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Criminal Procedure—Admissibility of Confession Elicited After Indictment

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Justice can be best served by allowing discovery in criminal cases. It is unfortunate that the Supreme Court did not decide the *Jencks* case on purely constitutional grounds. The states, however, are gradually adopting the policy considerations of the Court and we may look forward to an enlightened policy of criminal discovery in future years. For the present though, we will have to content ourselves with limited advancements in "at trial" discovery. Pretrial discovery is subject to the most serious objections and will be strongly resisted. Perhaps eventually, the legislature will take the initiative away from the courts and declare a policy consonant with justice and modern procedural reform. Until then, we must praise the leaders and hope for followers.

F. P. M.

ADMISSIBILITY OF CONFESSION ELICITED AFTER INDICTMENT

In *People v. Waterman*,[25] the defendant was convicted of robbery in the first degree, second degree grand larceny and assault. A complete confession made by Waterman after indictment and in the absence of counsel was admitted into evidence at the trial. The confession was obtained through interrogation by a police officer who knew that defendant had been indicted. At this interrogation after indictment the defendant did not request counsel, nor was the defendant told that counsel could be present. The Appellate Division, in a three to two decision, relying on the recent Court of Appeals decision of *People v. DiBiasi*,[26] reversed the conviction and ordered a new trial.[27] The court stated that the confession was inadmissible as evidence because it was obtained after indictment in the absence of counsel in violation of defendant's constitutional rights to counsel and against self-incrimination. The Court of Appeals affirmed the Appellate Division's decision on similar grounds.

The dissenting opinion written in the Appellate Division was adopted by two of the dissenters in the Court of Appeals. The dissent refused to recognize *People v. DiBiasi* as indicative of a broad exclusionary rule of evidence and would have limited *DiBiasi* to the peculiar facts therein. The dissent pointed out that Waterman, unlike DiBiasi, had not surrendered to authorities by arrangement of counsel but had been apprehended by the police. This factual differentiation formulated by the dissent is without merit. A reasonable conclusion, albeit disagreeable, from the dissent's argument would be: that if law enforcement authorities are put on notice that defendant has an attorney, his right to counsel during police interrogation after indictment is safeguarded; however, if defendant has the misfortune of being apprehended by authorities without an attorney representing him, then his right to counsel for post-indictment interrogation ceases.

Implicit within the *DiBiasi* and *Waterman* cases is a contest between individual liberties and the effective solution of crimes against society. The

25. 9 N.Y.2d 561, 216 N.Y.S.2d 70 (1961).
26. 7 N.Y.2d 544, 200 N.Y.S.2d 21 (1960).
27. 12 A.D.2d 84, 208 N.Y.S.2d 596 (1st Dep't 1960).

accused is advised of his right to counsel at various stages of a criminal case.[28] A confession elicited from a defendant after indictment in the absence of counsel and used against him at his trial clearly violates his constitutional right against self-incrimination.[29] Although this privilege can be waived by the accused,[30] a waiver cannot be made until the defendant knows of the existence of this privilege. The knowledge of this privilege can be gained in most instances only from counsel.

If the defendant desires to open his heart to the law enforcement officials after indictment, he should be properly advised of his privileges by counsel. Too often the law enforcer assumes the defendant is guilty, but, without a confession, he will go unpunished.[31] However, effective law enforcement never connoted eliciting confessions from an accused. If interrogation is necessary after indictment, the presence of defense counsel is imperative in order that he may properly advise the defendant of the repercussions which will reasonably follow from his confession. The defense attorney cannot compel his client to keep silent, although he will in many instances suggest silence. This silence is not intended to harass the police officer but to protect the rights of the defendant. Undermining law enforcement and protecting the accused against self-incrimination should be clearly differentiated. The lawyer's task is to protect the rights of his client, not to detract from the administration of criminal justice.

The district attorney, financed by the State and staffed with competent personnel, has ample time to interrogate and elicit a confession from the accused before indictment. Prior to the preliminary arraignment before a magistrate, the law enforcement officials may interrogate the suspect.[32] After the preliminary arraignment and before the indictment, the defendant is confined many days, during which another opportunity to question him is presented. After indictment, the State authorizes the district attorney to represent it in the prosecution of the defendant and designates him as the presenter of the evidence.[33] The case is now within his dominion, and it follows, therefore, that he is responsible for the actions of all law enforcement officials who interrogate the accused. By permitting the questioning of the accused in the absence of his own counsel, the district attorney violates the Canons of Professional Ethics which are addressed to prosecutor and defender alike.[34]

28. N.Y. Code Crim. Proc. § 8 (advised of right to counsel at preliminary arraignment); N.Y. Code Crim. Proc. § 188 (accused must be advised of right to counsel at indictment); N.Y. Code Crim. Proc. § 308 (accused must be advised of right to counsel at arraignment before trial).

29. N.Y. Const. art. I, § 6.

30. N.Y. Penal Law § 2446.

31. See People v. Getlow, 234 N.Y. 132, 136 N.E. 317 (1922), aff'd, 268 U.S. 652 (1925).

32. Although thirty-six hours has been held to be an unlawful detention of the suspect from the time of his arrest to the time of his preliminary arraignment, a confession made during this time has been held to be admissible at trial. See People v. Alex, 265 N.Y. 192, 192 N.E. 289 (1934).

33. N.Y. Code Crim. Proc. § 294.

34. Canons of Professional Ethics, Canon 9, Negotiations With Opposite Party:

The law has progressed from excluding confessions obtained by beatings,[35] by psychological coercion,[36] and presently by questioning after indictment without counsel present. It should be noted that the *Waterman* and *DiBiasi* cases are not concerned with voluntary or involuntary confessions. The formulation of this rule of exclusion would seem to indicate that the Court is not satisfied with the involuntary confession-exclusion rule. Law enforcement officials rely too extensively on sweating a "voluntary" confession out of the accused. This lackadaisical approach to law enforcement is not satisfactory. A more intelligent approach to the investigation of a crime is sorely needed. A confession may be relied upon too heavily and other evidence which is not located may lead to acquittal of a defendant rather than conviction. It is not the task of the defendant to make the law enforcement officer's job easier, but it is society's duty to protect the rights of each and every individual who has committed a crime, no matter how serious.

The question which still remains is whether the *DiBiasi-Waterman* rule will be extended so as to exclude from evidence those confessions made prior to indictment in the absence of counsel. The issue will be presented to the Court in *People v. Jackson, Robinson and Williams*, which is now pending on appeal to the Appellate Division.[37] Defendant Jackson, who had refused to admit any participation in the murder of Henry Duscher, was placed in a cell at Buffalo Police Headquarters next to a prisoner who was told by police officers to elicit admissions from the defendant. While the defendant freely confided to his fellow prisoner, two police officers listened to the entire conversation from behind the cell. These admissions were elicited after defendant was arraigned in Buffalo City Court but before indictment. On appeal the defendant will attempt to invoke the *DiBiasi-Waterman* rule to have the admissions excluded. This is defendant's only recourse because New York does not exclude confessions elicited by fraudulent tactics or by methods of trickery as used here.[38] The tactics of the Buffalo Police are inexcusable, and an extension of the *DiBiasi-Waterman* rule to pre-indictment interrogation would precipitate a law enforcement agency at the municipality level comparable to that of Federal Bureau of Investigation. Although this achievement would be highly desirable, it would reasonably seem unlikely at this time. To create, therefore, a practical balance between individual rights and the effective enforcement of crimes, the *DiBiasi-Waterman* rule should continue to apply to post-indictment interroga-

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

35. Brown v. Mississippi, 297 U.S. 278 (1936).

36. Ashcraft v. Tennessee, 322 U.S. 143 (1942).

37. The defendants were convicted in County Court, County of Erie, on October 23, 1959.

38. People v. Buffom, 214 N.Y. 53, 108 N.E. 184 (1915); People v. Wentz, 37 N.Y. 303 (1867).

tion. Unlikely or not, as this note goes to the publishers, a recent decision in the Appellate Division has extended the rule to confessions obtained prior to indictment.[39]

L. H. S.

ADMISSIBILITY OF CONFESSION AFTER REQUEST FOR COUNSEL IGNORED

The Court of Appeals, in *People v. Noble*,[40] was once again called upon to decide whether a conviction for first degree murder was to be set aside because of the use of certain statements claimed to be involuntary.

Three judges agreed that where an Assistant District Attorney ignored defendant's inquiry as to his right to counsel before making the statements, the use of the statements at his trial violated the fundamental fairness essential to the concept of justice and constituted an invasion of defendant's privilege against self-incrimination. Two judges concurred for reversal but on the limited ground that the People failed to prove beyond a reasonable doubt that defendant's confession was voluntary. Two judges dissented reasoning that since there is no duty to tell the defendant of his rights and privileges,[41] declining to advise is no more prejudicial than failing to advise.

The position taken by the three judges clearly goes beyond the due process requirements of the Fourteenth Amendment and further expands the rights of the accused in regard to the use of admissions and confessions obtained by police officers in the interim between arrest and trial. In 1936, the United States Supreme Court was first called upon to apply the due process clause to a case involving a state court conviction for first degree murder based on the use of a coerced confession.[42] The Court held that conviction on a confession which was admittedly coerced violated the due process clause of the Fourteenth Amendment.

Eight years later, in *Ashcraft v. Tennessee*, a more liberal Court held that 36 hours of continuous questioning without sleep rendered the confession inherently coerced.[43] A strong dissent reasoned that while it was true that long and persistent questioning was coercive, so is arrest alone. They stated that the test heretofore was ". . . whether the confessor was in possession of his own will and self-control at the time of the confession." The dissent's conclusion was that the confession was voluntary and trustworthy and, therefore, its use did not violate due process of law.

By 1952, the Court had returned to the position taken by the dissent in *Ashcraft* and in 1953, it further refined the voluntary-trustworthy test to the extent that it became a question of whether the procedure used (e.g., interrogation) had a coercive effect upon the particular person making the confession.[44] In 1958, the Court held in *Payne v. Arkansas* that if the confession was co-

39. People v. Meyer,—A.D.2d—(1st Dep't October 10, 1961).
40. 9 N.Y.2d 571, 216 N.Y.S.2d 79 (1961).
41. People v. Randazzio, 194 N.Y. 147, 87 N.E. 112 (1909).
42. Brown v. Mississippi, 297 U.S. 278 (1936).
43. Ashcraft v. Tennessee, 322 U.S. 143 (1944).
44. Stein v. New York, 346 U.S. 156 (1953).