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The arguments proposed by the dissent, that the holding of *Lockridge* would encourage a "general search" and provide an incentive for law enforcement officials to violate an individual's constitutional rights, clearly reflect the long-standing rationale of the exclusionary rule. The underlying effect of the holding in *Lockridge,* however, is to restrict the exclusionary rule and allow courts to engage in making policy choices even though the binding choices of policy have already been made by the United States Supreme Court in *Weeks v. United States*[61] and *Mapp v. Ohio.*[62] The driving force of *Mapp v. Ohio,*[63] was a "belief of the majority in the utter emptiness of the right assimilated by due process in *Wolf* without the remedy of exclusion."[64] When a state court is free to make a policy choice and thereby restrict the exclusionary rule, the remedy becomes almost non-existent.

HOWARD J. LEVINE

CRIMINAL LAW—VOLUNTARY ADMISSIONS HELD ADMISSIBLE EVEN THOUGH OBTAINED BY MEANS OF INTERROGATION IN ABSENCE OF COUNSEL.

In January, 1965, the defendant was arrested for murder and taken to the police station where he was permitted to confer with his attorney. When the attorney left the room, indicating to the detective on duty to "watch" the defendant while he went some place in the building, the detective asked defendant, "[D]id you ever think it would wind up like this?"[1] The defendant replied affirmatively and commenced to describe the crime in detail. The incriminating admissions were allowed into evidence at trial. The defendant was convicted in New York County Supreme Court of first degree murder and sentenced to life imprisonment. The defendant moved on appeal for reversal and a new trial on the grounds that once an attorney has entered a criminal proceeding, admissions made in his absence constitute a denial of the right to counsel and are therefore inadmissible. The conviction was affirmed by the appellate division.[2] The New York Court of Appeals affirmed in a five to two decision. *Held,* voluntary admissions made to a police officer are not inadmissible merely because they were made in response to questioning in the absence of defendant's counsel. *People v. Robles,* 27 N.Y.2d 155, 263 N.E.2d 304, 314 N.Y.S.2d 793 (1970).

61. 232 U.S. 383 (1914).
62. 367 U.S. 643 (1961).
63. *Id.*
64. Wolf, *A Survey of the Expanded Exclusionary Rule,* 32 GEO. WASH. L. REV. 193, 212 (1963).

1. People v. Robles, 27 N.Y.2d 155, 158, 263 N.E.2d 304, 305, 314 N.Y.S.2d 793, 794 (1970).
2. People v Robles, 32 App. Div. 2d 741, 300 N.Y.S.2d 510 (1st Dep't 1969).

The sixth amendment to the United States Constitution guarantees the accused in a criminal prosecution the right to counsel[3] and the fourteenth amendment makes this safeguard applicable in state proceedings.[4] Independent of these constitutional guarantees, many states, including New York, have statutory and state constitutional provisions providing a right to counsel.[5] These constitutional and statutory safeguards have been extensively interpreted by case law. Beginning with *Powell v. Alabama,*[6] the sixth amendment right to counsel has undergone considerable development. In *Powell,* the United States Supreme Court held that this sixth amendment guarantee is afforded to indigent defendants in capital cases. The development initiated by *Powell* was extended, in *Gideon v. Wainwright,*[7] to indigent defendants charged with less serious felonies. Both *Powell* and *Gideon* emphasized the right to counsel in the post-arraignment and trial stages of the proceeding, leaving uncharted the scope of defendant's sixth amendment right prior to arraignment. Yet pre-arraignment is a critical phase with regard to the right to counsel. If the exercise of this right is delayed until after arraignment, the defendant's case may well have suffered irreparable damage. The Supreme Court recognized this in *Escobedo v. Illinois,*[8] in holding that the right to counsel attaches "when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession. . . ."[9] Where *Escobedo* permitted an accused to have counsel present during custodial interrogation, *Miranda v. Arizona*[10] promulgated fifth and sixth amendment guidelines to be used during such interrogations. The *Miranda* ruling required that an accused be advised of his right to remain silent; his right to the presence of an attorney during interrogation; that such rights be afforded throughout the interrogation; and that if they are waived, the validity of such waiver must be demonstrated by the prosecution at trial.

New York law has had its own line of development with regard to the right to counsel. In the leading case of *People v. Donovan,*[11] the Court

3. U.S. CONST. amend. VI.

4. U.S. CONST. amend. XIV.

5. N.Y. CONST. art. I, § 6; N.Y. CODE CRIM. PROC. §§ 8, 188, 308, 699 (McKinney 1958).

6. 287 U.S. 45 (1932).

7. 372 U.S. 335 (1963). *See also* Betts v. Brady, 316 U.S. 455 (1942); Johnson v. Zerbst, 304 U.S. 458 (1938).

8. 378 U.S. 478 (1964). *See also* Crooker v. California, 357 U.S. 433 (1958), an earlier case considering this aspect of the right to counsel problem.

9. 378 U.S. at 492.

10. 384 U.S. 436 (1966). Though *Miranda* dominates this area of the law its relevance to the instant case is limited, for in Johnson v. New Jersey, 384 U.S. 719 (1966), the Court held that the *Miranda* guidelines are not to be available to those whose trials commenced prior to June 13, 1966. Nevertheless *Miranda* does present a constitutional standard with which state cases can be compared.

11. 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963).

of Appeals suppressed a written confession taken after police had refused to allow the suspect to consult with counsel during a period of illegal detention. The court indicated that the practice of prohibiting the accused from conferring with counsel constituted a violation of his fifth and sixth amendment rights. With *Donovan* serving as a cornerstone, the court continued to define the right to counsel. Statements made to police in the absence of counsel have been excluded when an attorney is deliberately misdirected by police to a place other than the place of the client's detention in order to delay consultation, and is denied access to the client until a confession has been taken.[12] This rule has also been held to extend to situations where an attorney's request to the police that no statement be taken from the accused in his absence be respected.[13] Further, in *People v. Vella*[14] the court held that where the police knew that the accused had retained counsel, interrogation of the accused "in the absence of and without notice to" the attorney[15] violated his right to counsel.

The delineation of the content of the right to counsel in New York, as initiated in *Donovan,* was seemingly completed in *People v. Arthur.*[16] There, defendant Arthur, detained on a charge of attempted murder, made a written confession on the night of his arrest, and also made incriminating oral admissions the following morning. On both occasions the statements were taken in the absence of defendant's counsel. Arthur appealed from his conviction on the ground that the statements were inadmissible because counsel had not been present during the interrogation. The court agreed with Arthur's contention and stated categorically that:

> Once an attorney enters the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney, of the defendant's right to counsel (*People v. Vella,* 21 N.Y.2d 249, [287 N.Y.S. 2d 369, 234 N.E.2d 422]). There is no requirement that the attorney or the defendant request the police to respect this right of the defendant.[17]

The law concerning the right to counsel, reflected in the progression from *Donovan* to *Arthur,* is qualified by several other Court of Appeals decisions. Among them is *People v. McKie,*[18] where defendant McKie made

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12. People v. Failla, 14 N.Y.2d 178, 199 N.E.2d 366, 250 N.Y.S.2d 267 (1964).
13. People v. Gunner, 15 N.Y.2d 226, 205 N.E.2d 852, 257 N.Y.S.2d 924 (1965).
14. 21 N.Y.2d 249, 234 N.E.2d 422, 287 N.Y.S.2d 369 (1967).
15. *Id.* at 251, 234 N.E.2d at 422, 287 N.Y.S.2d at 369.
16. 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968).
17. *Id.* at 329, 239 N.E.2d at 539, 292 N.Y.S.2d at 666. The rule of *Arthur* has been cited and applied in People v. Miles, 23 N.Y.2d 527, 245 N.E.2d 688, 297 N.Y.S.2d 913 (1969), and People v. Paulin, 25 N.Y.2d 445, 255 N.E.2d 164, 306 N.Y.S.2d 929 (1969).
18. 25 N.Y.2d 19, 250 N.E.2d 36, 302 N.Y.S.2d 534 (1969).

incriminating statements to the police during a street corner argument. McKie argued that since his attorney had requested the police not to question him in his absence, the rule of *Arthur* made the statements inadmissible. The Court distinguished *Arthur* and read it to apply only when the police had taken the accused into custody or deprived him of his freedom in some significant manner. For authority of this reading of *Arthur,* the court cited *Donovan,* stressing *Donovan's* emphasis on the right to counsel attaching *after* arrest and *during* detention. Dissenting, Judge Burke read *Arthur* and *Vella* to hold that once the police are aware of the attorney-client relationship they may not ignore it through the ruse of finding that the accused is not yet in formal custody.[19]

Another qualifying case is *People v. Kaye.*[20] Police counselled Kaye regarding his constitutional rights immediately upon his entry into a squad car en route to the police station. Disregarding admonitions of his right to remain silent and to have his attorney present during interrogation, Kaye spontaneously, and without interrogation, confessed to the murder of which he was accused. The confession was admitted into evidence and the resultant conviction was affirmed by the Court of Appeals. The court held that due to the lack of interrogation, the confession was spontaneous and therefore not the product of "custodial interrogation" within the meaning of *Miranda. Vella* and *Arthur* were consequently held inapposite. Judges Fuld and Burke dissented, arguing that "spontaneity" was immaterial, and that once the police knew that counsel was in the case, no statements taken in his absence could be admitted against defendant.[21]

In the instant case the majority opinion began by indicating that it was bound by the trial court's conclusion of fact that defendant's statements to the detective were made voluntarily and were not a product of "custodial interrogation."[22] The court then stated that the controlling legal principle was that "not every conversation between police and accused is unlawful"[23] and hence inadmissible, but rather, only those conversations "[in which] the questioning takes place under circumstances

19. Judge Burke found that the attorney-client relationship once made evident to police stood *independent* of any determination of the accused's status. This position appears inconsistent with the position taken by him in *Robles.*

20. 25 N.Y.2d 139, 250 N.E.2d 329, 303 N.Y.S.2d 41 (1969).

21. Both *Arthur* and *Vella* were cited as authority by the dissenters. And it is also to be noted that *again* Judge Burke indicated a belief that once the attorney-client relationship is made known to police, statements may not be taken in absence of counsel; notwithstanding the finding of lack of formal custody as in *McKie,* or the finding of *spontaneity* as in *Kaye.* Based on his position in *Kaye* and *McKie,* before *Robles,* Judge Burke apparently believed that the right to counsel was relatively unconditional.

22. People v. Yukl, 25 N.Y.2d 585, 256 N.E.2d 172, 307 N.Y.S.2d 857 (1969); People v. Leonti, 18 N.Y.2d 384, 222 N.E.2d 591, 275 N.Y.S.2d 825 (1966).

23. 27 N.Y.2d at 158, 263 N.E.2d at 305, 314 N.Y.S.2d at 795.

which are likely to affect substantially the individual's will to resist. . . ."[24] The court thus forcefully rejected Robles' assertion that the rule of *Arthur,* that once an attorney appears there can be no effective waiver in his absence,[25] was controlling. This formulation was characterized by the majority, relying on their interpretation of *Kaye, McKie,* and *People v. Rodney P. (Anonymous)* as a mere "theoretical statement of the rule."[26] The majority indicated that each case should be examined to determine the applicability of *Arthur,* and that only those statements which are found to be the product of "custodial interrogation" are inadmissible when made in the absence of counsel. The majority supported this proposition by citing *Kaye,* where the defendant's statement, characterized as spontaneous, was determined not to be the product of "custodial interrogation" and was hence admissible; and *McKie,* where the defendant's statement was admitted, since it was offered before the defendant had been taken into custody or in any way substantially deprived of his liberty. Having thus determined that a spontaneous statement is, by definition, not the product of "custodial interrogation," the court reached the conclusion that Robles' statement was not the product of "custodial interrogation." Rather it was seen as an "impetuous unbosoming of his implication in the crime."[27] This interpretation made the *Robles'* facts sufficiently analogous to *Kaye* to allow the *Robles'* statement into evidence.

It is apparent that the court has used the case law to create a syllogism. Not all statements between police and accused are unlawful—only those statements which are found to be the product of "custodial interrogation." A "spontaneous" statement is, by definition, not a product of "custodial interrogation." Robles' statement was "spontaneous" and hence not the product of "custodial interrogation." The conclusion is, therefore, that merely because the statement was made in the absence of an attorney does not make it inadmissible. To buttress this position the court commented: "At all relevant times [Robles'] attorney was physically present and available to him,"[28] and to its recollection the court knew of "no prior case where the defendant's attorney was physically present in the immediate vicinity of his client and had prompt access to his client [that] we [have] held that admissions made by a defendant during such time are inadmissible."[29]

Judge Breitel, in his dissent, chose to emphasize a different aspect of the facts. He astutely recognized that the defendant's admissions ". . . were

24. People v. Rodney P. (Anonymous), 21 N.Y.2d 1, 11, 233 N.E.2d 255, 261, 286 N.Y.S.2d 225, 234 (1967).
25. 22 N.Y.2d at 329, 239 N.E.2d at 539, 292 N.Y.S.2d at 666.
26. 27 N.Y.2d at 158, 263 N.E.2d at 305, 314 N.Y.S.2d at 795.
27. *Id.* at 159, 263 N.E.2d at 306, 314 N.Y.S.2d at 795.
28. *Id.* at 159, 263 N.E.2d at 306, 314 N.Y.S.2d at 796.
29. *Id.* at 160, 263 N.E.2d at 306, 314 N.Y.S.2d at 796.

extracted by systematic questioning following an initial sympathetic comment designed to invite an outpouring of guilt-ridden confession."[30] This circumstance, Judge Breitel argued, made *Arthur* applicable, for in both cases the defendant was subjected to interrogation under almost identical conditions, and in *Arthur,* the existence of such conditions was held sufficient to warrant the protection of the right to counsel. Judge Breitel asserted further, that far from being a "theoretical statement," the *Arthur* rule was a logical culmination of prior law,[31] and has since been accepted and applied on the grounds of fundamental due process.[32] The Breitel dissent maintained that the majority's reliance on *Kaye* and *McKie* to distinguish *Arthur* was misplaced, for neither case departed from the *Arthur* rule. In *Kaye* "there was not a single question asked and the defendant without solicitation volunteered his self-inculpating story,"[33] and in *McKie* the accused uttered the inculpating remarks before he was in any way restrained by the police. This is to be contrasted with *People v. Paulin,*[34] where *Arthur* was held controlling. In Judge Breitel's view the circumstances surrounding the "spontaneity" in *Kaye* are clearly distinguishable from the systematic questioning in *Robles;* while the more appropriate factual identification is to be made with *Paulin,* where the "barely-disguised devious questioning . . ."[35] was held to be interrogation.

Finally Judge Breitel urged that while availability of counsel and the failure to utilize counsel *may* indicate that the defendant desires to answer questions without counsel being present, the use of such an inference is not strong enough to substitute for an explicit waiver of the right to counsel. Thus, this dissent urged, the only conduct sufficiently protective of the rights of the accused would be a waiver executed by defendant in the presence of his attorney.

The second dissenter, Judge Fuld, stated, in a brief paragraph, that once law enforcement officers are aware that the accused is represented by counsel they must desist from questioning him "unless both he and his lawyer affirmatively waive his right to counsel."[36] As authority for his position, Judge Fuld argued by analogy to the provisions of the American Bar Association Code of Professional Responsibility, Canon 7, Disciplinary

30. *Id.*

31. *See* People v. Gunner, 15 N.Y.2d 226, 205 N.E.2d 852, 257 N.Y.S.2d 924 (1965) People v. Falla, 14 N.Y.2d 178, 199 N.E.2d 366, 250 N.Y.S.2d 267 (1964); People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963).

32. The court, Judge Breitel pointed out, applied *Arthur* in two recent cases, People v. Miles, 23 N.Y.2d 527, 245 N.E.2d 688, 297 N.Y.S.2d 913 (1969); and more significantly in People v. Paulin, 25 N.Y.2d 445, 255 N.E.2d 164, 306 N.Y.S.2d 929 (1969).

33. 27 N.Y.2d at 161, 263 N.E.2d at 307, 314 N.Y.S.2d at 797.

34. 25 N.Y.2d 445, 255 N.E.2d 164, 306 N.Y.S.2d 929 (1969).

35. 27 N.Y.2d at 161, 263 N.E.2d at 307, 314 N.Y.S.2d at 797.

36. *Id.* at 162, 263 N.E.2d at 307, 314 N.Y.S.2d at 798.

Rules 7-104[A][1], providing that in a civil case it would be impermissible for one party's counsel to confer with the other party in the absence of his counsel. Since Judge Fuld found this to be the standard observed in civil cases, no less protection, he believed, should be afforded the accused in criminal cases.

In evaluating the rule of the *Robles* case it would perhaps be most valuable to examine the court's application of *Arthur, Vella,* and *Kaye.* In its attempt to minimize the effect of *Arthur* on the instant case, it may be asserted that the court misread *Arthur.* In distinguishing *Arthur* from *Robles* the court indicated that Robles was granted immediate access to his attorney, whereas in *Arthur,* the attorney was forced to wait until the police had finished their interrogation. If this statement of the facts was complete, then a valid distinction between the two cases would exist. The court's description of *Arthur* clearly indicates a denial of the right to counsel, in that police interfered with a lawyer-client consultation. In *Robles,* as distinguished from *Arthur,* there is no evidence of police harassment; therefore the court concluded that *Arthur* was not in point. It may be argued, however, that the court's statement of the facts in *Arthur* was incomplete and that the actual holding of the case was based on the omitted facts rather than on those stated by the court. There were *two* different statements ultimately held inadmissible in *Arthur.* First, there was the written admission referred to by the court in *Robles.* This written admission was elicited during the time the attorney was unsuccessfully attempting to secure permission to confer with Arthur. Only after execution of the written statement was Arthur's attorney permitted to confer with him. The following morning an oral statement was taken from Arthur. In discussing the two statements the *Arthur* court accepted the defendant's argument that the written statement was inadmissible because all or part of it was obtained after his attorney had requested but was denied permission to confer with him. The court then directed its attention to the separate issue of the oral admissions secured the following morning in the absence of the counsel. It was in response to these admissions that the court put forth "the rule" of *Arthur* that: "Once an attorney enters the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney. . . ."[37] With this consideration in mind it would seem that, at least on this point, *Arthur* could not be distinguished from *Robles,* because in neither case was there an effort to prevent consultation on the admission in *question.*

In arguing for the diminution of *Arthur,* the court would have been more persuasive if it had examined the incorporation of the *Vella* holding in *Arthur* to determine whether the *Arthur* court's reading and restatement

37. 22 N.Y.2d at 329, 239 N.E.2d at 539, 292 N.Y.S.2d at 666.

of *Vella* was accurate. In *Vella* the police apparently spirited Vella away, and subsequently took statements from him in absence of *and without notice* to counsel. The *Vella* court interpreted this behavior as a deliberate attempt to prevent Vella from exercising his right to counsel. Two elements were necessary for the holding: failure to notify defendant's attorney of an intent to question *and* subsequent statements taken in the absence of the attorney. There is no indication from the language of *Vella* that statements elicited in the absence of counsel, taken alone, would have been sufficient to make such statements inadmissible. If both elements of *Vella* were required for a correct reading of the case, then it could be argued that *Vella* should not have been relied on as it was in *Arthur* and further that *Arthur* should not have been offered as controlling by Judge Breitel in his dissent. There was no element of duplicity with regard to the oral admissions in *Arthur,* nor was there any in *Robles.* The court in *Robles* was thus correct in finding *Arthur* inapposite in that *Arthur* misconstrued the law of *Vella.*

A second issue in the court's opinion which merits discussion is the notion of "spontaneity" derived from *Kaye* and applied in *Robles.* The two cases cannot be realistically compared on this issue. In *Kaye* the court's interpretation that the statements were spontaneous is creditable. Kaye was warned of his rights when he entered the police car; subsequently he made an effective verbal waiver of his right to counsel. The incriminating admissions followed. The only comment made by the police was that if Kaye chose to make a statement that he start from the "beginning." The facts in *Kaye* therefore can be seen to justify the description of the statement made as spontaneous, for unlike Robles, Kaye had just been taken into custody, had not yet been questioned, and the outburst did not take place in a station house. Robles, on the other hand, had been in custody for a number of hours, had already spent some time in a detention pen, and his statements resulted from an initial question from a detective followed by systematic questioning for an hour and a half. When these cases are compared it becomes evident that Robles' statement can not be characterized as spontaneous, and thus the court's analysis is unwarranted.

Though one may not approve of the court's semantic legerdemain in regard to spontaneity, the apparent purpose behind such a tactic is understandable. The fact that *Miranda* was not seen by this court as controlling does not obviate the *Miranda* problems which existed. If the court in *Robles* had found the statements the product of "custodial interrogation," they would have been confronted with a *Miranda*-type waiver problem. The case then would have hinged on an evaluation of Robles' "waiver" of his right to counsel. Whether or not a valid waiver could have been demonstrated is a matter of speculation. A reading of *Miranda* reveals,

however, that the precise standards for a valid waiver appear unclear. Thus, rather than venture into a no-man's-land of ambiguity, the Court of Appeals circumvented this difficulty by refusing to deal with *Robles* as a *Miranda*-type problem. This is not surprising, and it may be suggested that other jurisdictions will utilize such an approach in similar cases. The reluctance to couch cases in *Miranda* terms may indicate a fundamental wariness towards the *Miranda* guidelines. Apparently if the court chooses to circumvent *Miranda* it will continue to scrutinize the particulars of each case in search of instances of unfairness to the defendant. This standard would seem to allow the court to define the scope of the right to counsel on a case-by-case basis without disturbing the use of in-custody interrogation as an investigatory tool.

Although the position adopted by the majority may, on occasion, compromise the effectiveness of fifth and sixth amendment guarantees, the dissenting position, responding to this problem, created its own equally aggravating guidelines. The dissenters urged a position even more radical than *Miranda* by demanding that only a waiver executed in the presence of defendant's counsel will suffice, whereas *Miranda* merely places a burden on police to establish the validity of the waiver. The effect of adopting the dissenters' rule may thus curtail the use of "custodial interrogation" as an investigatory tool, for any skillful practitioner will inform his client not to waive his rights and to remain silent.[38]

To support the legal standards proposed in the majority and the dissenting opinions in *Robles* one can find two conflicting interests. Confronted with widely-publicized accounts of violent crime, many feel that life and property are pervasively threatened. They insist that this is not the time to hamper police efforts in combatting crime; nor is it fiscally expedient to require municipalities to expand their law enforcement agencies in order to secure convictions through independent evidence collection in lieu of convictions secured by custodial interrogation. It is argued that society cannot afford, for the sake of respect for law and order, to allow the conviction rate to decrease. To do so would thwart the aims of criminal justice.

With equal confidence, their antagonists argue that police credibility is minimal, and that "waivers" resulting from incommunicado interrogation are not trustworthy. Moreover, racial attitudes seriously compromise

38. *See* Justice Jackson's concurring opinion in Watts v. Indiana, 338 U.S. 49, 59 (1949): "To subject one without counsel to questioning which may and is intended to convict him, is a real peril to individual freedom. To bring in a lawyer means a real peril to solution of the crime, because, under our adversary system, he deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."

the fairness of "custodial interrogation," since minority group members are often victims of police abuse. This position thus leads to the conclusion that only a mechanical rule, similar to the one proposed by the dissenters, can give any real meaning to fifth and sixth amendment rights.

The elements of truth which exist in both positions does not make reconciliation impossible, but rather groping and difficult. Depriving law enforcement officials of a valuable tool of investigation is likely to have untoward effects, while maintaining the pretense of rights which are unenforceable makes a mockery of the law. Unwilling, therefore, to surrender law and order for liberty and law, the solution to the problem must rest on the ground of delicate adjustment,[39] refinement, and continuous evaluation of the actual effects of the new rules devised.

BERNARD M. BRODSKY

CRIMINAL PROCEDURE—CONSTITUTIONAL RIGHT TO COUNSEL IN PAROLE REVOCATION HEARING

In 1947, a relator was convicted on a plea of guilty to a charge of murder in the second degree in the court of general sessions and was sentenced to prison for a term of from tweny years to life. He was paroled in the summer of 1963 after having served sixteen years. In December of 1964 he was declared "delinquent" and subsequently taken into custody in March of 1965, charged with having violated the conditions of his parole by consorting with criminals and giving false information to his parole supervisor. The relator admitted these charges in a revocation hearing held before a parole court at which he was not represented by counsel. His parole was then revoked and the board ordered him barred from parole reconsideration for at least two years. In three subsequent appearances before the board held for the purpose of determining eligibility for parole release, the relator appeared without counsel and was denied release, apparently on the basis of his initial violation. He then brought an action to redress the deprivation of asserted constitutional rights to counsel and other procedural safeguards. The proceeding was dismissed on the ground that it

39. Because of the need for *delicate* adjustment, this writer is forced to reject the dissenters' rule. While this position does end the problem of the trustworthiness of a waiver, this is done without first determining whether some less drastic remedy would secure the desired measure of rights, without hobbling law enforcement efficiency. If modest remedies fail, then a choice between competing considerations may be necessary; but until such time it is incumbent upon courts and legislators to make sincere and imaginative efforts to create practices which will guarantee the reality of fifth and sixth amendment safeguards.