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The issue that was raised by defendant's answer, the Court thought, was that of user, i.e. whether defendant had actually based his program upon the materials that plaintiff had submitted to him. However, the Court went on to say that it was of the opinion that plaintiff's theme was substantially lifted by defendant in the production of his show.

The reasoning of the Court in determining that there is an arguable issue of fact here is difficult to follow. The Court admits that, in their opinion, defendant had pirated plaintiff's central theme, yet they say that an arguable issue of user exists, i.e. whether defendant had actually based his program upon the plaintiff's format. They also say that no plagiarist can excuse himself by showing how much of plaintiff's work that he did not pirate, and still they conclude with the determination that an arguable issue of fact exists.

Perhaps what the Court really was interested in was getting more expert testimony from literary experts. Possibly they felt that the question of substantial similarity in cases involving literary materials can best be disposed of with the aid of unbiased experts at a trial.

At the same time, however, Rule 113's specific purpose is to allow the courts to lighten their calendars by summarily disposing of cases where reasonable men could not differ in arriving at a verdict. In order for the trial courts to grant these motions, however, they have to know exactly what criteria to use but this decision does not clearly point out when a motion for summary judgment is in order.

CONSTITUTIONAL LAW

Admissibility of Confessions Obtained After Indictment

The Court of Appeals, by a recent decision, *People v. Di Biasi*,[1] has placed New York in the advanced guard among states in the protection of the right to counsel of persons accused of crimes. The position taken by Chief Judge Desmond in his dissenting opinion in *People v. Spano*[2] is now the law in New York State.

In the *Di Biasi* case, defendant was indicted in 1952 for first degree murder. But it was not until 1958 that defendant surrendered to the police, by arrangement with his attorney, to plead to the indictment. The defendant was questioned by the Assistant District Attorney and several officers in the District Attorney's office for an unspecified time and made certain statements to these officials which were admitted in evidence at his trial. These admissions were to the effect that he knew the deceased victim, was a partner of the deceased in a night club, and that he knew certain persons either involved in or witnesses to the murder. Defendant also stated that he was drunk when he

1. 7 N.Y.2d 544, 200 N.Y.S.2d 21 (1960).
2. 4 N.Y.2d 256, 173 N.Y.S.2d 793 (1958), rev'd infra note 3.

appeared at the scene of the killing, did not go to the deceased's funeral because of a personal misunderstanding with the deceased, and left town when he heard that the police were looking for him. Di Biasi was convicted of first degree murder by a jury, which was allowed to consider the above statements made by him over the objection of his counsel. The Court of Appeals, in an opinion by Chief Judge Desmond with three judges dissenting, reversed on constitutional grounds, and ordered a new trial.

The Court adopted the position taken by the concurring opinion of Justice Stewart when the *Spano*[3] case was before the United States Supreme Court. In *Spano* a confession was obtained from the accused after the indictment but before the arraignment and was admitted into evidence at the trial. The Court of Appeals found that the confession did not violate defendant's right to counsel, nor his right against self-incrimination as the confession was clearly voluntary,[4] and not compelled by constraint of legal process.

The United States Supreme Court reversed the Court of Appeals, the majority opinion holding that defendant's (Spano) will had been overborne by constant questioning, fatigue, psychological pressure, and appeals to false sympathy. Taking all the factors and considering their total affect upon defendant, the Court concluded that the confession was involuntary and thus inadmissible, according to traditional principles of due process under the Fourteenth Amendment.[5] The concurring opinion by Justice Stewart, above alluded to, took an entirely different constitutional approach, stating the view that a confession elicited after the indictment, i.e. after it has been determined by a judicial organ that there is a probable cause to hold the accused to answer for a crime, would not be admissible at trial, and if admitted would violate defendant's right to counsel in a capital case. It went on to state, ". . . Under our system of justice an indictment is supposed to be followed by an arraignment and a trial. At every stage in these proceedings the accused has an absolute right to a lawyer's help if the case is one in which a death sentence may be imposed.... Our Constitution guarantees the assistance of counsel to a man on trial for his life in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law. Surely a constitution which promises that much can vouchsafe no less to the same man under midnight inquisition in the squadroom of a police station. . ."[6]

The Court of Appeals in *Di Biasi,* the case this note is concerned with, stated that the majority opinion of the United States Supreme Court never

3. Spano v. New York, 360 U.S. 315 (1959).

4. The Court of Appeals had reasoned that defendant had not been overtaxed as the questioning lasted for only eight hours and that the motivation for the confession was defendant's concern for his friend Bruno, a police officer, who told defendant he would lose his job if defendant did not confess. This was not such psychological pressure, the Court felt, which made the confession involuntary.

5. Fikes v. Alabama, 352 U.S. 191 (1957); Ashcraft v. Tennessee, 332 U.S. 142 (1944); Brown v. Mississippi, 297 U.S. 278 (1936).

6. Supra note 3 at 327.

reached the question whether admission of a confession, after indictment, would, standing alone, violate defendant's constitutional right to assistance of counsel. The Court went on to establish that, whatever the Supreme Court might eventually decide upon this question, in New York the admission in evidence of such a confession would violate New York constitutional due process. Not only would admission of such a confession or such prejudicial statements violate defendant's right to counsel, the Court felt it would also amount to testimonial compulsion.[7] This testimonial compulsion would result because the admissions were obtained by constraint of legal process, to wit, the indictment. The defendant, being constrained by court process pursuant to the indictment, was entitled to all the rights against self-incrimination he would be entitled to at the trial. And the attempt by the police and Assistant District Attorney to elicit admissions from defendant was an unconstitutional use of legal process to importune the defendant to convict himself out of his own mouth. Judge Desmond stated the above reasoning in his dissent in *Spano*, ". . . Before a magistrate or a coroner or other judicial officer a defendant may under no circumstances be forced to make admissions of his guilt. . . . Yet the same defendant in the same criminal cause, held under the process of the same court can (it is now decided) be subjected to secret midnight questioning, out of reach of any lawyer, til he confesses. . . . This is a violation of the right against self-incrimination since the defendant is compelled in the course of a criminal prosecution to incriminate himself by his own utterances. . . ."[8]

The rule laid down by the Court of Appeals is a constitutional protection for the right to counsel which the Supreme Court has not, to date, imposed upon the states under the Fourteenth Amendment. Nor was the Court's ruling motivated by the probability that the Supreme Court would adopt this rule when a proper case was presented. Rather the Court of Appeals is fully convinced, according to its own constitutional understanding, that the instant method of protecting a defendant's right to counsel at every stage of a judicial proceeding, is an essential aspect of due process rights under the Constitution of New York.[9] This conclusion would follow considering the adoption of the position of the dissent in *Spano* by the majority of the Court in the *Di Biasi* case.

This decision leaves some unanswered questions which will arise when

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7. N.Y. Const. Art. 1, § 6:
No person shall be . . . compelled in any criminal case to be a witness against himself . . . .
This privilege is limited to cases where incriminatory disclosure has been extorted by the constraint of legal process directed against a witness. Not just force, but force combined with legal process is crucial for invocation of the above privilege. People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926).

8. Supra note 2 at 260, 173 N.Y.S.2d 797 (1958).

9. N.Y. Const. Art. 1, § 6:
No person shall be deprived of life, liberty or property without due process of law.

the rule in *Di Biasi* is applied to future cases. Does it apply when the defendant has never engaged counsel nor even asked for an attorney before he makes a confession? Does the rule apply to non-capital felony cases? These questions do not admit of positive answers considering the brevity of the Court's statement of the constitutional rule. But it may be stated with some degree of certainty that whether a defendant has or has not retained counsel when he makes a confession or admissions, after indictment, will not affect the admissibility of such confessions or admissions. They will be inadmissible in either case if the statement of the rule can be taken for what it reasonably imports. The statement of the rule by the Court is as follows: ". . . We think this questioning was a violation of this defendant's constitutional rights and that the admission in evidence, over objection, of his admissions made during the questioning after indictment and surrender for arraignment, were so gross an error as to require reversal, regardless of any other question in this case. . ."[10] The Court states that the very questioning of the defendant in the absence of counsel, after indictment, violated his constitutional rights, so it is reasonable to infer that whether the defendant had already engaged counsel before surrender would be immaterial. It also appears immaterial whether he asked for and was denied counsel, since in the instant case defendant did not request his counsel's presence. No statements in the opinion would seem to restrict the rule to capital cases only, for its rationale should logically apply to all indictable crimes in New York.

This case may restrict police investigating procedures to some degree although it should not be a serious impediment, for presumably the state already has independent evidence of defendant's probable guilt if it obtains an indictment before the defendant is arrested. The investigating stage of a criminal case is over when an indictment is handed down. Any interrogation by police after indictment can have no relation to an attempt to clear the accused or to check his alibi. After indictment only a court can clear the defendant. Hence it is highly probably that the only purpose of such interrogation by the police of a defendant, in secret and unaided by counsel, is to elicit a confession or prejudicial statements. To put a defendant at the mercy of police interrogation for endless hours, without a compelling policy of law enforcement to support it, has no basis in reason, justice or fair procedure. Fair procedure tends to suffer when police deal with hardened criminals who flaunt all the laws of right and decency, but as stated in the dissent in *Spano* ". . . This defendant may be a hoodlum and a killer but it is such wretches who most need the constitutional guarantees. And, if such a man may be deprived of his basic rights under the law, what man is safe?"[11]

It is submitted that the instant decision is supported by reason, justice, fair play and practical considerations of law enforcement.

10. Supra note 1 at 549, 200 N.Y.S.2d 25 (1960).
11. Supra note 2 at 267, 173 N.Y.S.2d 802 (1958).