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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

MATTHEW SLOCUM,

Respondent.

No. 17

20 Eagle Street
Albany, New York
February 07, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

JASON P. WEINSTEIN, ADA
ALBANY COUNTY DISTRICT ATTORNEY'S OFFICE
Attorney for Appellant
6 Lodge Street
Albany, NY 12207

MICHAEL J. MERCURE, ESQ.
WASHINGTON COUNTY PUBLIC DEFENDER
Attorney for Respondent
383 Broadway
Fort Edward, NY 12828

Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The next matter on this
2 afternoon's calendar is appeal number 17, the People of the
3 State of New York vs. Matthew Slocum.

4 Counsel.

5 MR. WEINSTEIN: Hi. I'd like to reserve two
6 minutes of rebuttal time, please.

7 CHIEF JUDGE DIFIORE: You may, sir.

8 MR. WEINSTEIN: Thank you. Jason Weinstein, New
9 York Prosecutors Training Institute for the People. In
10 this case, the trial court properly declined to suppress
11 defendant's confessions to the police because he made no
12 unequivocal request for counsel, nor did the public
13 defender's unilateral attempt to insert himself into the
14 case trigger the defendant's indelible right to counsel.

15 JUDGE STEIN: Before we talk about the merits,
16 I'm - - - I'm a little troubled by the - - - the question
17 about whether this is a mixed question of law in a case in
18 which the Appellate Division reversed and whether we can
19 even review it.

20 MR. WEINSTEIN: The issue of whether the
21 defendant made an unequivocal - - -

22 JUDGE STEIN: Wait. But - - -

23 MR. WEINSTEIN: - - - request for counsel
24 absolutely is a mixed question of fact and law. However,
25 this court can review the matter if there is no evidence in

1 the record whatsoever to form the basis of the factual
2 finding that the Appellate Division made or if the
3 Appellate Division determined the matter by an improper
4 standard. Both were the case in this matter. Looking at -
5 - -

6 JUDGE STEIN: What was the improper standard?

7 MR. WEINSTEIN: The improper standard was that
8 the Appellate Division took into consideration external
9 factors rather than simply the words of the defendant and
10 the surrounding circumstances. What the Appellate Division
11 took into consideration was the knowledge of the police
12 officers when they confronted the defendant regarding the
13 letters that the public defender had sent.

14 JUDGE GARCIA: But it seems to me that it's, at
15 best, a blurring of the tests here because you have was it
16 an unequivocal invocation given the words he said, and that
17 is as you are describing. And then there's a second issue
18 of is the letter from counsel enough to invoke on his
19 behalf, right? And that, it seems to me in reading the
20 Appellate Division, they were saying, well, those factors
21 coming into the room through the letter and what they were
22 required to ask. But going to Judge Stein's point, I think
23 both of those issues are mixed questions. It's arguable
24 they're both mixed questions. So what's the improper
25 standard? I mean you do look at extraneous factors when

1 you're looking at whether or not the letter and the follow
2 up that was done in the interrogation room was enough for -
3 - -

4 MR. WEINSTEIN: Right.

5 JUDGE GARCIA: - - - our purposes, right?

6 MR. WEINSTEIN: I - - - I think the word that you
7 used is actually the exact word that shows how an improper
8 standard was used, and that word is blurred. What the
9 Appellate Division did was to blur the line between the two
10 issues.

11 JUDGE GARCIA: But I think they blurred it in the
12 sense of articulating the finding, but in terms of what
13 they were applying, it seems you could go either on what he
14 said and the specific words he said were enough to invoke,
15 or this set of circumstances surrounding the filing of the
16 letter by the - - - by the public defender was enough on
17 its own. And it seems like at the end, they were talking
18 about that but might have used some language surrounding
19 the other test. But it - - - it seems to me, even if you
20 break those two things apart, the issue becomes aren't they
21 both really mixed questions?

22 MR. WEINSTEIN: I think the issue of whether the
23 defendant's indelible right to counsel was triggered by the
24 letter is not a mixed question. That's a strictly legal
25 question. The issue of whether he unequivocally requested

1 counsel is a mixed question. And even looking at the words
 2 themselves and to the extent that the Appellate Division
 3 claimed that those words were an unequivocal request,
 4 there's simply no basis in the record in the record. They
 5 talk about - - - and I think this is an imprecise quote of
 6 the decision, that looking at the defendant's attitude,
 7 this was an attempt by him to convey his uncertainty and
 8 his need for counsel under the circumstances. However,
 9 looking at all of the surrounding circumstances, the
 10 defendant - - - when the police came into the room it was
 11 10:45 by the notes of one of the investigators. The
 12 defendant then waived his Miranda rights within seven
 13 minutes. He did not make an independent request to the
 14 officers - - -

15 JUDGE FAHEY: Well - - -

16 MR. WEINSTEIN: - - - regarding counsel.

17 JUDGE FAHEY: The key - - - I think you're doing
 18 - - - you - - - in your argument you accuse - - - not
 19 accuse but you argue that - - - that the Appellate Division
 20 conflated the two issues, and it's a fair argument, I
 21 think, analytically. But the judges were - - - were
 22 mentioning 450.90(2), and - - - and that usually deals with
 23 jurisdictional issues in criminal cases where the DA is
 24 appealing because when they're - - - the Appellate Division
 25 is reversing a judgment, the vast majority of them, this

1 criminal cases, are cases where they're reversing a
2 judgment that - - - that the DA has obtained against them
3 so it applies to you more than to anybody. And in those
4 circumstances, it's either when - - - whether the Appellate
5 Division was either wrong on the matter of the law or
6 relied on facts that they should not have been able to rely
7 on in order to reverse. That's the basics there. So
8 you've got to the dismissal problem. That's one thing. I
9 think we have - - - and I - - - you should be - - - I think
10 that's a signification problem. But taking the steps
11 aside, I think that we then have to do what the Appellate
12 Division maybe didn't do is - - - and does not conflate
13 them. So let's just talk about the first part which is - -
14 - which is indication of counsel. And there you have the
15 words do you think you - - - do - - - do you want a lawyer?
16 The guy says, "yeah, probably," right?

17 MR. WEINSTEIN: I wouldn't - - - I would dispute
18 the exact categorization of what the question was. And - -
19 -

20 JUDGE FAHEY: Okay. But the - - - the answer we
21 don't dispute?

22 MR. WEINSTEIN: No. Absolutely.

23 JUDGE FAHEY: All right. Okay.

24 MR. WEINSTEIN: And - - - and in fact the - - -

25 JUDGE FAHEY: All right. So - - - so then in our

1 mind, then - - - let - - - let's just stay with this for a
2 second. So in our mind, there are - - - a number of cases
3 have had this kind of scenario before. I'm thinking first
4 off, Harris. Harris, the defendant said, "I think I want
5 to talk to a lawyer, and I want to go." That was
6 considered an invocation of counsel. Esposito, "I think I
7 might need a lawyer." That's an end quote. And then
8 Porter, a tragic case, very similar to this one, he said
9 also, "I think I need a lawyer." I think I need a lawyer
10 is arguably less - - - is more equivocal than yeah,
11 probably. So how are we to deal with those cases where we
12 have already held that that was a clear invocation of
13 counsel?

14 MR. WEINSTEIN: What I think is important to note
15 in all of those cases where there's some, I would say,
16 hesitation language or some mitigating language, it's
17 important that the courts in those cases also looked at the
18 reactions of the officers and also considered the - - - the
19 language and the attitude of the defendant. And looking at
20 the reactions of the officers, which I'll say that the
21 suppression court both found credible, each one of them
22 testified at the suppression hearing that they absolutely
23 did not believe that the defendant was requesting counsel.

24 JUDGE FAHEY: I thought that that was belied by
25 their notes. I thought their notes actually said that - -

1 - I can't remember which one. There was Harrison (sic) and
2 Ogden, I believe. I don't remember which one, but the
3 notes indicated that there - - - that there was a request
4 for counsel. The way that they were - - - testified in the
5 suppression hearing is they both absolutely did not believe
6 - - - one of them testified, I believe, it - - - it - - - I
7 neither considered it a request nor not a request. It was
8 somewhere in the middle of the - - -

9 JUDGE FAHEY: Of course, the test is whether or
10 not, objectively, a reasonable person will believe that was
11 a request for counsel, correct?

12 MR. WEINSTEIN: Absolutely.

13 JUDGE FAHEY: Yeah. So here we've got - - -
14 we've got a - - - so we're back to the same spot we started
15 on comparing the - - - the phrases that were used with our
16 prior case law.

17 MR. WEINSTEIN: But, again, in looking at those
18 phrases, what the courts did consider was not just the
19 words themselves but the surrounding circumstances. And
20 that's the standard that this court did articulate in
21 Glover, I believe.

22 JUDGE FAHEY: Sure. I - - - and I - - -

23 MR. WEINSTEIN: That - - -

24 JUDGE FAHEY: - - - think you're - - - you're
25 right about, and - - - and let's just say objectively

1 reasonable, we think it's an - - - an objective police
2 officer would think yeah, probably means I need a lawyer.
3 So then we have to look at the phrase itself. We're back
4 to where we're started. That's - - - that's why I asked it
5 that way. Do you want to talk at all about - - - about
6 entry of counsel? That - - - that's an interesting
7 question, and the - - - the Appellate Division was a little
8 unclear on that.

9 MR. WEINSTEIN: Well, in this case, the public
10 defender who was not asked was not contacted by any family
11 members or any friends, unilaterally sent a letter to the
12 district attorney's office, to the police, claiming an
13 expectation that he would enter the case. And as the
14 Appellate Division recognized, even the letter alone - - -

15 JUDGE STEIN: Well, I thought all he had to do
16 was - - - was communicate with the police that he has an
17 interest in the case in - - - in doing so. I mean here - - -
18 - I mean the - - - the problem is is that he hasn't been
19 charged with anything. So there's no way he can be - - -
20 you know say I represent him because there's - - - there
21 are no charges to represent him on.

22 MR. WEINSTEIN: Well, I don't - - - I don't think
23 that's necessarily true looking at cases like Pinzon and
24 Garofolo and Lennon in the Second Department where family
25 members or friends have contacted an attorney and requested

1 that an attorney enter the case - - -

2 JUDGE STEIN: But we haven't required that
3 somebody actually contact the attorney. Isn't it the
4 communication and the intention, really, that - - - that
5 leads to some obligation to then at least question the
6 defendant as to whether he wants this person to represent
7 him?

8 MR. WEINSTEIN: I don't believe that there are
9 any cases where this court or the Appellate Divisions have
10 said that an attorney who has not been contacted by anybody
11 else can unilaterally enter the matter.

12 JUDGE GARCIA: But - - -

13 JUDGE ABDUS-SALAAM: What about People v. Arthur
14 in our court where the lawyer, in facts very similar to
15 this, saw something on the evening news about his client
16 and came down to the police station and said this man's my
17 client, and I don't want you questioning him?

18 MR. WEINSTEIN: Well, aside from the fact that
19 Arthur came before Bing, and I think that Bing - - -

20 JUDGE FAHEY: Yeah. But Bing was about the
21 derivative right of counsel. It was - - - and here that -
22 - - that's not really the case here. Bing - - - Bing
23 overruled Bartolomeo and Bartolomeo had established
24 derivative right of counsel. That's not really what we're
25 concerned with here. And Bing is still good - - - or,

1 excuse me, Arthur that Judge Abdus-Salaam just mentioned is
2 still good law. We've cited it in 2014 and 2015 in two
3 separate cases. And specifically, in the Rogers case we
4 emphasized - - - or, excuse me, in the Bing case we
5 emphasized that Rogers, which relies upon Arthur in making
6 its determination is still good law and that the - - - in
7 other words, striking the derivative right of counsel in
8 Bing does not establish a situation where counsel can't
9 enter without talking.

10 MR. WEINSTEIN: Well, there's no doubt that
11 Arthur still is frequently cited, but Arthur has, whereas
12 Bing - - -

13 JUDGE FAHEY: Well, the - - - so I - - - so the
14 question is, I guess, if we're citing it, it seems to still
15 be good law then.

16 MR. WEINSTEIN: Well, but not cited for this
17 proposition. What Arthur has been frequently cited for is
18 the proposition that once an attorney enters the case, that
19 the defendant then can't waive the right to counsel unless
20 the attorney is present.

21 JUDGE FAHEY: I see.

22 MR. WEINSTEIN: And even in Arthur, I'll note
23 that what happened in Arthur is that the attorney who had
24 represented the defendant on prior matters came to the
25 precinct, spoke to the definition, and there was some

1 communication. And what the communication was between the
2 defendant and the attorney is not clear, and then the
3 interrogation by the police took place after the
4 communication between the attorney and the defendant. So
5 in other cases, such as Ramos, where there's clearly been
6 some communication between the attorney and the defendant,
7 this court and others have recognized that there is an
8 attorney-client relationship that's established and that
9 questioning can't take place.

10 JUDGE ABDUS-SALAAM: Haven't we also said in
11 cases, counsel, that the retention doesn't have to be
12 formal?

13 MR. WEINSTEIN: Absolutely.

14 CHIEF JUDGE DIFIORE: Thank you, Mr. Weinstein.
15 Counsel.

16 MR. MERCURE: Michael Mercure from Fort Edward.
17 I'm the Washington County Public Defender on behalf of
18 Matthew Slocum.

19 JUDGE GARCIA: Counsel, just to go to this issue
20 on the letter for a moment, so when the letter is sent,
21 it's from the public defender's office and it was, as I
22 understand it, representation on a separate matter, right?
23 Prior - - - there was prior representation on a separate
24 matter.

25 MR. MERCURE: Pending representation.

1 JUDGE GARCIA: Pending matter. Would it be
2 possible for your office to come into a case where there
3 were no charges? I mean is this as much as you could do at
4 that point?

5 MR. MERCURE: There were no charges.

6 JUDGE GARCIA: Right. So - - -

7 MR. MERCURE: It was a pending client. This is
8 not a case, as was raised in the People's brief, of public
9 defender offices sending blanket letters - - -

10 JUDGE GARCIA: No. I understand that but my
11 question - - -

12 MR. MERCURE: - - - but this was an Amber alert -
13 - -

14 JUDGE GARCIA: - - - goes more towards some of
15 our prior cases have been retained lawyers who can be hired
16 by the family. If someone's being questioned, they can
17 come down and say, I'm here on this matter. For your
18 office, is it somewhat different in terms of what you can
19 represent at that time without charges being filed?

20 MR. MERCURE: I would disagree, Your Honor. I'd
21 say at the time the office had the authority to represent
22 individuals without court authority.

23 JUDGE FAHEY: Well, let - - - let me ask you - -
24 -

25 CHIEF JUDGE DIFIORE: Is that what you said in

1 your letter, counsel? I represent him please don't talk to
2 him?

3 MR. MERCURE: Exactly.

4 JUDGE FAHEY: Well, no. That's not exactly what
5 you said, though, was it, Mr. Mercure? I - - - I had
6 thought that you said that you represented him on another
7 matter and that - - - but not that you represented him in
8 this case. That you understood that charges may be
9 brought. Let me just finish the thought here. And so but
10 you couldn't represent him here because he - - - you're a
11 public defender, right, and you hadn't been assigned to
12 him. So - - - so you couldn't have represented him at that
13 point.

14 MR. MERCURE: I would disagree. I would say at
15 the time and - - - and now that it does not require an
16 assignment for a public defender to appear and represent.

17 JUDGE ABDUS-SALAAM: What did you mean, Mr.
18 Mercure, when you said he's eligible for representation?
19 You didn't say I represent him you said - - - on this
20 matter you said he's eligible for representation from our
21 office.

22 MR. MERCURE: At the time, Your Honor - - - what
23 I meant, now it would be hard to say. At the time, the - -
24 - the purpose of the letter was - - - I think this was no
25 different than an Arthur situation. As opposed to me

1 driving over to the state police barracks or the sheriff's
2 department, I faxed the letter and I faxed it to the DA, as
3 well. I was attempting to enter. It - - - it was my
4 understanding there were no charges. He was a person of
5 interest and there was a multi-state Amber alert. I - - -

6 JUDGE RIVERA: So you're saying the letter is the
7 equivalent to saying I'm his lawyer don't talk to him?

8 MR. MERCURE: Correct.

9 JUDGE GARCIA: But why didn't you say that? I
10 thought the reason why might be something to do with
11 eligibility and the public defender service and this was as
12 far as you could go at the time. But you seem to be
13 telling us that's not the case, so why didn't you say, as
14 in our other cases, I represent him in this matter?

15 MR. MERCURE: It would be hard to - - - to say
16 now, Judge, why I did not say something different at the
17 time. The - - - it was - - - as I saw it, it all came - -
18 - happened very quickly. I was trying to urgently get
19 notice out. And - - -

20 JUDGE STEIN: But what - - - what - - - how does
21 that impact what - - - the police should or shouldn't have
22 done? If - - - if we looked at it and say, well, it's not
23 definitive, why would the police take it as definitive and
24 why should they have done anything more than they did?

25 MR. MERCURE: Well, initially, I would submit it

1 was definitive. It was clear there were - - - there were
2 no charges for me to represent him on. I was attempting to
3 be involved in the pre-charge investigation, which is
4 certainly the defendant's right once the attorney enters.
5 And as I say, I don't believe the entry here was any
6 different than the Arthur case. And what I think
7 distinguishes this case from Arthur is, unlike any of the
8 previous cases, in this case, the district attorney
9 actually had a meeting with the investigators and there was
10 an affirmative - - - there were affirmative steps taken to
11 avoid the defendant from invoking counsel.

12 JUDGE RIVERA: Now isn't the letter really you
13 represent him on something else? Nothing bars you from
14 representing him in this particular situation unless he
15 doesn't want you to represent him. Isn't that really what
16 it boils down to?

17 MR. MERCURE: I don't - - -

18 JUDGE RIVERA: As I understood it, it - - - he
19 would qualify - - -

20 MR. MERCURE: I would subm - - -

21 JUDGE RIVERA: - - - for representation on any
22 additional charges against him, right?

23 MR. MERCURE: Again, what that language is
24 referring to at the time, it would be hard to say. The
25 letter was drafted, I believe, five or six years ago. And

1 - - - and there may have been some concern over whether he
2 qualified or not. That might have been what the language
3 was referring to. But I can tell you he already - - - he
4 was an existing client from charges that were relatively
5 recent, and I think the point I was trying to make was he
6 presumptively qualifies on whatever new charges there may
7 be. And at the time, we did not - - - I mean, obviously, a
8 tragic event had happened, and they were out looking for
9 him. I mean we - - - we weren't certain he was the person
10 - - - that he was the person responsible. So I - - - we
11 didn't know if there would be charges. We just knew we had
12 a present client that was the subject of a multi-state
13 Amber alert, and we - - - I sent the letter. I - - - I
14 could have, actually, gone to the sheriff's department and
15 maybe I should have, and this would be closer to the Arthur
16 case. But we faxed the letter, and I submit that - - -

17 JUDGE STEIN: How was that different from - - -
18 from what the People say the - - - the risk is that every
19 time you - - - you represent someone in a pending matter,
20 you send out letters or faxes or whatever, to the - - - to
21 the police and the DA, you say if - - - if you pick my
22 client up on anything for any reason, I - - - I want to be
23 involved, I want to represent him?

24 MR. MERCURE: It's - - -

25 JUDGE STEIN: How was that - - - how is this

1 different from that?

2 MR. MERCURE: It's - - - well, this is
3 tremendously different from that scenario, again, in that
4 this was not some blanket letter that I sent trying to
5 protect all of my prior clients or Mr. Slocum in any future
6 criminal endeavors. This was an Amber alert that, you
7 know, if - - - I would have had to have been asleep to miss
8 this. So I - - - I mean at that - - - at that point, the
9 whole county knew that they were looking for him. And I
10 sent the letter because he was a present client. We had,
11 you know - - -

12 JUDGE STEIN: So the difference is that there was
13 actually something occurring in relation to him in another
14 matter?

15 MR. MERCURE: Yes.

16 JUDGE STEIN: Okay.

17 JUDGE FAHEY: Well - - -

18 JUDGE ABDUS-SALAAM: Counsel, what if we - - -
19 what if we don't think that you entered into this represent
20 through the letter? What is your position on the wording
21 that Mr. Slocum used, "yeah, probably"?

22 MR. MERCURE: Undoubtedly and unequivocal
23 invocation of counsel.

24 JUDGE ABDUS-SALAAM: Un - - - unequivocal?

25 MR. MERCURE: Unequivocal. And it - - - the - -

1 - as counsel for the People indicated in his argument, the
2 - - - the question was a compound question do you believe
3 you need an attorney and do you think you're going to use
4 the public defender's office? The response was - - - was
5 yeah, I need an attorney, which is undoubtedly a yes, and
6 probably going to use the public defender's office.

7 CHIEF JUDGE DIFIORE: Counsel, I'd like to move
8 for a moment to the social worker and ask you, in addition
9 to the presence of the police officer, I believe, maybe it
10 was a trooper who was in there during the interview, what
11 other evidence was there that the social worker was an
12 agent of the police?

13 MR. MERCURE: It was Investigator Hamilton, Your
14 Honor. And unlike the ordinary scenario where a social
15 worker may have to go to the jail and read a report - - -
16 that happens all the time. It happens with jail staff. It
17 happens without calling the lead investigator in the
18 homicide case. And in this scenario, this is after
19 arraignment so he's clearly - - - he's represented and I
20 should have been contacted about this meeting, and I was
21 not. The - - - unlike the usual scenario where the
22 caseworker will go over to the jail and see whomever is
23 being housed at the jail, the record indicates here
24 Investigator Hamilton contacted the caseworker, met her at
25 the jail, brought her back to booking, and stayed with her

1 during the entire interview of Mr. Slocum to listen to the
2 reading of the report and any response Mr. Slocum had.

3 JUDGE STEIN: Whose - - - whose burden is it to
4 prove whether the caseworker was or was not an agent of the
5 State? Was it yours or the People's?

6 MR. MERCURE: I would say it was the People's,
7 Your Honor.

8 CHIEF JUDGE DIFIORE: Thank you, counsel.

9 MR. MERCURE: To be clear, there - - - it's the
10 position of the respondent there - - - there are two
11 separate - - - that the "yeah, probably" invoked counsel
12 and that the letter invoked counsel very much like Arthur.

13 CHIEF JUDGE DIFIORE: Thank you, counsel.

14 MR. MERCURE: Thank you.

15 CHIEF JUDGE DIFIORE: Mr. Weinstein.

16 MR. WEINSTEIN: What I think is clear from Mr.
17 Mercure's argument is that at the time he was very much
18 attempting to take advantage of his position as the current
19 attorney or the public defender's current representation of
20 the defendant to use that status to get into the new case.

21 JUDGE GARCIA: Did that letter, aside from did it
22 clearly say he was representing him but was it enough to
23 require an inquiry?

24 MR. WEINSTEIN: I believe there was no legal
25 burden upon the officers to make the inquiry. Again, if

1 this attempt was not at all based on the derivative right
2 to counsel and it was simply the attempt of Mr. Mercure as
3 an attorney to enter - - -

4 JUDGE RIVERA: The district attorney decided that
5 there was a need for an inquiry.

6 MR. WEINSTEIN: I'm sorry?

7 JUDGE RIVERA: The - - - didn't the district
8 attorney decide that there was a need for an inquiry based
9 on the letter? Did I misunderstand the record?

10 MR. WEINSTEIN: The district attorney decided
11 that the defendant did not need to be told about the
12 letter, that there was no burden upon the police or the - -
13 -

14 JUDGE RIVERA: But - - - but didn't the DA
15 decided that there needed to be an inquiry - - -

16 MR. WEINSTEIN: I believe that - - -

17 JUDGE RIVERA: - - - based on the content of the
18 letter?

19 MR. WEINSTEIN: I believe that in an abundance of
20 caution he informed the officers who would be going out to
21 New Hampshire, I believe, to meet the defendant to say we
22 understand that the public defender represents you an open
23 matter and do you anticipate that you would use the public
24 defender or would you like the public defender at which
25 point the defendant made the equivocal response to the

1 question. But again, if the argument is that it's not
2 based on derivative right to counsel, then what if Mr.
3 Mercure were to take a trip down to New York City next
4 week, saw somebody being arrested, contacted the New York
5 City Police Department, and said I saw this person being
6 arrested, I represent him, don't question him? That would
7 be no different. That is the rule that the defendant is
8 asking for in this case.

9 JUDGE FAHEY: So what language would the
10 defendant have to use to enter here - - - or, excuse me,
11 defendant's attorney use to have to enter the case here?
12 What - - - what are you advocating? What language would
13 suffice? He says the defendant would qualify for
14 representation. We know that you're - - - that he's being
15 investigated on a murder - - - an arson and a murder, we
16 represent him in another case, don't question him. That's
17 the letter that you get. What language do you say
18 qualifies for entry?

19 MR. WEINSTEIN: That a defendant would have to
20 request an attorney. It's the right of a defendant to - -
21 -

22 JUDGE FAHEY: Well, that's a - - - that's a - - -
23 invocation is separate from entry. So he's going to enter
24 and he says I already represent this guy, in essence.
25 That's what he's got to say. What language are you saying

1 qualifies? Because it seems like you're saying that he has
2 to have talked to that attorney and said, yes, I want this
3 attorney to represent me in this case, that the defendant
4 has to say that, and I don't know if that's what the law
5 is.

6 MR. WEINSTEIN: Or a family member or a friend,
7 because in Garofolo and Pinzon and in the Second Department
8 cases what this court and the Second Department has held is
9 that there's a presumption that if a family member or a
10 friend has retained an attorney, there's a presumption that
11 a defendant would accept that representation. However,
12 even then the indelible right to counsel, that attorney-
13 client relationship does not attach because what the courts
14 have held, or at least the Second Department has held, is
15 that at the point the police can still talk to the
16 defendant, inform the defendant that there's an attorney
17 trying to get into the case who's been hired by your
18 family, and the defendant can still then refuse the
19 representation, which happened in Lennon.

20 JUDGE STEIN: So are you saying that we have to
21 overrule Arthur, if we haven't already done so, in order to
22 agree with that position?

23 MR. WEINSTEIN: I would say that that portion of
24 Arthur that defendant is saying is still surviving has
25 already been abrogated in Bing and in Pacquette by this

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court.

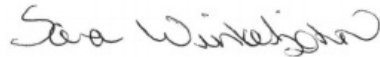
CHIEF JUDGE DIFIORE: Thank you, counsel.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Matthew Slocum, No. 17 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001

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