
**Court of Appeals
State of New York**

The People of the State of New York,

Appellant

vs.

Francis J. Burdo,

Defendant-Respondent

**Brief of the
New York State Defenders Association**

Amicus Curiae

Jonathan E. Gradess
New York State Defenders Association
11 North Pearl St., 18th Floor
Albany, NY 12207
(518) 465-3524

Alfred O'Connor
Of Counsel

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii-iii
PRELIMINARY STATEMENT.....	1
INTEREST OF AMICUS.....	1
STATEMENT OF FACTS.....	4
<u>ARGUMENT</u>	5
 THE <i>ROGERS</i> RULE PROHIBITED THE POLICE FROM INTERROGATING FRANCIS BURDO AT THE CLINTON COUNTY JAIL IN THE ABSENCE OF HIS LAWYER BECAUSE BURDO WAS KNOWN TO BE REPRESENTED BY COUNSEL ON THE CHARGE FOR WHICH HE WAS HELD IN CUSTODY.	
a. The <i>Arthur-Hobson</i> Rule	7
b. The <i>Taylor</i> Rule	8
c. The Court’s Reasoning in <i>Rogers</i>	9
i. <i>People v. Ramos</i>	10
ii. <i>People v. Carl</i>	11
iii. <i>People v. Ermo</i>	11
d. <i>Rogers</i> Modified <i>Taylor</i> with a Bright-Line Rule.....	12
e. Extension and Retrenchment - <i>Bartolomeo</i> and <i>Bing</i>	14
f. The <i>Rogers</i> Rule Survived.....	15
g. Appellant’s Revisionist Analysis of <i>Rogers</i>	15
i. The Facts in <i>Rogers</i>	17
ii. A Serious Misreading of <i>Rogers</i>	18
iii. <i>Bing</i> and <i>Cawley</i> Distinguished.....	20
h. Scope of Suppression Remedy.....	23
i. Francis Burdo was Subjected to Custodial Interrogation.....	24
j. In Conclusion.....	28
CONCLUSION.....	29
 Exhibits A & B - Excerpts from Briefs - <i>People v. Herbert Rogers</i>	

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Berkemer v. McCarty</i> , 468 U.S. 439 (1984).....	22, 27
<i>Cervantes v. Walker</i> , 589 F.2d 424 (9 th Cir. 1978).....	25
<i>Delaware v. Prouse</i> , 440 U.S. 648 (1979).....	22
<i>Edwards v. Arizona</i> , 451 U.S. 477 (1981).....	7
<i>Escobedo v. Illinois</i> , 378 U.S. 478 (1964).....	7
<i>Estelle v. Smith</i> , 451 U.S. 454 (1981).....	27
<i>People v. Alls</i> , 83 N.Y.2d 94 (1993).....	24-27
<i>People v. Arthur</i> , 22 N.Y.2d 325 (1968).....	5-9, 20
<i>People v. Bartolomeo</i> , 53 N.Y.2d 225 (1981).....	14-15, 21
<i>People v. Bell</i> , 50 N.Y.2d 869 (1980).....	23
<i>People v. Bertolo</i> , 65 N.Y.2d 111 (1985).....	14
<i>People v. Bing</i> , 76 N.Y.2d 331 (1990).....	passim
<i>People v. Carl</i> , 46 N.Y.2d 806 (1978).....	11, 23
<i>People v. Cawley</i> , 76 N.Y.2d 331 (1990).....	5, 16 20-22
<i>People v. Colwell</i> , 65 N.Y.2d 883 (1985).....	13, 19
<i>People v. Cunningham</i> , 49 N.Y.2d 203 (1979).....	7
<i>People v. Donovan</i> , 13 N.Y.2d 148 (1963).....	7
<i>People v. Ellis</i> , 58 N.Y.2d 749 (1982).....	20
<i>People v. Ermo</i> , 47 N.Y.2d 863 (1979).....	11-12, 23
<i>People v. Fuschino</i> , 59 N.Y.2d 91 (1983).....	14
<i>People v. Gunner</i> , 15 N.Y.2d 226 (1965).....	20

<i>People v. Hetherington</i> , 27 N.Y.2d 242 (1970).....	18
<i>People v. Hobson</i> , 39 N.Y.2d 479 (1976).....	7-8, 10, 13
<i>People v. Kazmarick</i> , 52 N.Y.2d 322 (1980).....	13, 19
<i>People v. Lopez</i> , 28 N.Y.2d 23 (1971).....	7
<i>People v. Lucarano</i> , 61 N.Y.2d 138 (1984).....	14
<i>People v. Pinzon</i> , 44 N.Y.2d 458 (1978).....	20
<i>People v. Ramos</i> , 40 N.Y.2d 610 (1976).....	7, 10-11, 19
<i>People v. Robles (Richard)</i> , 27 N.Y.2d 155 (1970).....	7
<i>People v. Robles (Juan)</i> , 72 N.Y.2d 689 (1988).....	13, 19
<i>People v. Rogers</i> , 48 N.Y.2d 167 (1979).....	passim
<i>People v. Rosa</i> , 65 N.Y.2d 380 (1985).....	14
<i>People v. Ruff</i> , 81 N.Y.2d 330 (1993).....	6, 15, 19
<i>People v. Samuels</i> , 49 N.Y.2d 218 (1980).....	13
<i>People v. Settles</i> , 46 N.Y.2d 154 (1978).....	3
<i>People v. Steward</i> , 88 N.Y.2d 496 (1996).....	6, 14, 15
<i>People v. Taylor</i> , 27 N.Y.2d 327 (1971).....	8-10, 12-13, 24
<i>People v. West</i> , 81 N.Y.2d 370 (1993).....	6, 13, 19
<i>United States v. Cheeley</i> , 36 F.3d 1439, (9 th Cir. 1994).....	27

Constitutional Provisions

New York Constitution, Article 1, section 6

Preliminary Statement

By permission of the Honorable Joseph W. Bellacosa, the Clinton County District Attorney appeals from an order of the Appellate Division, Third Department dated November 7, 1996, which affirmed an order of the County Court of Clinton County (McGill, J.) dated December 27, 1995, which granted respondent-Francis Burdo's motion to suppress oral and written statements.

The New York State Defenders Association has moved for permission to submit a brief as *amicus curiae* by motion returnable before this Court on May 27, 1997.

Interest of Amicus

The New York State Defenders Association (NYSDA) is a not-for-profit membership association of more than 1300 public defenders, legal aid attorneys, 18-B counsel and private practitioners throughout the state. With funds provided by the state of New York, NYSDA operates the Public Defense Backup Center, which offers legal consultation, research, and training to more than 5,000 lawyers who serve as public defense counsel in criminal cases in New York. The Backup Center also provides technical assistance to counties that are considering changes and improvements in their public defense systems.

New York State contractually obligates NYSDA, through its Public Defense Backup Center, "to review, assess and analyze the public defense system in the state, identify problem areas and propose solutions in the form of specific recommendations to the Governor, the Legislature, the Judiciary and other appropriate instrumentalities." In this

capacity, the Association has issued numerous reports identifying problems in the state's public defense system.

The Court of Appeals has granted NYSDA *amicus curiae* status in a number of important cases dealing with the rights of criminal defendants. Some of the cases in which NYSDA has filed amicus briefs include: *People v. Knowles*, 88 N.Y.2d 763 (1996); *People v. Ford*, 86 N.Y.2d 397 (1995); *People v. McKiernan*, 84 N.Y.2d 397 (1994); *Matter of King v. N.Y.S. Div. of Parole*, 83 N.Y.2d 788 (1994); *People v. Van Pelt*, 76 N.Y.2d 156 (1990); *People v. Seaberg*, 74 N.Y.2d 1 (1989); *People v. Pollenz*, 67 N.Y.2d 264 (1986) and *People v. Bigelow*, 66 N.Y.2d 417 (1985).

The instant case raises an important issue about the meaning and vitality of this Court's decision in *People v. Rogers*, 48 N.Y.2d 167 (1979). Supported in the court below by the New York State District Attorney's Association and the New York State Attorney General as *amici curiae*, the Clinton County District Attorney now argues that the police may ask a pre-trial detainee, known to be represented by counsel on the charge for which he is held, to waive his right to counsel and submit to custodial interrogation on unrelated matters. According to Appellant, after this Court's decision in *People v. Bing*, 76 N.Y.2d 331 (1990), *Rogers* can no longer be understood as establishing a bright-line prohibition on such counsel-less interrogation. Rather, it is urged that whenever a pre-trial detainee waives his rights and is interrogated by the police on unrelated matters in the absence of counsel, the propriety of the questioning must be analyzed on a case-by-case basis under this Court's decision in *People v. Taylor*, 27 N.Y.2d 327 (1971) and its progeny.

The District Attorney's argument represents a profound threat to NYSDA, its members and, most importantly, to the indigent criminal defendants we serve, many of

whom are held in lieu of bail as pre-trial detainees. In *People v. Rogers*, this Court recognized that questioning on matters ostensibly unrelated to the charge on which a defendant is represented and held in custody poses an *inherent* threat to an attorney-client relationship. The Court acknowledged that a case-by-case approach had failed to eliminate this threat, and so adopted a bright-line rule: Once an attorney enters the case for which the defendant is held in custody, law enforcement officials may not ask him to waive his right to counsel and submit to questioning on any matter - whether related or unrelated - unless counsel is present.

The *Rogers* rule articulates an important principle about the broad scope of protection accorded the attorney-client relationship under Article 1, section 6 of the New York State Constitution. In the instant case, the Clinton County District Attorney has proposed a revisionist analysis of *Rogers*, which greatly diminishes state constitutional protection of the relationship between a criminal defendant and his or her lawyer. Appellant also makes the startling assertion that a pre-trial detainee held in a local jail is not “in custody” and may therefore be interrogated by the police without running afoul of the *Rogers* rule. Consistent with Appellant’s reasoning, such police interrogation might also occur without rendition of *Miranda* warnings.

In short, because Appellant’s arguments threaten to erode the “cherished”¹ right to counsel under the New York State Constitution, NYSDA has an important interest in the instant appeal.

¹ *People v. Settles*, 46 N.Y.2d 154, 160 (1978)

Statement of Facts

The facts were briefly summarized in Justice Yesawich's opinion below:

On December 12, 1994, at the Clinton County jail, Senior Investigator Richard Sypek, together with fellow State Police investigator and a Plattsburgh City Police detective, interviewed defendant concerning the murder of Leo Gebo. Defendant, who was being held at the jail on assault and rape charges, was represented by counsel on those charges, a fact known to the interviewing officers.

Defendant was escorted to the jail's library where Sypek read defendant his *Miranda* rights. Sypek informed defendant that he knew of his representation by counsel, but that he wished to discuss with him matters unrelated to his current arrest. When asked if he understood his rights, defendant indicated that he did and agreed to speak with the officers. Sypek informed defendant that he was being questioned because defendant's uncle had given a statement regarding the latter's involvement in Gebo's death, to which defendant replied that his uncle was not involved. The officers then mentioned that a third person may have been implicated, to which defendant responded, "What third person?", got up and returned to his cell.

Approximately, 15 minutes later, after briefly speaking with his captain, Sypek asked to see defendant again. This time Sypek told defendant that he agreed with him that no third person was involved, and defendant replied, "Now you got it." The interview continued, with defendant ultimately accepting responsibility for Gebo's death and signing a written confession.

Indicted for murder in the second degree and related offenses, Francis Burdo moved to suppress the statements as taken in violation of his right to counsel. The hearing court ordered the statements suppressed on the authority of *People v. Rogers*. On the People's appeal, the Appellate Division unanimously affirmed. *People v. Burdo*, ___A.D.2d ___; 649 N.Y.S.2d 949 (3d Dept.1996). By permission, the People now appeal the Appellate Division's order of affirmance.

Argument

THE *ROGERS* RULE PROHIBITED THE POLICE FROM INTERROGATING FRANCIS BURDO AT THE CLINTON COUNTY JAIL IN THE ABSENCE OF HIS LAWYER BECAUSE BURDO WAS KNOWN TO BE REPRESENTED BY COUNSEL ON THE CHARGE FOR WHICH HE WAS HELD IN CUSTODY.

As the hearing court and the Appellate Division below recognized, the facts in this case present a textbook application of the *Rogers* rule: Francis Burdo was in custody on rape and assault charges, was known by the police to be represented by counsel on those charges, but was nevertheless interrogated on an unrelated murder investigation in the absence of his attorney. Despite recent and clear pronouncements from this Court about the continuing authority of the rule, the Clinton County District Attorney insists that *Rogers* did not survive unscathed from this Court's decision in *People v. Bing*, 76 N.Y.2d 331 (1990). Viewing *Rogers* in simple mechanical terms, the District Attorney detects an inconsistency between its holding and the holdings in *People v. Bing* and a companion case, *People v. Cawley*. In Appellant's view, this inconsistency can be harmonized only if *Rogers* is now understood - not as an important case about limits on the scope of custodial interrogation - but as a highly technical decision about "entry" of counsel in criminal investigations. But in fact, there is no inconsistency in the holdings. When properly understood, the *Rogers* rule stands clear of the shadow cast by *Bing*.

In *People v. Bing, supra* at 340, this Court reaffirmed the *Rogers* rule in the clearest of terms:

Our 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, whether related or unrelated to the subject of the representation.

In the years since *Bing*, this Court has repeatedly explained the *Rogers* rule as prohibiting uncounseled custodial interrogation of a defendant who is known to be represented by an attorney on the charge for which he is held in custody. See e.g. *People v. Ruff*, 81 N.Y.2d 330, 333 (1993) (*Rogers* held that “once an attorney had entered proceedings on prior pending charges, police may not question a suspect in custody on those charges, even on unrelated matters, in the absence of counsel.”); *People v. West*, 81 N.Y.2d 370, 377 (1993) (“In *Rogers* we held that once an attorney had entered a proceeding, thereby signifying that the police should cease questioning, a defendant in custody on that matter could not be further interrogated in the absence of counsel, whether or not the interrogation concerned the represented matter.”); see also *People v. Steward*, 88 N.Y.2d 446, 501 (1996).

Yet, the Clinton County District Attorney now maintains that *Bing* refutes the very proposition that the Court recognized in the decision itself. Appellant now argues that:

[T]he Court in *Bing* clearly held that those defendants who were in custody represented by counsel on their pending charges, can voluntarily waive their right to counsel on unrelated charges without an attorney present. The detailed decision in *Bing* cannot be read as holding less.

(Appellant’s brief at 15).² The Clinton County District Attorney is mistaken. An examination of the history and purpose of the *Rogers* rule reveals that the police did indeed violate Francis Burdo’s right to counsel in this case.

The Arthur-Hobson Rule

² The New York State District Attorney’s Association and the New York State Attorney General, *amici* below, made the same claim: “*Rogers* does not stand for the broad proposition - as the hearing court erroneously believed - that when the police know that a defendant is represented on charges for which he is in custody, they may not question him about the represented charges or any other charges.” (Appellate Division Brief for *Amicus Curiae* at 15).

The right to counsel under the New York State Constitution (Article 1, sec. 6) is more broadly protective of a suspect's rights than the Federal Constitution, both as to the time of attachment of the right and the law governing a defendant's waiver of the presence of counsel during questioning. Building upon its own pre-*Escobedo*³ case law [*People v. Donovan*, 13 N.Y.2d 148 (1963)], in 1968 this Court decided *People v. Arthur*, 22 N.Y.2d 325, which held that "Once an attorney enters the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, *in the presence of the attorney*, of the defendant's right to counsel" (at 329). Although there was a period when this Court's commitment to the *Arthur* rule was in doubt [*see People v. Robles*, 27 N.Y.2d 155 (1970); *People v. Lopez*, 28 N.Y.2d 23 (1971)], it was revitalized in *People v. Hobson*, 39 N.Y.2d 479 (1976), where this Court described the rule as "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" (at 483). Almost thirty years after it was first articulated, the *Arthur-Hobson* rule still stands as a prime example of how the New York State Constitution is more protective of the "precious"⁴ right to counsel than the U.S. Constitution. Compare e.g. *People v. Cunningham*, 49 N.Y.2d 203 (1979) and *Edwards v. Arizona*, 451 U.S. 477 (1981).

Initially, the *Arthur-Hobson* rule was considered case-specific; that is, it prohibited the police from questioning a suspect on the *specific* charge for which an attorney had entered on the client's behalf. The issue of interrogation on *unrelated*

³ *Escobedo v. Illinois*, 378 U.S. 478 (1964)

⁴ *People v. Ramos*, 40 N.Y.2d 610, 618 (1976)

matters emerged in a related line of cases, which began with *People v. Taylor*, 27 N.Y.2d 327 (1971), and culminated, for purposes of the immediate discussion, with *People v. Rogers, supra*.

b.) The Taylor Rule

In *People v. Taylor, supra*, an assistant district attorney questioned two men in connection with a murder investigation while they were being held in jail as pre-trial detainees on unrelated robbery charges. The men had been arraigned on the robbery charges and were represented by counsel, facts known to the assistant district attorney before the interrogation began. Both men waived their *Miranda* rights without their attorneys present, and made incriminating statements about the homicide. Subsequently indicted for murder, they moved to suppress the statements, arguing that this Court's decision in *People v. Arthur, supra*, precluded them from validly waiving their right to counsel in the absence of their attorneys. This Court held that because the interrogation concerned a matter unrelated to the robbery charges upon which they had been represented by counsel, the *Arthur* rule had no bearing on these facts:

. . . [T]he thrust of our prior decisions is that once the police learn that an attorney has entered the proceeding, it is offensive to our system of justice, in the absence of a waiver, to permit further questioning by representatives of the People. Implicit in this rationale is the concept that the rule does not obtain unless and until the police or prosecutor learn that an attorney has been secured to assist the accused in *defending against the specific charges for which he is held*. It is, therefore, of no consequence that the law enforcement officials involved herein learned that an attorney had been assigned at the arraignment on the robbery charge since this attorney was in no way connected with the instant criminal proceeding.

(at 332).

Under this Court's 1971 *Taylor* decision, then, Francis Burdo's confession to murder, made in response to official interrogation while he was in jail awaiting trial, would be admissible because the rape and assault charges, for which he was represented, and the murder investigation, for which he was not, were unrelated. Under the *Taylor* exception to the *Arthur* rule, Burdo would have been deemed capable of waiving his right to counsel outside the presence of his attorney because his interrogation at the Clinton County jail concerned a matter unrelated to the pending charges.

But *Taylor* was modified by *People v. Rogers, supra*, which held that a suspect on a robbery charge could not be questioned on that charge, *or in connection with any other investigation*, after an attorney called the precinct and entered the case for which the defendant had been arrested. By modifying the *Taylor* exception in *Rogers*, this Court established an important principle about the *scope of protection* provided to criminal defendants under Article 1, section 6 of the New York State Constitution.

c.) The Court's Reasoning in Rogers

In his opinion, former Chief Judge Cooke clearly explained why the Court had chosen to modify the *Taylor* rule under the facts presented in *Rogers*: experience had shown that *Taylor* posed an unacceptable risk of compromising an existing attorney-client relationship when invoked to justify custodial interrogation on matters ostensibly unrelated to the charge on which the client was represented and held in custody:

Since *Hobson* . . . it has been difficult to define the precise reach of the limitation concerning unrelated charges. Perhaps this is a result of the obvious difficulty encountered in drawing the subtle distinctions necessitated by the interaction of the *Hobson* and *Taylor* rules.

(at 17).

To illustrate these “subtle distinctions” and difficulties, former Chief Judge Cooke then discussed three cases where the *Hobson* and *Taylor* rules had come into conflict: *People v. Ramos*, 40 N.Y.2d 610 (1976); *People v. Carl*, 46 N.Y.2d 806 (1978) and *People v. Ermo*, 47 N.Y.2d 863 (1979). It is important to note that these cases were not discussed in the *Rogers* opinion to reaffirm the continuing authority of their precise holdings. Instead, *Ramos*, *Carl* and *Ermo* were cited in support of the Court’s conclusion that *Hobson* and *Taylor* were irreconcilable, and that *Taylor* should therefore be modified in the context of certain custodial interrogations.

c. i) People v. Ramos

The issue in *Ramos* was whether counsel’s statement at the defendant’s arraignment on drug charges, as his client was about to be taken away and questioned by police in connection with an unrelated murder investigation - “I have advised [the defendant] not to make any statements to these police officers who are taking him into custody” - was sufficient to trigger the *Arthur-Hobson* rule with respect to the murder case. This Court rejected the People’s argument that counsel’s admonition at the arraignment had been addressed to the drug charges alone, and that Ramos was consequently free to waive his right to counsel and answer questions about the murder in the absence of his attorney. The Court found the statement sufficient to be considered counsel’s entry into the murder investigation. To the extent that the counsel’s words were ambiguous, the Court noted that the People bore the burden of proving that the right to counsel had not been invoked: “The ambiguity of the lawyer’s statement . . . cannot be seized by the prosecution as license to play fast and loose with this precious right” (at 618).

c. ii) People v. Carl

In *People v. Carl* the police questioned the defendant about a burglary while he was being held at the county jail on a separate burglary charge for which he was represented by counsel. Prior to the interrogation, assigned counsel had mailed a letter to the Sheriff advising him of defendant's representation and requesting that no one, other than a relative, be permitted to confer or question him without counsel present. This Court rejected the People's contention that the jailhouse interrogation, conducted in the absence of counsel, was proper because it concerned an unrelated investigation. As the two burglaries were committed one week apart at the same location, and were later included within a single indictment, the charges were sufficiently similar to preclude application of the *Taylor* exception.

c. iii) People v. Ermo

The facts in *People v. Ermo* illustrated how the police could insidiously interfere with an existing attorney-client relationship by interspersing improper questions in the course of an interrogation on "unrelated matters." Ermo was arrested on March 14, 1972 for an act of sexual abuse that had occurred the previous day. He was questioned about the March 13th incident, as well as about a homicide that had occurred seven months earlier. Ermo made incriminating statements about both incidents, but soon recanted his confession to the homicide. On the following day, March 15th, the public defender was assigned to represent him on the sexual abuse charge. Ermo was held in lieu of bail and returned to police custody, where questioning on both cases continued. After waiving his *Miranda* rights, Ermo again made incriminating statements. Later released on bail on the sexual abuse charge, Ermo was picked up for a third round of questioning by the District

Attorney on March 22nd, when he once again waived his right to counsel and made incriminating statements about the sexual abuse charge and the homicide. This Court held that all statements taken from Ermo after counsel was assigned to represent him on March 15th were inadmissible because the police asked improper questions about the sexual abuse charge “for the purpose and with the effect of advancing their interrogation on the homicide charge.”

d.) Rogers Modified Taylor with a Bright-Line Rule

Thus, in different ways, *Ramos*, *Carl* and *Ermo* demonstrated that the *Taylor* rule could be easily subverted by the police, that it posed a substantial risk of interfering with attorney-client relationships in some situations, and that it raised difficult enforcement problems for the courts. Inevitably, the *Taylor* rule required courts to make subtle judgments about whether an attorney’s words or actions were sufficient to constitute “entry” of counsel in connection with a separate investigation (*Ramos*); whether two incidents were sufficiently similar that questioning on one necessarily implicated the defendant’s right to counsel on the other (*Carl*); and whether the police improperly questioned a defendant in violation of his right to counsel in order to advance their interrogation with respect to a separate offense (*Ermo*).

In *Rogers*, therefore, this Court established a “bright-line rule” (*Bing* at 350) to protect defendants from questioning on matters that “some may perceive to be unrelated” (*Rogers* at 169) to the charge on which they are represented. The rule is straightforward and relatively easy to enforce: If a defendant is represented by counsel on a charge for which he is in custody, law enforcement officials may not ask him to waive his right to counsel and submit to questioning on any matter - whether related or unrelated - unless

counsel is present at the interrogation. The rule was designed to eliminate the kind of interference the *Taylor* rule had spawned in such cases as *Ramos*, *Carl* and *Ermo*. It was also a logical extension of the holdings in these cases. As Chief Judge Cooke wrote, the *Rogers* rule emerged as the “common thread” in the holdings of these three cases:

Thus following *Hobson* it has been urged in several cases and under a variety of circumstances that the exception concerning unrelated charges was applicable. In each instance, however, it has been found that the exception could not be applied or expanded consistent with the *Hobson* rationale. It is evident that in these cases, the *Taylor* rule was considerably narrowed (citations omitted). The common thread running through these holdings is the simple fact that defendant was represented by an attorney at the time of interrogation. We today recognize that the *Taylor* rule is inconsistent with the principles enunciated in *Hobson* and declare that *once a defendant is represented by an attorney the police may not elicit from him any statements, except those necessary for processing of his physical needs. Nor may they seek a waiver of this right, except in the presence of counsel.*

(at 172-173).

It should be noted that while *Rogers* modified *Taylor*, it did not eliminate the distinction about interrogation on unrelated matters in all circumstances. Because the concerns in *Rogers* were to protect existing attorney-client relationships, and to shield defendants from inadvertently incriminating themselves in the absence of their attorneys, questioning on unrelated matters was later held permissible when a defendant’s right to counsel had attached solely as the result of the issuance of an arrest warrant [*see People v. Samuels*, 49 N.Y.2d 218 (1980)] and not by the actual entry of an attorney [*People v. Kazmarick*, 52 N.Y.2d 322 (1980)], and also when a defendant was represented by counsel on appeal [*People v. Colwell*, 65 N.Y.2d 883 (1985)]. *See generally People v. Robles*, 72 N.Y.2d 689, 695-698 (1988); *People v. West*, *supra* at 377-378 (1993).

e.) Extension and Retrenchment - Bartolomeo and Bing

The holding in *Rogers* was greatly extended by *People v. Bartolomeo*, 53 N.Y.2d 225 (1981). In *Bartolomeo*, the defendant was released following his arraignment on an arson charge for which he was represented by counsel. Approximately one week later, he was arrested again on an unrelated murder charge for which he was unrepresented. After waiving his rights, Bartolomeo was interrogated about the murder by detectives who knew about the arson charge but were unaware that he was represented by counsel. By holding that Bartolomeo's right to counsel had been violated in this situation, this Court extended the *Rogers* holding in two ways: 1) by applying it notwithstanding the fact that the defendant was in custody on a *new* charge for which he was *not* represented; and 2) by imposing on the police an "affirmative duty to inquire whether a defendant was represented in any unrelated criminal matter of which they had knowledge and [charging them] with knowledge of what such an inquiry would have revealed." *People v. Steward*, *supra* at 499.

Bartolomeo was arguably the most controversial decision ever issued by this Court in the area of criminal law and procedure. During its nine-year life span, the *Bartolomeo* rule was narrowed on virtually every occasion that this Court had an opportunity to define its reach.⁵ In 1990, it was overruled by *People v. Bing*, *supra*, a trio of cases (*Bing*, *Cawley* and *Medina*) that raised issues from the logical "outer limits"⁶ of the *Bartolomeo* rule. In *Bing*, the Court declared that the "heavy" social costs associated

⁵ See e.g. *People v. Fuschino*, 59 N.Y.2d 91 (1983); *People v. Lucarano*, 61 N.Y.2d 138 (1984); *People v. Bertolo*, 65 N.Y.2d 111 (1985); *People v. Rosa*, 65 N.Y.2d 380 (1985); *People v. Robles*, *supra*.

⁶ *People v. Bing*, *supra* at 356 (Kaye, J. concurring/dissenting in part)

with enforcement of *Bartolomeo* outweighed concerns about *stare decisis*. Finding *Bartolomeo* to be “unworkable” and riddled with exceptions, the Court, by a 4-3 margin, overruled it.

f.) The Rogers Rule Survived

But while *Bartolomeo* was condemned as imposing an “unacceptable burden on law enforcement,” this Court took pains to make clear that *Rogers* remained the law in New York: “[O]ur decision today should not be understood as retreating from the stated holding in *Rogers*” (at 350). Indeed, just last term this Court reiterated that *Rogers* “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.” *People v. Steward, supra* at 501 (1996). *See also People v. Ruff, supra* at 333 (1993) (Once an attorney enters a case the “police may not question a suspect in custody on those charges, even on unrelated matters, in the absence of counsel.”)

g.) Appellant’s Revisionist Analysis of Rogers

Despite these recent and clear articulations of the bright line *Rogers rule*, the Clinton County District Attorney now argues that the actual holding of the case is far more limited, and far more difficult to comprehend. According to Appellant, *Rogers* should now properly be understood - not as an important case about limitations on the custodial interrogation of defendants like Francis Burdo - but as a highly technical decision about “entry” of counsel in criminal cases. In Appellant’s view, it is not enough under *Rogers* that the police have actual knowledge of a suspect’s representation by

counsel on the charge for which he is held in custody. An attorney must also contact the police and “signify that questioning must cease” in order to protect the client from uncounseled interrogation on unrelated matters.

This rather fanciful interpretation is logically compelled, according to Appellant, by an inconsistency between the holdings in *Bing* and *Cawley*, and the *Rogers* rule, at least insofar as the rule has been conventionally understood and applied by the trial court and Appellate Division below in this case. The Clinton County District Attorney correctly points out that the defendants in both *Bing* and *Cawley* were brought into custody on warrants, and that both men had been represented by counsel, at some point, in the underlying criminal actions. *Bing* was brought into custody on an Ohio warrant for burglary and, unbeknownst to the police, was represented by counsel on that charge. Similarly, *Cawley* was arrested on a six-month old New York bench warrant for robbery. Although the police were unaware of it at the time, he too had been represented by counsel on the charge. Yet in both cases, this Court held that the defendants were free to waive their rights in the absence of counsel and submit to questioning on unrelated matters.

In light of these facts, Appellant asks the following question: If *Rogers* prohibits uncounseled interrogation on unrelated matters when the defendant is in custody on the charge for which he is represented, why didn't *Rogers* result in suppression in *Bing* and *Cawley*? There are some rather obvious answers to this question. For example, *Bing* and *Cawley* had been *re-taken* into custody on charges for which they had previously been represented and, in neither case, were the police aware of the prior representation. Overlooking these distinctions, the Clinton County District Attorney instead proposes a

stunning, revisionist analysis of *Rogers* which: 1) robs the decision of any legal or historical significance; 2) renders much of former Chief Judge Cooke’s opinion meaningless; 3) posits that every subsequent articulation of the rule by this Court was incorrect; and 4) violates prior decisions of this Court on the subject of “entry” of counsel in criminal cases.

g. i) The Facts in *Rogers*⁷

Scrutiny of Appellant’s remarkable claim requires some discussion of the facts in *Rogers*. The defendant, Herbert Rogers, was arrested at his home in December, 1975 in connection with a liquor store robbery that had occurred in February of the same year. When arrested, Rogers had two criminal charges pending against him, a fact known to the detectives who took him into custody. Rogers was represented on those pending charges by an attorney named Paul Goldstein. After receiving *Miranda* warnings at the robbery squad, Rogers told the detectives that Goldstein was his lawyer, but that he was willing to talk without his attorney present. During the ensuing two hour interrogation, Rogers denied involvement in the liquor store robbery, and maintained that he was living in Goshen, New York at the time of the crime.

In the early afternoon, Goldstein called the robbery squad and told the detectives to cease further questioning. Thereafter, the police stopped interrogating Rogers about the liquor store robbery, but continued to question him for some four hours about an unrelated matter. At the conclusion of all questioning, as paperwork was being completed, one of the detectives overheard Rogers make an incriminating statement

⁷ The facts recounted here are from the reported decision, and are supplemented by details included in the briefs of the parties. See Excerpts from Briefs for Appellant and Respondent - People v. Herbert Rogers - copies of which are attached hereto as Exhibits A and B respectively.

about the liquor store robbery. The issue in *Rogers* was whether this last statement was admissible.

g. ii) A Serious Misreading of *Rogers*

From the outset, Appellant's analysis is thrown off track by an error about the facts. Appellant apparently concludes that Herbert Rogers must have invoked his right to counsel on the robbery charge when, upon arrival at the precinct, he told the detectives that Goldstein was his lawyer, but that he would nevertheless talk to them. (Appellant's brief at 11). But Rogers never argued that his right to counsel had attached prior to Goldstein's phone call. In fact, statements Rogers made before the phone call concerning his whereabouts on the day of the robbery were admitted in evidence against him at trial. In his Court of Appeals brief, Rogers conceded these statements were admissible; he sought suppression only of statements made *after* Goldstein had contacted the robbery squad. *See People v. Rogers, supra*, fn. 1 at 170.⁸

Proceeding on the faulty premise that Rogers' right to counsel had attached soon after his arrival at the precinct, Appellant posits that Goldstein's subsequent call to the robbery squad and direction to "cease further questioning" must have been the crucial factor that foreclosed further questioning of Rogers on unrelated matters. Appellant appears to argue that since Goldstein took "affirmative and direct action relative to the interrogation which was about to be commenced" (Appellant's brief at 11, citing *Ramos*), he entered as counsel for Rogers *in the unrelated matter*, and thereby precluded the detectives from conducting further interrogation in his absence.

⁸ Given the law at the time, Rogers' failure to argue that his right to counsel had attached earlier is certainly understandable. *See People v. Hetherington*, 27 N.Y.2d 242 (1970).

Viewed in this way, *Rogers* is transformed from an important case about limitations on the scope of custodial questioning into a routine case about “entry” of counsel. Indeed, Appellant would turn *Rogers* into nothing more than a reiteration of the holding in *Ramos*: the only distinction between the two cases being that Ramos’ attorney entered the unrelated case by speaking to the police in a courtroom, while Goldstein entered the unrelated case over the telephone. It also follows under this misguided view that most, if not all, of former Chief Judge Cooke’s discussion in *Rogers* about the impracticality of the *Taylor* rule was superfluous. And, as it then turns out, every subsequent articulation of the *Rogers* rule by this Court was in error. *See e.g. People v. Kazmarick, supra* at 327; *People v. Colwell, supra* at 885; *People v. Robles, supra* at 695-697; *People v. Bing, supra* at 350; *People v. Ruff, supra* at 333; *People v. West, supra* at 377; *People v. Steward, supra* at 501.

Suffice it to say, this reading of *Rogers* is fraught with significant factual, historical and textual difficulties. Most notably, it ignores what was made plain in *Rogers* itself: that the questioning took place on a matter unrelated to the charge for which counsel had entered.

On the other hand, Appellant may be making a different argument. The District Attorney may, in fact, recognize that Goldstein entered the liquor store robbery case. If so, the argument seems to be that because Goldstein took the *extra step*, when entering the case, of directing the police to *cease further questioning*, he cloaked Rogers with added protection against interrogation on unrelated matters. In other words, only because Goldstein “souped up” his entry on the liquor store robbery case were the police powerless to interrogate Rogers on any other subject.

But this can't be right. Surely, the *Rogers* rule operates on a higher principle than a child's game of "May I?" or "Simon Says." This Court has consistently held that a defendant's right to counsel attaches when the "police know or have been apprised of the fact that [a] defendant is represented by counsel or that an attorney has communicated with the police for the purpose of representing [him]." *People v. Arthur, supra* at 329. The right has never been held to be dependent upon "mechanical or arbitrary requirements," such as a lawyer's failure to "instruct the police not to take any statements from the defendant." *Id.* Indeed, even in a non-custodial setting, this Court has declared it "immaterial" that an attorney failed to direct the police to cease questioning. *People v. Ellis*, 58 N.Y.2d 749 (1982); *see also People v. Pinzon*, 44 N.Y.2d 458 (1978); *People v. Gunner*, 15 N.Y.2d 226 (1965). Although such an admonition may be sufficient, by itself, to constitute a lawyer's entry into a case [*People v. Ramos, supra*], this Court has never held that a direction to "cease questioning" has any other independent legal significance.

In short, Appellant's argument is totally without merit.

g. iii) Bing and Cawley Distinguished

Despite Appellant's best efforts to shroud the *Rogers* rule in mystery, its teaching is quite simple: If the police know that a suspect is represented by counsel on a charge for which he is held in custody, they may not question him on any matter - whether related or unrelated - unless counsel is present and consents to the interrogation. The defendants in both *Bing* and *Cawley* did not benefit from this rule because they had been released on the charges for which they were represented, and thereafter failed to appear in

court. They were later rearrested on warrants by police officers who were unaware of the prior representation.

There are a number of reasons why these facts fall squarely within the scope of *Bartolomeo* and outside the ambit of the *Rogers* rule. First and most obviously, the arresting officers in both *Bing* and *Cawley* did not know of the defendants' representation on the underlying charges. Nor was there any hint that they deliberately avoided actual knowledge of such representation. Rather, the claim in both cases was that knowledge of the prior representation should have been imputed under *Bartolomeo* because the police failed to make any inquiry on the subject. In *Rogers* and in Francis Burdo's case, the police had actual knowledge of the defendants' representation by counsel.

Secondly, the *Rogers* rule applies when a defendant is held in *continuous* custody on a charge for which he is represented by counsel. The rule did not apply in *Bing* and *Cawley* because the defendants had been released on bail. One of the major criticisms of *Bartolomeo* was that it afforded defendants released on pending charges immunity from interrogation on new crimes. As former Chief Judge Wachtler noted in the very first line of his dissent in *Bartolomeo*, "A defendant who commits a crime while out on bail should not be immune from questioning by police with respect to his latest criminal acts. Such a rule would be a benefit to the repeat offender and an obstacle to law enforcement" (at 236). This observation applies with equal force to defendants like *Bing* and *Cawley*, who were rearrested on warrants and questioned about their recent criminal activity.

Finally, because *Bing* and *Cawley* had been released, the *Rogers* rule was no longer essential to protect their existing attorney-client relationships from interference caused by custodial interrogation on unrelated matters. Once a defendant has been

released from custody, the *Fourth Amendment* serves as a check against official interference in the existing attorney-client relationship, and eases most of the concerns underlying the bright-line *Rogers* rule. Because defendants who are admitted to bail may be formally retaken into custody and subjected to custodial interrogation on unrelated matters only upon a showing of probable cause [*Dunaway v. New York*, 442 U.S. 200 (1979)]⁹-- an important protection that is, by definition, denied to defendants already held in police custody or jail -- it makes sense that the *Rogers* rule applies in the latter situation, but not in the former one.

In other words, the *Rogers* rule recognizes that an attorney-client relationship is easily compromised when the police can subject a defendant to custodial interrogation on “unrelated” matters by simply switching the focus of their inquiry at the stationhouse or, as in Francis Burdo’s case, by paying him a visit at the local jail. The threat is greatly diminished once the client has been released on bail; thereafter the police cannot easily subject him to further custodial questioning. By reserving its protection for defendants, like Francis Burdo, who are held in continuous custody on a charge, the *Rogers* rule “strike[s] a balance between society’s need to investigate and prosecute crime and the right of individuals to be free from the police intimidation and harassment that can result from it.” *People v. Bing*, *supra* at 348.

⁹ Although police questioning during brief investigatory detentions, such as traffic stops, may be supported by reasonable suspicion, [*Delaware v. Prouse*, 440 U.S. 648 (1979); *Berkemer v. McCarty*, 468 U.S. 439 (1984)], such limited questioning will usually pose no risk of interfering with an existing attorney-client relationship.

h.) Scope of Suppression Remedy

A similar misconstruction of the *Rogers* rule is apparent in Appellant's argument about the proper scope of the suppression order in this case. The Clinton County District Attorney maintains that since the *Rogers* rule is designed to prevent interference in an existing attorney-client relationship, the People should be free to use statements taken in violation of the rule so long as questioning on the unrelated matter does not actually encroach upon the charge for which the defendant is represented. In other words, the District Attorney argues that the People should be permitted to capitalize on the unlawful interrogation of a suspect -- so long as the police otherwise conduct themselves in an above-board manner!

Appellant's argument is foreclosed by *People v. Bell*, 50 N.Y.2d 869 (1980). (Violation of *Rogers* rule requires suppression of statements about charge for which defendant is represented *and* statements about unrelated matter.) In reality, the District Attorney's argument is nothing more than a thinly-disguised invitation to overrule *Rogers*. Appellant urges abandonment of the bright-line rule and return to the case-by-case analysis of such cases as *Carl* and *Ermo*. Yet, it was precisely because the case-by-case approach was deemed unworkable that this Court formulated the *Rogers* rule in the first place. In *Rogers*, this Court recognized the *inherent* dangers of custodial interrogation conducted outside the presence of a defendant's lawyer, even when the questioning concerns unrelated matters. Although actual interference in the attorney-client relationship would not be apparent in every case, experience had revealed that the threat was insidious, and a that strong rule was necessary. To meet this need, the Court adopted a bright line rule:

Once a defendant is represented by an attorney, the police may not elicit from him any statements, except those necessary for processing his physical needs. Nor may they seek a waiver of this right, except in the presence of counsel.

(at 173).

Appellant complains that the actual interrogation of Francis Burdo at the Clinton County jail did not violate the *Taylor* rule. But because the police flagrantly violated the *Rogers* rule, the District Attorney's point is completely irrelevant. As the Appellate Division below recognized, "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."

i.) Francis Burdo was Subjected to Custodial Interrogation.

Finally, the Clinton County District Attorney makes the audacious claim that Francis Burdo, a pre-trial detainee held in a local jail, was not "in custody" when three police officers, one of whom had arrested him several weeks earlier, paid him an unannounced "visit" and interrogated him alone in the jail library in connection with a murder investigation. Likening respondent's predicament to that of a bored guest at a cocktail party, Appellant maintains that Burdo was free to walk away from the conversation and so was not "in custody" for purposes of the *Rogers* rule or, for that matter, for *Miranda* purposes. Appellant cites as authority this Court's decision in *People v. Alls*, 83 N.Y.2d 94 (1993).

Not surprisingly, *Alls* does not support this remarkable proposition. The issue in *Alls* was whether a correction officer who was investigating a fight or possible assault that had just occurred within a prison facility was required to deliver *Miranda* warnings prior to questioning an inmate about the incident. The dilemma in *Alls* was that a finding of custody based on the mere fact of the inmate's incarceration would result in a *per se*

rule that *Miranda* warnings are required whenever a correction officer poses a question to an inmate. Such a *per se* rule would ironically grant greater rights to prisoners than to the general public, and would also wreak havoc on prison administration. As Judge Levine wrote in his majority opinion:

In the context of a correctional facility environment, despite the undeniable fact of an inmate's general confinement in the sense of not being free to leave the facility, we can envisage confrontations between correctional officers and prisoners analogous to the relatively brief, generally public, or otherwise on-the-scene investigatory detentions in nonprison setting found not custodial for *Miranda* purposes. On the other hand, to impose a requirement that correctional authorities must administer warnings before even the most casual or spontaneous interchanges with inmates integral to prison life would have an enormous impact upon the ability of correctional authorities to maintain prison order and discipline, in cases where the Fifth Amendment rights of inmates are not seriously implicated (citations omitted). For these reasons, we decline to adopt a *per se* rule that any questioning of an inmate in a correctional facility is custodial interrogation under *Miranda v. Arizona*.

(at 100).

To solve the dilemma, the Court adopted the “added constraint” test, which had first been articulated in *Cervantes v. Walker*, 589 F.2d 424 (9th Cir. 1978). As explained by Judge Levine:

When . . . the circumstances of the detention and interrogation of a prison inmate are no longer analogous to those kinds of detentions found not custodial in nonprison settings, but instead entail added constraint that would lead a prison inmate reasonably to believe that there has been a restriction on that person's freedom over and above that of ordinary confinement in a correctional facility, *Miranda* warnings are necessary.

Id. The Court remitted the case to the trial court for a determination of whether the inmate's removal to a basement area for questioning by the correction officer satisfied the test.

Taking *Alls* entirely out of context, the Clinton County District Attorney seizes upon the “added constraint”¹⁰ test and seeks to apply to it to a *police dominated* interrogation about a murder committed *outside the jail*. But the “added constraint” test was developed to determine whether *correction officers* must deliver *Miranda* warnings during the investigation of *prison-related incidents*. The underlying assumption in *Alls* was that *Miranda* governs police interrogation of inmates in a correctional setting. Indeed, the essential problem in the case was how to determine when questioning by correction officers crosses the line and begins to take on the character of police-dominated interrogation. The point was made clear in the dissenting opinion of former Judge Simons:

There can be no doubt that questioning by prison officials sometimes takes on the quality of a police-dominated interrogation, and Miranda should obviously apply in those cases. But at other times the questioning of an inmate has decidedly more in common with the sort of routine investigative questioning police engage in outside prison which does not require warnings.

(at 119, emphasis added).

There were no easy answers to the dilemma posed in *Alls*. Three separate approaches to the problem were proposed and, in the end, four members of the Court embraced the “added constraint” test. The Clinton County District Attorney now suggests that what this Court really achieved in *Alls* was the creation of a very large loophole: one that permits the police to interrogate suspects in all manner of investigations without delivering *Miranda* warnings by merely shifting the locus of questioning from the stationhouse to a county jail. Clearly, this was not what the Court had in mind when it decided *Alls*. *Alls* is limited by its facts and reasoning to the

¹⁰ Appellant misreads *Alls* as establishing a “coercive pressures” test (Appellant’s brief at 2, 22-23).

questioning of inmates by correction officers about prison-related incidents. This exact point about the “added constraint” test was recently made by the U.S. Court of Appeals for the 9th Circuit, the court that first announced the test. *United States v. Cheeley*, 36 F.3d. 1439, 1447 (9th Cir. 1994) (Prisoner questioned by postal inspector about murder that occurred outside the prison was subjected to custodial interrogation - added constraint test is limited to questioning by prison staff about matters under investigation within the prison itself).

Ironically, while this Court struggled in *Alls* to create a rule that avoided classifying all questioning within a correctional setting as “custodial,” but that also took account of the “authoritarian realities” of prison life (at 102), the Clinton County District Attorney now argues that *Alls*, in effect, creates a *per se* rule that all such interrogation is non-custodial. For if a pre-trial detainee who is interrogated alone in a jail room by three police officers about a murder is somehow *not* being subjected to restrictions “over and above that of ordinary confinement in a correctional facility,” it is difficult to envision a circumstance that would meet the standard. The Supreme Court has always recognized - often as a matter not requiring discussion - that persons under formal arrest or in jail who are questioned by the police are “in custody” for *Miranda* purposes. See *Berkemer v. McCarty*, 468 U.S. 420, 434-435 (1984); *Estelle v. Smith*, 451 U.S. 454 (1981).

Clearly, then, the police violated the *Rogers* rule in this case by subjecting Francis Burdo to custodial interrogation at the Clinton County jail.

j.) In Conclusion

The Clinton County District Attorney struggles hard to associate the *Rogers* rule with the perceived evils that lead this Court to overrule *Bartolomeo*. Yet, as the Court has repeatedly pointed out, the two cases are distinct. While there is no doubt that the *Rogers* rule frustrated the will of the police to interrogate Francis Burdo without his lawyer present, it is certainly not because this Court favors the rights of recidivists over first-time offenders (Appellant's brief at 24). It is because our State Constitution honors the sanctity of the attorney-client relationship, and seeks to protect it from the kind of authoritarian impulses that lead three police officers to the Clinton County jail one day in December of 1994 to confront a young man when he was most vulnerable: when his lawyer was not there by his side.

The order of the Appellate Division should be affirmed.

CONCLUSION

FOR THE ABOVE-STATED REASONS, AND THE REASONS SET FORTH IN RESPONDENT'S BRIEF, THE ORDER OF THE APPELLATE DIVISION SHOULD BE AFFIRMED.

Respectfully submitted,

Jonathan E. Gradess
New York State Defenders Assoc.
11 North Pearl Street, 18th Floor
Albany, New York 12207

Alfred O'Connor
Of Counsel

Dated: May 13, 1997