St. John's Law Review

Volume 80, Winter 2006, Number 1 Article 13

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THE EMBARRASSING SAGA OF NEW YORK'S DERIVATIVE RIGHT TO COUNSEL: THE RIGHT TO COUNSEL OF DEFENDANTS SUSPECTED OF TWO UNRELATED CRIMES

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INTRODUCTION

The story of New York's "derivative right to counsel" is the story of an intellectual failure, and possibly an ethical failure, on the part of New York's highest court. The "derivative right to counsel"—which extended the right to counsel of defendants who were represented by counsel on one offense, and were then questioned about another, utterly unrelated crime—was born out of a clearly mistaken interpretation of a 1979 case. The mistake was eventually recognized, and the doctrine overruled, in 1990; but the derivative right was soon reintroduced through a series of cases purporting to apply the very case which sought to eliminate it. The story is, at best, one of recurring bungles, both on the part of majority opinions and on the part of the opposing dissents. The result today is a legal regime which excludes reliable confessions from trials for no good reason, and favors dangerous recidivists over first time arrestees or people accused of minor crimes. It is an often-heard accusation, and a wholly unfounded one, that the criminal justice system coddles criminals; yet, in the derivative right to counsel, New York constitutional law does just that, and for no justifiable reason. It is high time for a re-examination of this area of our law, and for the final abolition of this unjustified constitutional doctrine.

The right to counsel under the Federal Constitution arises principally under the Sixth Amendment's right to counsel and

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the Fifth Amendment's right against self incrimination, and federal jurisprudence sees great significance in the distinction between the two sources.[1] New York's right to counsel, however, is much fuzzier: New York courts habitually ground their determinations in the collective authority of the New York Constitution's right to counsel clause, the right against self incrimination, and the right to due process of law (probably because all three clauses are grouped together in Article I, Section 6 of the New York Constitution).[2] This means that the analysis of a right to counsel claim under New York law can be quite different than an equivalent analysis under the Federal Constitution, and a direct comparison between the two may quickly turn confusing, if not impossible.[3] Hence, the almost exclusive focus of this Article on New York law.[4]

The Article focuses on six leading right to counsel precedents and is arranged in a chronological order: Part I analyzes *People*

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[1] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic]."); U.S. CONST. amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself . . . ."). The right to counsel may also arise, though less often, from the "due process" clause. *See, e.g.*, Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948).

[2] *See, e.g.*, People v. Skinner, 52 N.Y.2d 24, 28, 417 N.E.2d 501, 503, 436 N.Y.S.2d 207, 209 (1980) ("Our determination is guided by principles founded upon State constitutional guarantees of the privilege against self incrimination, the right to be aided by counsel and due process."); People v. Cunningham, 49 N.Y.2d 203, 207, 400 N.E.2d 360, 363, 424 N.Y.S.2d 421, 423 (1980) ("[W]e conclude that the issue presented here may be resolved by application of principles that are firmly rooted in our State's constitutional and statutory guarantees of due process of law, the privilege against self incrimination and the right to the assistance of counsel."); People v. Hobson, 39 N.Y.2d 479, 483, 348 N.E.2d 894, 897, 384 N.Y.S.2d 419,421 (1976) ("[The] rule [is] grounded in this State's constitutional and statutory guarantees of the privilege against self incrimination, the right to the assistance of counsel, and due process of law.").

[3] Indeed, the elaboration of some of New York's right to counsel protections preceded the elaboration of equivalent federal rights. *See generally* Peter J. Galie, *State Constitutional Guarantees and Protection of Defendants' Rights: The Case of New York, 1960–1978*, 28 BUFF. L. REV. 157, 178–86 (1979) (noting that the right to counsel in New York has an extensive history and examining a number of New York cases that went beyond the federal requirements for a defendant's right to counsel).

[4] Moreover, New York provides criminal defendants with right to counsel protections that are far more extensive than the federal ones. *See, e.g.*, People v. Bing, 76 N.Y.2d 331, 351, 558 N.E.2d 1011, 1023, 559 N.Y.S.2d 474, 486 (1990) (Kaye, J., concurring as to result in *Bing* and *Medina*, and dissenting as to *Cawley*) ("[T]his court applying the New York State Constitution evolved a body of law that 'constitute[s] the strongest protection of right to counsel anywhere in the country.'" (quoting Peter J. Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 SYRACUSE L. REV. 731, 764 (1982)).

v. Rogers,[5] the case that inadvertently spawned New York's derivative right to counsel, and *People v. Bartolomeo*,[6] the case that purported to borrow the derivative right to counsel from *Rogers* but which in fact single-handedly invented it; Part II examines how *Bartolomeo* and its invented derivative right to counsel were overruled by *People v. Bing*;[7] Part III shows how *People v. West*[8] misinterpreted *People v. Bing*; Part IV shows how *People v. Steward*[9] misinterpreted *People v. Bing* in a different way; Part V examines the latest Court of Appeals authority on New York's derivative right to counsel, *People v. Burdo*,[10] showing how it, too, misinterpreted *People v. Bing*; and Part VI concludes with a proposal to reinstall *Bing*, ignore *West*, reinterpret *Steward*, and scrap *Burdo*.

The road to today's derivative right to counsel has been paved with numerous judicial errors. This Article is a journey through those errors and an attempt to clear the path for the final elimination of the doctrine.

I. *PEOPLE V. ROGERS* AND *PEOPLE V. BARTOLOMEO*

New York constitutional law recognizes an "indelible" right to counsel—a right to counsel which defendants can waive only in their counsel's presence. This famous—for some, infamous—"indelible" right attaches with the commencement of formal proceedings against the defendant, or when an attorney begins representing the defendant, or when the defendant requests an attorney.[11] Thus, if a defendant is represented by an attorney regarding a certain criminal matter, and the police arrest him for questioning on that matter, the defendant cannot waive his right

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[5] 48 N.Y.2d 167, 397 N.E.2d 709, 422 N.Y.S.2d 18 (1979).

[6] 53 N.Y.2d 225, 423 N.E.2d 371, 440 N.Y.S.2d 894 (1981), *overruled by Bing*, 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990).

[7] 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990).

[8] 81 N.Y.2d 370, 615 N.E.2d 968, 599 N.Y.S.2d 484 (1993).

[9] 88 N.Y.2d 496, 670 N.E.2d 214, 646 N.Y.S.2d 974 (1996).

[10] 91 N.Y.2d 146, 690 N.E.2d 854, 667 N.Y.S.2d 970 (1997).

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> There are two well-defined situations in which the right is said to attach indelibly under the State Constitution and a waiver, notwithstanding the client's right to waive generally, will not be recognized unless made in the presence of counsel. The first . . . deals with waivers after formal proceedings have commenced. The second . . . relates to uncharged individuals in custody who have retained or requested an attorney.

Bing, 76 N.Y.2d at 339, 558 N.E.2d at 1015, 559 N.Y.S.2d at 478 (citations omitted).

to counsel and answer questions without his counsel present. Any such waiver would be considered ineffective, and any statement made by the defendant could be suppressed at trial on the ground that it was obtained in violation of the defendant's right to counsel. Once the indelible right to counsel has attached, an effective waiver of the right to counsel can be made only in the presence of counsel (which is to say, rather rarely).

People v. Rogers involved a suspect who was arrested and taken to a police station for questioning about a robbery.[12] After he was given *Miranda* warnings, Rogers told the police that he was represented by an attorney in regard to the matter for which questioning was sought, but that he was willing to answer questions in his attorney's absence.[13] After a two-hour interrogation, during which Rogers denied any involvement in the crime, the police received a communication from Rogers' attorney requesting that they cease further questioning. Thereafter, the police asked no further questions about the offense for which Rogers was represented, but instead continued to question him regarding other alleged offenses—"unrelated activities in which he [in fact] had not participated."[14] That questioning continued for approximately four more hours, during which time Rogers remained manacled. At last, Rogers uttered an incriminating statement concerning the robbery for which he was arrested and originally interrogated. At the trial for that crime, Rogers moved to suppress his statement on the ground that his right to counsel under the New York Constitution had been violated.[15]

There was no doubt that Rogers could not have waived his right to counsel in the absence of his counsel in regard to the robbery interrogation: Rogers was represented by counsel on that offense, and his counsel even contacted the police and asked them to cease any questioning. Thus, Rogers' indelible right to counsel had attached, and any waiver made in the absence of counsel would have been ineffective. However, the prosecution claimed that a waiver in the presence of counsel was necessary only when the defendant was subjected to interrogation about the

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[12] People v. Rogers, 48 N.Y.2d 167, 170, 397 N.E.2d 709, 711, 422 N.Y.S.2d 18, 20 (1979).

[13] *Id.* at 170, 397 N.E.2d at 711, 422 N.Y.S.2d at 20.

[14] *Id.* at 170, 397 N.E.2d at 711, 422 N.Y.S.2d at 20.

[15] *Id.* at 170, 397 N.E.2d at 711, 422 N.Y.S.2d at 20.

crime for which he was represented, but not when he was questioned about unrelated crimes.[16] Thus, the four-hour interrogation following Rogers' attorney's request to stop questioning was claimed to have been proper because dealing only with unrelated matters.[17] Indeed, a 1971 case, *People v. Taylor*, had explicitly held that defendants could waive their right to counsel in the absence of counsel when questioned about offenses which were unrelated to those for which their indelible right had attached.[18]

The trial court agreed and denied Rogers' motion to suppress the statement. The Appellate Division affirmed the denial, and the Court of Appeals then granted review of the case and reversed, holding, in an opinion written by then-Chief Judge Cooke and joined by Judges Jones, Wachtler, Fuchsberg, and Meyer, that "once an attorney has entered the proceeding, thereby signifying that the police should cease questioning, a defendant in custody may not be further interrogated in the absence of counsel."[19]

People v. Bartolomeo came two years after *Rogers* and involved a defendant who was arrested for an arson charge, was arraigned for that charge with his counsel present, was released from custody, and was re-arrested a week later for questioning on an unrelated homicide.[20] The officers knew that Bartolomeo was

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[16] *Id.* at 171, 397 N.E.2d at 711, 422 N.Y.S.2d at 20.

[17] *Id.* at 171, 397 N.E.2d at 711, 422 N.Y.S.2d at 20.

[18] People v. Taylor, 27 N.Y.2d 327, 330, 332, 266 N.E.2d 630, 631, 633, 318 N.Y.S.2d 1, 3, 5 (1971).

[19] *Rogers*, 48 N.Y.2d at 169, 397 N.E.2d at 710–11, 422 N.Y.S.2d at 19.

[20] People v. Bartolomeo, 53 N.Y.2d 225, 230, 423 N.E.2d 371, 374, 440 N.Y.S.2d 894, 896–97 (1981), *overruled by* People v. Bing, 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990).

This Article deals exclusively with questioning on "unrelated" offenses. A different line of cases, and a different set of considerations, apply where the offense for which the defendant is represented and the offense for which he is questioned are "related." *See, e.g.*, People v. Cohen, 90 N.Y.2d 632, 638–39, 687 N.E.2d 1313, 1316–17, 665 N.Y.S.2d 30, 33–34 (1997) (noting that a police interrogation of a suspect on the subject of one crime after the right to counsel had indelibly attached as to another crime falls into two categories, the first being where the two criminal matters are so closely related transactionally that questioning on the unrepresented matter would elicit incriminating responses in the matter in which the suspect had an attorney); People v. Ermo, 47 N.Y.2d 863, 865, 392 N.E.2d 1248, 1249–50, 419 N.Y.S.2d 65, 66 (1979) (holding that had the police interrogated the defendant about a homicide only, his statements would not have been suppressible because the attorney's representation of the defendant was on a different and unrelated assault charge); People v. Townes, 41 N.Y.2d 97, 104–05, 359 N.E.2d 402, 407, 390 N.Y.S.2d

previously arrested on a different charge (they were from the same police agency which made the previous arrest), but they did not know, nor did they bother to find out, whether he was actually represented on that charge. Bartolomeo was given *Miranda* warnings, agreed to waive his right to counsel, and gave police an incriminating statement regarding the homicide about which he was interrogated.[21] He then sought to suppress his statement at the trial for that offense.[22]

As in *Rogers*, there was no doubt that Bartolomeo's indelible right to counsel had attached in regard to the offense for which he was represented by counsel, and for which he was also arraigned (so that formal proceedings had commenced). Thus, any statements made to the police after a purported waiver of counsel obtained in the absence of counsel would have been suppressible at a trial on that offense. But in *Bartolomeo* the issue of suppression arose at a trial on the unrelated homicide, in regard to which Bartolomeo did not yet have an indelible right to counsel at the time that his statements were made.[23] Thus, since no indelible right to counsel had yet attached in regard to that offense, Bartolomeo could have presumably waived his right to counsel in the absence of counsel and answered police questions.

The trial judge denied suppression of Bartolomeo's statements, and the Appellate Division affirmed. The Court of Appeals granted review and reversed. Applying *People v. Rogers*, the Court concluded that Bartolomeo could not have waived his right to counsel in the absence of counsel, and ordered his statements suppressed.[24] The entire part of the opinion dealing with the application of *Rogers* to the factual situation in *Bartolomeo* was as this:

> Knowledge that one in custody is represented by counsel, albeit on a separate, unrelated charge, precludes interrogation in the

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893, 899 (1976) (holding that defendant's statements regarding related crimes made in the course of an interview with the Civilian Complaint Review Board were obtained in violation of his right to counsel).

[21] *Bartolomeo*, 53 N.Y.2d at 230, 423 N.E.2d at 374, 440 N.Y.S.2d at 897.

[22] *Id.* at 230, 423 N.E.2d at 374, 440 N.Y.S.2d at 897.

[23] Bartolomeo had a right to counsel in that he could have requested an attorney, and police questioning would then have had to cease until he met with one. But Bartolomeo did not yet possess an *indelible* right—that is, a right that he could not waive without an attorney present—in regard to the second offense for which he was arrested.

[24] *See Bartolomeo*, 53 N.Y.2d at 231, 423 N.E.2d at 374, 440 N.Y.S.2d at 897.

> absence of counsel and renders ineffective any purported waiver of the assistance of counsel when such waiver occurs out of the presence of the attorney (*People v. Miller*, 54 N.Y.2d 616; *People v. Rogers*, 48 N.Y.2d 167). The same consequence flows from knowledge, such as that possessed by Detectives Rafferty and Donohue here, that the defendant has been arrested only seven days earlier by members of the same police department on an arson charge, if in fact the defendant has counsel on the earlier charge.[25]

People v. Miller, to which the opinion cited, is irrelevant to our issue, as it concerned interrogation on *related* offenses.[26] As for *Rogers*, *Bartolomeo* offered no analysis of that case, no comparison between *Rogers*' factual predicate and its own, no policy reasons supporting *Rogers* or *Rogers*' application to the *Bartolomeo* circumstances—nothing but the above short and conclusory statement, declaring, as a matter of clear and undisputable deduction, the applicability of *Rogers* to the case at hand.

And yet *Rogers* was a very different case than *Bartolomeo*. In *Rogers*, the Court suppressed a statement at the trial for the *original offense for which the defendant was represented at the time that he made his statement*.[27] In *Bartolomeo*, by contrast, the Court suppressed a statement at the trial for the offense for which the defendant was *not* represented by counsel, and regarding which his indelible right to counsel had presumably not yet attached at the time that his statement was made.[28] Nowhere did *Rogers* hold—and indeed *Rogers* had no occasion to

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[25] *Id.* at 231, 423 N.E.2d at 374, 440 N.Y.S.2d at 897.

[26] *See* People v. Miller, 54 N.Y.2d 616, 618, 425 N.E.2d 879, 881, 442 N.Y.S.2d 491, 493 (1981). The *Miller* opinion suppressed three statements made in regard to three different offenses: two on the ground that the defendant's indelible right to counsel had attached at the time of the questioning; one on the ground that the questioning was interrelated with questioning on one of the offenses in regard to which the indelible right to counsel had attached (a finding upon which the Appellate Division also relied in its decision). As an aside to the third suppression, the court added, "Moreover, as defendant was known to be represented by counsel in connection with the 'McE' rape charge, questioning on other matters was precluded (*People v. Rogers*, 48 N.Y.2d 167)." *Id.* at 619, 425 N.E.2d at 881, 442 N.Y.S.2d at 493. The three offenses, it should be noted, were charged in the same indictment. On the right to counsel in regard to interrogations on related offenses, see *supra* note 20.

[27] *See* People v. Rogers, 48 N.Y.2d 167, 169–70, 397 N.E.2d 709, 711, 422 N.Y.S.2d 18, 19–20 (1979).

[28] *See Bartolomeo*, 53 N.Y.2d at 231, 423 N.E.2d at 374, 440 N.Y.S.2d at 897.

hold—that its ruling applied to statements regarding an unrelated offense at the trial for that offense. *Rogers*' holding merely suppressed a defendant's statement in the very proceeding into which "an attorney has [already] entered."[29]

The distinction between holding and dicta is important for realizing the inadequacy of the *Bartolomeo* opinion's summary reliance on *Rogers*. As we all know, if a court makes a pronouncement whose validity is irrelevant to the verdict in the case, that pronouncement is dicta; if a pronouncement's validity is necessary for the verdict, it is holding. The genius of precedent consists, to a large measure, in its grounding in particular fact situations—in the fact that it derives from the meeting of abstract law and concrete reality, and not from mere hypothetical conjectures. A judicial declaration that is a mere aside to the factual circumstances before the court is therefore not a part of the precedent's holding, and its application to a new case requires a justification going beyond the mere reference to that precedent. Since *Rogers* did not involve a factual situation where admissibility of statements was sought at a trial on the unrelated and unrepresented offense, its pronouncements in regard to any such hypothetical claim (if existing at all) could not have been its holding; they were superfluous to its decision to suppress Rogers' statements. *Bartolomeo* was a clear and radical expansion of *Rogers*, and its decision required much more than the mere reliance on *Rogers*—though, to repeat, nothing more was given.

There were other significant differences between *Bartolomeo* and *Rogers*: the *Rogers* opinion noted that the police continued to question the defendant, after his attorney requested that they stop, on "unrelated activities *in which he had not participated*"—thus suggesting that the police used the questioning on "unrelated activities" as a pretext for continuing their questioning.[30] By contrast, in *Bartolomeo*, the "unrelated activities" were the very crimes on whose trial the defendant was seeking to suppress his statements.[31] In *Rogers*, the police questioned the defendant for two hours on the original offense even after he had told them that he was represented by an

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[29] *See Rogers*, 48 N.Y.2d at 169, 397 N.E.2d at 710, 422 N.Y.S.2d at 19.

[30] *See id.* at 170, 397 N.E.2d at 711, 422 N.Y.S.2d at 20 (emphasis added).

[31] *See Bartolomeo*, 53 N.Y.2d at 229–30, 423 N.E.2d at 373–74, 440 N.Y.S.2d at 896.

attorney in regard to that offense;[32] no such impropriety occurred in *Bartolomeo*. And in *Rogers*, unlike in *Bartolomeo*, the questionings constituted one continuous session, and it did not appear that the police gave the defendant fresh *Miranda* warnings before questioning him on the unrelated crimes.[33] In *Bartolomeo*, the questionings were separated by more than a week, and fresh *Miranda* warnings were given.[34] In short, the circumstances surrounding Rogers' interrogation convinced the Court that to admit Rogers' statement would have amounted to rewarding police misconduct.[35] Moreover, if Rogers' statements were held admissible, then a defendant's indelible right to counsel could have been easily subverted: the police would simply purport to question defendants about offenses unrelated to those for which their indelible rights had already attached, with the knowledge that any statements made about the original offenses would be perfectly admissible at their trial. That, in fact, was the principal concern underlying the *Rogers* decision.[36] By contrast, in *Bartolomeo* there was no apparent police misconduct and no subversion of any existing indelible right to counsel.

I mention all these differences not in order to claim that *Bartolomeo* could have been convincingly distinguished from *Rogers* (of course it could), but to show that *Rogers*' holding was never meant to apply to a case like *Bartolomeo*. Granted, the *Rogers* opinion (like many we will examine) was far from clear and even self-contradictory.[37] But although some of *Rogers*'

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[32] *See Rogers*, 48 N.Y.2d at 170, 397 N.E.2d at 711, 422 N.Y.S.2d at 20. Indeed, the court's opinion drew attention to this improper questioning by remarking in a footnote that: "Defendant does not challenge on this appeal . . . the statements made by defendant prior to the call to the police by defendant's attorney." *Id.* at 170 n.1, 397 N.E.2d at 711 n.1, 422 N.Y.S.2d at 20 n.1.

[33] "Thereafter, the police asked no further questions about the robbery but, under a purported waiver of defendant's rights, continued to question concerning unrelated activities in which he had not participated." *Id.* at 170, 397 N.E.2d at 711, 422 N.Y.S.2d at 20. It is unclear whether the purported waiver was the original one or a new one.

[34] *Bartolomeo*, 53 N.Y.2d at 230–31, 423 N.E.2d at 374, 440 N.Y.S.2d at 896–97.

[35] *See Rogers*, 48 N.Y.2d at 173–74, 397 N.E.2d at 713, 422 N.Y.S.2d at 22.

[36] *See* People v. Bing, 76 N.Y.2d 331, 353, 558 N.E.2d 1011, 1024, 559 N.Y.S.2d 474, 487 (1990) (Kaye, J., dissenting) ("In *Rogers*, . . . this court determined to call a halt to the facile evasion of defendants' constitutional rights . . . .").

[37] The opinion started by claiming: "We hold today that once an attorney has entered the proceeding, thereby signifying that the police should cease questioning, a defendant in custody may not be further interrogated in the absence of counsel."

pronouncements, torn out of context, appear to be congruent with *Bartolomeo*'s reading of the case, those pronouncements were inapplicable to suppression issues at the trial on the *unrelated* matters (rather than at a trial on the original offense).[38] Moreover, to repeat, they were all dicta.

In short, the *Bartolomeo* decision showed a complete lack of awareness that *Rogers'* application to the case represented a fundamental expansion of *Rogers* from suppression of statements at the trial for offenses for which defendants' right to counsel had indelibly attached, to suppression of statements at trials for offenses for which defendants did not yet possess an indelible right.[39] Whereas the dissenting opinion, while characterizing the

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Rogers, 48 N.Y.2d at 169, 397 N.E.2d at 710–711, 422 N.Y.S.2d at 19. And yet a footnote in the opinion read:

> Contrary to the suggestion of the dissent, this holding creates no undue impediment to the investigation of criminal conduct unrelated to the pending charge. An accused represented by counsel may still be questioned about such matters; we hold simply that information obtained through that questioning in the absence of counsel may not be used against him.

Id. at 173 n.2, 397 N.E.2d at 713 n.2, 422 N.Y.S.2d at 22 n.2. The last sentence in the footnote read, "Thus, the police may continue to obtain information from a defendant who is a mere witness to unrelated events." *Id.* at 173 n.2, 397 N.E.2d at 713 n.2, 422 N.Y.S.2d at 22 n. 2. Perhaps the Court merely meant to authorize the questioning of defendants who were witnesses to a crime. But the Court also stated that it was "the role of defendant's attorney, not the State, to determine whether a particular matter will or will not touch upon the extant charge." *Id.* at 173, 397 N.E.2d at 713, 422 N.Y.S.2d at 22.

[38] In the later *Bing* case, the Court said:

> The concurring Judges contend that *Bartolomeo* is premised on the necessity to have an attorney present to determine whether the interrogation is related to the prior pending charges. . . . [T]he need for [such] a . . . rule was recognized in *Rogers* because an attorney had entered the proceeding for which defendant was arrested. We decided that under those circumstances the attorney must be allowed to resolve whether police questioning was related to those charges on which defendant was represented. There is no such requirement in these cases, however, because no attorneys had appeared in the [new, unrelated] proceedings and defendants voluntarily chose to forego legal representation on the new charges. Thus, there is no basis for the concurrence's argument that the attorney must be brought into the new proceeding to decide whether the questions are related to the prior charges. The courts are fully capable of protecting the defendants' rights on both the prior pending charges and the new charges.

Bing, 76 N.Y.2d at 349, 558 N.E.2d at 1021–22, 559 N.Y.S.2d at 484–85.

[39] Some of the literature disagrees. A Comment written by a law student proclaimed that "[t]he *Bartolomeo* court rightly saw its opinion as following naturally from and directly resolved by the *Rogers* decision, and therefore offered little justification for its holding. . . . [T]he *Rogers* opinion can, and was intended to

decision (in contrast with the majority) as an expansion of *Rogers*, failed to clearly identify wherein lay that expansion, stating:

> [T]he issue on this appeal is whether this court should extend the rule of *People v. Rogers* to the facts of the present case. The majority holds that because the defendant had been represented by counsel on prior charges at the time of the interrogation the incriminating statements the defendant gave in the absence of counsel must be suppressed. The majority fails to accord significance to the fact that the police knew only that defendant had been previously arrested and did not know defendant had counsel on those earlier charges, or to the fact that defendant never indicated in any manner that he desired the aid of an attorney.[40]

Thus, the *Bartolomeo* majority radically expanded New York's indelible right to counsel without the slightest of explanations, the dissent complained that the police were unaware that the defendant was represented on the unrelated offense, and a felony murder conviction was unceremoniously vacated (the defendant pumped three bullets into the person whose home he was burglarizing). New York's derivative right to counsel was born.[41]

II. *PEOPLE V. BING*

It took the Court of Appeals nine years to realize its mistake and attempt to correct it. Finally, in *People v. Bing*,[42] the Court characterized *Bartolomeo* (according to the dissent in the case) as

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be read to dictate the outcome in *Bartolomeo*." Charles J. Sullivan, Comment, *People v. Bing: Did the New York Court of Appeals Throw Baby Bartolomeo Out With His Bath Water*, 40 BUFF. L. REV. 835, 865 (1992) (footnotes omitted). The article not only does not try to explain the patently wrong claim that *Rogers* controlled *Bartolomeo*, it goes so far as to assert that the claim needed no explanation. As we saw earlier, this evidences a fundamental failure to distinguish between holding and dicta.

[40] People v. Bartolomeo, 53 N.Y.2d at 236–39, 423 N.E.2d at 377–79, 440 N.Y.S.2d at 900–02 (1981) (Wachtler, J., dissenting; joined by Jasen & Gabrielli, JJ.) (citations omitted), *overruled by* People v. Bing, 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990).

[41] In People v. Robles, decided seven years after *Bartolomeo*, Judge Wachtler (who dissented in *Bartolomeo*) was clearer, stating that "*Rogers* established a . . . limited right with respect to unrelated charges in order to protect the . . . right to counsel in the pending proceeding" and that "our primary concern in *Rogers* was that questioning on unrelated charges might interfere with the attorney-client relationship that existed with respect to the pending charges." People v. Robles, 72 N.Y.2d 689, 697–98, 533 N.E.2d 240, 244, 536 N.Y.S.2d 401, 405 (1988).

[42] 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990).

"an aberrant decision not worthy of precedential respect, a decision without a principled basis or even a rationale. . . ."[43] *Bing*, a decision written by Judge Simons (who was joined by then Chief Judge Wachtler and Judges Hancock and Bellacosa[44]), was a consolidation of three cases—*People v. Bing*, *People v. Cawley*, and *People v. Medina*.[45]

Defendant Bing had counsel on a pending charge in Ohio. The police arrested Bing on the Ohio warrant and then proceeded to question him about his involvement in a New York burglary which was unrelated to the Ohio crime.[46] The police (obviously) knew of the pending Ohio charge, but made no inquiries as to whether Bing was represented. After receiving *Miranda* warnings, Bing waived his right to counsel and made self-incriminating statements about the New York burglary.[47] He then moved to suppress his statements at his trial for the burglary.[48]

In *People v. Cawley*,[49] the defendant was charged in New York with robbery. Following his arraignment, with counsel present, the defendant was released on bail. He thereafter absconded and remained at large until caught on a bench warrant for that robbery six months later.[50] He was then questioned on an unrelated murder by a police officer who was unaware of the prior representation.[51] Cawley waived his right to counsel and confessed to committing the murder.[52] He then moved to suppress his confession at his murder trial.[53]

In *People v. Medina*,[54] the defendant was released on a pending assault charge and soon thereafter was questioned about the unrelated murder of two of his neighbors. The police officer

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[43] *Id.* at 352, 558 N.E.2d at 1023, 559 N.Y.S.2d at 486 (Kaye, J., concurring and dissenting).

[44] Current-Chief Judge Kaye wrote a dissenting opinion in which she was joined by Judges Alexander and Titone.

[45] People v. Cawley, 150 A.D.2d 994, 542 N.Y.S.2d 1003 (1st Dep't 1989); People v. Medina, 146 A.D.2d 344, 541 N.Y.S.2d 355 (1st Dep't 1989); People v. Bing, 146 A.D.2d 178, 540 N.Y.S.2d 247 (2d Dep't 1989).

[46] *Bing*, 76 N.Y.2d at 335, 558 N.E.2d at 1012–13, 559 N.Y.S.2d at 475–76.

[47] *Id.* at 335, 558 N.E.2d at 1012–13, 559 N.Y.S.2d at 475–76.

[48] *Id.* at 335, 558 N.E.2d at 1013, 559 N.Y.S.2d at 476.

[49] 150 A.D.2d 994, 542 N.Y.S.2d 1003 (1st Dep't 1989).

[50] *Bing*, 76 N.Y.2d at 336, 558 N.E.2d at 1013, 559 N.Y.S.2d at 476.

[51] *Id.* at 336, 558 N.E.2d at 1013, 559 N.Y.S.2d at 476.

[52] *Id.* at 336, 558 N.E.2d at 1013, 559 N.Y.S.2d at 476.

[53] *Id.* at 336, 558 N.E.2d at 1013, 559 N.Y.S.2d at 476.

[54] 146 A.D.2d 344, 541 N.Y.S.2d 355 (1st Dep't 1989).

investigating the murders knew that Medina had been recently held on an assault charge, but thought, erroneously, that the case against Medina was dismissed.[55] Medina was brought to the police station, waived his right to counsel, and made self-incriminating statements about these murders.[56] He moved to suppress the statements at his trial for the murders.[57]

Bing began its analysis by noting that *People v. Taylor*[58] allowed a waiver of right to counsel in cases where "statements [were] made to police in response to inquiries about crimes unrelated to those on which the suspect had representation," and that "[w]e modified the *Taylor* rule somewhat in *People v. Rogers* [1979]."[59] (*Rogers* modified *Taylor* by forbidding such a waiver where statements made "in response to inquiries about crimes unrelated to those on which the suspect had representation" were in fact about the *original*, represented crime.) The opinion continued:

> It was against this background that the court in June 1981 issued its decision prohibiting the police from questioning a suspect not only on the pending charge, on which the right to counsel had attached, but also on a new, unrelated charge under investigation on which defendant had waived the right to counsel.[60]

Declaring that, as things stood, the three cases—*Bing*, *Cawley* and *Medina*—"involve no more than a routine application of the *Bartolomeo* rule and under a strict application of the doctrine of stare decisis, which requires that cases similar to each other be decided the same, defendants' statements must be suppressed," the Court moved to consider two exceptions to *Bartolomeo* urged by the prosecution.[61] In *People v. Bing*, the urged exception pertained to "pending charges in other States"[62] (Bing had a pending charge in Ohio); and in *People v. Cawley* an exception was urged "for defendants who implicitly relinquish the attorney-client relationship by absconding" (Cawley absconded after he

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[55] *Bing*, 76 N.Y.2d at 336, 558 N.E.2d at 1013, 559 N.Y.S.2d at 476.

[56] *Id.* at 336, 558 N.E.2d at 1013, 559 N.Y.S.2d at 476.

[57] *Id.* at 336, 558 N.E.2d at 1013, 559 N.Y.S.2d at 476.

[58] 27 N.Y.2d 327, 266 N.E.2d 630, 318 N.Y.S.2d 1 (1971).

[59] *Bing*, 76 N.Y.2d at 340, 558 N.E.2d at 1015, 559 N.Y.S.2d at 478 (citations omitted).

[60] *Id.* at 341, 558 N.E.2d at 1016, 559 N.Y.S.2d at 479.

[61] *Id.* at 344, 558 N.E.2d at 1018, 559 N.Y.S.2d at 481.

[62] *Id.* at 344, 558 N.E.2d at 1018, 559 N.Y.S.2d at 481.

was released on bail).[63]

The Court rejected both proposals: "There is no logical reason to proscribe the police conduct if the pending charge is in New York but permit it if the pending charge is in Ohio"; and "If a defendant cannot expressly reject counsel, there seems to be little legal basis for a judicial inquiry to determine whether he or she has impliedly done so [by absconding]."[64] Instead, stating that "a fundamental change is required," the Court explicitly overruled *Bartolomeo*.[65] In *Bartolomeo*, explained *Bing*, "the right to counsel on the new charge was derived from representation on a prior pending charge."[66] This "fictional" derivative right rewarded persistent offenders (first time arrestees could waive their right to counsel and answer questions, whereas those already represented on a previous charge could not), and lacked a principled basis that could justify its social cost.[67] *Bing* therefore eliminated that derivative right altogether and held the statements in all three cases admissible.[68]

Nonetheless, *Bing* explicitly retained the holding of *People v. Rogers*.[69] It distinguished *Rogers* from *Bartolomeo* in the following way:

> [A]lthough *Rogers* and *Bartolomeo* are frequently linked in legal literature and *Rogers* was the only case cited to support the new rule adopted in *Bartolomeo*, the two holdings are quite different. In *People v. Rogers*, the right to counsel had been invoked on the charges on which defendant was taken into custody and he and his counsel clearly asserted it. . . . In *People v. Bartolomeo*, however, defendant was taken into custody for questioning on a new, unrelated charge. He was not represented on that charge and freely waived his right to counsel. Since the right to counsel is personal and may be waived by a defendant, the court had to create an indelible right, a right that defendant could not waive in the absence of counsel, to justify suppression of the voluntary statement. It did so by implying a derivative right

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[63] *Id.* at 344, 558 N.E.2d at 1018, 559 N.Y.S.2d at 481.

[64] *Id.* at 345–46, 558 N.E.2d at 1019–20, 559 N.Y.S.2d at 482–83.

[65] *Id.* at 337, 558 N.E.2d at 1014, 559 N.Y.S.2d at 477.

[66] *Id.* at 344, 558 N.E.2d at 1018, 559 N.Y.S.2d at 481.

[67] *See id.* at 342, 347–48, 558 N.E.2d at 1017, 1020–21, 559 N.Y.S.2d at 480, 483–84.

[68] *See id.* at 337, 558 N.E.2d at 1014, 559 N.Y.S.2d at 477.

[69] *See id.* at 350, 558 N.E.2d at 1022, 559 N.Y.S.2d at 485.

arising from the prior pending charges.[70]

Thus, *Rogers* did not rely on a "derivative" indelible right to counsel but on an indelible right to counsel that was already attached. Rogers invoked his indelible right to counsel at the trial for those charges for which he was already represented when questioned, and regarding which his lawyer had contacted the police and requested the termination of questioning. In *Bartolomeo*, by contrast, the right was invoked at the trial for the unrelated charges on which the defendant was not represented, and in which his indelible right to counsel had not yet attached.[71] Bartolomeo's right was entirely derivative (Bartolomeo derived his right to counsel from his representation on the original arson charge), whereas there was nothing derivative about Rogers' right. So *Rogers* remained a binding precedent while *Bartolomeo* was overruled.

It seemed, at that point, that an embarrassing episode had finally come to an end. Not so.

III. *PEOPLE V. WEST*

People v. West[72] came three years after *Bing*. West, who was a suspect in a homicide investigation, was represented by an attorney on the matter.[73] The investigation reached a dead-end, and the defendant was never charged. Three years later, the police received new information about the crime, and an agent for the police was sent to record statements made by West.[74] The statements were later admitted at the trial, and West was convicted of murder. The Appellate Division affirmed the conviction, but the Court of Appeals reversed, finding a violation of defendant's constitutional right to counsel because "[m]ere passage of this period of time . . . did not eradicate defendant's indelible right."[75] Thus the *West* case did not involve the issue before *Bing*, *Bartolomeo*, or *Rogers*—viz., defendant's right to counsel in regard to a second offense unrelated to the one for which he was represented.[76] Yet *Bing*, *Bartolomeo,* and *Rogers*

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[70] *Id.* at 350, 558 N.E.2d at 1022, 559 N.Y.S.2d at 485 (citations omitted).
[71] *Id.* at 350, 558 N.E.2d at 1022, 559 N.Y.S.2d at 485.
[72] 81 N.Y.2d 370, 615 N.E.2d 968, 599 N.Y.S.2d 484 (1993).
[73] *Id.* at 372, 615 N.E.2d at 969, 599 N.Y.S.2d at 485.
[74] *Id.* at 372, 615 N.E.2d at 969–70, 599 N.Y.S.2d at 485–86.
[75] *Id.* at 373, 379–80, 615 N.E.2d at 970, 974, 599 N.Y.S.2d at 486, 490.
[76] *See id.* at 377–79, 615 N.E.2d at 972–74, 599 N.Y.S.2d at 488–90.

came up in rather lengthy dicta, as a response to some comments made by the dissent.

The majority opinion, written by Chief Judge Kaye (who dissented in *Bing*), clearly misinterpreted all three cases:

> [U]nder *Rogers*, a right to counsel in a matter in which defendant is not represented arises in the first instance only because of defendant's actual representation in another matter . . . .
>
> After *Rogers*, a broader rule developed that prohibited police questioning whenever a defendant had counsel in a unrelated matter (*see*, *People v. Bartolomeo*, 53 N.Y.2d 225, 232, *overruled People v. Bing*, 76 N.Y.2d, at 341–342). Like *Rogers*, this right was derivative and dependent on the actual existence of an attorney-client relationship. Unlike *Rogers*, the *Bartolomeo* right could attach without police awareness of the unrelated representation. From the start, therefore, the *Bartolomeo* right was problematic (*see*, *People v. Bing*, 76 N.Y.2d, at 341–342).
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> Under *Bartolomeo*, the police were obliged to inquire whether a suspect was represented in any unrelated matter of which they had knowledge. Failing such inquiry, the police were bound by what such inquiry would have revealed—meaning the derivative right could attach without actual knowledge that the suspect was represented by counsel at all. Indeed, that was the case in *Bartolomeo* itself, where the police questioning defendant had no knowledge of his representation in an unrelated matter, yet were charged with having violated defendant's derivative right (*People v. Bartolomeo*, 53 N.Y.2d, at 230–232).
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> . . . Ultimately, however, we concluded that the societal cost could not be justified, and overruled *Bartolomeo* (*People v. Bing*, 76 N.Y.2d, at 349).[77]

As always with dicta, it is hard to pin down the precise meaning of the analysis, since it was proposed in the abstract—disconnected from any factual situation which could demonstrate its operation and applicability. Nevertheless, the analysis made some clearly wrong assertions. To begin with, it claimed that *Rogers* entailed a derivative right to counsel, derived from actual representation on a previous offense and attaching to questioning on a new, unrelated offense.[78] But as we saw, *Rogers* upheld a

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[77] *Id.* at 377–78, 615 N.E.2d at 973–74, 599 N.Y.S.2d at 489–90.

[78] According to *West*, a *Rogers* right to counsel does not arise "if at the time of questioning, the accused is not actually represented in the unrelated matter[;] for example, if the right to counsel had attached solely because of the commencement of

defendant's right to counsel in an offense for which the defendant was already represented, and had no occasion to announce a derivative right on an unrelated matter. In any event, no such derivative right to counsel would have survived the holding in *Bing*. *Bing* was very clear about what it considered wrong with *Bartolomeo* and why *Bartolomeo* was distinguishable from *Rogers*: *Rogers* suppressed a statement at the trial for the offense for which the defendant was represented when making his statements; [79] *Bartolomeo*, by contrast, suppressed a statement at the trial for the unrelated, unrepresented offense for which no indelible right had yet attached.[80] For *Bing*, *Bartolomeo* stood for the proposition that "the right to counsel on the new charge was derived from representation on a prior pending charge."[81] Indeed, *Bing* blasted *Bartolomeo* for failing to explain "why *Rogers* should be expanded so dramatically to protect a suspect . . . on the new crime unrelated to the matter upon which defendant actually obtained representation."[82] *Bartolomeo*'s mistake was the invention of a derivative right to counsel, and *Bing* overruled *Bartolomeo* in order to eliminate that derivative right.

It was preposterous to claim that *Bing* overruled *Bartolomeo* because under *Bartolomeo*, "the police were obliged to inquire whether a suspect was represented in any unrelated matter of which they had knowledge."[83] In fact, *Bing* positively endorsed

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formal proceedings—no *Rogers* right arises." *Id.* at 377, 615 N.E.2d at 973, 599 N.Y.S.2d at 489. It remained unexplained why *Rogers* should extend its generous protections to defendants who were actually represented by an attorney, but deny that protection to defendants whose indelible right to an attorney has attached but who did not yet have a lawyer retained or assigned to them. The case which upheld this seemingly arbitrary distinction, People v. Kazmarick, 52 N.Y.2d 322, 324–25, 420 N.E.2d 45, 46–47, 438 N.Y.S.2d 247, 248–49 (1981), offered no good answer for this. My belief, shared by the dissent in *Kazmarick*, is that it was an unprincipled attempt to curb the derivative right to counsel. *See id.* at 330–32, 420 N.E.2d at 50–51, 438 N.Y.S.2d at 252–53 (Cooke, C.J., dissenting).

[79] *See* People v. Bing, 76 N.Y.2d 331, 350, 558 N.E.2d 1011, 1022, 559 N.Y.S.2d 474, 485 (1990).

[80] *See id.* at 350, 558 N.E.2d at 1022, 559 N.Y.S.2d at 485.

[81] *Id.* at 344, 558 N.E.2d at 1018, 559 N.Y.S.2d at 481; *see also id.* at 346, 558 N.E.2d at 1020, 559 N.Y.S.2d at 483 ("The legal basis for the [*Bartolomeo*] rule is a derivative right arising from an established attorney-client relationship on prior pending charges."); *id.* at 349, 558 N.E.2d at 1021, 559 N.Y.S.2d at 484 ("*Bartolomeo* . . . rests on a fictional attorney-client relationship derived from a prior charge . . . .").

[82] *Id.* at 341, 558 N.E.2d at 1017, 559 N.Y.S.2d at 480.

[83] *West*, 81 N.Y.2d 370, 378, 615 N.E.2d at 973, 599 N.Y.S.2d at 489.

Bartolomeo's attribution of knowledge of representation to the police—citing approvingly to cases "requiring the police to engage in a good-faith effort to determine if there was representation on the pending charges."[84]

Additionally, according to this mistaken interpretation, *People v. Taylor*[85] was overruled by *Rogers*. Taylor was represented by counsel on a previous charge when he agreed to waive his right to counsel and answer questions about an unrelated offense, and the police were fully aware of the representation.[86] The Court of Appeals held Taylor's statements admissible on the ground that they were made during an interrogation about an offense unrelated to the one on which the defendant was represented. But if *Rogers* would have mandated the suppression of Bartolomeo's statements if only the officers knew about Bartolomeo's previous representation, then Taylor's statements should have been suppressed as well and *Taylor* would have been overruled by *Rogers*. But *Rogers*, which mentioned *Taylor*, did not state that it was overruling it, and *Bing* explicitly mentioned that *Taylor* was not overruled by *Rogers*, stating: "We *modified* the *Taylor* rule *somewhat* in *People v. Rogers*."[87]

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[84] *Bing*, 76 N.Y.2d at 345, 558 N.E.2d at 1019, 559 N.Y.S.2d at 482.

[85] 27 N.Y.2d 327, 266 N.E.2d 630, 318 N.Y.S.2d 1 (1971).

[86] *Id.* at 328–29, 332, 266 N.E.2d at 630–31, 633, 318 N.Y.S.2d at 2, 5.

[87] *Bing*, 76 N.Y.2d at 340, 558 N.E.2d at 1015–16, 559 N.Y.S.2d at 478–79 (emphasis added) (citations omitted). A 1992 Comment in a law review cited to *People v. Ramos*, 40 N.Y.2d 610, 357 N.E.2d 955, 389 N.Y.S.2d 299 (1976), which was interspaced between *Taylor* and *Rogers*, as an indication that *Rogers* "apparently overturn[ed] *Taylor*." Robert W. Connolly, Comment, *New York's Right to Counsel: Overturning the Derivative Rule*, 56 ALB. L. REV. 197, 207 (1992). According to the Comment, *Ramos* demonstrated that the post-*Taylor* Court "was looking for a way to expand the right to counsel," so that *Rogers* completed the gradual erosion of *Taylor* by simply overturning it. *Id.* at 207. The Comment, however, misrepresented *Ramos*' holding. In *Ramos*, the Court of Appeals ordered the suppression of a statement made by a defendant who had counsel in one case, and was then taken for interrogation on another, unrelated offense. When the defendant was taken for this unrelated questioning, his lawyer, who was present, stated in open court, "I have advised [the defendant] not to make any statements to these police officers who are taking him into custody." *Ramos*, 40 N.Y.2d at 612, 357 N.E.2d at 957, 389 N.Y.S.2d at 301. The Comment claimed that "the court found *Taylor* distinguishable [and suppressed Ramos' subsequent statement] because there was no specific direction given in that case [i.e., *Taylor*] to refrain from questioning." Connolly, *supra* at 207 n.87. But that was not at all why the Court of Appeals did not find *Taylor* applicable. The Court made it crystal clear that its holding was based on a finding that the defendant's lawyer, in making his statement, "has undertaken to represent the accused with respect to the second,

An interpretation as wrong as *West*'s interpretation of *Rogers* and *Bing* can be debunked from a variety of angles; but there is little reason to belabor the point. The short of the matter is that *West*'s claim, that the overruling of *Bartolomeo* merely eliminated the police's duty to inquire whether a defendant was represented, ignored *Bing*'s entire analysis and made a mockery of its holding. (It was also a claim that presented *Bing* as a case making little sense, for why would a defendant's right to counsel depend on whether a police officer, who is aware of a pending charge, bothers to inquire whether the defendant is represented or not?) But what was most disturbing about this erroneous interpretation was that this was the same interpretation of *Rogers* and *Bartolomeo* proposed by Chief Judge Kaye in her dissenting opinion in *Bing*, and soundly rejected by the *Bing* majority. Kaye's dissent in *Bing* stated:

> On defendant's appeal from his conviction [in *Bartolomeo*], the main thrust of the People's argument in this court was not that counsel in *Rogers* had been retained on the charge for which defendant was then in custody, while the counseled matter in *Bartolomeo* was an 'unrelated' prior charge . . . .
> What was more novel about *Bartolomeo*—and the principal point of the People's argument—was that *Rogers* should be distinguished on the ground that the police had actual knowledge of the existence of the unrelated [original] charges, but did not have actual knowledge of defendant's representation on those charges. We rejected that argument . . . [and imposed] a duty to inquire as to the presence of counsel . . . .[88]

Thus Kaye's dissent claimed that *Bartolomeo*'s expansion of

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unrelated crime." *Ramos*, 40 N.Y.2d at 616, 357 N.E.2d at 960, 389 N.Y.S.2d at 303. And once the defendant became thus represented, his indelible non-derivative right to counsel had attached—and *Taylor* became irrelevant. It is indeed interesting to note that, as we already saw and as we shall see more below, this area of the law suffered not only from poor judicial decisions but also, in what appears to be a closely related two-way phenomenon, from faulty scholarship.

[88] *Bing*, 76 N.Y.2d at 354–55, 558 N.E.2d at 1025, 559 N.Y.S.2d at 488 (Kaye, J., concurring as to result in *Bing* and *Medina*, and dissenting as to *Cawley*). The dissent in *Bing* also claimed that in *Bartolomeo*, "[a]s in *Rogers*, the court confronted what was perceived as a means of circumventing defendant's constitutional rights through questioning on 'unrelated' matters." *Id.* at 354, 558 N.E.2d at 1025, 559 N.Y.S.2d at 488 (Kaye, J., concurring as to result in *Bing* and *Medina*, and dissenting as to *Cawley*). But whereas *Rogers* was properly portrayed as a case where the defendant's right to counsel was "evaded," *Bartolomeo* was a case *about these unrelated matters*. The police in *Bartolomeo* were not circumventing any right to counsel because, prior to *Bartolomeo*, there was no such right to circumvent.

Rogers consisted in its imposition of a duty to inquire on the police, and it went on to denounce the overruling of *Bartolomeo* on the ground that such attribution of knowledge was perfectly reasonable. But the majority opinion, as Judge Kaye's dissent in *Bing* irritably recognized, took an entirely different view of *Bartolomeo*: *Bartolomeo*'s expansion of *Rogers*, it said, consisted in its invention of an unprincipled and utterly unjustified derivative right to counsel.[89] Yet in *West*, Judge Kaye presented her dissenting view of *Rogers* and *Bartolomeo* as *Bing*'s actual holding![90]

Judge Kaye was clearly disturbed by *Bing*'s overruling of *Bartolomeo*. She wrote in *Bing*:

> That there are now four votes [arraigned against *Bartolomeo*] . . . is, of course, not a valid reason to overrule the case. "The ultimate principle is that a court is an institution and not merely a collection of individuals; just as a higher court commands superiority over a lower not because it is wiser or better but because it is institutionally higher. This is what is meant, in part, as the rule of law and not of men."
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> . . . .
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> . . . [T]his court in the past had placed a high value on adherence to the doctrine of stare decisis. Not often in our history have we explicitly overruled a recent precedent, and rarely *if ever* have we done so by a closely divided court. Perhaps even more disturbing than the extraordinary step of overturning *Bartolomeo*—wrong and unnecessary as it is to do so—is that it cannot help but unsettle the belief "that bedrock principles are founded in the law rather than in the proclivities of individuals."[91]

But violating the doctrine of stare decisis is a perfectly legitimate judicial practice: "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."[92] By contrast, to present a

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[89] *See id.* at 350, 558 N.E.2d at 1022, 559 N.Y.S.2d at 485 (majority opinion).

[90] And this without a peep from two judges who were part of the majority in *Bing*, one of whom, Judge Simons, actually wrote the *Bing* opinion—though it need be remembered that this was dicta, a mere aside to the actual issue in *West*.

[91] *Bing*, 76 N.Y.2d at 360–61, 558 N.E.2d 1028–29, 559 N.Y.S.2d at 491–92 (Kaye, J., concurring and dissenting) (citations omitted).

[92] People v. Hobson, 39 N.Y.2d 479, 487, 348 N.E.2d 894, 900, 384 N.Y.S.2d 419, 424 (1976).

dissenting opinion as the court's holding is to violate an inviolable principle of our rule of law.

Chief Judge Kaye's opinion in *West* was joined by Judges Titone, Hancock, Bellacosa, and Smith.

IV. *PEOPLE V. STEWARD*

While the return to the confusions and misinterpretations of the past appeared as mere dicta in *People v. West*,[93] in *People v. Steward* it was already the holding.[94] *Steward* was another typical opinion in this unfortunate series: its holding was obscure and ambiguous, it misread the precedents, contradicted itself, and was ultimately based on a newly discovered distinction, the significance of which was never explained and is probably unexplainable.

Steward was arrested for criminal possession of a controlled substance and for resisting arrest, was arraigned for these offenses and assigned counsel, and was then released on his own recognizance.[95] A few days later, Steward was re-arrested for an unrelated parole violation. The police knew that Steward was represented by counsel on the earlier charges, but proceeded to interview him about a homicide unrelated to the offenses for which he was represented, as well as the offense for which he was arrested.[96] Steward waived his right to counsel and made self-incriminating statements about the homicide.[97] He was then indicted for murder. At trial, Steward moved to suppress his statements.[98] The trial court granted suppression of the statements, but the Appellate Division reversed and held the statements admissible; the Court of Appeals affirmed their admissibility.[99]

"The sum and substance of [Steward's] argument," said the Court of Appeals, "is that *People v. Rogers* contains a derivative right to counsel rule that is still operative after this Court's

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[93] *See* People v. West, 81 N.Y.2d 370, 377–79, 615 N.E.2d 968, 973–74, 599 N.Y.S.2d 484, 489–90 (1993).

[94] *See* People v. Steward, 88 N.Y.2d 496, 501–02, 670 N.E.2d 214, 216–17, 646 N.Y.S.2d 974, 976–77 (1996).

[95] *Id.* at 498, 670 N.E.2d at 214–15, 646 N.Y.S.2d at 974–75.

[96] *Id.* at 498, 670 N.E.2d at 215, 646 N.Y.S.2d at 975.

[97] *Id.* at 498, 670 N.E.2d at 215, 646 N.Y.S.2d at 975.

[98] *Id.* at 498, 670 N.E.2d at 215, 646 N.Y.S.2d at 975.

[99] *Id.* at 498–99, 502, 670 N.E.2d at 215, 217, 646 N.Y.S.2d at 975, 977.

holding in *People v. Bing*."[100] This was a perfectly reasonable argument for Steward to make given that, as we have seen, *People v. West*, decided three years earlier, explicitly stated that such a "derivative right" survived *Bing*.[101] Yet the *Steward* Court summarily dismissed the claim, correctly asserting that *Rogers* never was about a derivative right to counsel and that "*Bing* unequivocally eliminates any right to counsel derived solely from a defendant's representation in a prior unrelated proceeding."[102]

The Court, however, soon began contradicting itself. Just a few paragraphs below, it pronounced that "*Rogers* establishes and still stands for the important protection and principle that once a defendant in custody on a particular matter is represented by or requests counsel, custodial interrogation about any subject, whether related or unrelated to the charge upon which representation is sought or obtained, must cease."[103] The Court also adopted *People v. West*'s absurd contention—without citing to that case—that *Bing* was all about eliminating *Bartolomeo*'s attribution of knowledge of representation to police officers who were aware of a previous charge.[104] Thus, despite its earlier

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[100] *Id.* at 499, 670 N.E.2d at 215, 646 N.Y.S.2d at 975 (citation omitted).

[101] *See* People v. West, 81 N.Y.2d 370, 377–79, 615 N.E.2d 968, 973–74, 599 N.Y.S.2d 484, 489–90 (1993) ("[W]e conclude that defendant's right to counsel was violated when the police sent an informant to . . . record . . . statements about the counseled matter without regard to their knowledge that defendant had a lawyer in the case.").

[102] *Steward*, 88 N.Y.2d at 500–01, 670 N.E.2d at 216–17, 646 N.Y.S.2d at 976–77.

[103] *Id.* at 501, 670 N.E.2d at 217, 646 N.Y.S.2d at 977.

[104]

> *People v Bartolomeo* built a different and significantly expanded right to counsel rule atop *Rogers*' holding. After *Bartolomeo*, and until *Bing*, a duty to inquire was imputed to the police when a defendant was in custody and being questioned, and was represented by counsel on a prior, separate, unrelated charge. . . .
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> . . . Under *Bartolomeo*, the police were charged with an affirmative duty to inquire whether a defendant was represented in any unrelated criminal matter of which they had knowledge and were chargeable with the knowledge of what such an inquiry would have revealed. Thus, even though the interrogating officers in *Bartolomeo* had no knowledge that the defendant was actually represented by counsel and the defendant had voluntarily waived the right to counsel, this Court held that testimony concerning the defendant's statements had to be suppressed nonetheless. The rationale was that the officers were aware that the defendant had been arrested earlier on an unrelated charge and were deemed to have knowledge of the defendant's representation upon that charge.
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> Soon after the promulgation of the *Bartolomeo* extension, this Court found

claim to the contrary, the *Steward* opinion conceded that a right to counsel *could* derive "solely from a defendant's representation in a prior unrelated proceeding."[105] If a defendant was in custody and was represented by counsel, she would have a derivative indelible right to counsel in any unrelated matter if the police actually knew of the representation. Indeed, this is precisely what happened in a case decided just a year later—a case we will soon examine.

All of this, however, still did not explain why Steward's statement was not suppressed. After all, the police *knew* that Steward was represented by counsel on another charge when they questioned him. If *Bing* was about eliminating *Bartolomeo*'s attribution of knowledge of representation to the police, then *Bing*'s holding was inapplicable to *Steward*—where no question of attributing knowledge to the police ever arose—and Steward should have had his statement suppressed under *Rogers*.

The *Steward* opinion, though, added a new twist to its reading of *Bing*—it purported to detect, in *Bing*, an interpretation of *Rogers* that entailed the admissibility of Steward's statements. The *Steward* opinion stated:

> *Bing* could not be clearer that the *Rogers* right to counsel bars questioning on unrelated matters only when a defendant is in custody *on the initial charge upon which the right to counsel has attached.* It does not extend to questioning and result in suppression when the defendant is subsequently taken into custody on an unrelated charge, under circumstances as occurred in this case.[106]

Steward, you may recall, was taken into custody not on the offense for which he was represented, but on another offense, while Rogers was taken into custody on the offense for which he was represented.[107] Thus, Steward had no derivative right to counsel under *Rogers*, and his statements were admissible.

As an initial matter, it is an obvious stretch to claim that *Bing* "could not be clearer" on this point; for myself, I did not see

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it necessary to start reining it in. After eight years of experience, this Court determined [in *Bing*] that the *Bartolomeo* rule lacked any "principled basis which justifies its social cost."

Id. at 499–500, 670 N.E.2d at 215–16, 646 N.Y.S.2d at 975–76 (citations omitted).

[105] *Id.* at 500, 670 N.E.2d at 216, 646 N.Y.S.2d at 976.

[106] *Id.* at 502, 670 N.E.2d at 217, 646 N.Y.S.2d at 977 (emphasis added).

[107] *Steward*, 88 N.Y.2d at 497, 670 N.E.2d at 214, 646 N.Y.S.2d at 974; People v. Rogers, 48 N.Y.2d 167, 169–70, 397 N.E.2d 709, 711, 422 N.Y.S.2d 18, 19–20 (1979).

this point in *Bing* before reading *Steward*, and I still cannot see it. Sure enough, there are some passages in *Bing* which, read out of context, appear to coincide with this thesis: *Bing* said that "[o]ur holding [in *Rogers*], contained in the very first sentences of the opinion, emphasized that since defendant was represented on the charge on which he was held in custody, he could not be interrogated in the absence of counsel on any matter."[108] *Bing* also said—this being the only support for the thesis cited by both *Steward* and the law review Note from which *Steward* appeared to have lifted this theory[109]— that:

> [A]lthough *Rogers* and *Bartolomeo* are frequently linked in legal literature and *Rogers* was the only case cited to support the new rule adopted in *Bartolomeo*, the two holdings are quite different. In *People v. Rogers*, the right to counsel had been invoked on the charges on which defendant was taken into custody and he and his counsel clearly asserted it . . . . In *People v. Bartolomeo*, however, defendant was taken into custody for questioning on a new, unrelated charge. He was not represented on that charge and freely waived his right to counsel.[110]

But these quotes miserably fail to establish *Steward*'s claim that *Bing* distinguished *Rogers* from *Bartolomeo* on the mere ground that Rogers was taken into custody for the offense for which he was represented, whereas Bartolomeo was taken into custody for an offense for which he was not represented (although he *was* represented at the time on another, unrelated offense). *Bing* was making a much more fundamental point when it described *Rogers*' holding and distinguished it from *Bartolomeo* in the passage above—namely, that Rogers sought suppression of his statement by invoking his right to counsel regarding a charge for which *his indelible right to counsel had already attached* when he made his statement, while Bartolomeo sought the suppression of his statement by invoking a right to counsel in regard to a charge for which his indelible right to counsel had not yet attached when

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[108] People v. Bing, 76 N.Y.2d 331, 340, 558 N.E.2d 1011, 1016, 559 N.Y.S.2d 474, 479 (1990).

[109] The article claimed that "The *Bing* court distinguished between questioning with respect to unrelated matters in the context of a single arrest and questioning about unrelated matters in the context of a separate arrest." Joseph D. Sullivan, Note, *Interaction Between State and Federal Right to Counsel: The Overruling of* Bartolomeo, 8 TOURO L. REV. 191, 226-7 (1991); *see also* Connolly, *supra* note 87, at 204 (expressing a similar sentiment).

[110] *Bing*, 76 N.Y.2d at 350, 558 N.E.2d at 1022, 559 N.Y.S.2d at 485.

his statement was made.[111] The remark that Rogers was taken into custody for the offense for which he was represented was entirely incidental to the point being made.

In any event, *Steward*'s reading of *Bing* could only be a reading of *Bing*'s dicta, not of *Bing*'s holding. *Bing* could not have based the admissibility of its defendants' statements on the ground claimed by *Steward* because two of the defendants in *Bing*—both Bing and Cawley—were taken into custody for the offense for which they were represented, and not, like Steward and Bartolomeo, for an unrelated offense.[112] Yet the *Steward* Court asserted that Steward's statements were admissible because "the salient facts of this case fit readily within *Bing*'s control" and "even produce an a fortiori application . . . of the *Bing* analysis."[113] This claim must be fallacious.

Moreover, *Steward*'s holding makes no sense as a matter of policy. According to *Steward*, a defendant in custody could not waive his right to counsel and answer questions on an unrelated offense if he were taken into custody for an offense for which he was represented, but could waive his right if he were taken into custody for an offense for which he was not represented.[114] But if a defendant has his right to counsel attached in one offense, why should it matter to his right to counsel on another unrelated offense whether he was taken into custody for the original offense or for another? (Two of three defendants in *Bing*, for instance, were taken into custody for crimes for which they had outstanding arrest warrants, but were then interrogated exclusively about unrelated offenses.) Moreover, since the defendant is actually represented by an attorney, whether he is taken into custody for one offense or for another, the rule flies in the face of the only rationales the Court ever proposed in support of a derivative right to counsel—viz., that it is the responsibility of a defendant's attorney, not the State, to determine whether an interrogation is in fact related or unrelated to the crime for which a defendant is represented, and that an attorney will not

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[111] *See supra* notes 109–10 and accompanying text.

[112] *Bing*, 76 N.Y.2d at 335–36, 558 N.E.2d at 1012–13, 559 N.Y.S.2d at 475–76.

[113] People v. Steward, 88 N.Y.2d 496, 501, 670 N.E.2d 214, 216–17, 646 N.Y.S.2d 974, 976–77 (1996).

[114] *See id.* at 502, 670 N.E.2d at 217, 646 N.Y.S.2d at 977 (stating that the *Rogers* right to counsel bars questioning on unrelated matters only when a defendant is in custody on the initial charge upon which the right to counsel has attached).

"abandon the client" simply because the new charge is unrelated.[115]

The only thing to be said in favor of the *Steward* opinion is that it bent over backwards in order to admit a statement whose suppression was completely unjustified; but with its confused analysis and its poor rationale it paved the way for subsequent unjustified suppressions.

V. *PEOPLE V. BURDO*

People v. Burdo[116] is the latest Court of Appeals authority on New York's derivative right to counsel. Defendant Burdo was in jail following his arraignment for rape charges when police officers, who knew that Burdo was represented by counsel on those charges, came to question him regarding an unrelated murder.[117] Burdo agreed to waive his right to counsel and proceeded to make inculpating statements in regard to that murder.[118] Burdo then moved to suppress his statements at the trial for the murder charge, claiming that his statements were obtained in violation of his right to counsel under the New York Constitution.[119] Burdo clearly claimed a derivative indelible right to counsel—a right to counsel derived solely from the unrelated rape offenses for which he was represented, and with which he was already charged, at the time of the questioning.[120] The trial court agreed with Burdo and suppressed the

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[115] As then-Judge Kaye noted in her dissenting opinion,

> Those conclusions rested on two key observations about the attorney-client relationship. First, as the court noted, even as to charges unrelated to the subject of an existing representation, the attorney naturally would not abandon the client. And second, it "is the role of defendant's attorney, not the State, to determine whether a particular matter will or will not touch upon the extant charge." *Rogers* established that the "relatedness" of pending charges, henceforth, would be determined not by law enforcement authorities, or even by courts, but by the attorneys who were actually representing the defendants.

Bing, 76 N.Y.2d at 354, 558 N.E.2d at 1024–25, 559 N.Y.S.2d at 487–88 (Kaye, J., concurring and dissenting) (quoting People v. Rogers, 48 N.Y.2d 167, 173, 397 N.E.2d 709, 713, 422 N.Y.S.2d 18, 22 (1979)).

[116] 91 N.Y.2d 146, 690 N.E.2d 854, 667 N.Y.S.2d 970 (1997).

[117] *Id.* at 148, 690 N.E.2d at 854, 667 N.Y.S.2d at 970. On the right to counsel in regard to interrogations on related offenses, see *supra* note 20.

[118] *Burdo*, 91 N.Y.2d at 148, 690 N.E.2d at 854–55, 667 N.Y.S.2d at 970–71.

[119] People v. Burdo, 224 A.D.2d 115, 116, 649 N.Y.S.2d 949, 950 (3d Dep't 1996), *aff'd*, People v. Burdo, 91 N.Y.2d 146, 690 N.E.2d 854, 667 N.Y.S.2d 970 (1997).

[120] *Burdo*, 224 A.D.2d at 116–18, 649 N.Y.S.2d at 950.

statements, the Appellate Division affirmed the suppression, and the Court of Appeals granted review of the case and affirmed. The opinion, a very short one, claimed that *People v. Rogers* fully governed the matter:

> [W]e underscore that our decision neither expands nor narrows *Rogers*, which established the principle that a defendant represented by counsel on the charge on which he is held in custody cannot be interrogated in the absence of counsel "on any matter." For nearly two decades *Rogers* has stood as a workable, comprehensible, bright line rule . . . . We reject the proposal put forth by the dissent to now modify *Rogers* . . . ."[121]

For the sake of good form, let us reiterate why *Burdo* was not, and could not have been, governed by *Rogers*: *Rogers* suppressed statements at a trial for an offense for which the defendant was represented by counsel at the time that his statements were made; *Burdo*, by contrast, suppressed statements at a trial for an offense for which the defendant had no counsel, requested no counsel, and had no formal proceedings commenced against him.[122] Thus, *Rogers*' holding, and its rationale, were inapplicable to *Burdo*. Moreover, whatever dubious arguments one could make in favor of reading a derivative right into *Rogers*, such a derivative right was conclusively eliminated by *Bing*.

Indeed, *Bing* held admissible the statements of defendants who, like Burdo, were in custody for offenses for which they were represented, were questioned about unrelated offenses for which their indelible right to counsel had not yet attached, and who then sought suppression of their statements at the trial for these unrelated offenses. What, then, distinguished Burdo from the defendants in *Bing*, whose statements were admissible despite *Bing*'s affirmation of the continuing validity of *Rogers*? The *Burdo* Court never explicitly addressed this crucial and rather obvious question (as previously stated, *Burdo* was a brief opinion that hardly addressed *any* question); but when declaring that *Rogers* mandated the suppression of Burdo's statements, the Court stated:

> *Rogers* clearly applies to the instant case. Defendant was in custody at the Clinton County jail pursuant to a pending charge of rape and assault. It is also conceded that defendant had been

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[121] *Burdo*, 91 N.Y.2d at 150–51, 690 N.E.2d at 856, 667 N.Y.S.2d at 972.

[122] *Id.* at 148, 690 N.E.2d at 854, 667 N.Y.S.2d at 970.

> assigned legal representation following his arraignment and subsequent incarceration on a pending charge. The officers who questioned defendant were fully aware of these facts and proceeded to interrogate the defendant anyway. Under a plain reading of *Rogers*, the State was prohibited from questioning him under these circumstances.[123]

Thus the difference between *Bing* and *Burdo*—and therefore the reason why *Rogers* presumably mandated the suppression of Burdo's statements but not the suppression of the statements in *Bing*—was that in *Burdo* the police officers "were fully aware" of defendant's representation, whereas the officers in the *Bing* cases, "though alerted by the outstanding bench warrant[s], made no inquiry about the representation . . . ."[124] This theory therefore holds that *Bing* overruled *Bartolomeo*, not in order to eliminate the derivative right to counsel, but in order to eliminate the attribution of knowledge of representation to the police (that knowledge being a precondition for the attachment of the derivative right to counsel). We already saw the absurdity of this interpretation of *Bing* when we analyzed *People v. West*.[125]

To make a long story short, in contradiction with *Burdo*'s proclamation that its decision "neither expands nor narrows *Rogers*," *Burdo* was a repeat of the unjustifiable, and unexplained, expansion of *Rogers*' holding. Moreover, *Burdo*'s error was particularly extraordinary because the lone dissenter in the case alerted the majority to the opinion's contradiction with *Bing*, stating in no uncertain terms that "[i]f *Rogers* were read to mean what the majority now ascribes to it, then the Court in *Bing* would have been required to overrule *Rogers* also . . . ."[126] And yet no analysis seeking to refute this grave allegation was undertaken.

The majority's obstinate adherence to its mistake may have been induced by the fact that the dissent itself, although presenting a legal analysis far superior to the majority's, advanced a faulty interpretation of the *Rogers/Bartolomeo/Bing*

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[123] *Id.* at 150, 690 N.E.2d at 856, 667 N.Y.S.2d at 972 (footnote omitted).

[124] People v. Bing, 76 N.Y.2d 331, 335, 558 N.E.2d 1011, 1013, 559 N.Y.S.2d 474, 476 (1990). In the third case, People v. Medina, 146 A.D.2d 344, 541 N.Y.S.2d 355 (1st Dep't 1989), the officer mistakenly believed that the previous charge was dismissed. *Id.* at 345–46, 541 N.Y.S.2d at 355–56.

[125] *See supra* Part III.

[126] *Burdo*, 91 N.Y.2d at 155, 690 N.E.2d at 859, 667 N.Y.S.2d at 975 (Wesley, J., dissenting).

trilogy. I will not engage in a full exposition of the dissent's proposal (the proposal was confusing and complicated, and things are complicated and confusing enough as they are), but let me offer the following relatively brief synopsis.

According to the dissent, *Rogers* did not apply to the three cases in *Bing* because Rogers' right to counsel arose out of his right against self-incrimination, and Rogers also had an actual and substantial attorney-client relationship.[127] In *Bing*, by contrast (so claimed the dissent), the right to counsel arose merely out of the initiation of formal proceedings, and the defendants' relationships with their attorneys were "superficial."[128] The dissent's suggested holding was that "defendant must establish an actual [rather than a superficial] attorney-client relationship or an invocation of his right to counsel under the Fifth Amendment of the United States Constitution and article I, § 6 of our State Constitution [in the original, unrelated offense] before the protection of *Rogers* becomes available."[129] Thus, defendants could *not* waive their right to counsel in the absence of counsel regarding an unrelated offense if: (1) the right to counsel for the original offense arose in the context of the right against self incrimination (as when a defendant requests to speak to an attorney before answering questions, or an attorney instructs the police to stop the questioning); or (2) the right to counsel for the original offense arose out of an actual and substantial counsel-client relationship. But defendants *could* waive their right to counsel if it arose out of the mere initiation of formal proceedings and they did not have an actual and substantial counsel-client relationship in the original, unrelated offense — which is why, according to the dissent, Burdo's statements should have been admissible.[130] In short, the dissent proposed a distinction between those defendants who enjoy a derivative right to counsel and those who do not based on the source of the right to counsel and the type of counsel-client relationship in the original unrelated offense, and this distinction was supposedly found in *Bing* and its reading of

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[127] *Id.* at 154, 690 N.E.2d at 858, 667 N.Y.S.2d at 974 (Wesley, J., dissenting).

[128] *Id.* at 155, 690 N.E.2d at 859, 667 N.Y.S.2d at 975 (Wesley, J., dissenting).

[129] *Id.* at 151, 690 N.E.2d at 856, 667 N.Y.S.2d at 972 (Wesley, J., dissenting).

[130] Note the similarity with *West* in regard to the "actual representation." *See supra* note 77 and accompanying text.

Rogers and *Bartolomeo*.[131] Indeed, according to the dissent, *Bartolomeo* was overruled by *Bing* because it "extended the *Rogers* rule to hold that the mere pendency of one matter in which the [indelible] right to counsel had attached prohibited the police from questioning a suspect about other matters, related or unrelated" (whereas what was actually needed for a *Rogers* derivative right, according to the dissent, was either an invocation of the right to counsel in the context of the right against self incrimination, or an actual and substantial client-counsel relationship—not the mere pendency of a charge).[132]

This awkward proposal stemmed from the dissent's wish to align New York's right to counsel with its federal counterpart, while at the same time paying lip service to the unique historical development, and to the binding precedents, of the New York right.[133] But the proposal offered a blatantly wrong interpretation of *Rogers*, *Bartolomeo*, and *Bing*, and also seemed to fly in the face of the factual scenarios of these cases. As an initial matter, as we saw, *Bing* overruled *Bartolomeo* for inventing a derivative right to counsel, not merely for deriving that right from the "mere pendency" of an unrelated charge. Indeed, *Bing* criticized *Bartolomeo* for failing to explain "why *Rogers* should be expanded so dramatically to protect a suspect against self-incrimination on the new crime unrelated to the matter upon which defendant actually obtained representation"—a criticism showing little concern with whether a defendant's original right to counsel arose out of the right against self incrimination, or from an "actual" client-lawyer

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[131] *Burdo*, 91 N.Y.2d at 151–60, 690 N.E.2d at 856–62, 667 N.Y.S.2d at 972–78 (Wesley, J., dissenting).

[132] *Id.* at 153, 690 N.E.2d at 858, 667 N.Y.S.2d at 974 (Wesley, J., dissenting).

[133] The dissent's holding sought to emulate U.S. Supreme Court decisions differentiating the right to counsel arising from the right against self-incrimination (Fifth Amendment right to counsel) from the right to counsel arising from the commencement of formal proceedings (Sixth Amendment right to counsel). *See id.* at 159, 690 N.E.2d at 861–62, 667 N.Y.S.2d at 977–78 (Wesley, J., dissenting). The problem with the claim was that New York's own constitutional right to counsel—upon which Burdo's claim was based—did not recognize this distinction. The dissent thus opted to draw the line along the mentioned, and partly overlapping, distinction which New York law did recognize. *See id.* at 151–52, 690 N.E.2d at 856–57, 667 N.Y.S.2d at 972–73 (Wesley, J., dissenting); *see also* People v. West, 81 N.Y.2d 370, 373–74, 615 N.E.2d 968, 970–71, 599 N.Y.S.2d 484, 486–87 (1993). Hence the dissent's insistence that *Rogers*' right to counsel attaches either when the defendant requests an attorney while in custody, *or* when he is *actually* represented by an attorney.

relationship.[134] In fact, it was practically impossible to tell from *Bing*'s description of the facts before it whether any of its individual defendants had counsel because he had requested one in the context of the right against self-incrimination, or because he had actually retained one, or simply because of the commencement of formal proceedings.[135] Moreover, *Bing* explicitly rejected the prosecution's suggestion in *People v. Cawley* to carve an exception to *Bartolomeo*, and hence to admit Cawley's statements, on the basis of Cawley's superficial relationship with his attorney (it being a result of his escape).[136]

Furthermore, *Bartolomeo* was a case where the defendant was *actually* represented by counsel—not merely a case where a defendant's right to counsel has attached due to the pendency of a charge (we were told that Bartolomeo was represented by counsel at his arraignment and that he "did have an attorney acting on his behalf"[137]); and yet the *Burdo* dissent maintained, without offering an explanation, that Bartolomeo was not entitled to *Rogers*' derivative right. In fact, Burdo himself was also "actually represented"—at least in the natural sense of these words (and, as matter of fact, it was also impossible to determine from the facts spelled out in *Burdo* the source of Burdo's right to

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[134] People v. Bing, 76 N.Y.2d 331, 341, 558 N.E.2d 1011, 1017, 559 N.Y.S.2d 474, 480 (1990).

[135] *Bing* merely said:

> In *People v. Bing*, defendant, suspected of a New York burglary, was arrested in Nassau County on an Ohio warrant after a police teletype confirmed that he was wanted for burglary in that State. He had counsel on the pending Ohio charge . . . .
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> . . . .
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> In *People v. Cawley*, defendant was charged in New York with robbery, second degree. Following his arraignment, with counsel present, he was admitted to bail. . . .
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> . . . .
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> In *People v. Medina*, defendant was convicted of murdering two neighbors. A detective investigating the homicides learned that defendant had recently been released from jail after being held on an assault charge. . . . Defendant moved to suppress the statements . . . because of his representation on the prior charge.

Id. at 335–36, 558 N.E.2d at 1012–13, 559 N.Y.S.2d at 475–76.

[136] "[T]he exception urged in *Cawley* would require the trial court to inquire into the substantiality of the attorney-client relationship, a matter which has not concerned us in *Bartolomeo* cases previously, to determine if the suspect could waive a right which we have held indelible once it attaches." *Id.* at 337, 558 N.E.2d at 1014, 559 N.Y.S.2d at 477.

[137] People v. Bartolomeo, 53 N.Y.2d 225, 231–32, 423 N.E.2d 371, 374–75, 440 N.Y.S.2d 894, 897 (1981).

counsel). The dissenter never allowed these uncomfortable facts to get in the way of his theory: he simply ignored Bartolomeo's actual representation.[138] But he never explained what distinguished a superficial counsel-client relationship from an actual one, or why that distinction should make a difference to a defendant's right to counsel in an unrelated offense.

Seeking to reconcile New York's right to counsel with its federal equivalent, the dissent distorted the facts of the relevant precedents, offered an untenable interpretation of their holdings, and suggested a rule which was confusing and also unjustified as a matter of policy. The *Burdo* majority, forced to choose between its own mistaken interpretation and the dissent's, stuck with its own.

VI. THE CORRECT INTERPRETATION

The correct interpretation of *Rogers*, *Bartolomeo*, and *Bing* should be clear by now, but I will briefly summarize it for clarity's sake. As we saw, *People v. Rogers* suppressed a statement at the trial for an offense for which the defendant's indelible right to counsel had already attached at the time that he made his statement. The *Rogers* Court simply viewed Rogers' continued questioning on "unrelated activities in which he had not participated," after his attorney's request that the questioning stop, as a ruse aimed at subverting an existing indelible right to counsel.[139] Nowhere did *Rogers* hold—and indeed it had no occasion to hold—that its ruling applied to the admissibility of statements at a trial on such "unrelated activities."[140] Whatever ambiguous statements one finds in *Rogers* in support of such an interpretation are mere dicta, and ambiguous and even self-contradictory dicta at that.

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[138] *Id.* at 236–40, 423 N.E.2d 377–79, 440 N.Y.S.2d 900–02 (Wachtler, J., dissenting).

[139] People v. Rogers, 48 N.Y.2d 167, 170, 397 N.E.2d 709, 711, 422 N.Y.S.2d 18, 20 (1979).

[140] *See Bing*, 76 N.Y.2d at 340, 558 N.E.2d at 1016, 559 N.Y.S.2d at 479 ("We concluded [in *Rogers*] that the statement was anything but spontaneous and had resulted from exploiting custody on the crime on which Rogers had counsel. . . . Under such circumstances, the *Taylor* rule necessarily gave way to insure that questioning stopped and 'accidental' interference with the established lawyer-client relationship was avoided."); People v. Robles, 72 N.Y.2d 689, 697–98, 533 N.E.2d 240, 244, 536 N.Y.S.2d 401, 405 (1988) ("[O]ur primary concern in *Rogers* was that questioning on unrelated charges might interfere with the attorney-client relationship that existed with respect to the pending charges.").

People v. Bartolomeo, however, purported to apply *Rogers* to the case of a defendant who was represented by counsel on another unrelated offense at the time that he made his statements, and then sought the suppression of his statements at the trial, not on the original offense for which he was represented, but on the new, unrelated charges.[141] The *Bartolomeo* decision thus gave rise to New York's derivative right to counsel in a short and barely elaborated paragraph, by relying on *Rogers* for a proposition that *Rogers* never made.

Bing overruled this unjustified, and possibly unjustifiable, expansion of *Rogers*. Perceiving that *Bartolomeo*'s right to counsel arose mysteriously out of his right to counsel for another unrelated offense, *Bing* moved to eliminate this "fictional" indelible right "derived from a prior charge,"[142] describing *Bartolomeo* (in the words of the dissent) as an "aberrant decision not worthy of precedential respect, a decision without a principled basis or even a rationale."[143] Thus, *Bing* eliminated any indelible right to counsel arising from a defendant's representation on an unrelated crime. *Bing*, however, preserved *Rogers*, thereby retaining the rule that any statements made after a purported waiver of the indelible right to counsel without counsel present, whether made in response to questioning on related or on unrelated crimes, would be suppressed *at the trial for an offense for which the defendant's indelible right to counsel had already attached at the time of questioning.*

Unlike *Bartolomeo* or *Burdo*, *Bing* was a lengthy, detailed, and well-argued opinion. Unfortunately, it retained *Rogers* without an explicit explanation as to what it meant by that, thereby leaving the door open for the confusions and distortions that followed.[144]

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[141] *Bartolomeo*, 53 N.Y.2d at 236, 423 N.E.2d at 377, 440 N.Y.S.2d at 900 (Wachtler, J., dissenting).

[142] *Bing*, 76 N.Y.2d at 349, 558 N.E.2d at 1021, 559 N.Y.S.2d at 484.

[143] *Id.* at 352, 558 N.E.2d at 1023, 559 N.Y.S.2d at 486 (Kaye, J., concurring and dissenting).

[144] *Rogers* and *Bing* do not exhaust defendants' right to counsel in the context of a custodial interrogation on offenses unrelated to those for which a defendant's right to counsel has attached.

A 1988 U.S. Supreme Court case, Arizona v. Roberson, 486 U.S. 675 (1988), upheld the suppression of statements made by a defendant who requested to see an attorney during an interrogation (pursuant to the Fifth Amendment right to counsel), remained in custody for three days without yet seeing an attorney, and was then questioned (after waiver of *Miranda* rights) about an unrelated offense in

CONCLUSION

We saw that *People v. Rogers*' holding had nothing to do with a derivative right to counsel; that *Rogers* was misinterpreted by *People v. Bartolomeo*; that *People v. Bing*, which overruled *Bartolomeo*, sought to eliminate the misinterpretation of *Rogers*, and with it the derivative right to counsel; that *People v. West*, in dicta, presented *Bing*'s dissenting opinion as if it were *Bing*'s holding, claiming that *Rogers was* about a derivative right; that *People v. Steward*, while subscribing to *West*'s mistaken interpretation of *Rogers* and *Bing*, sought to limit *Rogers*' applicability by purporting to discover a new distinction in *Bing*'s dicta; and that *People v. Burdo*, adopting the misinterpretations of *Rogers* and *Bing* appearing in both *West* and *Steward*, used those misinterpretations to formally reintroduce that same

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whose commission he then incriminated himself. The Supreme Court reasoned that since the accused was continuously in police custody from the time of asserting his Fifth Amendment right through the time of the questioning, so that "[t]he coercive environment never dissipated," "the resumption of questioning by the police without the requested attorney being provided strongly suggest[ed] to the accused that he ha[d] no choice but to answer." *Id.* at 679 & n.2. The Court concluded that "the presumption raised by a suspect's request for counsel—that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance—does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation." *Id.* at 683. Thus, "reinterrogation may only occur if 'the accused himself initiates further communication, exchanges, or conversations with the police.'" *Id.* at 680–81. The Court added that "the continuing investigation of uncharged offenses did not violate the defendant's Sixth Amendment right to the assistance of counsel"—thereby drawing a clear distinction between a defendant's request for attorney during interrogation and a defendant's right to counsel in other contexts (the same distinction the *Burdo* dissent sought to adopt). *Id.* at 685.

In *Minnick v. Mississippi*, 498 U.S. 146 (1990), the Supreme Court applied *Roberson* by ordering the suppression of a statement made by a defendant who was held in custody, asked to see an attorney, met with his attorney, and was then again interrogated by the police on the police's initiative. *Id.* at 148–49, 156. The defendant was interrogated on the same offense, but at least the dissent in *Minnick* thought that the same result would have been required had the defendant been interrogated on an unrelated offense. *See id.* at 163 (Scalia, J., dissenting).

Of course, neither *Taylor*, nor *Rogers*, nor *Bartolomeo*, nor *Bing*, nor *West*, nor *Steward*, nor *Burdo* presented the New York Court of Appeals with similar questions (that is, cases where a defendant requested to see an attorney before making his statement), and the decisions' rationales do not apply to any of those cases. Granted, the suppression of Roberson's or Minnick's statements are probably mandated under New York's own right to counsel jurisprudence as well (in which case, however, reinterrogation would not be possible upon the defendants' initiation of further communication, since New York's indelible right to counsel is stricter than its federal equivalent), but neither of the cases above governs the issue.

derivative right to counsel that *Rogers* never had and *Bing,* in any case, eliminated.

This is an embarrassing saga: the Court, divided and confused, is incapable of settling on a straight course; instead, it veers from side to side, without acknowledging or even recognizing its vagaries. If we take *Burdo* seriously (and this Article believes we should not), crediting its holding over any inconsistencies with prior precedents (of which there are many), the state of the law today is this: a defendant who is actually represented by counsel on one offense (mere attachment of right to counsel without assignment or retention of counsel would not suffice), and who is then interrogated in custody on another, unrelated offense, may waive his right to counsel in the absence of counsel in regard to that unrelated offense only if: (1) the interrogating police officers are not fully aware of the fact that the defendant is represented on an unrelated charge (even if the officers know there is a pending charge against the defendant, or that the defendant was arrested for such a pending charge, and even if they belong to the police unit which initiated the prior arrest and charge);[145] or (2) the defendant was not taken into custody for the offense for which he is actually represented[146]—even if the defendant *was* taken into custody for the offense for which he was represented and was then released and immediately re-arrested only so that he could waive his right to counsel (there is Appellate Division authority for this proposition).[147]

As we saw, this tortuous rule was announced in a series of badly reasoned opinions that offered little by way of legal analysis or policy justifications, and which were often opposed by equally misguided dissents. Interestingly, as mentioned in the footnotes, these decisions relied on several law review Notes and

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[145] This is the upshot of *Steward*'s and *West*'s interpretation of *Bing*'s overruling of *Bartolomeo.*

[146] Even if he is taken into custody for an offense other than the one for which suppression of statements is subsequently sought, that is, even if he is taken into custody for a third offense (these were the circumstances in *Steward*). And if he *is* taken into custody for the offense for which he is represented, the defendant could not waive his right to counsel in the absence of counsel even if interrogated *exclusively* about an unrelated offense.

[147] *See* People v. Walker, 285 A.D.2d 660, 662–64, 727 N.Y.S.2d 731, 734–35 (3d Dep't 2001).

articles which were of equally poor quality.[148] The harmful consequences are plenty. First, the rule makes no sense as a matter of policy. For one thing, what could be more reasonable than attributing knowledge of representation to a police officer who knows a defendant was recently arrested for a different crime, or was in jail on a pending charge, in those cases where the defendant is indeed represented (and where representation, one might add, is a rather reasonable inference)? Any rule to the contrary simply invites the police to remain ignorant. But why should a defendant's constitutional right to counsel depend on the knowledge or ignorance of the interrogating officer? That knowledge or ignorance has nothing to do with the right against self-incrimination, or due process, or fairness, or the wish to avoid reliance on unreliable confessions, or any other constitutional policy in which the right to counsel is grounded. Indeed, if the police's knowledge or ignorance of representation determine the defendant's right to counsel when he is questioned on unrelated offenses, why should it not determine the defendant's right to counsel in the original offense as well?

The distinction between represented defendants taken into custody for the offense for which they are represented, and represented defendants taken into custody for other offenses, is equally silly. Why should it matter to a defendant's right to counsel whether the arresting officer arrested her for an earlier pending charge or for the charge for which she was about to be questioned? And why should it matter to a defendant's right to counsel whether she is awaiting the resolution of unrelated charges in jail or on bail? A defendant may spend many months in jail on a pending charge, especially when the charges are severe and the defendant is a flight-risk. And often, especially when the prosecution's case is strong, defendants choose to spend the time between arraignment and trial (or plea) in jail instead of out on bail: any time spent in the jail will be deducted as time served at the time of sentencing, and defendants may be anxious to start serving their time. Moreover, county jails are generally less harsh places than the tougher state prisons in which a defendant might ultimately end up. Thus, a defendant who is represented on a pending matter is more likely to be in custody if he is a severe offender with a strong case against him. In

[148] *See supra* notes 39, 87 & 109.

overruling *Bartolomeo*, the *Bing* Court noted that the *Bartolomeo* rule "favors recidivists over first-time arrestees" in that first time arrestees could waive their right to counsel and answer police questions, whereas recidivists who were represented on another, unrelated crime, could not. The current rule compounds this absurdity in that it not only favors recidivists over first-time arrestees, but also favors serious offenders over minor ones (insofar as minor offenders are likely to be released while their charges are pending).

Additionally, under this rule, the derivative right attaches only when a defendant is actually represented by counsel (on the original, unrelated offense), but not if his indelible right to counsel has attached merely due to the commencement of formal proceeding. But why should it matter to a defendant's constitutional right, once formal proceeding has begun, whether he is already represented by counsel, or whether he hasn't yet retained or been assigned one? Indeed, defendants who are lucky enough to have a counsel assigned at arraignment, or are sufficiently experienced or well-off to immediately retain one, are accorded more constitutional protections than those who are less well-off or experienced, or are just unlucky (no available attorney happened to be at hand at the time of arraignment). This is one more instance where constitutional protections under the current regime depend on the most irrelevant of factors.[149]

What is more, this legal regime corrupts our law enforcement officers by inviting them to "play with the rules." If a police officer keeps himself ignorant of a defendant's representation, the defendant's indelible right to counsel does not attach. If a defendant is disingenuously "released" and then immediately re-arrested on another charge, he may waive his right to counsel in the absence of counsel.[150] Police officers

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[149] *See, e.g.*, People v. Smith, 5 A.D.3d 991, 991, 773 N.Y.S.2d 648, 649 (4th Dep't 2004) (observing no indication in the record that interrogating officer did not know defendant was represented); People v. Harvey, 273 A.D.2d 604, 605, 710 N.Y.S.2d 141, 142 (3d Dep't 2000) (holding that a *Rogers*' derivative right to counsel does not arise if the right to counsel on the original offense derives merely from the commencement of formal proceeding and counsel was not yet assigned, though assignment would have sufficed to invoke the right); People v. Tenace, 256 A.D.2d 928, 930, 682 N.Y.S.2d 279, 281 (3d Dep't 1998) (finding that although defendant was represented by counsel on a pending charge, he was in custody on a third, unrelated charge).

[150] As already noted, a recent Appellate Division case held that such a ruse, contrived to allow questioning on the unrelated matter, would do the trick. *See*

cannot be expected to make fine legal distinctions between those constitutional rights which are properly avoided through chicanery and those which are not. Rules such as this send their corrupting influence throughout the criminal justice system by presenting constitutional protections as empty shells—as absurd formalities to be treated with a mere ceremonial nod of the head.

Further, the rule is responsible for ever growing confusions and misunderstandings among lower courts. A review of appellate court decisions shows rulings with no serious analysis of the governing law (indeed that would entail quite an undertaking), where conclusions are often drawn without the rule's most relevant facts stated on record.[151] And it shows courts, baffled by a rule whose policy goals have become indiscernible, reaching resolutions through unprincipled hair-splitting.[152] One can only imagine what trial court determinations look like, or what the police make of all this.[153]

Indeed, it is quite difficult to assess the full impact of these faulty Court of Appeals decisions—including the number of dropped or unsuccessful prosecutions, or the favorable bargains struck by defendants whose admissions were believed by the prosecution to be tainted or inadmissible. Whatever that number

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Walker, 285 A.D.2d at 662–64, 727 N.Y.S.2d at 734–35.

[151] *See, e.g.*, People v. Lyons, 22 A.D.3d 606, 606, 801 N.Y.S.2d 752, 752 (2d Dep't 2005); People v. Eberle, 265 A.D.2d 881, 882, 697 N.Y.S.2d 218, 219–20 (4th Dep't 1999) (ordering suppression of statements made by the defendant without mentioning the knowledge of representation of the investigating officer); *see also* People v. Whaley, 255 A.D.2d 980, 980, 681 N.Y.S.2d 716, 716 (4th Dep't 1998); People v. Casey, 181 Misc. 2d 744, 746, 698 N.Y.S.2d 404, 406 (Sup. Ct. App. T. 2d Dep't 1999).

[152] *See, e.g.*, People v. Scaccia, 6 A.D.3d 1105, 1105–06, 776 N.Y.S.2d 420, 421 (4th Dep't 2004) (concluding that *Rogers* applies only to defendants in custody); People v. Clarke, 298 A.D.2d 259, 259, 748 N.Y.S.2d 376, 377 (1st Dep't 2002) ("There was no violation of defendant's derivative right to counsel under *People v. Rogers*, 48 N.Y.2d 167, because a rearrest on a bench warrant [for which defendant was represented], followed by immediate questioning at the police station prior to any court proceedings or reincarceration on the warrant, is not the type of custody contemplated by the *Rogers* rationale."); People v. McNear, 265 A.D.2d 810, 810, 696 N.Y.S.2d 611, 612 (4th Dep't 1999) (finding that although he was arraigned on the prior charge, "defendant failed to meet his burden of establishing that an attorney had been assigned on that charge"); People v. Fiber, 261 A.D.2d 484, 484, 692 N.Y.S.2d 396, 396–97 (2d Dep't 1999) (citing *Bing* to support its holding that since defendant was in custody in New Jersey, and under New Jersey law no indelible right to counsel had attached, defendant's right to counsel was not violated).

[153] I once had the distinct pleasure of trying to explain all this to a police detective.

is, it is too high. The rule requires the suppression of perfectly voluntary statements in the name of a dubious policy and in contradiction of any serious analysis of the governing precedents.[154] The bottom line is this: *Burdo* should be scrapped, the dicta in *West* should be ignored, and the decision in *Steward* should be reinterpreted so as to accord with the correct reading of *Rogers* and *Bing*. Moreover, it is not necessary for lower courts to await the formal overruling of *Steward* and *Burdo*. These cases were exercises in self-contradiction, purporting to rely on *Bing*'s reading of *Rogers* while contradicting that very reading. *Steward* and *Burdo* were both mistakes that should be ignored. (That lower courts are not constrained by *Steward* and *Burdo* is a proposition whose full defense, and theoretical ramifications, are too lengthy for this place; suffices to say that it is a proposition explicitly supported by legal authorities in New York).[155] Legal analysis is not error-free; mistakes occur, especially when more and more precedents accumulate and the attempt to reconcile and explain them becomes intellectually challenging. But legal analysis should never become a hostage to such errors. When they are identified, these errors should be swiftly delegated to the dustbin of history. The Court of Appeals may, of course, embark on a new path yet again, breaking with *Bing* and adopting a rule along the lines suggested in *Steward* or *Burdo*, but it may not do so by unwittingly misreading and distorting the precedents upon

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[154] The derivative right to counsel could also mandate the suppression of physical evidence. *See* People v. Loomis, 255 A.D.2d 916, 916, 682 N.Y.S.2d 743, 743–44 (4th Dep't 1998).

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> In general, this Court is duty bound to follow the decisions of higher courts. But, *stare decisis* is a principle of guidance, not "a contrivance to hamper the judge in administering justice." Its force is not mechanical or automatic; to the contrary, it is a "moral obligation only"—where the law has been misunderstood or misapplied, or contrary to reason, "*stare decisis*" does not inhibit correction. . . . [T]his Court not only can but should render decision as it finds the law to be.

Park-58 Corp. v. Reder, 21 Misc. 2d 395, 397, 196 N.Y.S.2d 39, 42 (N.Y.C. Mun. Ct. N.Y. County 1960)(citation omitted). This principle is all the more applicable here given the lack of any serious analysis in *Burdo*, and the obscure and faulty analysis of *Steward*. Indeed, "a precedent is less binding if it is little more than an ipse dixit, a conclusory assertion of result, perhaps supported by no more than generalized platitudes." People v. Hobson, 39 N.Y.2d 479, 490, 348 N.E.2d 894, 902, 384 N.Y.S.2d 419, 426 (1976). Moreover, a lower court's deviance from precedent is not, by itself, a sufficient ground for reversal.

which it purports to rely. It may only do so consciously, with open eyes, and with a proper analysis. This, indeed, is what the rule of law is about. But then again, what conscious open-eyed court would have adopted the *Burdo* ruling?