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from the post indictment to the post arraignment stage of the criminal proceedings. The Court held that a voluntary, unsolicited statement made by the defendant to a police officer, in the absence of counsel, after arraignment following his arrest, was inadmissible. The Court, in *Meyer,* stated that the arraignment must be considered the first stage of a criminal proceeding, and any statement, made thereafter in the absence of counsel, violates the defendant's right to counsel and also infringes upon his privilege against self-incrimination. In an even more recent case,[15] the Court stated that interrogation in the absence of counsel is prohibited after the criminal proceeding had been commenced. The Court went on to state that it makes no difference if the criminal proceedings are commenced by a grand jury indictment, or by a charge placed against the accused by a magistrate after arrest.

In the light of these developments, the question that arises with regard to the instant case would be—when did the criminal proceedings against the accused commence? With the benefit of hindsight it would seem likely that if a case involving the same facts as the instant case were before the Court today, it would hold that the criminal cause against the defendant had begun. The defendants had been committed to jail by a court order, and although a formal arraignment was postponed until the following day, the judicial process had started in motion. Therefore, it would seem that the statements of the defendants, obtained during the interrogation following their illegal removal from jail, would be a violation of their right to counsel and their privilege against self-incrimination. But this conclusion would only pertain to the facts of the instant case, that is, where there has been the illegal removal of an accused from jail, following judicial process. Still the question remains whether eventually the Court may find it necessary to adopt the exclusionary rule in the area of illegal detentions. Since constitutional rights now attach at arraignment, it may present a real temptation to law enforcement officials to prolong further the pre-arraignment period and exaggerate present illegal detentions. The result is an impingement on these constitutional rights which depend upon arraignment. The door then is left ajar for the Court to declare through due process that such impingement requires an exclusionary rule to make effective the constitutional right to counsel and freedom from testimonial compulsion already declared to belong to the accused.

W. J. L.

Confessions Obtained by Confrontation with Illegally Seized Evidence or After Initiation of Criminal Proceedings Without Benefit of Counsel Are Inadmissible

Prior to arraignment for premeditated murder, defendant was questioned and made statements implicating himself after being confronted with illegally obtained evidence. The following day he was brought before a justice of the

15. People v. Rodriguez, 11 N.Y.2d 279, 183 N.E.2d 651, 229 N.Y.S.2d 353 (1962).

peace for arraignment, but this was postponed so that an interpreter could be obtained since defendant did not understand English. Two days later, a few hours before the actual arraignment, he made a second, similar confession. Both confessions, made in the absence of counsel, were admitted into evidence, and the defendant was convicted. Defendant appealed; the Court of Appeals reversed and ordered a new trial, one judge concurring in result. *Held*: a confession elicited without benefit of counsel, after the criminal proceeding has been commenced, whether it be by grand jury indictment or by a charge placed before a magistrate following an arrest, is inadmissible in evidence. Likewise, a confession induced by reason of confrontation with illegally obtained evidence must be excluded. *People v. Rodriguez*, 11 N.Y.2d 279, 183 N.E.2d 651, 229 N.Y.S.2d 353 (1962).[1] Earlier, where a defendant made a voluntary, unsolicited statement to a police officer after arrest and arraignment but prior to indictment, although he was informed of his right to counsel but requested none, the Court held that such a statement was inadmissible as it "necessarily impinges on the fundamental rights of protection against testimonial compulsion, since the jury might well accord it weight beyond its worth to reach a verdict of guilty." *People v. Meyer*, 11 N.Y.2d 162, 182 N.E.2d 103, 227 N.Y.S.2d 427 (1962).[2]

These decisions illustrate that the import of *Spano v. New York*[3] had not yet been clearly understood or enunciated. In *Spano* the United States Supreme Court held that an involuntary confession was a violation of an accused person's right under the 14th Amendment and thus inadmissible into evidence in a state criminal proceeding. The majority commented upon the question of whether any statement made after indictment, not in the presence of an attorney, was in violation of a defendant's constitutional rights, but declined to reach a holding on the ground that it was unnecessary to the decision.[4] Four concurring judges, however, took the position that any questioning of a defendant after indictment, in the absence of counsel, was a violation of the defendant's right to be represented by counsel.[5] This was also the position taken by some of the dissenting judges when *Spano* was at the state level.[6]

Because of the concurring opinions in *Spano*, the majority of the Court of Appeals in *People v. DiBiasi*[7] did not feel precluded from holding that post-indictment statements in the absence of counsel were in violation of a defendant's constitutional guarantee of right to counsel. Subsequently, in

1. 28 Misc. 2d 736, 218 N.Y.S.2d 177 (County Ct. 1961).
2. 14 A.D.2d 241, 220 N.Y.S.2d 438 (1st Dep't 1961).
3. 360 U.S. 315, reversing 4 N.Y.2d 256, 150 N.E.2d 226, 173 N.Y.S.2d 793 (1959).
4. Id. at 320.
5. Spano v. New York, supra note 3, at 325, 326.
6. 4 N.Y.2d 256, 266, 150 N.E.2d 226, 232, 173 N.Y.S.2d 793, 801 (1958) (dissenting opinion).
7. 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960); 10 Buffalo L. Rev. 89 (1960).

People v. Waterman,[8] the Court made it clear that it was laying down a broad principle and not one to be confined to the special circumstances of *DiBiasi*, a capital case. In *Waterman* the Court also distinguished the seemingly contrary holding in *People v. Downs*,[9] on the ground that the testimony of the accused on trial was substantially the same as the statements introduced into evidence by the state.

In *DiBiasi* and *Waterman* the Court had apparently set the time of the indictment as the borderline between permissible and non-permissible interrogation in the absence of counsel, as evidenced by its statement that

> Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime.[10]

The Court did indicate in *Waterman*, however, that the time of indictment might not be the dividing line. It noted that a defendant has a constitutional[11] and statutory[12] right to the assistance of counsel *at every stage of a criminal proceeding* and that section 274 of the Code of Criminal Procedure states that an indictment is the "first pleading on the part of the people" and, "*where there has been no preliminary examination*, marks the formal commencement of the criminal action against the defendant" (italics supplied).

Now in *Meyer* the "hinted at" extension materialized, where the Court recognized that "in reason and logic the admissibility into evidence of a post-arraignment statement should not be treated any differently than a post-indictment statement."[13] And in *Rodriguez* a further application was noted. The fact that arraignment was postponed did not matter since at the first attempted arraignment the information charging the defendant with the crime was filed, and this was the start of the criminal proceeding. Thus it is clear that what is important is not what the particular step is *termed* but when criminal proceeding begins.

An interesting approach, however, was used to invalidate the first confession in *Rodriguez* since the *Meyer* rule could not be applied to render the confession inadmissible, as it was clearly made before the initiation of the criminal proceeding. Instead, the Court chose this occasion to apply *Mapp v. Ohio*[14] as excluding not only evidence that is the product or fruit of an illegal

8. 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961); 11 Buffalo L. Rev. 153 (1961).
9. 8 N.Y.2d 860, 168 N.E.2d 710, 203 N.Y.S.2d 908 (1960), cert. denied, 364 U.S. 867 (1960).
10. People v. Waterman, supra note 8, at 565, 175 N.E.2d at 448, 216 N.Y.S.2d at 75.
11. N.Y. Const. art. I, § 6.
12. N.Y. Code Crim. Proc., §§ 8, 188, 308, 699.
13. People v. Meyer, 11 N.Y.2d 162, 164, 182 N.E.2d 103, 104, 227 N.Y.S.2d 427, 428 (1962).
14. 367 U.S. 643 (1961).

search and seizure, but also any confession or statement the defendant was induced to make by reason of confrontation with such illegally obtained evidence. The Court based this holding on the citation of *Silverthorne Lumber Co. v. United States*,[15] in *Mapp*, where the statement was made that "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[16] Judge Froessel, concurring in the result in *Rodriguez*, objected to this new New York extension of the *Mapp* decision on the ground that the Court of Appeals had always held that the voluntariness of a confession was a question of fact to be submitted to a jury for determination,[17] and that this rule should not now be changed to render a confession inadmissible as a matter of law, if the confession is induced by confrontation with illegally obtained evidence.

In considering the development of the rule prohibiting the use of confessions obtained after the initiation of criminal proceedings in the absence of counsel, from *Spano* through *Rodriguez*, the primary factor in support of the rule is the violation of the defendant's constitutional rights under the 14th Amendment. That such a confession is a violation was clearly stated by the Supreme Court in *Spano*, and; it is not the intention here to protest this decision. What is objected to is the seemingly unwarranted, headlong expansion of this rule by the Court of Appeals. It has been stated many times that the protection of the rights of the accused in criminal cases must be carefully weighed against the harm that may be done to society by the hampering of law enforcement agencies. The development of the rule in question to its present state seems to have tipped the scale too far against society. According to the Court of Appeals, a remorseful defendant who wishes to unburden his conscience must first wait until his attorney finishes his round of golf, changes his clothes, and drives to the jail to sit by his side before he can confess. Of course this is an absurd example, but it serves to illustrate that there is a vast difference between the defendant who is informed of all of his rights and has had the full benefit of counsel and the defendant who is denied counsel when he requests or clearly needs it. In the first example society should not be denied the benefits of a confession. In the second the deprivation of one of the defendant's fundamental constitutional rights should be the primary consideration.

The principle behind the guarantee of counsel was to prevent an accused criminal from being coerced or acting in ignorance of his rights.[18] It was not to prevent an accused from making a voluntary confession when fully aware

15. 51 U.S. 385 (1920).
16. Id. at 392.
17. People v. Lane, 10 N.Y.2d 347, 179 N.E.2d 339, 223 N.Y.S.2d 197 (1961) (Court stated that "Admissibility of confessions is a matter of State procedure," citing Rogers v. Richmond, 365 U.S. 534, at 543 (1961)); People v. Vargas, 7 N.Y.2d 555, 166 N.E.2d 831, 200 N.Y.S.2d 29 (1960); Balbo v. People, 80 N.Y. 484 (1880).
18. Powell v. Alabama, 287 U.S. 45, at 69 (1932).

of his rights. The fact situation should be the controlling factor. This was recognized by Judge Froessel in his dissent in *Meyer* where he stated that: "to hold that admission of a defendant's statements under the particular circumstances of this case constitutes reversible error will not serve the administration of justice."[19] Of course, this view may make the determination of the admissibility of a confession more difficult, but it cannot be alleged that this should be a controlling factor in a criminal prosecution.

T. C. L.

Contempt Proceedings Immediately Following Notice Held Sufficient When Conduct in Grand Jury Room Is Obviously Contemptuous

Relator was subpoenaed to appear before the Grand Jury in connection with its investigation of an attempted murder in Brooklyn. He was questioned about his activities on the afternoon of the assault but refused to answer on the ground of self-incrimination. In response to this plea, he was granted immunity; and the questions were repeated. His replies thereafter were evasive and unbelievable. He was willing and able to relate with considerable detail his activities during the morning and evening hours of that day, but pleaded lack of memory concerning his activities during the afternoon. Following his testimony before the Grand Jury, and on the same day, an application was made by the district attorney to the County Court to have the relator punished for criminal contempt. The proceedings before the Grand Jury were made known to the Judge, and he ordered the relator to answer the questions or face punishment. Relator was taken back before the Grand Jury and was once again questioned concerning his activities at the time of the attempted murder. Despite the Judge's warning that such replies would be regarded as false and treated as deliberate refusals to answer, the relator answered only that he did not remember. The district attorney renewed his motion to punish for contempt and the relator made his second appearance of the day in County Court. A hearing was held at which the minutes of the Grand Jury proceedings were introduced as evidence for the prosecution. Relator's attorney made repeated requests that he be given sufficient time (a few days) to prepare a defense and submit a brief. These requests were denied, and the relator was sentenced to thirty days in prison and fined $250. On appeal from the Appellate Division's dismissal of relator's writ of habeas corpus, *held*, affirmed, one Judge dissenting. In a conviction under section 750, subdivision 5, of the Judiciary Law, obtained through proceedings dictated by section 751 of the Judiciary Law, relator was given a reasonable time to make a defense, although such time was only momentary, when relator's contemptuous behavior was patently obvious. *People ex rel. Cirillo v. Warden of City Prison*, 11 N.Y.2d 51, 182 N.E.2d 85, 226 N.Y.S.2d 398 (1962).

19. People v. Meyer, supra note 13, at 166, 182 N.E.2d at 105, 227 N.Y.S.2d at 430.