430 N.E.2d at 1269, 446 N.Y.S.2d at 216. (Jones, J., dissenting).

The Ferrara Court stressed that the defendant voluntarily admitted his prior kickback arrangements while initiating a "new crime," noting that the defendant undertook the risk of making incriminating statements to a government agent. Id. When discussing competing offers with the defendant, however, Sreter stated that "price was not everything." Id. at 504, 430 N.E.2d at 1277, 446 N.Y.S.2d at 224. Thus, there may have been some inducement to elicit the incriminating statements. Indeed, the use of informants to obtain information has been equated with direct interrogation of an accused. See United States v. Henry, 447 U.S. 264, 270 (1980). In Henry, the defendant made incriminating statements to an informer while incarcerated in a federal prison. Id. at 267. The Supreme Court held that the statements were elicited in violation of the defendant's right to counsel. Id. at 274. Since he was unaware that his fellow inmate was a paid informant acting under instructions of the government, he could not effectively waive his right to an attorney. Id. at 273. The Court observed that no less stringent a standard should be applied when the accused is prompted by an undisclosed undercover informant than when he is speaking directly to government officials. Id. at 272-73. Moreover, the Court stressed that no distinction should be made as to which party initiated the conversation or raised the subject which brought out the incriminating statements. Id. at 272 & n.10.


See 54 N.Y.2d at 508, 430 N.E.2d at 1279, 446 N.Y.S.2d at 226; note 259 and accompanying text supra.

See note 260 supra (discussing People v. Middleton, 54 N.Y.2d 474, 430 N.E.2d 1264, 446 N.Y.S.2d 211 (1981)). In Middleton, the offer of the bribe was the "new crime" used to justify the questioning which led to the revelation of the defendant's prior crime
an accused who is represented by counsel should not be evaluated subjectively after the fact, but must be scrutinized as of the time of its inception for potential exacerbation of the imbalance between the suspect and the state.\textsuperscript{266}

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\textit{Transfer of custody is dependent upon best interests of the child, not upon whether particular changed circumstances can be denominated extraordinary}

Awards of child custody typically are based upon “the best interests of the child.”\textsuperscript{266} This standard has been applied in initial


Interestingly, the early common law perceived the father as having a natural right in the custody of his children, while the mother was entitled merely to reverence and respect.