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Criminal Procedure--Evidence--Post-Arraignment Incriminatory Statements Held Inadmissable Where Defendant's Right to Counsel Was Not Observed (People v. Meyer, 11 N.Y.2d 162 (1962))

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Nevertheless, a relevant market must be determined. It is important to note that the Court mentioned such factors as interchangeability and cross-elasticity, but also ruled that submarkets were appropriate "lines of commerce." Furthermore, the concept of the geographic market was a flexible one consisting first of the nation as a whole, and then of cities with populations of ten thousand or over.

The standard of illegality was also flexible, for in assessing the effect of the vertical aspects, the Court felt that the share of the market foreclosed "will seldom be determinative." [49] Yet in assessing the effects of the horizontal aspects it was stated that "the market share which companies may control . . . is one of the most important factors to be considered. . . ." [50]

Application of *Brown Shoe* to mergers between *small* companies in industries in which there is competition may have harmful effects. It may be that size and strength are necessary for corporations to survive in some industries.[51] A strict application may prevent this development.

Whether or not *Brown Shoe* has brought a degree of stability to antitrust litigation is clearly open to question. It cannot even be stated with certainty that *Standard Oil's* quantitative standard has been laid to rest. However, one aspect of the decision is apparent. In the hands of one who fears that business concentration is unhealthy, *Brown Shoe* can be a most effective weapon.

CRIMINAL PROCEDURE — EVIDENCE — POST-ARRAIGNMENT INCRIMINATORY STATEMENTS HELD INADMISSIBLE WHERE DEFENDANT'S RIGHT TO COUNSEL WAS NOT OBSERVED. — Defendant was arraigned on charges of first degree robbery, second degree assault and petit larceny. After arraignment and before indictment, defendant in the absence of counsel — whose presence he had not requested — made certain voluntary, unsolicited, inculpatory statements to the arresting officer. These statements were received into evidence at trial over defendant's objection. The Appellate Division reversed the conviction and the Court of Appeals, in a 4-3 decision, affirming the reversal, *held* that "any statement made by an accused after arraignment not in the presence of counsel . . . is inadmissible." *People v. Meyer*, 11 N.Y.2d 162, 165, 182 N.E.2d 103, 104, 227 N.Y.S.2d 427, 429 (1962).

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[49] *Id.* at 328.
[50] *Id.* at 343.
[51] See Business Week, June 30, 1962, p. 160.

The New York approach to the admissibility of incriminating statements obtained through police interrogation has been to determine whether they were a product of coercion and therefore involuntary.[1]

An involuntary statement obtained through coercion was considered unreliable and therefore inadmissible.[2] This voluntariness test when considered in the light of due process took on a second reason for excluding an involuntary statement — that it had been obtained through illegal methods.[3]

Within the last five years, the New York Court of Appeals has been in the process of formulating a new approach to the problems raised by coerced statements. This approach took root in the case of *People v. Spano*.[4] While the majority opinion in that case relied on the voluntariness test as expanded by due process,[5] the dissent sought to resolve the issue of admissibility on the basis of the post-indictment status of the defendant. They reasoned that once an indictment is returned against a defendant, his accused status requires the enforcement of his constitutional rights: "to have the advice of a lawyer at every stage of a court proceeding, and the right not to be forced to testify against oneself during such proceeding." [6]

The *Spano* case represents a pivotal point in the development of New York law in this area, since the rationale of the dissent was

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[1] This was the test at common law. People v. Chapleau, 121 N.Y. 266, 274, 24 N.E. 469, 471 (1890). New York utilized the common-law rule in § 395 of the Code of Criminal Procedure: "A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor. . . ." This seems to apply to admissions as well as confessions. People v. Reilly, 181 App. Div. 522, 169 N.Y. Supp. 119 (1st Dep't), *aff'd on other grounds*, 224 N.Y. 90, 120 N.E. 113 (1918). *Contra*, Slough, *Confessions and Admissions*, 28 FORDHAM L. REV. 96, 103-04 (1959).

[2] People v. McMahon, 15 N.Y. 384 (1857). In a more recent case the court said, "an involuntary 'confession', is, by its very nature, evidence of nothing." People v. Valletutti, 297 N.Y. 226, 231, 78 N.E.2d 485, 487 (1948). See Marx, *Psychosomatics and Coerced Confessions*, 57 DICK. L. REV. 1 (1952).

[3] People v. Leyra, 302 N.Y. 353, 98 N.E.2d 553 (1951); see Malinski v. New York, 324 U.S. 401 (1945).

[4] 4 N.Y.2d 256, 150 N.E.2d 226, 173 N.Y.S.2d 793 (1958), *rev'd*, 360 U.S. 315 (1959) (defendant induced to make post-indictment incriminatory statements by deception of friend in police force).

[5] *Ibid.*

[6] *Id.* at 266, 150 N.E.2d at 231, 173 N.Y.S.2d at 801. See N.Y. CONST. art. I, § 6 (guarantee of right to counsel at trial); N.Y. CODE CRIM. PROC. § 188 (must be informed of his right to counsel when brought before a magistrate); N.Y. CODE CRIM. PROC. § 189 (must be given reasonable time to secure counsel).

subsequently applied by the majority of the court in the case of *People v. Di Biasi.*[7] In that case defendant had been indicted for murder in the first degree and after indictment had surrendered to the police, either in the company of his attorney or by prior arrangement of his attorney. Certain damaging admissions were elicited from the defendant during an interrogation period in the assistant district attorney's office in the absence of his counsel. At no time had defendant requested the presence of his counsel. The court held this to be a denial of his constitutional rights and reversed the conviction.[8] In the case of *People v. Downs,*[9] the court affirmed a conviction where incriminatory statements obtained after indictment were received into evidence. However, in that case, the essence of the post-indictment statements had been reiterated by the defendant at trial. This was not a retreat from the *Di Biasi* case as was later pointed out in the case of *People v. Waterman,*[10] which involved a conviction for a noncapital offense. Here the court unequivocally applied the *Di Biasi* rationale where defendant had not retained counsel and had made an incriminatory

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[7] 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960).

[8] The majority opinion relied heavily on the concurring opinions of the Supreme Court in *Spano* stating: "In view of what happened in the Supreme Court we do not think we are concluded by this court's decision in *Spano.*" People v. Di Biasi, 7 N.Y.2d 544, 550, 166 N.E.2d 825, 828, 200 N.Y.S.2d 21, 25 (1960).

Two significant occurrences took place in the time span between the dissent in *Spano* and the majority opinion in *Di Biasi*: (1) On appeal to the Supreme Court there were two concurring opinions, one by Mr. Justice Douglas (in which Black and Brennan, JJ., joined), and the other by Mr. Justice Stewart (in which Douglas and Brennan, JJ., joined), which had approached the post-indictment statements in *Spano* on the same basis as did the dissent on the New York Court of Appeals. "This is a case of an accused, who is scheduled to be tried by a judge and jury, being tried in a preliminary way by the police. This is a kangaroo court procedure whereby the police produce the vital evidence in the form of a confession which is useful or necessary to obtain a conviction. They in effect deny him effective representation of counsel." Spano v. New York, 360 U.S. 315, 325 (1959) (concurring opinion of Douglas, J.). (2) There was a shift in the makeup of the Court of Appeals. Chief Judge Conway who had taken part in the majority opinion in *Spano,* stepped down from the court and was replaced by Judge Foster who with the three dissenting judges in *Spano* (Desmond, Fuld and Van Voorhis, JJ.) formed the majority in *Di Biasi.*

[9] 8 N.Y.2d 861, 168 N.E.2d 711, 203 N.Y.S.2d 908, *cert. denied,* 364 U.S. 867 (1960) (defendant made voluntary unsolicited confession in post-indictment situation).

[10] 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961). In reference to the opinion in *Downs,* the court stated: "Our affirmance in *People v. Downs* . . . upon which the People rely, represents no departure from the principle laid down in *Di Biasi.*" *Id.* at 567, 175 N.E.2d at 448, 216 N.Y.S.2d at 76.

statement in a post-indictment setting.[11] The court once again emphasized the effect of an indictment and stated that "the initiation of a criminal action against the accused by the finding of an indictment operates to impose certain disabilities upon the People." [12] The disabilities imposed were that there could be no infringement of defendant's right to counsel and his protection from self-incrimination. "Any secret interrogation" at this point would constitute violation of these rights where defendant's counsel was not present and he had not been apprised of these rights.[13] Thus the Court of Appeals had excluded the voluntariness test in the post-indictment situation where defendant's constitutional rights had not been enforced.

The position represented by the *Di Biasi* and *Waterman* cases goes beyond the requirements of the fourteenth amendment.[14] The Supreme Court has refused to deal with the issue raised in these cases on the same basis [15] and has resolved the cases solely on the basis of the voluntariness test as expanded by the concept of due process.[16] There is, however, a minority on that Court

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[11] In referring to *Di Biasi,* the court stated that: "The crucial consideration was, rather, that the interrogation to which he was subjected, since it came after indictment, was an impermissible step in the progress of a criminal cause against the defendant." *Id.* at 565, 175 N.E.2d at 447, 216 N.Y.S.2d at 74.

[12] *Id.* at 566, 175 N.E.2d at 448, 216 N.Y.S.2d at 75.

[13] *Ibid.*

[14] As has been stated, due process requires that the incriminatory statement be voluntary and not obtained through illegal means. "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from actual criminals themselves." Spano v. New York, 360 U.S. 315, 320-21 (1959).

[15] "We find it unnecessary to reach that contention, for we find use of the confession obtained here inconsistent with the Fourteenth Amendment under traditional principles." *Id.* at 320.

Where the same issue has been raised where confessions were obtained prior to arraignment, the Supreme Court has refused to recognize it because of public policy considerations: "[W]here an event has occurred while the accused was without his counsel which fairly promises to adversely affect his chances, the doctrine suggested by petitioner would have a lesser but still devastating effect on enforcement of criminal law, for it would effectively preclude police questioning—*fair as well as unfair*—until the accused was afforded opportunity to call his attorney." Crooker v. California, 357 U.S. 433, 441 (1958); Cicenia v. Lagay, 357 U.S. 504 (1958).

Denial of counsel during pre-arraignment period has bearing on the issue of voluntariness. Haley v. Ohio, 332 U.S. 596 (1948); Lisenba v. California, 314 U.S. 219 (1941).

[16] This test is used regardless of the point reached before trial. Culombe v. Connecticut, 367 U.S. 568 (1961) (pre-arraignment); Spano v. New York, *supra* note 14 (post-indictment); Lyons v. Oklahoma, 322 U.S. 596 (1943) (post-arraignment).

which has consistently upheld the rationale as presented in *Di Biasi* and *Waterman* and has sought to impose it upon the states as a requirement of due process.[17]

The majority of the Court in the principal case applied the *Di Biasi - Waterman* rationale to a voluntary and unsolicited post-arraignment statement which had been made in the absence of counsel. "In reason and logic the admissibility into evidence of a post-arraignment statement should not be treated any differently than a post-indictment statement." [18] The Court reasoned that an arraignment after arrest was "the first stage of a criminal proceeding" [19] and thereby entitled defendant to have his right to counsel and protection from self-incrimination enforced. Nor was defendant estopped from objecting to receipt of such statements into evidence because he had made no request for counsel when informed of his rights.

The dissent, on the other hand, took issue with the majority position on the following grounds. First, it was contended that when there was no question as to the voluntary nature of the statement, which had been made for defendant's own benefit, there should be no reason for excluding it as evidence.[20] Secondly, the dissent considered that there was a basic distinction between an arraignment before indictment which was aimed at determining whether there was *"suffcient cause to believe the defendant guilty"* [21] and an indictment which "imports that the People have legally *sufficient evidence to warrant a conviction."*[22] The contention here was that the defendant did not become an accused until after the return of an indictment and thus was not entitled to the constitutional protection sought. Thirdly, it was felt: "To hold that admission of a defendant's statement under the particular cir-

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As has been recently enumerated, the elements considered on the issue of voluntariness are: (1) extensive cross-questioning; (2) undue delay in arraignment; (3) failure to advise prisoner of his rights; (4) refusal to permit contact with his lawyer; (5) duration and condition of detention; (6) manifest attitude of police toward defendant; (7) defendant's physical and mental state; (8) the various pressures applied which seek to destroy his resistance and self-control. Culombe v. Connecticut, *supra* at 601-02.

17 See Culombe v. Connecticut, *supra* note 16, at 637. (concurring opinion); Spano v. New York, *supra* note 14, at 325 (concurring opinion); Crooker v. California, *supra* note 15, at 441 (dissenting opinion); Cicenia v. Lagay, *supra* note 15, at 511 (dissenting opinion); Ashdown v. Utah, 357 U.S. 426, 431 (1958) (dissenting opinion).

18 People v. Meyer, 11 N.Y.2d 162, 164, 182 N.E.2d 103, 104, 227 N.Y.S.2d 427, 428 (1962).

19 *Ibid.* See N.Y. CODE CRIM. PROC. §§ 165, 188, 208.

20 People v. Meyer, *supra* note 18, at 166, 182 N.E.2d at 105, 227 N.Y.S.2d at 430.

21 *Ibid.* See N.Y. CODE CRIM. PROC. § 207.

22 People v. Meyer, *supra* note 18, at 166, 182 N.E.2d at 105, 227 N.Y.S.2d at 430. See N.Y. CODE CRIM. PROC. § 208.

cumstances of this case reversible error will not serve the administration of justice." [23]

The principal case, by extending the *Di Biasi - Waterman* rationale to the post-arraignment situation, has precluded the possibility of "any secret interrogation" from the point of arraignment on. Not only has this decision gone beyond the requirements of the fourteenth amendment,[24] but also adopts a rationale which has not been favorably passed on by the federal courts where the issue has been raised in relation to their own rules of admissibility.[25]

The decision gives rise to certain practical considerations. There can be no doubt that many will view the decision as "handcuffing" the police and thereby frustrating the social need for having the guilty brought to justice.[26] On the other hand, others will acclaim the decision as being consonant with the basic dictates of

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[23] People v. Meyer, *supra* note 18, at 167, 182 N.E.2d at 105, 227 N.Y.S.2d at 430.

[24] See note 16 *supra* and accompanying text.

[25] "On the other hand, the rationales offered here for right to counsel are essentially prophylactic: that his presence and advice would guard defendant against making incriminatory statements and would prevent police distortion and misrepresentation of what occurs at such interrogation. Although the latter argument has weighty support in Supreme Court dissenting opinions, it has not yet commended itself to a majority of the court, nor has the former argument." United States v. Killough, 193 F. Supp. 905, 921 (D.D.C. 1961). See Jackson v. United States, 285 F.2d 675 (D.C. Cir. 1960); Goldsmith v. United States, 277 F.2d 335 (D.C. Cir. 1960); Moreland v. United States, 270 F.2d 887 (10th Cir. 1959).

[26] There seem to be three different reasons for not adopting an inflexible rule for declaring confessions obtained through police questioning inadmissible.

One has a psychological basis: "Moreover, and more important, every guilty person is almost always ready and desirous to confess, as he is detected and arrested. . . . The nervous pressure of guilt is enormous; the load of the deed done is heavy; the fear of detection fills the consciousness; and when detection comes, the pressure is relieved; and the deep sense of relief makes confession a satisfaction. At that moment he will tell all, and tell it truly. To forbid soliciting him, to seek to prevent this relief, is to fly in the face of human nature. It is natural, and should be lawful, to take his confession at that moment—the best one." 3 WIGMORE, EVIDENCE § 851, at 319 (3d ed. 1940). It would seem that Professor Wigmore's comment would be applicable at any time during police interrogation regardless of whether it was a post-arraignment or pre-arraignment situation.

Another argument revolves around the practical considerations of police interrogation and its purposes. See Inbau, *Law and Police Practice: Restrictions in the Law of Interrogation and Confessions,* 52 NW. U. L. REV. 77 (1957); PUTTKAMMER, ADMINISTRATION OF CRIMINAL LAW 72-78 (1953).

The third is that by demanding the presence of a lawyer, the investigatory process is completely frustrated: "As soon as a lawyer is introduced on the scene, he advises his client to answer no questions. Thus if a lawyer were admitted the whole proceeding would be stultified." Williams, *Questioning by the Police: Some Practical Considerations,* 1960 CRIM. L. REV. (Eng.) 325, 344.

our democratic way of life.[27] Regardless of the view taken it is certain that, by demanding the presence of counsel from the point of arraignment on, the New York Court of Appeals has sought to assure, with as much judicial certainty as possible, that statements obtained after arraignment are in fact voluntary.[28]

There seems to be no reason to expect that the practical effects of the *Meyer* case will be felt only in the post-arraignment area. This is prompted by the realization that the *Meyer* decision will exert pressure on the police and district attorneys to obtain whatever information they would have ordinarily sought after arraignment in the period from arrest to arraignment. Thus it would seem that the same problem which the Court of Appeals sought to correct in the post-arraignment situation, would present itself in the pre-arraignment period. In that event, the Court of Appeals would seem to have three alternatives with which to cope with the problem: (1) to retain the voluntariness test; (2) to extend the *Meyer - Di Biasi* rationale to the moment of arrest; or (3) to enforce the prompt arraignment statute[29] utilizing the *McNabb - Mallory*[30] rationale with which the federal courts interpret prompt arraignment,[31] *i. e.,* an unnecessary delay in arraignment would make incriminating statements obtained therein inadmissible. Presently, the court still utilizes the voluntariness test

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[27] The proponents of this position argue that defendant's representation by counsel at the earliest stage possible would be the best guarantee of his rights. "A person accused of crime needs a lawyer right after his arrest probably more than at any other time." 1 CHAFEE, FUNDAMENTAL HUMAN RIGHTS 541 (1951). See Rothblatt & Rothblatt, *Police Interrogation: The Right to Counsel And To Prompt Arraignment,* 27 BROOKLYN L. REV. 24, 60-68 (1961); ASS'N OF THE BAR OF THE CITY OF NEW YORK & NAT'L LEGAL AID & DEFENDER ASS'N, EQUAL JUSTICE FOR THE ACCUSED 60 (1959). For a history of the right to counsel in the United States on both the federal and state level, see BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS (1955).

[28] In a recent Appellate Division case the court distinguished a post-arraignment situation from *Meyer.* People v. Berry, — App. Div. 2d —, 228 N.Y.S.2d 34, 35 (2d Dep't 1962) (conviction was affirmed because there had been no objection to admission of the statements at trial).

[29] N.Y. CODE CRIM. PROC. § 165.

[30] Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943).

[31] FED. R. CRIM. P. 5(a): "An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States." As was stated in *McNabb,* which put teeth into the concept, its purpose "checks resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime." McNabb v. United States, *supra* note 30, at 344.

from the point of arrest to arraignment.[32] There is, however, some basis for suggesting that the court might resort to the *McNabb-Mallory* rationale.[33] Section 165 of the New York Code of Criminal Procedure requires: "The defendant must in all cases be taken before the magistrate without unnecessary delay. . . ." At the present time an unnecessary delay in arraignment has bearing only on the question of voluntariness as applied to the period from arrest to arraignment.[34] By enforcing the prompt arraignment statute, the court could effectively obtain the same results which it has sought to obtain by utilizing the *Meyer - Di Biasi* rationale in the period after arraignment.[35] As contrasted to the application of the *Meyer - Di Biasi* rationale from arrest to arraignment, the *McNabb - Mallory* reasoning commends itself on two grounds: (1) it has been tested by the federal courts with a certain amount of success;[36] and (2) it does not exclude all incriminatory statements obtained from arrest to arraignment as would *Meyer* where counsel was not present.[37]

The extension of the *Di Biasi - Waterman* rationale in *Meyer* falls within the logical development of the trend from its roots in *Spano*. Logically the underlying rationale of *Meyer* could only have been successfully contended with at the *Di Biasi* point of development. The next logical step would seem to be to extend it further to the period from arrest to arraignment. Yet at this juncture, experience suggests that the court should not adopt such an inflexible rule which would operate to frustrate any and all types of police questioning and thereby defeat the social need which prompts such investigation.

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[32] See, *e.g.*, People v. Everett, 10 N.Y.2d 500, 180 N.E.2d 556, 225 N.Y.S.2d 193, *cert. denied*, 370 U.S. 963 (1962); People v. Lane, 10 N.Y.2d 347, 179 N.E.2d 339, 223 N.Y.S.2d 177 (1961).

[33] See, *e.g.*, People v. Everett, *supra* note 32, at 510, 180 N.E.2d at 561, 225 N.Y.S.2d at 200 (1962) (concurring opinion); People v. Lane, *supra* note 32, at 354, 179 N.E.2d at 341, 223 N.Y.S.2d at 200 (1961) (concurring opinion).

[34] See note 32 *supra*.

[35] See note 31 *supra*.

[36] It has provided an incentive to the development of more sophisticated technical means of crime detection thus eliminating the need for "third degree" methods either physical or mental. "Technical crime-detection methods have greatly reduced arbitrary intrusions on civil liberties." J. Edgar Hoover, quoted in FRANK & FRANK, NOT GUILTY 185 (1957).

[37] The *McNabb - Mallory* rationale does not exclude confessions merely because obtained by police. "The mere fact that a confession was made while in the custody of the police does not render it inadmissible." McNabb v. United States, *supra* note 30, at 346. It does not exclude statements made immediately upon arrest. See, *e.g.*, Lockley v. United States, 270 F.2d 915 (D.C. Cir. 1959); Metoyer v. United States, 250 F.2d 30 (D.C. Cir. 1957). It does not exclude statements made prior to period of illegal detention. See United States v. Mitchell, 322 U.S. 65 (1044).