

**This opinion is uncorrected and subject to
revision in the Official Reports. This opinion
is not available for publication in any official
or unofficial reports, except the New York Law Journal,
without approval of the State Reporter or the
Committee on Opinions (22 NYCRR 7300.1)**

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY

----- x
THE PEOPLE OF THE STATE OF NEW YORK, : By: STEVEN W. FISHER, J.
Part J-25
vs. :
Indictment No. 1845/2000
JOHN TAYLOR, : Indictment No. 1012/2001
Defendant. : Dated: March 20, 2002

----- x
DECISION ON DEFENDANT'S MOTION TO SUPPRESS
(See Decisions # 9, #24, & Q)

In the two indictments before the court, defendant John Taylor stands charged with murder in the first degree and lesser crimes in connection with a robbery and shooting that left five persons dead and two injured inside a Wendy's restaurant in Flushing, Queens. Pursuant to section 250.40 of the Criminal Procedure Law, the People have served and filed a notice of intent to seek the death penalty.

The defendant has moved to suppress and preclude physical evidence, potential identification testimony, and all statements he is alleged to have made while in custody. In prior orders, the court granted the motions to the extent of directing that hearings be held to determine (1) whether any physical evidence sought to be introduced by the People at trial was seized or obtained in violation of the defendant's constitutional rights; (2) whether sufficient and timely statutory notice was given of the People's intention to offer potential identification testimony at trial and, if so, whether the proposed testimony would nevertheless be inadmissible as the product of an unnecessarily and impermissibly suggestive police-arranged identification procedure or as the fruit

of some other violation of the defendant's constitutional rights;¹ and (3) whether sufficient and timely statutory notice was given of the People's intention to offer evidence of statements made by the defendant to law enforcement officials and, if so, whether the statements in question were obtained under circumstances consistent with the defendant's constitutional rights.

Additionally, in connection with the defendant's challenge to the search warrants issued in the case, the court ordered hearings to determine (1) whether, as the People maintain, entry was made into the defendant's apartment at 103-29 171st Street, Jamaica, Queens, under the authority of Search Warrant #510 between the hours of 6:00 a.m. and 9:00 p.m.; (2) whether, as the People maintain, the apartment was unoccupied at the time of the warrant's execution and the police were allowed inside by the landlady using a key; and (3) whether, as the People maintain, the incriminating character of the items seized in plain view during the search was immediately apparent to the officers executing the warrant.

The hearings have now been held and completed. The principal issue to emerge is whether the defendant's statements must be suppressed as having been obtained in violation of his right to counsel.

THE FACTS

At the hearings, the People called ten witnesses and the defendant called three. The People called seven officers of the New York City Police Department: Det. Radesh Verma, Det. Stacy Calantjis, Sgt. Edmund Fong, Lt. Thomas Reilly, Det. Elizabeth Curcio, Det. Brian Quinn, and Det. Richard McCabe; two officers of the Suffolk County Police Department: Police Officer Christopher Krucher and Detective Sergeant Thomas Groneman; and Queens County Assistant District Attorney Patricia Malloy. The defendant called attorneys Joseph Vaccarino and Pamela Jordan, as well as Craig Godineaux, a named co-defendant on Indictment No. 1845/2000.²

Upon an evaluation of the credibility of the hearing testimony and an examination

¹ The defendant no longer presses the claim that preclusion of potential identification testimony is required on the ground that the statutory identification notice was somehow defective.

² On January 22, 2001, with the District Attorney's consent, Craig Godineaux pleaded guilty to each count of the indictment in which he was named. On February 21, 2001, Godineaux was sentenced to five consecutive terms of life without parole.

of the sixty-four exhibits received in evidence, and to the extent necessary to resolve the issues presented, I make the following findings of fact:

At approximately 12:52 a.m. on Thursday, May 25, 2000, Patrol Sgt. Edmond Fong was in uniform riding in a chauffeured marked police vehicle when he received a radio run of a robbery in progress with people shot at a Wendy's restaurant at 41-20 Main Street in Flushing. He ordered his driver to respond to the scene, and found two police units already there.

Some of the restaurant's lights were on, but the doors were locked. Fong was informed that the robbery call had come from the basement, and he called for the Emergency Services unit. His attention was suddenly directed to a male walking out of the kitchen area carrying another male over his shoulder. Police officers immediately used a shovel to break the bottom part of the restaurant's glass door to gain entry.

The man walking out of the kitchen was Patrick Castro, a male Hispanic in his early 20's who appeared to be about 5'6". He had dried blood on his face near his chin from an apparent gunshot injury. The man being carried was Juoquione Johnson, a male black in his late teens. He was 5'6" and appeared dazed and unresponsive.

Sgt. Fong spoke briefly with Mr. Castro as he was receiving medical assistance. Castro said that the manager of the restaurant and other employees were lying shot downstairs in the refrigerator. Fong sent officers down to investigate.

Mr. Castro explained that, at about 11:10 p.m., two male blacks, one tall and one short, entered the restaurant. The tall man stood near the door while the short man approached the counter and asked for the manager by name. Thereafter, the manager called the employees downstairs where the two men tied them up with duct tape inside the refrigerator and placed plastic bags over their heads. Castro said he heard shots, and then heard one of the men say, "let's get the fuck out of here, I'm out of bullets." Castro later managed to free himself and call the police.

Castro described the tall man as about 6', 25 years old, slim, with black hair, wearing brown sweat pants and a dark sweat shirt. He described the shorter man as about 5'5", between 25 and 30 years old, fat, with black hair, wearing blue jeans and a black jacket. Castro said that he had been shot but thought he was all right. He said he believed that Johnson had been struck in the head with a gun but not shot.

After this conversation, Sgt. Fong left Castro and Johnson with Emergency Medical

Technicians and went downstairs. He saw the refrigerator door slightly ajar, and heard an officer say, "someone's moving in there." The manager was still breathing and Emergency Medical Technicians worked on him and then removed him from the scene. The others were not moving and were presumed dead. After Castro and the still-unresponsive Johnson were removed to the hospital, Sgt. Fong took steps to secure the scene.

In the hours following the incident, a witness told Det. Radesh Verma that, sometime after 11:50 p.m., he had been waiting for the Q-65 at a bus stop some seven to eight feet away from the Wendy's door when he saw two men exit the restaurant. Both men were black. The taller one was between 30 and 40 years old and was wearing a beige jacket; the shorter one was carrying what looked like a briefcase. The shorter man locked the restaurant's door, and both men walked away down Main Street toward Prince Street.

Taken back to the 109th Precinct, the witness was shown a machine-generated photo array consisting of one thousand photographs of male blacks who had been arrested in the City of New York within the preceding few months. The witness viewed six photographs at a time, but made no identification. He then moved on to machine-generated arrays of photographs of male blacks recently arrested in northern Queens and then photographs of male blacks recently arrested in southern Queens.

Meanwhile, two other detectives were assembling five additional photographic arrays. They gave them to Det. Verma who did not know who in the arrays was a possible suspect. Verma told the witness to stop looking at the machine-generated photographs and look at the newly-assembled arrays. The witness looked at the first four arrays but did not recognize anyone. When shown the fifth array, however, he identified the person depicted in the third photograph as the shorter man who had locked the Wendy's door. The person identified was the defendant, John Taylor.

Det. Verma then took back the arrays and asked the witness to continue looking through the machine-generated photographs. He did so but made no further identifications. Taylor's photograph was not in any of the machine-generated arrays viewed by the witness.

Later that afternoon, at the 109th Precinct, Detective Stacy Calantjis interviewed a second witness who said that, on the evening of May 24, 2000, he was working as a bus driver and

stopped for a meal at the Wendy's at about 10:30 p.m. Customers began leaving and the manager appeared to be closing down.

The witness saw a man enter and sit down facing him. The man seemed to stare at him for at least twenty minutes, shifting in his seat, without any food. The man, who was a male black, 5'5," thirty years of age, heavysset, with short black hair and wearing a dark jacket, was carrying a gym bag. When the witness left, the male was still there.

At approximately 5:00 p.m., Det. Calantjis showed the witness a photo array containing the defendant's photograph. The witness immediately recognized the defendant's photograph as depicting the man he had seen inside the Wendy's restaurant.

In addition to these identifications, investigating detectives soon learned that the defendant's fingerprint had been lifted in the basement of the Wendy's restaurant. It was also determined that he had worked at the restaurant and that his employment had ended in less than happy circumstances. The police began checking locations the defendant was known to visit, including his sister-in-law's home in Brentwood, Long Island.

In the early afternoon of Friday, May 26, 2000, Lt. William Nevins contacted Det. Sgt. Thomas Groneman of the Suffolk County police. He said that New York police were looking for John Taylor who was wanted in connection with the Wendy's shootings. Nevins described him as a male black with dark hair, about 25 years old, 5'4" to 5'6" tall, weighing between 225 and 250 pounds, and he said that police had reason to believe that Taylor might be at his sister-in-law's house at 11 Dilmont Street in Brentwood. Lt. Nevins said that he and other police officers were on their way out to Brentwood.

By 1:45 p.m., Suffolk County police officers had set up a surveillance of the premises at 11 Dilmont Street. A member of the surveillance team reported that a man matching the defendant's description was on the porch of the house. Det. Sgt. Groneman drove by the house and saw the defendant.

Between 2:00 and 2:15 p.m., New York police, including Lt. Nevins and Detective Elizabeth Curcio, arrived in Brentwood and met Groneman in a parking lot about a quarter of a mile from the premises. They consulted with him and provided a photograph of the defendant.

Shortly after 4:00 p.m., an aided call was received from the premises indicating that

a child had fallen off a bicycle and was in need of assistance. Suffolk County Police Officer Christopher Krucher, in uniform and driving a marked patrol car, was en route to the location with Officer Michael Grosso when he received a radio direction to meet Groneman in the parking lot. Groneman told Krucher that a suspect in the Wendy's case might be at 11 Dillmont Street, and he gave the officer the defendant's photograph and his pedigree sheet bearing his date of birth. Groneman directed Krucher and Grosso to respond to the location to see if the suspect was there. The officers were told to report their findings without taking any further action. Officer Krucher was familiar with the premises, having been called there on several prior occasions to assist in arrests.

Krucher, and Grosso drove to 11 Dillmont Street. A volunteer ambulance with three attendants had already arrived. The defendant, whom Krucher recognized from the photograph, was standing on the stoop in front of the premises. He was wearing a blue jean shirt, jeans, and Timberland boots. He stood about 5'4" and seemed to weigh approximately 220 lbs. His eyes were "bouncing around," and he appeared uncomfortable. It was later confirmed that the defendant had personally placed the call for assistance.

The officers approached him, with Grosso putting on latex gloves. When they asked the defendant, "Where's the child?" he seemed to relax and said, "upstairs." The officers asked him to show them, and he led them into the house.

In the living room, the three ambulance attendants were assisting the child who had sustained a deep 4" long cut to his thigh. There were two or three other children on the premises, along with the injured child's mother and an unknown male black.

Officer Krucher asked the defendant to provide information since the child's mother seemed very upset. The defendant gave the injured child's name as "Taylor," and then identified himself as "Benjamin Taylor." He gave his date of birth as March 10, 1964. He said he was there just for the day.

As Grosso engaged the defendant in conversation, Krucher returned to his vehicle and looked again at the photograph. The pedigree sheet bore the same date of birth the defendant had just given. Krucher radioed Det. Sgt Groneman and informed him that he had made a positive identification. When the officer asked for instructions, Groneman replied, "take him." Groneman and the New York officers then drove directly to the location.

After getting the instruction from Groneman, Krucher returned to the house. He asked the defendant to come downstairs, and then handcuffed him as Groneman and New York officers rushed in. The defendant was removed from the house. The injured child was taken to the hospital.

Outside, Groneman asked the defendant if he had anything on him. The defendant replied that he was carrying a gun in his waist pouch. Det. Curcio then approached and asked the defendant his name. He replied that his name was John Taylor. Curcio also asked if he was carrying any weapons, and he answered that, in his black pouch, he was carrying the same gun he had used.

Curcio and other officers brought the defendant to the garage area and frisked him. Under his shirt, they found a black pouch. Det. Curcio touched the pouch and determined that it contained an object that felt like a weapon. When she seized and unzipped the pouch, she discovered a loaded .380 automatic and a magazine containing rounds.

The defendant was then placed in a police vehicle and driven back to Queens accompanied by Lt. Nevins, Det. Martin Feeny, and Det. Curcio. On the ride back, the defendant seemed nervous. When he was told that he would receive Miranda warnings at the precinct, he said he knew his rights and began almost immediately talking about "Craig." Without having been asked any questions, the defendant said that he had "to make this right." He explained that it was only supposed to have been a robbery and that he had actually worked with three of the victims in the past. He implored the detectives to get Craig who was working at a place called "S.C.&R." at Jamaica Avenue and 165th Street. The defendant said that he was the only one who saw Craig shoot the people inside Wendy's. "If you don't get Craig," he said, "he'll shoot me." He described Craig as a tall, dark-skinned male black with a dragon tattoo on his arm.

The defendant also revealed to the detectives that there was a suitcase back at his sister-in-law's house containing the money – as yet uncounted – and the videotape taken from the restaurant. Sometime later, a search was conducted of the premises at 11 Dilmont Street pursuant to a search warrant. Among the items seized were a duffle bag and a suitcase.

After about ten minutes, the defendant stopped talking. The detectives drove him to the 111th Precinct, arriving between 5:20 and 5:30 p.m. They went into an interview room where the defendant was uncuffed and seated at a table. He seemed very cooperative. He said he was thirsty, and the detectives brought him a soda. He was permitted to use the bathroom. He did not want

anything to eat.

Meanwhile, the news media were reporting that police were focusing on the defendant as a suspect in a potential capital case growing out of the Wendy's homicides. As a consequence, the Capital Defender Office contacted Joseph Vaccarino, the Executive Director of Queens Law Associates which represented the defendant on a still-pending robbery case on which he was a fugitive. Mr. Vaccarino was told that the man wanted as a suspect in the Wendy's case might be a client of his organization. It was suggested that, if that were so, Mr. Vaccarino would want to contact the defendant and arrange for his surrender.

Mr. Vaccarino investigated and confirmed that attorney Pamela Jordan of Queens Law Associates had been assigned to represent the defendant on June 24, 1999, on a still-pending, unrelated robbery case on which a bench warrant had been issued. Consistent with Queens Law Associates's policy of representing clients on new arrests in the county, Mr. Vaccarino considered the defendant a client on any arrest in the Wendy's case. He spoke with Ms. Jordan by telephone and told her to contact the police to inform them that the defendant was represented by Queens Law Associates and was not to be questioned. He suggested that she also contact the defendant's family to try to arrange a surrender.

Meanwhile, Mr. Vaccarino drafted a letter stating that Queens Law Associates represented the defendant for all purposes, and that he was not to be questioned or placed in a lineup in the absence of counsel. At approximately 3:50 p.m., he faxed the letter to the police and to the Queens District Attorney's Office.

Ms. Jordan had last seen the defendant on October 6, 1999. She knew that he had been unhappy with her inability to get the District Attorney to offer less than twelve years on a plea bargain in the robbery case. He had failed to appear in court and a bench warrant had been ordered on November 5, 1999. As it happened, a bail jumping charge growing out of that failure to appear was presented to the grand jury on May 22, 2000 – two days before the Wendy's incident. The resulting indictment was filed on May 25, 2000, and an arrest warrant was issued the next day.

Ms. Jordan now made several unsuccessful attempts to contact the defendant's family. At 2:25 p.m., she spoke with Lt. Shatinsky one of the lead officers in the investigation, informing him that she represented the defendant who was being sought in the Wendy's case. She said that the

defendant was not to be questioned. She told the Lieutenant that she considered herself the defendant's attorney in the case by virtue of her representation of him on the prior robbery case even though she had not been retained by the family or appointed by the court in the Wendy's matter.

That evening, the Capital Defender Office moved on notice in the Criminal Court for an order appointing the Office as counsel for the defendant pursuant to section 35-b of the Judiciary Law. The application was denied.

Back at the 111th Precinct, Det. Curcio was administering the Miranda warnings to the defendant, reading them from a printed form. The defendant indicated his understanding of each of the rights both orally and by placing his initials after each warning on the form. The Miranda process was completed at approximately 5:50 p.m.

Before questioning could begin, however, Lt. Nevins told Det. Curcio that he had spoken with the District Attorney's Office and learned that an attorney named Pamela Jordan of Queens Law Associates represented the defendant on a prior case. Lt. Nevins directed Curcio to ask the defendant whether he wanted Ms. Jordan present. She did so, offering to contact Ms. Jordan, advise her of the arrest, and bring her to the precinct. The defendant replied that he did not want Ms. Jordan. He said that he was extremely dissatisfied with her services, and that he did not want any attorney. He explained that he wanted to tell his story.

At no time was the defendant informed about the unsuccessful attempt of the Capital Defender Office to enter the case on his behalf.

Lt. Nevins informed Det. Curcio that the District Attorney was preparing a waiver form regarding Ms. Jordan and that interrogation on the Wendy's incident was not to begin until it arrived. When the form got to the precinct, Det. Curcio read it to the defendant. He signed it at 6:15 p.m. The form read:

"I am informed that the police have been contacted by an attorney by the name of Pamela Jordan of Queens Legal Associates who represents me on robbery cases that occurred at a McDonald's in Queens County in June of 1999. I have not asked Ms. Jordan to represent me on the incident that occurred on Wednesday, May 24, 2000 at the Wendy's restaurant located on Main Street in Flushing nor does she represent me regarding the Wendy's incident.

"I am willing to speak to the police about what happened at that Wendy's."

Det. Curcio spoke with the defendant for a little more than an hour about the Wendy's incident. Then, before asking him to give a written statement, she requested that he read aloud the waiver he had signed so that she could assure herself that he was able to read and write. He did so.

The defendant agreed to reduce his account to writing. He declined Curcio's invitation to write it out himself, however, preferring instead to dictate it and have her write what he said. The process began at 7:35 p.m. Throughout, the defendant seemed very eager to give his version of events and, at Lt. Nevin's direction, Det. Curcio never questioned or challenged his account. She made no promises to him, never threatened or struck him, and did not interrogate him on any other matter. She simply asked him to explain what had happened.

In the statement, the defendant insisted that only a robbery had been planned but that Craig had shot the employees to insure that there would be no witnesses to the crime.

It took some three hours for Det. Curcio to take down verbatim the defendant's eleven-page statement. Both the defendant and Curcio signed each page. Thereafter, the defendant was asked if he would give a videotape statement and he agreed.

Before the videotaping began, Det. Curcio gave a copy of the written statement to Lt. Nevins. He passed it on to Dets. Brian Quinn and Louis Pia, telling them to review it and to be prepared to interview the defendant after his videotape statement was completed.

An hour and a half after completing his statement to Det. Curcio, the defendant gave a statement on videotape to Assistant District Attorneys Peter Reese and Craig Brown. At the outset, he acknowledged having signed the waiver involving Pamela Jordan, and reiterated that he was willing to speak without counsel present. The statement he then made was essentially consistent with the one he had given to Det. Curcio.

Meanwhile, Dets. Quinn and Pia were planning to confront the defendant with the inconsistencies they found in the written statement. They had difficulty accepting the defendant's suggestion that there had been no prior planning or understanding between him and Godineaux about committing a robbery on the night in question. More important, the detectives could not reconcile the defendant's assertion that, when Craig ran out of ammunition, he asked the defendant for a second clip. As the detectives read the defendant's version of events, Godineaux would have had no way of knowing that the defendant was carrying a second magazine.

Shortly after the videotape statement was completed, Det. Quinn and Det. Pia entered the interview room and introduced themselves to the defendant. They said they wanted to talk with him about his statement and clear up some things they did not understand. He responded that that would be no problem, and he asked them what it was they did not understand.

The detectives went over the statement, reading it to the defendant and periodically asking for clarification. When they confronted him with the inconsistency regarding Godineaux's request for a second clip, the defendant was unable to explain the discrepancy. He soon began making additional admissions.

He described how, after the manager was taped, he broke free, claiming he could not breathe. Godineaux punched him in the face and told him to shut up. The defendant then told Godineaux to re-tie him and put a bag over his head. The defendant shot the manager in the head, and then gave the gun to Godineaux, telling him to "finish them." After Godineaux shot the others, he returned the gun to the defendant.

In the course of his conversation with the detectives, the defendant admitted that he had discussed committing robberies with Godineaux for about a month before the Wendy's incident. He said that Godineaux had suggested robbing livery cabs, but the defendant preferred fast-food restaurants.

The defendant told the detectives that he remembered having touched the box containing the bags that were placed over the heads of the victims. He said he had kept the gun for a possible shootout with the police. He could not explain why he kept the store's videotape.

After about forty-five minutes, the defendant agreed to write out this revised version. He wrote out one page which did not contain all the details he had given the detectives. He also drew a diagram of the freezer and the location of the victims. Quinn and Pia both signed the statement and the diagram. The interrogation was completed at approximately three o'clock on the morning of May 27, 2000.

Det. Quinn testified that he had made no promises to the defendant nor had he uttered any threats or raised his voice. He never told the defendant that Godineaux had named him as a shooter. Quinn testified that the defendant had not been handcuffed during the interview and had been given soda and potato chips. He never asked for a lawyer or refused to answer any of the

detectives' questions.

Det. Quinn denied having slapped the defendant. He testified that the defendant had never screamed for help during the interrogation nor had he broken a table in the room by falling into it.

At approximately 4:00 p.m. on the afternoon of May 27, 2000, Assistant District Attorney Patricia Malloy took a call from Mr. Vaccarino and advised him that lineups would soon be conducted with the defendant and that, if he wanted to be present, he should come to the 111th Precinct as soon as possible. Mr. Vaccarino contacted Ms. Jordan and told her to go to the precinct for the lineup.

Between 5:45 and 6:00 p.m., Ms. Jordan arrived at the precinct and spent some time consulting with the defendant in the interview room. He told her that Det. Curcio had advised him of his Miranda rights and that he had made statements. When asked if he was all right, the defendant replied that he had been struck by the detective during his last interview whenever he said that he could not remember something. He claimed that he had been punched twice and slapped once, and that a piece of a table in the room had broken off after he had been shoved into it. Ms. Jordan did not see any signs of physical injury to the defendant's head, face, or hands, but she did see on the floor what appeared to be a piece of a typewriter table.

Thereafter, Ms. Jordan met with A.D.A. Malloy. She mentioned that she would not be representing the defendant as the case progressed.

Sometime between 6:00 and 6:30 p.m., Patrick Castro and the bus driver who had been inside the Wendy's restaurant arrived at the precinct to view the lineups. Mr. Castro appeared pale and shaken. He complained of pain and wore a bandage over his gunshot wound. He told Ms. Malloy that he had not watched any television news since the incident.

Subsequently, lineups were conducted under the supervision of Ms. Malloy and Lt. Thomas Reilly. The five fillers used in the defendant's lineup were obtained from the Salvation Army's men's shelter in Long Island City.³ Each participant was seated, with the defendant selecting the fourth position. The two witnesses were kept apart from each other, and were never out

³

A separate lineup with five different fillers was conducted with Craig Godineaux.

of the presence of a police officer. Neither ever saw the other, or the defendant, or the fillers, prior to viewing the lineups

Patrick Castro viewed the lineup first and identified the defendant as the man with the gun. The bus driver then viewed the lineup and also identified the defendant as the individual he had seen in the Wendy's restaurant.

Ms. Jordan voiced no objection and offered no suggestions as to either the composition of the lineups or the viewing procedures employed. In fact, she told Ms. Malloy, "off the record, that's one of the best lineups I've ever seen."

Meanwhile, Det. Richard McCabe and other police personnel, including officers from the Crime Scene Unit, were arriving at 103-29 171st Street in Jamaica to execute Search Warrant #510 authorizing the search of the defendant's apartment. They found a three story residence and knocked on the door, but received no answer. They waited outside until the landlady returned from work sometime between 6:00 p.m. and 7:00 p.m. The officers showed her the warrant and said they wanted to search the defendant's room at the rear of the second floor. She took them to the door of the room. They knocked but received no answer. They asked the landlady if she had a spare key. She produced one and opened the door.

Officers from the Crime Scene Unit entered the unoccupied room first, taking photographs. Inside, other detectives seized several items that they found on the table and in the safe located in the closet. Among the items seized under authority of the warrant were a Wendy's name tag, a jacket, shirt and sneakers, and miscellaneous papers reflecting the defendant's prior employment at Wendy's.

Officers also seized items that were not specified in the warrant but which they discovered in plain view in the apartment. They seized a green Halloween mask because Godineaux had said that the defendant told him that he had a mask with him when they went to the Wendy's. They seized three Metrocards because the officers thought they might corroborate the defendant's statement regarding how he and Godineaux had left the scene. They seized business cards and an identification tag from McDonald's because the officers thought they would corroborate charges that the defendant had participated in prior robberies at McDonald's restaurants. They seized business cards from a cab service because the officers thought they would corroborate the defendant's

statement regarding his movements shortly after the Wendy's incident. They seized a Patrolman's Benevolent Association card because the officers thought it might have been used in some other crime. And the officers seized the defendant's New York State driver's license, his social security card, and an identification card from the University of Rhode Island because the officers thought they might be valuable for identification and investigative purposes.

The search of the defendant's apartment was completed and the officers left the premises sometime between 7:00 p.m. and 8:00 p.m. They locked the door and returned the key to the landlady.

At the hearings, the defendant called Craig Godineaux who testified that, after his arrest, he had also been questioned at the 111th Precinct. He knew that the defendant was nearby because one of the officers had said, "We have your partner in the other room," and had shown him the defendant's picture. Godineaux testified that, although he was never struck during his own interrogation, he did hear the defendant yell, "help me, help me, they're beating me up." He also heard the sound of someone being smacked, and what sounded like chairs falling as if a body was being thrown into furniture. When he asked one of the officers what happened, he was told, "your partner is acting like a real asshole."

In rebuttal of Godineaux's testimony, the People re-called Det. Richard McCabe who testified that the rooms in which the defendant and Godineaux were seated were only about thirty-five feet apart. Many detectives, police officers, and assistant district attorneys had been present throughout the night in the area between the two rooms. McCabe himself had been with Godineaux for almost the entire time, beginning at approximately 1:45 a.m., and continuing until the completion of Godineaux's videotape statement at 7:04 a.m.

Det. McCabe testified that he never heard any screams or cries for help coming from the defendant, nor did he ever hear the sound of breaking furniture. When McCabe met the defendant at eleven o'clock that morning, the defendant seemed pleasant and in good shape. He showed no injuries and complained of none. When McCabe tried to question the defendant about an unrelated murder, the defendant loudly refused to discuss it and demanded an attorney.

Based upon these findings of fact, I draw the following conclusions of law:

PHYSICAL EVIDENCE

I. The Arrest and Incidental Search

The defendant's arrest was plainly supported by probable cause. Before he was taken into custody, the defendant had been identified by two independent civilian witnesses, his fingerprint had been found in the basement area where the homicides had occurred, and the police had discovered a prior and unhappy connection between him and the restaurant. Clearly, to any reasonably prudent police officer familiar with the investigation, it would have appeared more probable than not that a crime had been committed and that the defendant was its perpetrator. Nothing more is required to establish probable cause justifying an arrest (*see, e.g., People v Carrasquillo*, 54 N.Y.2d 248, 254 [1981]; *cf. People v. Bigelow*, 66 N.Y.2d 417, 423 [1985]; *People v. McCray*, 51 N.Y.2d 594, 602 [1980]). The subsequent seizure of the waist pouch, and the gun and magazine found inside, was the product of a permissible search incidental to the lawful arrest since, based upon the defendant's statements and the confirming pat down, Det. Curcio had reasonable grounds to believe that the pouch contained a gun (*cf. People v. Contrero*, 232 A.D.2d 213 [1st Dept. 1996], *lv. denied* 89 N.Y.2d 1090; *People v. Carmen*, 167 A.D.2d 913 [4th Dept. 1990], *lv. denied* 77 N.Y.2d 959).

The only remaining physical evidence in issue is the property seized by the police in the course of searches conducted under the authority of the search warrants.

II. Search Warrant #508

The defendant first challenges Search Warrant #508 which authorized the search of the home of his sister-in-law at 11 Dillmont Street in Brentwood. He argues that "the affidavit accompanying the search warrant application *** failed to set forth sufficient facts establishing probable cause *** [and] failed to establish any nexus between the area to be searched and [the] crime being investigated." (Motion #24, Notice of Motion, p.1.) More particularly, the defendant contends that the application failed to link him to the Wendy's incident because the supporting affidavit "merely stated that somebody named 'John Taylor' was 'identified' or 'later identified' as one of the Wendy's robbers ***[but did not explain h]ow these identifications came about, when they occurred, [or] how and under what auspices." (Motion #24, Memorandum of Law at p. 3.) Moreover, the defendant maintains that the affidavit "offered no basis whatsoever for believing that fruits or evidence of the Wendy's crime would be found at 11 Dillmont Street." (*Id.* at p. 5.)

In response, the People have submitted a transcript revealing that, before issuing Search Warrant #508 on May 26, 2000, the judge specifically asked the affiant detective how John Taylor had been identified as the person at the Wendy's restaurant. The detective responded under oath that the two civilian witnesses named in the application both identified the defendant's photograph. (Motion #24, People's Response, Exhibit A.)

Moreover, the warrant application asserted that, on the afternoon of May 26, 2000, three calls were placed from the defendant's cellular telephone to the 11 Dillmont Street address, and that the defendant was observed later that day exiting from the premises. The application further alleged that, upon his immediate arrest, he was found to be carrying a loaded .380 caliber handgun, the same caliber as the eight shell casings recovered at the scene of the homicides.

Thus, the judge considering the warrant application was informed that, less than two days after the commission of a widely-reported multiple homicide, the principal and identified suspect was discovered emerging from his sister-in-law's home, far from the scene of the crime and far from his own apartment, and that, when arrested, he was carrying the same caliber weapon as that used in the crime. In my view, it was entirely reasonable for the issuing judge to find, on the basis of those allegations, that there was probable cause to believe that fruits, instrumentalities, or evidence of the crime, not recovered at the crime scene, would be found inside the subject premises.

Our Court of Appeals wrote more than a quarter century ago that "search warrant applications should not be read in a hypertechnical manner [but instead] must be considered in the clear light of everyday experience and accorded all reasonable inferences." (*People v. Hanlon*, 36 N.Y.2d 549, 559 [1975]; *see, also, Illinois v. Gates*, 462 U.S. 213, 236 [1983]; *United States v. Ventresca*, 380 U.S. 102, 109 [1965].)

In the case at bar, the issuing judge was entitled to rely on the fact that "logic suggests that a person who has committed a crime and who wishes to conceal evidence thereof would choose to hide it at a place where he exercises some control" (*People v. Christopher*, 101 A.D.2d 504, 526 [4th Dept. 1984], *rev'd on other grounds* 65 N.Y.2d 417; *cf. People v. Robinson*, 68 N.Y.2d 541, 552 [1986]; *People v. Wheatman*, 29 NY2d 337, 346 [1971] *cert. denied sub nom. Marcus v. New York*, 409 US 1027; *People v. Paccione*, 259 A.D.2d 563 [2nd Dept. 1999], *lv. denied* 93 N.Y.2d 975). The fact that the defendant would freely emerge from the house alone carrying a loaded handgun

supports the inference that he exercised some control over the premises.

Moreover, in defense counsel's affirmation submitted in support of the motion to controvert, he states: "At the time of his arrest, Mr. Taylor was an overnight guest at the home of his sister-in-law *** at 11 Dillmont Street ***." (Motion #24, Youngblood Affirmation at p. 3.)⁴ The defendant's claim that he was an overnight guest further supports the inference that he exercised some measure of control over the premises.

Consequently, I find that, when viewed in the light of everyday experience and accorded all reasonable inferences, the application submitted in support of Search Warrant #508, as supplemented by the sworn testimony of the affiant detective, established probable cause to believe both that the defendant was the person who had committed the crime, and that fruits, instrumentalities, or evidence of that crime, not recovered at the crime scene, would be found inside the premises at 11 Dillmont Street.

III. Search Warrant #510

The defendant next challenges Search Warrant #510 which authorized the search of his apartment at 103-29 171st Street in Jamaica. He argues that the provisions in the warrant permitting the search to be conducted "any time day or night," and "without giving prior notice of authority and purpose" were unsupported, and rendered the warrant defective. He further contends that, in any event, the seizure inside the apartment of certain property not listed in the warrant was unlawful because it violated the Fourth Amendment's particularity requirement.

A search warrant may contain a provision permitting its execution at any time day or night, *inter alia*, if the application demonstrates reasonable cause to believe that "the property sought will be removed or destroyed if not seized forthwith" (CPL 690.35[4][a][ii]; *see also*, CPL 690.45[6]). And a search warrant may contain a provision authorizing a search to be made without the giving of notice of the executing officer's authority and purpose, *inter alia*, if the application provides reasonable cause to believe that "the property sought may be easily and quickly destroyed

⁴ Defendant contends that, as a consequence of his status as an overnight guest, he has standing to contest the search of the premises (*see, Minnesota v. Olson*, 495 U.S. 91 [1990]; *People v. Ortiz*, 83 N.Y.2d 840, 842 [1994]). Although the defendant has offered no evidence to establish his status, and although the only proof before the court is Officer Krucher's testimony that the defendant told him he was at the premises just for the day, the People do not contest the defendant's standing and the court therefore has no occasion to reach the issue.

or disposed of, or *** the giving of such notice may endanger the life or safety of the executing officer or another person" (CPL 690.35[4][b][i]&[ii]; *see also*, CPL 690.45[7]).

Assuming without deciding that the application for Search Warrant #510 failed to provide reasonable cause sufficient to justify either of these provisions, the defect does not invalidate the warrant in the circumstances at bar.

The uncontradicted testimony at the hearing established that entry was gained into the defendant's unoccupied apartment only after the landlady, in the presence of the police, knocked on the door and then opened it with a key. The testimony also established that the search was conducted and completed well before 9:00 p.m. Because the authority granted in the "no-knock" and "nighttime" provisions was never used in the execution of the warrant, their inclusion, even if without sufficient foundation, does not require suppression (*see, e.g., People v. Sinatra*, 102 A.D.2d 189, 191 [2nd Dept. 1984][*"no-knock"*]; *People v. Varney*, 32 A.D.2d 181, 182 [2nd Dept. 1969][*"nighttime"*]; *cf. People v. Greenleaf*, 222 A.D.2d 838, 840 [3rd Dept. 1995], *lv. denied* 87 N.Y.2d 973 [*"no-knock"*]).

Aside from his arguments directed at the "no-knock" and "nighttime" provisions, the defendant does not challenge Search Warrant #510 insofar as its issuance, contents, or manner of execution. Having found that the inclusion of the two provisions did not invalidate the otherwise properly issued and executed warrant, I hold that the officers were lawfully inside the apartment conducting a search when they discovered and seized the property enumerated in the return on the warrant but not listed in the warrant itself.

The defendant asserts without contradiction that "the police seized a variety of items not specifically listed in the warrant and not reasonably within the scope of any listed category: driver's license; social security card; White Plains PBA card 'Lt. K. Ford'; '2 Misc. cards'; Metrocards; McDonald's name tag bearing the name 'John Taylor'; Halloween mask; miscellaneous papers; University of Rhode Island identification card." (Motion #24, Defendant's Memorandum of Law at p. 8, quoting the return.) The defendant argues that, "[s]ince none of these items is inherently illegal, the police were not authorized to seize any of them pursuant to the plain view doctrine *** [and] even if the noted items had been listed in the warrant, 'the warrant application provided no basis to conclude that [they] constituted possible evidence of the crime.'" (*Id.* at p. 8-9; citation

omitted.) Thus, the defendant maintains, the court "must suppress the various items seized from Mr. Taylor's home, but not listed in Search Warrant #510, and any derivative fruits of that search." (*Id.* at p. 9.)

The Fourth Amendment's requirement that search warrants particularly describe the things to be seized is generally thought, *inter alia*, to prevent "the seizure of one thing under a warrant describing another" (*Marron v. United States*, 275 U.S. 192, 196 [1927]; *see, also, People v. Darling*, 95 N.Y.2d 530, 537 [2000]; *People v. Basilicato*, 64 N.Y.2d 103, 114 [1984]). Nevertheless, when, in the course of the lawful execution of a warrant, officers discover property in plain view, they may seize it even though it is not described in the warrant, provided they have lawful access to the property, and its incriminating character is immediately apparent to them (*see, e.g., People v. Brown*, 96 N.Y.2d 80, 89 [2001]; *cf. Horton v. California*, 496 U.S. 128, 136 [1990]; *People v. Diaz*, 81 N.Y.2d 106, 110 [1993]).

The items cited by the defendant were discovered in plain view in the defendant's apartment during the course of the search authorized by the warrant. The officers had lawful access to those items, and therefore the legality of their seizure turns on whether the incriminating character of the items was immediately apparent to the officers who found them.

At the hearing, the prosecution offered testimony in an attempt to justify the seizure of items not listed in the warrant. The police seized the Halloween mask because Godineaux told them that the defendant said he had a mask with him when they went to the Wendy's restaurant. The police seized the three Metrocards as possible corroborative evidence because the defendant had described traveling to and from the restaurant by subway and bus. And the police seized the business cards of a cab service because the defendant had told of calling a cab for his girlfriend shortly after the crime, and taking a cab himself to the railroad as he traveled to his sister-in-law's home.

The requirement that the incriminating character of the property be "immediately apparent" to the seizing officer does not demand that the officer actually know that the items are contraband or evidence of a crime. Instead, "[i]t merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief' *** that [the] items may be *** useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true

than false. A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required" (*Texas v. Brown*, 460 U.S. 730, 741-742 [1983][plurality opinion]; *see, also, People v. Batista*, 261 A.D.2d 218, 221 [1st Dept. 1999], *lv. denied* 94 N.Y.2d 819). In my view, the justifications offered for the seizure of the mask, the Metrocards, and the cab service business cards meet this test.

By contrast, the reasons given for the seizure of the McDonald's business cards and identification tag, the Patrolman's Benevolent Association card, the defendant's New York State driver's license, his social security card, and an identification card from the University of Rhode Island, were speculative in nature, and, in my judgment, do not meet the test. Accordingly, those items, and any other miscellaneous papers seized in the apartment that do not relate directly to the Wendy's restaurant, must be suppressed.

IV. Search Warrant #538

Lastly, the defendant challenges Search Warrant #538 which authorized the search of the defendant's cellular telephone for all names and telephone numbers stored within it. The defendant argues, *inter alia*, that the application for the warrant reveals that "the police had no basis whatsoever for searching the internal memory of Mr. Taylor's telephone and their justification for doing so was entirely speculative." (Motion #24, Defendant's Memorandum of Law at p. 10.)

The only allegation contained in the application relating to the defendant's cellular telephone is the assertion that, on May 26, 2000, he used it to make three calls to the home of his sister-in-law at 11 Dillmont Street in Brentwood, where he was later found and arrested. The People argue that "the link between the phone and the crime was established by defendant's use of the phone to call his sister-in-law to arrange to stay with her. *** [D]efendant's flight was probative of his consciousness of guilt, and that alone was sufficient to establish the phone's evidentiary value. In addition, a wholly logical and reasonable inference to be drawn from defendant's use of the phone for that purpose was that he used the phone for other similar purposes, such as to arrange the disposal or secretion of the evidence, or even to plan the crime." (Motion #24, People's Memorandum of Law at p. 17.)

In my view, this proffered justification is largely speculative, and the simple allegation contained in the warrant application does not provide probable cause to believe that a

search of the memory of the defendant's cellular telephone would yield fruits, instrumentalities or evidence of the crime under investigation. Accordingly, all property seized under the authority of Search Warrant #538 must be suppressed.⁵

POTENTIAL IDENTIFICATION TESTIMONY

I. The Identifications

The witness interviewed by Detective Verma identified the defendant's photograph only after having viewed hundreds of photographs of male blacks. The bus driver identified the defendant's photograph from an array of six, all depicting male blacks of strikingly similar appearance. The viewing procedures used were in no way suggestive. Indeed, Detective Verma was not even aware of the identity of the possible suspect when he showed the five arrays to the first witness.

Because there was nothing about the photographic identifications that created a substantial likelihood that the defendant would be singled out, those identifications were not constitutionally objectionable (*see, e.g., People v. Lee*, 96 N.Y.2d 157, 163 [2001]; *People v. Burke* 251 A.D.2d 424 [2nd Dept. 1998], *lv. denied* 92 N.Y.2d 894).

Moreover, the fillers used in the lineups viewed by Mr. Castro and the bus driver resembled the defendant so well that the experienced defense attorney present was compelled to remark, "that's one of the best lineups I've ever seen." Clearly, both in their composition and in the viewing procedures employed, the lineups were fair, and were neither unduly suggestive nor conducive to irreparable misidentification (*see, e.g., People v. Ashby*, ___ A.D.2d ___, 735 N.Y.S.2d 715 [2nd Dept. 2001]; *People v. Nolan*, 277 A.D.2d 400 [2nd Dept. 2000], *lv. denied* 96 N.Y.2d 786; *People v. Shaw*, 251 A.D.2d 686 [1998], *lv. denied* 92 N.Y.2d 905; *People v. Folk*, 233 A.D.2d 462 [2nd Dept. 1996], *lv. denied* 89 N.Y.2d 942). Indeed, following the hearings, aside from his contention regarding "sequential" identification procedures discussed *infra*, the defendant has

⁵ The defendant has also moved for a hearing to determine whether the prosecution is obligated to disclose to the defense, and, if not, to the court, the identities of the informants whose names were deleted from the warrant applications provided to the defense (see Motion #24, Defendant's Memorandum of Law at p. 10). No such hearing is required since the name of the Wendy's employee who provided the information was revealed at the hearing, and the names of the two civilian witnesses were disclosed in the unredacted transcript provided as Exhibit A in the People's response to Motion #24.

pressed no claim that the photographic or lineup identifications at bar were unconstitutionally suggestive.

II. The Double-Blind Sequential Format

The defendant does contend, however, that the court erred in refusing to allow him to call at the hearing Professor Steven Penrod, a noted expert in eyewitness identification. According to the defendant, Professor Penrod would have testified as to "the inherent suggestiveness of the standard, simultaneous method of exhibiting photo arrays and lineups to potential trial witnesses *** [and] the categorical superiority of the double-blind, sequential format [which] bears directly on the question of whether potential eyewitnesses against Mr. Taylor were subjected to unfairly suggestive procedures." (Defendant's Post-Hearing Memorandum at p. 98-99.)

The court explained its ruling on the record on December 11, 2001 (*see People v. Taylor*, Decision #25). The defendant was not asking that the court compel the police or the District Attorney to employ the double-blind, sequential method in a yet-to-be-conducted identification procedure (*see, e.g., In the Matter of an Investigation of Rahim Thomas*, 189 Misc.2d 487 [Sup. Ct. Kings Co. 2001] [Kreindler, J.]; *People v. Gerald Alcime*, NYLJ 2/19/02, p. 21, col. 1, 2002 WL 264371 [Sup. Ct. Kings Co.] [Lewis, J.]). He was, instead, making an application to present evidence of the superiority of the double-blind, sequential format at a suppression hearing where the only issue was whether the identification procedures actually used were unduly suggestive and conducive to irreparable misidentification. In the context of this case, however, that question did not turn on whether there was a "better" identification method available. Indeed, courts have consistently rejected the proposition that the asserted superiority of the double-blind, sequential format is such as to render any other procedure, including the traditional simultaneous method, unreliable or unconstitutional (*see, e.g., People v. Martinez*, NYLJ 1/18/2002, p. 18, col. 3 [Sup. Ct. N.Y. Co.] [Soloff, J.]; *People v. Franco*, NYLJ 7/5/2001, p. 20, col. 5 [Sup. Ct. Bx. Co.] [Barrett, J.]).⁶

I have no occasion now to consider whether evidence regarding the attributes of the

⁶ Indeed, as our Court of Appeals has observed, traditional corporeal lineups, properly conducted, "generally provide a reliable pretrial identification procedure and are properly admitted unless it is shown that some undue suggestiveness attached to the procedure" (*People v. Chipp*, 75 N.Y.2d 327, 335 [1990], *cert. denied* 498 U.S. 833).

double-blind, sequential format would be admissible at trial (*cf. People v. Lee*, 96 N.Y.2d 157, 163 [2001], *supra*). I adhere to my holding, however, that such evidence was not admissible at the suppression hearing.

III. Calling the Identification Witnesses

Finally, the defendant argues that the court erred in refusing to permit him to call at the suppression hearings the civilian witnesses who made the identifications. The defendant maintains that he was "entitled to a pretrial opportunity to question these witnesses about the effect on them of the media barrage and the flawed simultaneous method." (Defendant's Post-Hearing Memorandum at p. 99.)

A defendant may call an identifying witness at a pretrial suppression hearing only if the evidence "raises substantial issues as to the constitutionality of the [identification procedures employed], the resolution of which could not be properly resolved without testimony from the identification witness" (*People v. Chipp*, 75 N.Y.2d 327, 338 [1990], *cert. denied* 498 U.S. 833). The defendant argues that such substantial issues were raised here owing to the "intense media scrutiny of this case during the brief time between the incident and Mr. Taylor's arrest." (Defendant's Post-Hearing Memorandum at p. 99.)

To the contrary, the two witnesses who identified photographs of the defendant did so well before the media began reporting that he was being sought in connection with the Wendy's case. And when Mr. Castro arrived at the precinct to view the lineup, he told A.D.A. Malloy that he had not seen the media coverage of the case. Consequently, that coverage raised no substantial issues as to the constitutionality of the identification procedures that would necessitate the testimony of the civilian witnesses (*see, People v. Abrew*, 95 N.Y.2d 806, 808 [2000])

THE STATEMENTS

I. Statement at the Scene of the Arrest

The defendant first challenges the admissibility of his alleged statement, made to Det. Curcio immediately after his arrest at 11 Dillmont Street, in which he said, in effect, that he was carrying in his waist pouch the same gun he had used in the crime. The statement was made in response to the detective's inquiry as to whether he was carrying any weapons. The defendant argues that, because the question was posed when he was already in custody, handcuffed and surrounded

by police, and because it was not preceded by Miranda warnings, the statement must now be suppressed.

In *New York v. Quarles* (467 U.S. 649 [1984]), the Supreme Court recognized what has come to be known as the public-safety exception to the Miranda rule. The Court held that the exception would apply to situations in which, without having first administered constitutional warnings to suspects in custody, "police officers ask questions reasonably prompted by a concern for the public safety" (467 U.S. at p. 656). The Court reasoned that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination" (*Id.* at p. 657). And the Court expressed confidence that police officers "can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect" (*Id.* at p. 658-659).

Following *Quarles*, New York courts have uniformly applied its public-safety exception where officers, acting principally to protect their own safety or that of the public, and not to elicit incriminating evidence, ask suspects immediately after their apprehension to reveal the location of weapons (*see, e.g., People v. Scotchmer*, 285 A.D.2d 834, 836 [3rd Dept. 2001], *lv. denied* 96 N.Y.2d 942; *People v. Oquendo*, 252 A.D.2d 312, 314 [1st Dept. 1999], *lv. denied* 93 N.Y.2d 901; *People v. Sanchez*, 255 A.D.2d 614, 615 [3rd Dept. 1998], *lv. denied* 92 N.Y.2d 1053; *People v. Clark*, 198 AD2d 46 [1st Dept. 1993], *lv. denied* 83 N.Y.2d 870; *People v. Ingram*, 177 A.D.2d 650 [2nd Dept. 1991], *lv. denied* 79 N.Y.2d 858; *cf. Matter of John C.*, 130 A.D.2d 246 [2nd Dept 1987]).

In the case at bar, Det. Curcio asked the question of the defendant as they stood with other officers in front of a house in a residential area. Children and other adults were still in the vicinity. The defendant had just been arrested for the commission of a multiple homicide and had not yet been frisked or searched.

In my view, the evidence supports the inference that Det. Curcio asked the question so that, if the defendant were carrying a weapon, she could go directly to it and remove it as quickly and safely as possible. She was clearly not then concerned with eliciting incriminating evidence. Thus, she did not ask the defendant whether he was in possession of the weapon used in the crime.

Nor did she ask him to reveal the location of any other evidence connected with the incident.⁷ Instead, she simply asked him whether he was then carrying any weapon.

Because I conclude that Det. Curcio's question was prompted, not by a desire to elicit incriminating evidence, but by a concern for her own safety and that of the officers and civilians around her, I hold that her failure to administer Miranda warnings before asking the question does not require suppression of the defendant's unexpected response.

II. Right to Counsel

The defendant's principal challenge to the admissibility of his precinct statements rests on his contention that his right to counsel was violated when he was interrogated in the absence of an attorney.

i. The attorneys' efforts to enter the case

Our Court of Appeals has found in the New York Constitution an expanded right to counsel that affords protections beyond the requirements of its federal counterpart (*see, e.g., People v. Davis*, 75 N.Y.2d 517, 521 [1990]). In the modern context, when that expanded right to counsel is triggered, it is said to have "indelibly attached," and it renders ineffective any subsequent waiver of counsel elicited in the absence of an attorney (*see, People v. Settles*, 46 N.Y.2d 154, 165-166 [1978]).

There are generally said to be two lines of cases describing when New York's expanded right to counsel indelibly attaches. The first holds that the right is triggered when an accusatory instrument is filed against the suspect, initiating formal proceedings and converting any inquiry from investigative to accusatorial (*see, e.g., People v. DiBiasi*, 7 N.Y.2d 544, 551 [1960]; *People v. Settles, supra*, at p. 162-163). Thus, once a felony complaint or an indictment is filed, the charged suspect, whether actually represented or not, may not effectively waive counsel or be questioned except in the presence of an attorney (*see, e.g., People v. Samuels*, 49 N.Y.2d 218 [1980]).

The second line of cases holds that the right to counsel may indelibly attach even

⁷ Indeed, on the car ride back to Queens, the detective tried to dissuade the defendant from talking, telling him that he would receive his Miranda warnings when they arrived at the precinct.

before the filing of a formal charge, if an attorney representing the suspect enters the case in connection with the charges under investigation (*see, e.g., People v. Hobson*, 39 N.Y.2d 479 [1976]), or if the suspect in custody asks for a lawyer (*see, e.g., People v. Cunningham*, 49 N.Y.2d 203, 205 [1980]).

The first line of cases is not very different from federal case law (*see, e.g., Massiah v. United States*, 377 U.S. 201 [1964]; *Kirby v. Illinois*, 406 U.S. 682 [1972]). The second, however, is distinctive to this state, and its development has been markedly uneven.

Thus, in *People v. Arthur* (22 N.Y.2d 325, 329 [1968]), the Court of Appeals held that, "[o]nce 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." But two years later, the Court called the *Arthur* formulation "merely a theoretical statement of the rule," and warned that "[t]his dogmatic claim is not the New York law" (*People v. Robles*, 27 N.Y.2d 155, 158 [1970], *cert. denied* 401 U.S. 945).

Six years after that, however, in *People v. Hobson* (39 N.Y.2d 479 [1976], *supra*), the Court re-embraced the *Arthur* rule, holding again that "[o]nce a lawyer has entered a criminal proceeding representing a defendant in connection with criminal charges under investigation, the defendant in custody may not waive his right to counsel in the absence of the lawyer" (39 N.Y.2d at p. 481). The Court reasoned that the rule was necessary to breathe life into the requirement that constitutional waivers be competent, intelligent and voluntary, and observed that "[t]he right to the continued advice of a lawyer, already retained or assigned, is [the individual's] real protection against an abuse of power by the organized State ***, more important than the preinterrogation warnings given to defendants in custody." (*Id.* at p. 485.)

Moreover, the Court noted that "an attempt to secure a waiver of the right of counsel in a criminal proceeding in the absence of a lawyer, already retained or assigned, would constitute a breach of professional ethics, as it would be in the least-consequential civil matter. *** Since the Code of Professional Responsibility is applicable, it would be grossly incongruous for the courts to blink its violation in a criminal matter." (*Id.* at p. 484-485; citations omitted.)

In *People v. Rogers* (48 N.Y.2d 167 [1979]), the Court expanded the *Arthur-Hobson* rule by holding that, once an attorney enters a criminal proceeding representing a suspect in custody

in connection with criminal charges under investigation, the right to counsel indelibly attaches and prohibits interrogation, in the absence of the attorney, on those charges or any other (*see, e.g., People v. Steward*, 88 N.Y.2d 496, 501 [1996]). And the same was later held to be true for a suspect not in custody who has obtained the service of counsel (*see, People v. Skinner*, 52 N.Y.2d 24,32 [1980]).

Then, in *People v. Bartolomeo* (53 N.Y.2d 225 [1981]), the Court announced a striking expansion of the rule. The Court now held that "[k]nowledge that one in custody is represented by counsel, albeit on a separate, unrelated charge, precludes interrogation in the absence of counsel and renders ineffective any purported waiver of the assistance of counsel when such waiver occurs out of the presence of the attorney" (53 N.Y.2d at p. 231). Knowledge by the police of an outstanding charge against the suspect, the Court wrote, gives rise to "an obligation to inquire whether defendant was represented by an attorney on that charge," and a failure to make the inquiry will leave the officers "chargeable with what such an inquiry would have disclosed." (*Id.* at p. 232.)

Nine years later, however, the Court flatly overruled *Bartolomeo*, finding that its expansion of the *Arthur-Hobson* rule "is not firmly grounded on prior case law, cannot be applied uniformly, favors recidivists over first-time arrestees, and exacts *** a heavy cost from the public" (*People v. Bing*, 76 N.Y.2d 331, 350 [1990]). At the same time, the Court took the opportunity to reaffirm its adherence to the *Arthur-Hobson* rule, and to the *Rogers* expansion of it. (*Id.*)

The Court's most recent formulation of the rule is that "the right to counsel attaches indelibly where an uncharged individual has actually retained a lawyer in the matter at issue or, while in custody, has requested a lawyer in that matter" (*People v. West*, 81 N.Y.2d 370, 373-374 [1993][*per* Kaye, Ch. J.]). In those circumstances, the police may not question the suspect in the absence of the attorney on the matter in issue or any other (*People v. Rogers, supra*).

The defendant here contends that, when Ms. Jordan notified the police that she represented the defendant on the Wendy's matter, she entered that case on his behalf, and therefore all subsequent waivers of counsel elicited from him in her absence were, for that reason, ineffective. I disagree.

The common thread running through the cases dealing with the entry of counsel into a criminal proceeding is that, in each instance, the suspect was actually represented by an attorney at the time of the interrogation (*see, People v. Rogers*, 48 N.Y.2d 167, 172-173 [1979], *supra*).

Clearly, legal representation implies something more than an attorney's unilateral decision to provide services in a particular case.

An attorney, who is a stranger to a suspect and to the matter under investigation and who has not been invited to do so either by the suspect or someone acting on his behalf, cannot enter the proceedings by simply declaring himself to be the suspect's lawyer and then communicating the same to the police. "The decision to retain counsel rests with the client *** not the lawyer" (*People v. Bing*, 76 N.Y.2d 331, 349 [1990], *supra*).

Although Ms. Jordan and Mr. Vaccarino were not strangers to the defendant, neither he nor anyone acting on his behalf asked them to provide representation in the Wendy's matter. Indeed, their only connection with the defendant was their representation of him on a prior but still-pending, unrelated case. Although that representation, known to the police, would have been enough to trigger the indelible right to counsel had *Bartolomeo* still been the law, *Bing* "unequivocally eliminate[d] any 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]). Thus, the fact that the lawyers represented the defendant on the unrelated robbery case was largely irrelevant to his right to counsel in the Wendy's matter.

Ms. Jordan's calls to the precinct and Mr. Vaccarino's letters to the police had no more legal significance therefore than would any other attorney's communications about the case unsolicited by the defendant or anyone acting on his behalf. Nevertheless, in recognition of the attorneys' relationship with the defendant in the prior case, the police quite properly advised him of the contact (*cf. People v. Donovan*, 13 N.Y.2d 148 [1963]; *People v. Bevilacqua*, 45 N.Y.2d 508 [1978]).

After administering the Miranda warnings but before beginning interrogation, Det. Curcio told the defendant that Ms. Jordan had contacted the police. The detective offered to communicate with the attorney, advise her of the arrest, and bring her to the precinct. The defendant was free to accept or reject the offer of legal assistance. But to say that his decision could be effective only if made in the actual presence of the attorney would be to return to the abandoned holding of *Bartolomeo*.

The defendant expressly and unambiguously declined the offer, revealing his

dissatisfaction with Ms. Jordan and saying that he did not want any attorney but wished only to explain to the police what happened in the Wendy's incident. Before questioning began, he confirmed that choice by signing the written waiver.⁸

In my view, there is no reason in law or policy to hold that the defendant's knowing and voluntary decision was ineffective.

In *People v. Lennon* (243 A.D.2d 495 [2nd Dept. 1997], *app. disp.* 91 N.Y.2d 942), the defendant was charged with murdering her husband and moved to suppress inculpatory statements on the ground that they were taken in violation of her right to counsel. The facts, as described by the Court, were as follows:

"[A]fter the defendant agreed to accompany the police to the police station, an attorney who had represented her in past matters telephoned the station and later appeared at the station, after being contacted by the defendant's father. Upon learning that the attorney was on his way to the station, the detective interviewing the defendant conveyed this to the defendant and inquired as to whether she wanted the attorney to represent her. In response to this inquiry, the defendant indicated that he had represented her in the past, 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. The defendant agreed to speak to the detectives without an attorney, and ultimately admitted murdering her husband." (243 A.D.2d at p. 496.)

The Court rejected the claim that the defendant's right to counsel had indelibly attached, noting that "[t]he defendant neither retained counsel on the matter in question nor requested the assistance of counsel *** [but instead] made it quite clear that she did not wish to extend her relationship with the attorney to include the matter in question, despite being given the opportunity to have him represent her." (*Id.* at p. 497.) Precisely the same is true here.

Lennon is indistinguishable from the case at bar, and commands a holding that the actions of Ms. Jordan and Mr. Vaccarino did not trigger an indelible right to counsel and do not require suppression of the defendant's precinct statements (*see also, People v. Martino*, 259 A.D.2d

⁸ The defendant's claim that the waiver was not knowingly and intelligently made is without merit. Contrary to the defendant's contention (*see*, Defendant's Post-Hearing Memorandum at p. 55), the police were not obligated to inform him of "exactly what efforts had been made on his behalf by QLA and what QLA's advice to him would have been" (*cf. Moran v. Burbine*, 475 U.S. 412 [1986]; *United States v. Huerta*, 239 F.3d 865, 873-874 [7th Cir. 2001]).

561 [2nd Dept. 1999], *lv. denied* 93 N.Y.2d 1004; *cf. People v. Cajigas*, NYLJ 10/28/1998, p. 34, col. 6, 1998 WL 1806153 [Co. Ct. Westchester Co.][Angiolillo, J.][defendant did not reject the representation of the Legal Aid Society when he was informed the police had been contacted by an attorney]].

ii. The C.D.O. application

The defendant further contends that his right to counsel was violated by the erroneous denial of the Capital Defender Office's motion to represent him, and by the failure of the police to inform him of that application.

Subdivision one of section 35-b of the Judiciary Law provides that an indigent defendant is entitled to the appointment of counsel if, in a "criminal action," he or she "is charged with murder in the first degree *** or *** is charged with murder in the second degree *** and the district attorney confirms upon inquiry by the court that the district attorney is undertaking an investigation to determine whether the defendant can or should be charged with murder in the first degree *** and the court determines that there is a reasonable likelihood the defendant will be so charged ***."

Because a "criminal action" as used in the statute does not commence until the filing of an accusatory instrument (*see*, CPL 1.20[16]), and because no accusatory instrument had yet been filed against the defendant when the Capital Defender Office moved to be appointed to represent him, the motion was properly denied as premature.

Notably, although several courts have appropriately recognized the critical need in potential capital cases for early involvement of counsel employed by, or qualified by, the Capital Defender Office (*see, e.g., People v. Brown*, 166 Misc.2d 378, 380 [Co. Ct. Monroe Co. 1995][Connell, J.]), none has appointed the Office as counsel prior to the actual commencement of a criminal action against the defendant (*see, e.g., People v. Brown, supra* [defendants indicted for attempted robbery in the first degree and assault in the first degree]; *People v. Andrews*, 170 Misc.2d 67 [Co. Ct. Tompkins Co. 1996] [Barrett, J.] [defendant charged by felony complaint with kidnapping in the first degree]; *cf. People v. Owens*, 187 Misc.2d 317 [Sup. Ct. Monroe Co. 2001]

[Egan, J.] [defendant arraigned on felony complaint charging murder in the second degree)].⁹

Accordingly, I find that the denial of the Capital Defender Office's application to be appointed counsel for the defendant pursuant to section 35-b of the Judiciary Law was not improper, and therefore did not violate the defendant's right to counsel.

Moreover, although the police here did promptly inform the defendant of the contacts made by Ms. Jordan, they were under no obligation, even if they were aware of it, to notify him of the denial of the Capital Defender Office's motion to be appointed counsel in the case (*cf. Moran v. Burbine*, 475 U.S. 412 [1986]).¹⁰

iii. The warrants

Lastly, the defendant contends that his right to counsel was violated when he was interrogated in the absence of an attorney notwithstanding the existence of two warrants for his arrest, *viz.*, a bench warrant on the prior robbery case in which he was represented, and an arrest warrant issued as a consequence of the new bail jumping indictment filed against him.

The defendant maintains that, upon his arrest at 11 Dillmont Street, the warrants were "executed *de facto*" (Defendant's Post-Hearing Memorandum at p. 75), and that thereafter he "was effectively in custody on all the charges for which he was sought, including those directly related to the June, 1999, robbery on which Queens Law Associates represented him." (*Id.* at p. 74.) He argues that, since he was taken into custody on a charge on which he had counsel, he could not be questioned on that or any other matter, including the Wendy's case, in the absence of an attorney (*People v. Rogers, supra*).

The hearing evidence plainly revealed that the officers who arrested the defendant did so solely in connection with the Wendy's matter and no other. Indeed, there is no credible evidence that they even knew of the existence of the arrest warrant prior to the arrest. Moreover, the defendant cites no authority for the proposition that the arrest of a suspect in a pending investigation

⁹ The defendant's reliance on *People v. Cajigas* (NYLJ 10/28/1998, p. 34, col. 6, 1998 WL 1806153 [Co. Ct. Westchester Co.][Angiolillo, J.], *supra*) is misplaced. That case concerned *notification* to the Capital Defender Office shortly before a scheduled arraignment. It did not deal with the *appointment* of the Office pursuant to Judiciary Law 35-b.

¹⁰ The defendant argues that the District Attorney was without standing to oppose CDO's application. Because I find that the denial of the application was not improper, I need not reach the standing issue.

must be deemed an arrest as well on all outstanding warrants in which he is named. To the contrary, the Court of Appeals has recognized that a defendant named in a warrant can be taken into custody on unrelated charges without the warrant having been executed (*see, People v. Kazmarick* 52 N.Y.2d 322, 324 [1981]).

In any event, the Court of Appeals has held that "[a] pending unrelated criminal case upon which an arrest warrant has issued does not bar the police from questioning a suspect when the suspect does not in fact have counsel on the unrelated charge (*People v. Kazmarick, supra*, at p. 324; *see, also, People v. Ruff*, 81 N.Y.2d 330 [1993]). The arrest warrant here was issued in connection with the unrelated bail jumping charge on which the defendant did not have counsel.

Moreover, I reject the suggestion that questioning on the Wendy's matter was proscribed because, as a result of the bench warrant, the defendant was "effectively in custody" on the robbery case on which he had counsel. Had the defendant not failed to appear in the robbery case, his representation by an attorney in that case would have had no effect on his capacity in the unrelated Wendy's investigation to waive counsel and give a statement in the absence of an attorney (*People v. Bing, supra*). It would therefore be incongruous to hold that he was entitled to greater protection because he did fail to appear in the robbery case, and thereby caused a bench warrant to issue.

The defendant further argues that his right to counsel was violated because the police failed to obey the arrest warrant's command to bring him before the court without unnecessary delay. I conclude, however, that the police did not arrest the defendant on a warrant and, in any event, considering the crime they were investigating, any delay in bringing the defendant before the court following his arrest was not unreasonable, nor was it engineered for the purpose of depriving the defendant of his right to counsel (*see, e.g., People v. Perciballi*, ___ A.D.2d ___, ___ N.Y.S.2d ___, 2002 WL 315323 [1st Dept. 2002]; *People v. Santiago*, ___ A.D.2d ___, 734 N.Y.S.2d 239 [2nd Dept. 2001]; *People v. Curry*, 287 A.D.2d 252 [1st Dept. 2001] *lv. denied* 97 NY2d 680).

III. The statement notice

The defendant contends that an order should issue "precluding the prosecution from introducing, on its direct case, any evidence of Mr. Taylor's silent response to Detective Quinn's questioning regarding Craig Godineaux's knowledge that Mr. Taylor had a second ammunition clip."

(Defendant's Post-Hearing Memorandum at p. 97.) The defendant insists that preclusion is required because the People failed to give notice, pursuant to CPL 710.30(1)(a), of their intention to use evidence of the "silent response" at trial.

The purpose of CPL 710.30 (1)(a) is to inform the defendant that the People intend to offer at trial evidence that he made a statement to a public officer, so that he can timely move to suppress it (*see, e.g., People v. Rodney*, 85 N.Y.2d 289, 291-292 [1995]). The statute's requirements are met when the People inform the defendant of the time and place that the statement was made and of the sum and substance of the statement, described sufficiently so that the defendant can intelligently identify it (*see, People v. Lopez*, 84 N.Y.2d 425, 428 [1994]).

Here the defendant received notice of the time and place of his statement to Det. Quinn, and of the sum and substance of that statement. The so-called "silent response" occurred in the middle of the interview that produced the noticed statement. The failure to cite or describe that "silent response" with particularity did not render the notice insufficient or otherwise prevent the defendant from timely moving to suppress. Thus, preclusion is unwarranted (*cf. People v. Coleman*, 256 A.D.2d 473 [2nd Dept. 1998], *lv. denied* 93 NY2d 872; *People v. Steisi*, 257 A.D.2d 582 [2nd Dept. 1999], *lv. denied* 93 N.Y.2d 979).

IV. Voluntariness

The defendant contends that the People failed to establish beyond a reasonable doubt that his statement to Det. Quinn was voluntary. More specifically, he argues that the evidence that he was assaulted during his interview with the detective was sufficient to raise a reasonable doubt as to the statement's voluntariness.

As the defendant recognizes, his argument presents a question of credibility. Det. Quinn denied under oath that he had struck the defendant during the interview. Det. McCabe, who was some thirty-five feet from the interview room throughout the night, testified that he did not hear sounds of a struggle or cries for help, and that, when he spoke to the defendant the next morning, he showed no signs of physical abuse.

The evidence offered in support of the claim, on the other hand, came largely from the defendant's own self-serving statement reported in court by Ms. Jordan who candidly testified that she saw no sign of injury to him. Aside from what Ms. Jordan took to be a piece of a typing

table lying on the floor, the only corroboration of the defendant's claim of physical abuse was the testimony of co-defendant Craig Godineaux, a mentally retarded, self-confessed multiple murderer with an admitted history of lying.

I credit the testimony of the police.

CONCLUSION

For all the foregoing reasons I conclude that the defendant's motions should be granted in part and denied in part.

The motion to suppress the McDonald's business cards and identification tag, the Patrolman's Benevolent Association card, the defendant's New York State driver's license, his social security card, and an identification card from the University of Rhode Island, all recovered from the defendant's apartment, together with any other miscellaneous papers seized there that do not relate directly to the Wendy's restaurant, should be granted, as should the motion to suppress all evidence seized under the authority of Search Warrant #538.

In all other respects, the defendant's motions to suppress and preclude should be denied.

It is so ordered.

Justice