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Constitutional Law—Constitutional Right to Counsel: Adjournment to Secure

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a bar to a federal conviction,[10] since the interests vindicated by each are not the same.

The strained and often elusive analysis by the Court in the instant case, indicates the relative difficulty present in a case involving the pre-emption issue. This difficulty is in part due to the lack, even in the United States Supreme Court, of any constant analytical approach to the solution of such questions. The *Nelson* case has been viewed as a landmark case in the area, but even the approach used there has been subject to criticism.[11] The Court, in using the *Nelson* approach in the case at bar, finds it relatively easy to distinguish on the facts here present. The State has, of necessity, a strong interest in upholding the validity of its statutory provisions, and is consequently loath to overturn them absent a strong and persuasive argument to the contrary.

There are several questions left unanswered by the opinion, which will apparently remain unanswered for the present at least, since the United States Supreme Court, in denying *certiorari,* has approved of the New York Court's finding as to the validity of Section 1423(6). However, the New York Court has by implication agreed with *Benanti,* that state legislation authorizing wire-tapping is a contradiction of Section 605 policy. This tacit acquiescence, places New York Constitution Article I, Section 12, and New York Code of Criminal Procedure, Section 813-a, which authorize state officers to tap phones pursuant to a court order, on very tenuous footing. The future of these provisions would appear to be uncertain.[12]

CONSTITUTIONAL RIGHT TO COUNSEL: ADJOURNMENT TO SECURE

In the case of *People v. Banner,*[13] seventeen defendants were charged with disorderly conduct. Although, the City Court Judge properly advised them of their right to be represented by counsel, he failed to adequately advise them of their additional right to a postponement in the proceedings to enable them to obtain counsel, as required by the Code of Criminal Procedure, Section 699.[14] The *per curiam* opinion of the Court of Appeals held, that in order to make the above statute "meaningful and effective," this additional right must be made clear to the defendants by the presiding judge. Therefore, the judgment below was reversed and a new trial was ordered.

10. Abbate v. United States, 359 U.S. 187 (1959). Cranton, *Pennsylvania v. Nelson: A Case Study of Federal Pre-emption,* 26 U. CHI. L. REV. 85 (1958).

11. Broady v. New York, 28 U.S.L. WEEK 3100 (U.S. Oct. 13, 1959).

12. See in this regard, *In re Telephone Communications,* 9 Misc.2d 121, 170 N.Y.S.2d 84 (Sup. Ct. 1958), where Samuel H. Hofstader, J., stated that while he sat on the bench in that session of Court, no orders under the Code of Criminal Procedure, authorizing wire-tapping, would issue, since such orders were illegal under Benanti.

13. 5 N.Y.2d 109, 180 N.Y.S.2d 292 (1958).

14. N.Y. CODE CRIM. PROC. § 699;

> "1. In cases in which the courts of special sessions or police courts have jurisdiction, when the defendant is brought before the magistrate, the magistrate must immediately inform him of the charge against him and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had.
>
> 2. The magistrate must allow the defendant a reasonable time to send for counsel and adjourn the proceedings for that purpose."

In the various states, the right to counsel is based on the due process clause of the Fourteenth Amendment, state constitutions, and state statutes.[15] Concerning due process, the United States Supreme Court has said, "the states are free to determine their own procedures as to the assistance of counsel . . . (providing) that such practice shall not deprive the accused of life, liberty or property without due process of law."[16]

There usually is a greater likelihood that defendants will be deprived of their rights in inferior courts, than in higher courts.[17] Therefore, it becomes increasingly significant for the inferior court magistrates to rigidly enforce those state laws which require that defendants be advised of this right.

"Unfortunately, only twelve states take the reasonable precaution of requiring that the accused be advised of his legal right to have counsel appointed."[18] New York is one of these, and generally, the courts strictly interpret this requirement in favor of the defendant.[19] This statutory right would have little significance, however, if it were not accompanied by a correlative right to a postponement in the proceedings in order to give the defendant time to obtain counsel. Thus, the interpretation of Section 699, subdivision two, of the Code of Criminal Procedure in the principal case, recognizes the logical necessity of a delay in the proceedings, if the right to the aid of counsel is to achieve its entire purpose. It would also seem to follow, that since the requirement of advising defendants of their right to the aid of counsel is strictly construed, the New York courts must also strictly construe the right of defendants to a delay in the proceedings in order to obtain counsel. The Court in the principal case found the case of *People v. Marincic* to so interpret this right to a delay.[20]

There are at least two cases in New York, however, which point toward a less stringent interpretation. The first of these is the case of *People v. Dolac*.[21] After informing the defendant of his right to the aid of counsel, the magistrate immediately asked him how he pleaded, and the defendant replied not guilty. Later, upon conferring with counsel, defendant changed his plea to guilty. While the majority admitted it was error to require the defendant to plead before conferring with counsel, since there was no waiver, they maintained that

15. Duqe, *Right to Counsel*, 31 CALIF. S.B.J. 465 (1956).
16. Bute v. People of State of Illinois, 333 U.S. 640 (1948).
17. Many of the defendants in these inferior courts are indigents. Since the right to the aid of counsel has never been seriously questioned in any case when the defendant is capable of paying for this service, it is only when the accused is unable to afford counsel in a criminal case that this right becomes controversial. Myneder, *Right to Counsel in State Courts*, 48 MICH. L. REV. 521 (1948).
18. Beany, THE RIGHT TO COUNSEL IN AMERICAN COURTS 86 (1955).
19. *Id.* at 99.
20. 2 N.Y.2d 181, 158 N.Y.S.2d (1957). This case pointed out that after informing a defendant, probably ignorant of court procedure, of her right to counsel, and then immediately asking her how she pleads (her answer being guilty), without waiting for any reply from the defendant, was not in compliance with either the spirit or the language of Section 699 of the Criminal Code. For the presiding judge "must make it clear" that a defendant does have a right to a delay in the proceedings.
21. 3 App. Div. 2d 351, 160 N.Y.S.2d 911 (4th Dep't 1957).

subsequent events rectified the error. The defendant did change his plea to guilty after conferring with counsel, and no steps were taken to move against the indictment because he was deprived of counsel. The dissent, however, pointed out that had the defendant pleaded guilty, the case would have been identical to the *Marincic* case. For it is no answer, continued the dissent, simply to say that because the defendant was not prejudiced by this error the judgment must be affirmed. The dissent further argued, that the right to counsel being fundamental, the denial of such right is enough to set a conviction aside.

People v. Spano,[22] is the second case to point in this direction. The defendant had retained counsel prior to being taken into custody. Once in custody, however, he was questioned at three A.M. in the absence of counsel, and a full confession was obtained. The majority held (4-3), that since the defendant was provided with counsel before being taken into custody, he thereby obtained counsel's advice as to future conduct, and this was sufficient to show compliance with his right to aid of counsel.

While this holding supported a less rigid interpretation of the right to the aid of counsel, it also strongly implied a less stringent interpretation of the requirement of a delay in the proceedings. For as the dissent in the *Spano* case pointed out, a defendant's right to the aid of counsel is not confined to immediately before being taken into custody, or to any other single time, but extends to every stage of the proceedings. Yet, the defendant in this case, while being held no longer as a suspect, but as a defendant awaiting trial, was questioned, and a full confession obtained in the absence of counsel. To this practice the majority subscribes. Such a holding, contends the dissent, makes the right of a defendant to the aid of counsel useless. The rationale of the dissent in the *Spano* case was specifically upheld by the United States Supreme Court, in overruling the decision of the New York Court of Appeals, holding that the denial of the right to counsel at every stage of the proceedings is violative of the Fourteenth Amendment.[23]

The logical relationship *between* a defendant's right to the aid of counsel on the one hand, and a right to a delay in the proceedings to obtain counsel on the other, is inescapable. In many cases, of which the *Dolac* and *Spano* cases are examples, it is in fact quite difficult to make any distinction at all between these two rights. A court cannot infringe upon one, or foster the free operation of one, without, *ipso facto*, influencing the other. The better reasoned cases, to which the instant case adheres recognizes this relationship and thereby allows Section 699 of the Criminal Code to achieve its full purpose.

COERCED CONFESSIONS: DUE PROCESS CHALLENGE

Under Section 395, New York Code of Criminal Procedure, the confession

22. 4 N.Y.2d 256, 173 N.Y.S.2d 793 (1957).
23. People v. Spano, 360 U.S. 315 (1959).