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Criminal Procedure—Prospective Defendant Entitled to Immunity from Prosecution for Other Crimes Based on Evidence Given Under Subpoena

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The appellant had three trials on the charge of murder in the first degree: the first resulted in a hung jury; a conviction in the second was later reversed for error;[84] and a final conviction in the third from which this appeal comes in a coram nobis proceeding. The appellant alleged that the trial judge in a hearing prior to the third trial interfered with his right to counsel of his own selection. The hearing was called to discharge his two attorneys, at his request, and to adjourn the trial for one week to enable him to engage his own counsel. At his next appearance before the judge, appellant stated that he had not secured the services of an attorney, that he was without funds, but that he desired either Mr. Landes or Mr. Richter who had previously defended him but who were discharged because he lacked confidence in them, to be assigned to this case. Mr. Richter announced that he would be willing to defend the appellant; however, the trial judge, acting in his discretion, assigned other counsel.

The Court of Appeals, affirming the denial of the writ, said that under these circumstances the defendant's right to counsel had not been interfered with. The selection of assigned counsel is a matter exclusively within the discretion of the court, the only necessary consideration being that those assigned be men of ability and integrity.

The law is fairly clear as to what constitutes an interference with the right to counsel. A defendant must be granted a fair opportunity to secure counsel of his own choice[85] and be allowed a reasonable time in which to prepare his case.[86] This right is always tempered by the rule that no defendant has the right to unreasonably delay his trial.[87] When a defendant comes into court without an attorney, after a reasonable time has been granted, and does not waive his right to counsel, it becomes the duty of the court to assign counsel in a capital offense. Failure to do so is a violation of due process under the Fourteenth Amendment, even though there is no request for an assignment.[88]

R. A. O.

PROSPECTIVE DEFENDANT ENTITLED TO IMMUNITY FROM PROSECUTION FOR OTHER CRIMES BASED ON EVIDENCE GIVEN UNDER SUBPOENA

When a prospective defendant or target of an investigation is called to testify and be examined before a Grand Jury, his constitutionally-conferred privilege against self-incrimination is deemed violated.[89] "An automatic result of the violation of the constitutional privilege is that the defendant is protected not only from indictment based on any incriminating testimony which he may

84. People v. Feolo, 284 N.Y. 381, 31 N.E.2d 496 (1940).
85. People v. McLaughlin, 291 N.Y. 480, 27 N.Y.S.2d 772 (1944).
86. Ibid.
87. People v. Milne, 253 App. Div. 768, 1 N.Y.S.2d 1 (2d Dep't 1937).
88. Powell v. Alabama, 287 U.S. 45 (1932).
89. People v. Steuding, 6 N.Y.2d 214, 189 N.Y.S.2d 166 (1959); People v. DeFeo, 308 N.Y. 595, 127 N.E.2d 592 (1955); People v. Ferola, 215 N.Y. 285, 109 N.E. 500 (1915).

have given, but also from the use of such evidence."[90] This is true even though he does not claim or assert the privilege.[91]

The question of the privilege against self-incrimination in such a situation recently came before the Court of Appeals in the case of *People v. Laino*.[92] In October 1958, the Governor appointed an Extraordinary Special and Trial Term of the Supreme Court to inquire into among other things, official corruption in Oneida County. Because of the apparent disregard of competitive bidding requirements, the Grand Jury desired to ascertain whether or not there had been any conspiracy or official corruption involved in the purchase of tires and other supplies by the City of Utica. Defendant was served with a subpoena duces tecum to appear before the Grand Jury, as he was one of the two principal tire dealers selling to the City of Utica. Upon his appearance before the Grand Jury he was told that he was "not a defendant presently before this Grand Jury."[93] Prior to questioning, he explicitly claimed his privilege against self-incrimination. However, during his interrogation he answered all questions and submitted his books and records and did not interpose his privilege at any time, although the Chairman of the proceedings instructed him to specifically claim his privilege when asked specific questions. He was subsequently prosecuted on three counts of evasion of New York State income tax as the result of his testimony and records submitted by himself and his accountant. He was convicted, on trial without jury in the Supreme Court, Extraordinary Special and Trial Term, Oneida County. The Appellate Division unanimously affirmed the conviction.[94] The Court of Appeals reversed and dismissed the indictment, two judges dissenting without opinion.[95]

Refuting the State's argument, that the defendant was not a prospective defendant before the Grand Jury because the present tax indictment had no relation to the inquiry of that body into public offices and officers, the Court said that similar contentions had been made and rejected in previous cases.[96] The Court particularly relied on language in *People v. DeFeo*,[97] stating that "the witness was being interrogated as to transactions and matters of such a nature that the prosecutor must have known in advance that he was placing the witness in the role of a prospective defendant."[98] Then, following the *Steuding* case,[99] the Court held that as a prospective defendant, the subpoena was deemed a form of compulsion, and that the testimony thus compelled may not be used against such defendant as the basis of an indictment, or for any other purpose.

90. People v. Steuding, supra note 89 at 217, 189 N.Y.S.2d at 167.
91. Ibid.
92. 10 N.Y.2d 161, 218 N.Y.S.2d 647 (1961).
93. Id. at 164, 218 N.Y.S.2d at 650.
94. 12 A.D.2d 880, 211 N.Y.S.2d 716 (4th Dep't 1961).
95. Supra note 92.
96. People v. Steuding and People v. DeFeo, supra note 89.
97. Supra note 89.
98. Id. at 603, 127 N.E.2d at 596.
99. Supra note 89.

The Court indicated, however, that the defendant, merely by testifying, did not receive automatic immunity for all time, as to "any transaction, matter or thing" revealed by him, under Section 2447 of the Penal Law.[1] Complete immunity from prosecution may be obtained by a prospective defendant only by strict compliance with the procedural requirements of the immunity statutes[2] or by virtue of immunity provisions of the State Constitution. By not interposing his privilege against self-incrimination in answer to a particular question, the defendant failed to meet the technical requirements of Section 2447.

The *Laino* decision is based on sound law and completely in line with the precedent of the *Steuding* case. It goes further, however, and answers a question left open by the majority in *Steuding*,[3] when it holds that the defendant is not entitled to complete immunity under Section 2447 from prosecution for the crime for which he had been indicted. In general terms, such decisions are in accord with the traditionally accepted policy of courts to protect the fundamental, constitutional privilege of freedom from self-incrimination.

P. W. D.

DENIAL OF RIGHT TO SPEEDY TRIAL MAY PREVENT REINDICTMENT

Section 8 of the Code of Criminal Procedure and Section 12 of the Civil Rights Law both plainly state that in criminal actions the defendant has a right to a speedy trial. Section 668 of the Code of Criminal Procedure which enforces this right declares: "If a defendant, indicted for a crime, . . . be not brought to trial at the next term of the court in which the indictment is triable, after it is found the court may, on application of the defendant, order the indictment to be dismissed, unless good cause to the contrary be shown."

However, there are other sections of the Code of Criminal Procedure, which under certain circumstances, may conflict with a defendant's right to a speedy trial. Section 142 allows the prosecution of a felony to be commenced anytime during a five-year period following the commission of that felony.[4] Section 673 states that an order for the dismissal of an action is not a bar to another prosecution if the offense committed was a felony.[5]

1. N.Y. Penal Law § 2447:
In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.
2. In re Doyle, 257 N.Y. 244, 177 N.E. 489 (1931).
3. Supra note 89 at 217, 189 N.Y.S.2d at 168.
4. N.Y. Code Crim. Proc. § 142:
A prosecution for a felony, other than murder or kidnapping, or a prosecution for the crime of conspiracy to commit a felony must be commenced within five years after its commission. . . .
5. N.Y. Code Crim. Proc. § 673: