APL-2016-00057

Court of Appeals

of the

State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

– against –

MATTHEW A. SLOCUM,

Defendant-Respondent.

BRIEF OF *AMICI CURIAE*
THE BRONX DEFENDERS, LEGAL AID SOCIETY OF NEW YORK, CENTER FOR APPELLATE LITIGATION, NEW YORK STATE DEFENDERS ASSOCIATION, NEW YORK COUNTY DEFENDER SERVICES, BROOKLYN DEFENDER SERVICES AND NEIGHBORHOOD DEFENDER SERVICE OF HARLEM

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DISCLOSURE STATEMENT

Pursuant to 22 N.Y.C.R.R. Part 500.1(f), The Bronx Defenders, Legal Aid Society of New York, Center for Appellate Litigation, New York State Defenders Association, New York County Defender Services, Brooklyn Defender Services and Neighborhood Defender Service of Harlem disclose that they are non-profit organizations with no parents, subsidiaries or affiliates.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

INTRODUCTION

Under long-established New York law, when an attorney appears or communicates to police on behalf of a particular client in a matter under investigation, entry is effective and the indelible right to counsel attaches. Public defenders and private counsel regularly act on behalf of clients pursuant to this rule, representing existing clients on new criminal matters before the engagement is formally established, whether by retainer agreement or assignment. This longstanding rule is inherent in the representation of criminal defendants and fundamental to the protection of arrestees' constitutional rights.

In its briefs filed before this Court, Appellant misunderstands and misstates this long-standing rule. Amici public defenders submit this brief to set out the law governing the invocation of the indelible right to counsel as articulated by this Court over the past 50 years, since this Court's decision in *People v. Arthur*, 22 N.Y.2d 325 (1968), because Appellant's mistaken account of the law in this area is not only wrong but, if adopted, would significantly diminish fundamental constitutional protections for arrestees in custody.

Appellant erroneously argues that this Court's decisions require a client's affirmative assent to representation in a new matter before an attorney who already represents the client may enter the new matter and invoke the client's constitutional rights. Reply at 9. This is not, and has never been, New York law—

indeed, this argument was rejected in *Arthur* itself. *Id.* at 328–29. Over the past five decades, this Court has repeatedly reaffirmed that an individual's indelible right to counsel attaches when an attorney appears or communicates on the client's behalf in the custodial matter.

Appellant's incorrect statement of the law would mean that an attorney's actual appearance and communication would not effectuate entry or cause the right to counsel to attach; in fact, Appellant argues that the attorney's appearance or communication would not even give rise to a requirement that the police confirm the representation with the arrestee. Appellant's Br. at 37. Appellant's misunderstanding of the case law would thus leave the arrestee unrepresented while in police custody *even when he is already represented by an attorney who stands ready to enter on the arrestee's behalf in the custodial matter*. By imposing on the arrestee the burden of effectuating entry at the moment the arrestee is separated from his attorney and family, Appellant's erroneous reading of this Court's precedent would undermine the right to counsel in a manner this Court has rejected: "[t]he right to counsel is of little value if the attorney cannot communicate with the defendant or with the officials holding him in custody or can only reach them after extended delay when the investigation is, in effect, completed." *People v. Pinzon*, 44 N.Y.2d 458, 464 (1978). The harms that would follow from

Appellant's mistaken presentation of the doctrine are precisely those that the indelible right to counsel is intended to protect against.

Public defenders engage with the police and invoke constitutional rights on behalf of indigent clients on a daily basis. Drawing on their substantial experience in representing clients pursuant to the existing rules, the undersigned Amici respectfully present this brief in order to reiterate those well-recognized rules in response to Appellant's briefs' erroneous presentation of this Court's precedents.

STATEMENT OF INTEREST

The Bronx Defenders ("BxD") is a non-profit provider of innovative, holistic, client-centered criminal defense, family defense, civil legal services, and social work support to indigent people in the Bronx. The BxD staff of over 200 advocates represents approximately 35,000 individuals each year and reaches hundreds more through outreach programs and community legal education. Bronx Defenders attorneys regularly enter new criminal matters under investigation on behalf of existing clients by communicating with law enforcement, as the well-established law of this State permits. Bronx Defenders' clients have, on countless occasions, benefited from the longstanding protection of the indelible right to counsel in New York. BxD has filed amicus curiae briefs in numerous cases involving criminal justice and civil rights issues.

The Legal Aid Society of New York ("Legal Aid Society") is the oldest and largest nonprofit legal services organization in New York City. Legal Aid Society's Criminal Defense Practice provides citywide defense services in both trial and appellate litigation to over 200,000 people annually. As such, Legal Aid Society routinely enters new criminal matters that are being investigated by either NYPD or the District Attorney's office for clients already being represented by the organization. Legal Aid Society believes that this work is vital to protect its clients' rights and is supported by current State law.

The Center for Appellate Litigation ("CAL") is a non-profit law firm representing indigent criminal defendants pro bono in appeals and post-conviction proceedings in New York and Bronx Counties. Almost all of CAL's clients have been convicted of serious crimes. In its appeals, CAL has raised numerous challenges to statements obtained in violation of the right to counsel in circumstances like those in this case. The resolution of this appeal in a manner that ensures the indelible right to counsel remains intact is a matter of direct concern to CAL and its clients.

The New York State Defenders Association ("NYSDA") is a not-for-profit membership association of more than 1,700 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 (the

"Backup Center"), which offers legal consultation, research, and training to nearly 6,000 lawyers who represent individuals who cannot afford to retain counsel in criminal and Family Court cases. The Backup Center also provides technical assistance to counties that are considering changes and improvements in their public defense systems. NYSDA reviews, assesses and analyzes the public defense system in the state, identifies problem areas and proposes solutions in the form of specific recommendations to the Governor, the Legislature, the Judiciary and other appropriate instrumentalities.

New York County Defender Services ("NYCDS") is a non-profit law firm providing criminal representation for indigent persons in New York County. Every year, NYCDS lawyers handle in excess of 20,000 cases and its clients reside throughout the five boroughs as well as the surrounding counties and states. NYCDS attorneys regularly enter new criminal matters when its existing clients are being investigated by the New York City Police Department, one of the State's District Attorney Offices and/or the NYS Office of the Attorney General. NYCDS believes that the continuing representation of its clients is a vital duty of its attorneys and a right which its clients enjoy under existing State law.

Brooklyn Defender Services ("BDS") is a public defender office providing high quality criminal defense, immigration, family defense and civil legal services to thousands of poor residents of Brooklyn each year. Its criminal practice

represents approximately 40,000 people that cannot afford an attorney in Brooklyn annually and over the course of the past 20 years has represented about a half million Brooklyn residents. As part of its core services, BDS routinely provides advice, guidance and enters cases consistent with the needs of the particular client. In hundreds of cases, BDS has made contact with law-enforcement, attended lineups, arranged for a voluntary surrender, been present for interviews and/or invoked its client's constitutional rights such as the right to remain silent and the right to counsel. BDS' belief that everyone deserves an attorney to assure their rights are protected, whether that person is rich or poor, compels BDS to join in as amicus in support of Defendant-Respondent Slocum.

Neighborhood Defender Service of Harlem ("NDS") is a community-based, client-centered public defender office that has served the residents of Northern Manhattan for more than 25 years. Through its innovative team-based model of representation, NDS has served tens of thousands of clients in criminal, family, and civil defense cases. One unique component of NDS' community-based model is its community intake unit. If a resident of Northern Manhattan has recently been arrested, or believes he or she is about to be arrested, then they are eligible to be represented by NDS. This aspect of NDS' community-based legal work often requires NDS to communicate with the police department, invoke a client's right to remain silent, and arrange a safe surrender at the precinct. NDS' client-centered

practice likewise involves entering new criminal matters on behalf of existing NDS clients. NDS works hard to protect the constitutional rights of the residents of Northern Manhattan, and is pleased to join in as amicus in support of Defendant-Respondent Slocum.

ARGUMENT

I. AN APPEARANCE OR COMMUNICATION BY A SUSPECT'S EXISTING ATTORNEY ON BEHALF OF THE SUSPECT IN A CUSTODIAL MATTER ESTABLISHES ENTRY.

A. *Arthur* and its Progeny Establish That Entry Is Effective Where a Client's Existing Attorney Communicates His or Her Representation of an Individual in a Custodial Matter.

Over a series of cases, this Court has identified the protections offered by the indelible right to counsel established by the New York State Constitution, which affords greater protections than the right to counsel in the U.S. Constitution. *See People v. Settles*, 46 N.Y.2d 154, 161 (1978) ("So valued is the right to counsel in this State, it has developed independent of its Federal counterpart. Thus, we have extended the protections afforded by our State Constitution beyond those of the Federal—well before certain Federal rights were recognized.") (citations omitted). Starting with *Arthur*, a long line of cases has defined and clarified how an attorney may enter a case so that the right to counsel attaches and any questioning must stop. The Court has made clear that "entry" is not based on a retainer or the existence of an agreement to representation. Instead, as this Court has explained,

"entry is premised on the actual appearance or communication by an attorney." *People v. Grice,* 100 N.Y.2d 318, 322 (2003) (and cases cited therein).

In *Arthur*, the defendant was arrested, and news of the arrest was almost immediately broadcast on television. 22 N.Y.2d at 327. At the time, the defendant was represented in an unrelated matter by an attorney who happened to see the news report of the defendant's arrest and quickly made his way to the police station where questioning of the defendant was underway. *Id*. When the attorney arrived at the police station, "[h]e identified himself as an attorney representing the defendant and asked to see him." *Id*. The police denied the attorney access to the defendant until the police had a signed statement from the defendant. *Id*.

This Court rejected the People's argument in that case that entry was ineffective in the absence of an agreement between the attorney and the suspect, instead finding that its previous holdings regarding "the fundamental right of the accused to be represented by counsel" were "not dependent upon" whether the defendants in those cases "were represented by retained counsel." *Id*. at 328. Rather, the Court held that "once the police know or have been apprised of the fact that the defendant is represented by counsel *or that an attorney has communicated with the police for the purpose of representing* the defendant, the accused's right to counsel attaches," even where the attorney "had not been asked by anyone to go to Police Headquarters." *Id.* at 327, 329 (emphasis added).

The Court in *Arthur* made clear that the determination of whether a defendant is deemed to be represented is dependent upon the *attorney's* communication asserting representation, not the defendant's active retention of the attorney. The Court further made clear that this holding was not new law, but rather upheld a long-respected principle enshrined in the New York Constitution.

This Court's decisions since *Arthur* have repeatedly reaffirmed this basic principle of New York law, holding across factual settings that the right to counsel attached *before* the attorney and defendant had formally established the representation in the custodial matter. *See People v. Ramos*, 40 N.Y.2d 610, 612, 616 (1976) (holding that an attorney who represented a client in an arraignment proceeding had also "communicated with the police for the purpose of representing the defendant" on an unrelated charge when the attorney instructed the defendant to make no statements to the police, even though the defendant did not confirm representation in the new matter); *People v. Hobson*, 39 N.Y.2d 479, 482–84 (1976) (holding that the right to counsel attached by virtue of a Legal Aid attorney's presence at a lineup for a robbery charge, though the attorney had only been assigned to represent the client on unrelated charges); *People v. Rogers*, 48 N.Y.2d 167, 170–71 (1979) (citing *Arthur* and *Hobson* to conclude that an attorney's representation of a client in custody continues from one matter to another, unrelated matter where the attorney affirmatively communicates with the

police to cease questioning); *Grice*, 100 N.Y.2d at 321 ("Our decisions prior to and since *Arthur* demonstrate that 'entry' is premised on the actual appearance or communication by an attorney."); *cf. People v. Carranza*, 3 N.Y.3d 729, 730 (2004) (rejecting defendant's arguments for entry where "the requirements of the *Arthur* rule were not met").

This long line of cases confirms that a defendant need not know that his attorney has taken on the representation in the custodial matter for the right to counsel to attach; entry is deemed to occur when the attorney communicates the representation of the client to the police. The Court's "critical inquiry" in determining whether entry is effective thus considers whether the attorney appeared or communicated to the police that the attorney represented the defendant in the present custodial matter. *People v. Pacquette*, 17 N.Y.3d 87, 100 (2011).

B. Appellant's Misunderstanding of the Law as Requiring Communication Between a Client and Attorney or an Affirmative Agreement to Representation by the Client Has Been Rejected By This Court.

Appellant argues that there must be "some communication or actual counseling between a suspect and an attorney regarding the new matter" prior to an attorney's effective entry. Reply at 9. This is wrong, as this Court has directly rejected such a requirement. In *Arthur*, the Court explicitly held that the defendant's right to counsel attached upon direct communication from the attorney to the police proclaiming an attorney-client relationship before the attorney and the

client spoke at all, even where communication was impossible because the client was apparently too intoxicated "to coherently answer" the attorney's questions. *Arthur*, 22 N.Y.2d at 327, 329.

Appellant acknowledges that cases such as *People v. Garofolo*, 46 N.Y.2d 592 (1979), *People v. Pinzon*, 44 N.Y.2d 458 (1978), and *People v. Borukhova*, 89 A.D.3d 194 (2d Dep't 2011) represent examples of an attorney's entry on behalf of a defendant who did not request—or even have knowledge of—that attorney. Appellant's Br. at 41. Appellant nonetheless states that because, in these cases, the attorney had been retained by the defendant's family, they are distinguishable from this case. This is also wrong. This Court has never suggested, much less held, that entry turns on whether an attorney was formally retained by the defendant's family. The cases have focused only on the attorney's appearance or communication for the purpose of representation in that particular matter and not on the presence of a formal retainer agreement created between an attorney and a suspect's family members. *See Borukhova*, 89 A.D.3d at 213–14 (quoting this Court's instruction in *Pinzon*, 44 N.Y.2d at 464, that police must "realize that even though the defendant may not have retained counsel prior to being taken into custody, an attorney, later retained by friends or family *or otherwise representing him* may wish to consult with him while he is being questioned by the police")

(emphasis added). All of this Court's case law in this area demonstrates that the right to counsel can attach *before* the client has formally retained the attorney.

C. The Cases Articulating the Limits of the *Arthur* Rule Confirm that an Attorney Can Effectuate Entry on Behalf of the Client in the Custodial Matter.

There are, of course, limits to the *Arthur* rule, and New York courts have defined these limits in two cases where the representation of the defendant was either affirmatively repudiated or was never taken on in the first place. These cases illustrate the breadth of this Court's rule that entry is effective where an attorney asserts his or her intention to appear on behalf of a current client in a specific new matter.

Appellant calls attention to *People v. Lennon*, 243 A.D.2d 495 (2d Dep't 1997), an Appellate Division ruling that has never been endorsed by this Court. Reply at 8. In that case, the defendant's father hired an attorney on her behalf, and the attorney "telephoned the station and later appeared at the station." *Lennon*, 243 A.D.2d at 496. Upon learning that the attorney was on his way to the station, the defendant repudiated the attorney, "spoke disparagingly" of him, "and stated in no uncertain terms that if she needed a lawyer to represent her in this case, it would not be him." *Id*. The Appellate Division majority stated that in previous cases where an attorney "contacted the police or appeared at the station" on behalf of a defendant without the defendant's knowledge, the court "impliedly assumed that

an attorney-client relationship existed with regard to the matter in question, and that the defendant would not have rejected the attorney retained by the family," but decided that because the *Lennon* defendant had affirmatively and unequivocally rejected counsel's representation, entry was not effective. *Id*. at 497. This ruling did not—and could not—displace this Court's precedent; moreover, the defendant's emphatic disavowal of the attorney distinguishes *Lennon* from the consistent line of case law on entry and the indelible right to counsel since *Arthur*.

Similarly, where the attorney never affirmatively communicates for the purpose of representing the defendant in the new matter under investigation, this Court has declined to find that the right to counsel has attached. In *Pacquette*, the defendant was represented by an attorney during an arraignment on a drug charge when, immediately following his release, he was arrested on an unrelated murder charge. 17 N.Y.3d at 90. To determine whether the right to counsel attached on the murder charge, the Court looked to whether the attorney ever communicated to the police that he represented the defendant on that charge. *Id*. at 91–92.

Appellant's reliance on *Pacquette* is misplaced. Appellant's Br. at 39. As Appellant recognizes, the *Pacquette* Court said that "We have never held that an attorney may unilaterally create an attorney-client relationship in a criminal proceeding *in this fashion*, and decline to do so now." 17 N.Y.3d at 95 (emphasis added). The "in this fashion" limitation distinguishes *Pacquette* from *Arthur* and

its line of cases: whereas in *Pacquette* it was undisputed that the attorney never directly told the police that he represented the defendant in the second matter, in *Arthur* the attorney did tell the police that he represented defendant in the matter in which he was being questioned. The *Pacquette* Court underscored the attorney's concession "that he never indicated to defendant that he would be or was considering representing him in the homicide case, although he might have commented that he 'would be happy to represent him.' In answers to questions posed by the judge, [the Attorney] *confirmed that he was not defendant's attorney for the homicide, and never told the detectives otherwise*." *Id.* at 91 (emphasis added). Entry was ineffective because the attorney did not represent the defendant on the homicide and did not communicate with the police with respect to that matter. *Id*. at 95–96. *Pacquette* thus establishes that entry is ineffective when the attorney fails to explicitly communicate with police with respect to the specific matter on which the client is being questioned. *Pacquette* did not overrule *Arthur*, and did not claim to; the decision merely clarifies that if an attorney is asserting representation on behalf of a client in a specific matter, the attorney should communicate that to the police.

D. Application of *Bing* in This Case Is Inapposite as *Bing* Involves Derivative Representation and This Case Involves an Attorney Entering on Mr. Slocum's Behalf.

The *Arthur* line of cases concern entry; that is, when an attorney is deemed to have entered a case for the purpose of representing a defendant and for constitutional protections of the right to counsel to attach. Appellant mistakenly conflates a separate line of cases concerning derivative counsel—a doctrine under which an attorney-client relationship is created based *solely* on the existence of an attorney-client relationship in an unrelated matter—as justification for its claim that an attorney cannot establish entry by communicating with the police. Appellant's Br. at 35, 38 (citing *People v. Bing*, 76 N.Y.2d 331 (1990)). Appellant is wrong again. *Bing* is inapposite because *Slocum* is a case about entry, not derivative counsel.

Prior to *Bing*, the right to counsel in a later proceeding extended automatically from prior representation; a defendant was not required to show that an attorney had effectuated entry in the later proceeding by appearing or communicating on the client's behalf. Representation in a prior case was sufficient for the right to counsel to attach in the new case. *See People v. Bartolomeo*, 53 N.Y.2d 225 (1981). *Bing* overruled *Bartolomeo* and rejected this right to "derivative counsel," which the Court has defined as the right to counsel "derived *solely* from a defendant's representation in a prior unrelated proceeding." *People*

v. Steward, 88 N.Y.2d 496, 500 (1996) (emphasis added). Appellant's erroneous reliance on *Bing* stems from misunderstanding the difference between the derivative counsel rejected in *Bing* and the entry of counsel in *Arthur* and in this case. Derivative representation presupposes a lack of entry; the doctrine was at issue in *Bing* only because there was no entry of counsel: if an attorney had entered, the right to counsel would have attached based on that entry and not solely based on derivative representation from a prior proceeding.

In contrast, in this case, as in *Arthur*, counsel appeared and communicated on behalf of the client; the representation derives from counsel's entry on the new custodial matter rather than from the previous representation alone. Appellant mistakenly conflates these two contexts in arguing that an attorney cannot enter a new custodial matter on behalf of an existing client based on the existing relationship between them stemming from an earlier proceeding. Appellant's Br. at 38–39. But of course, *Arthur* and the cases that follow directly held that the attorney's appearance or communication on the custodial matter effectuates entry, as *Bing* itself emphasized.

The *Bing* Court explicitly maintained the distinction between derivative counsel and the question of entry, emphasizing that the rule on entry established in *Arthur,* and followed in *Rogers*, remained good law. 76 N.Y.2d at 350 (emphasis added). The Court in *Bing* concluded:

> We emphasize in closing that although *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 (supra)*, the right to counsel had been invoked on the charges on which the defendant was taken into custody and he and his counsel *clearly asserted it*.

Id. As this language illustrates, the suggestion that *Bing* overrules *Arthur* is incorrect. The Court has repeatedly and expressly distinguished the *Bing* line of cases from *Arthur* and *Rogers*. *See, e.g., Steward*, 88 N.Y.2d 496 (citing *Arthur* in the supporting line of cases for *Rogers*, which was not overturned by *Bing*). Indeed, as this Court later clarified, "*Rogers*, as a precedent within its own class of counsel cases, never was about a derivative right to counsel." *Id.* at 501. The present case involves a communication by a client's existing attorney on behalf of that client in a specific new matter, not an after-the-fact assertion of representation solely based on an existing attorney-client relationship in an unrelated matter. Accordingly, this case is not a derivative counsel case and does not implicate the line of derivative counsel cases that were overruled in *Bing*.

E. Appellant's Misstatements of Established New York Law Would Impose Harmful and Needless Restrictions on Access to Counsel.

In misstating the law on entry, Appellant's briefs suggest dangerous restrictions, unsupported by New York law, which would undermine the long-protected right to counsel. Appellant sketches an imagined scenario in which a

public defender organization issues a blanket mailing preemptively invoking the right to counsel on behalf of anyone previously represented by the organization as to any future matters. Reply at 4. This dubious hypothetical stems from Appellant's misunderstanding of the rule established in *Arthur*, that entry is effective when an attorney directly communicates with police on behalf of a particular client in a specific investigation—*Arthur*'s rule is retail and not wholesale. The fact that no public defender's office actually issues such blanket communications underscores that Appellant's concerns are fanciful.

In contrast, Appellant's view of the law would significantly impair arrestees' access to counsel. According to Appellant, an attorney's actual appearance or communication on behalf of the client not only fails to effectuate entry, but fails to even obligate the police to confirm with the arrestee that the attorney represents him. Appellant's Br. at 37. Such a rule would leave arrestees unrepresented while in police custody, including during questioning and for lineups, even when the arrestee is already represented by an attorney who stands ready to enter on his behalf in the custodial matter. Requiring assent by the arrestee before entry can be effective places the burden on the arrestee and chills the indelible right to counsel because the arrestee is cut off not only from counsel but also from family and friends who could reach out to the arrestee's attorney. Rather than the imaginary blanket mailings depicted by Appellant, the danger actually at stake here is the

very real scenario of an attorney who appears at the precinct on her client's behalf but is prevented from seeing her client while the client is questioned without the benefit of counsel: in other words, the facts of *Arthur* itself. The indelible right to counsel has guaranteed the ability of attorneys to appear or communicate their representation of the client for over 50 years to protect against this danger, to the benefit of their clients and the judicial system as a whole. *See People v. Donovan*, 13 N.Y.2d 148, 153–54 (1963) ("It cannot be overemphasized that our legal system is concerned as much with the integrity of the judicial process as with the issue of guilt or innocence.").

CONCLUSION

The law on entry of counsel has been well-established for nearly fifty years, since this Court's decision in *People v. Arthur*. That law provides that upon "the actual appearance or communication by an attorney" on behalf of a client, entry is effective and the right to counsel attaches. *Grice,* 100 N.Y.2d at 322. This repeatedly-reaffirmed rule applies identically today and governs the present case.

Dated: New York, New York
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Respectfully submitted,

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 N.Y.C.R.R. Part 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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