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Right to Counsel

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initiates further communication with police.¹⁰¹⁵ In contrast, New York has instituted a *per se* rule based on its own state constitution which forbids further questioning *and* elicitation of voluntary waiver of the right to counsel in the absence of counsel. Therefore, an individual cannot freely choose to waive the right to counsel without his or her attorney's presence subsequent to an earlier request or retention of counsel.

Bartolomeo further expanded such protection by imputing a request or retention of counsel with respect to an earlier pending charge to a subsequent arrest on an unrelated charge. As a result, although the *Bing* decision has negated this recent expansion, New York continues to provide greater protection for the uncharged individual subject to custodial interrogation in the context of a single arrest.

SUPREME COURT, APPELLATE DIVISION

SECOND DEPARTMENT

People v. Margan¹⁰¹⁶
(decided April 23, 1990)

A criminal defendant contended that his constitutional right to the presence of counsel was violated during trial when the court proceeded with the direct examination of a state witness in the absence of defense counsel. The court held that proceeding with the direct examination of a witness, in the absence of defense counsel, may not be considered harmless error under either the federal¹⁰¹⁷ or state¹⁰¹⁸ constitutions.¹⁰¹⁹

1015. See *Edwards v. Arizona*, 451 U.S. 477 (1981). "An accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges, or conversations with the police.*" *Id.* at 484-85 (emphasis added).

1016. 157 A.D.2d 64, 554 N.Y.S.2d 676 (2d Dep't 1990).

1017. U.S. CONST. amend. VI.

1018. N.Y. CONST. art. I, § 6.

1019. *Margan*, 157 A.D.2d at 69, 554 N.Y.S.2d at 679.

At a jury trial, defendant was convicted of robbery in the first degree and criminal prosecution of weaponry in the third degree. During the trial, the judge directed the prosecutor to begin the direct examination of his first witness despite the fact that the defendant's attorney was not yet present in the courtroom.¹⁰²⁰

The appellate court reasoned that the denial of counsel "may never be tolerated"¹⁰²¹ and "deprivation of the assistance of counsel during trial would be, if anything, more offensive to the State than to the Federal Constitution."¹⁰²² Additionally, the court held that errors of this magnitude may be reserved for "appellate review as a matter of law"¹⁰²³ regardless of whether timely objection was raised at trial. The trial court's judgment was reversed and a new trial ordered.¹⁰²⁴

The court began its analysis by noting that both the federal and state constitutions secure to an accused the right to the assistance of counsel.¹⁰²⁵ The court distinguished between the right to the presence of counsel and the right to the effective assistance of counsel. This distinction is crucial because ineffective assistance of counsel may, under many circumstances, be harmless error. "[R]eversal is unwarranted unless defense counsel's ineptitude actually had a probable effect on the outcome of the trial."¹⁰²⁶

1020. *Id.* at 65, 554 N.Y.S.2d at 676.

1021. *Id.* at 69, 554 N.Y.S.2d at 679.

1022. *Id.* New York State constitutional law generally affords the defendant broader protections under the right to counsel than does the Federal Constitution. *See, e.g.,* *People v. Krom*, 61 N.Y.2d 187, 461 N.E.2d 276, 473 N.Y.S.2d 139 (1984); *People v. Hobson*, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976). The court of appeals has discussed when it may determine that the state constitution affords greater protection to an individual than does the Federal Constitution. *See People v. Vilardi*, 76 N.Y.2d 67, 555 N.E.2d 915, 556 N.Y.S.2d 518 (1990); *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986), *cert. denied*, 479 U.S. 1091 (1987).

1023. *Margan*, 157 A.D.2d at 69, 554 N.Y.S.2d at 679.

1024. *Id.* at 71, 554 N.Y.S.2d at 680.

1025. *Id.* at 65, 554 N.Y.S.2d at 677 (citing U.S. CONST. amends. VI, XIV; N.Y. CONST. art. I, § 6; *Gideon v. Wainwright*, 377 U.S. 335 (1963); *Pointer v. Texas*, 380 U.S. 400 (1965) (federal guarantee of the right to counsel obligatory on states pursuant to the fourteenth amendment)).

1026. *Id.* at 66, 554 N.Y.S.2d at 677.

However, when the defendant is denied counsel, prejudice is presumed. “[T]he complete denial of counsel is an error so fundamental as to be harmful per se.”¹⁰²⁷ This right to the presence of counsel at trial is almost as important as the right to a trial itself, because without the presence of counsel, the right to be heard may be meaningless.¹⁰²⁸

The court then proceeded to evaluate applicable state and federal law. Under New York law, the court discussed four court of appeals cases. The first, *People v. Hodge*,¹⁰²⁹ applied the federal rule of *Coleman v. Alabama*,¹⁰³⁰ which held that “a preliminary hearing was a ‘critical’ stage in a criminal prosecution [and] trigger[ed] the applicability of the Federal right to counsel.”¹⁰³¹ The court required the reversal of a criminal conviction because the defendant had been denied assistance of counsel during a preliminary hearing. The reversal was deemed necessary, regardless of the fact that defendant was later indicted by a grand jury.¹⁰³²

The second case, *People v. Wicks*,¹⁰³³ clarified the holding of *Hodge* by explaining that the absence of counsel at a preliminary hearing does not require an automatic reversal and is subject to harmless error analysis. However, the court did state that “the defendant’s right to counsel at trial was ‘too fundamental’ to permit application of the harmless error doctrine.”¹⁰³⁴

The third case cited was *People v. Felder*,¹⁰³⁵ where the court stated its belief that the right to counsel cannot be considered

1027. *Id.*

1028. *Id.* at 65, 554 N.Y.S.2d at 677 (citing *Powell v. Alabama*, 287 U.S. 45 (1932)).

1029. 53 N.Y.2d 313, 423 N.E.2d 1060, 441 N.Y.S.2d 231 (1981).

1030. 399 U.S. 1 (1970).

1031. *Margan*, 157 A.D. at 67, 554 N.Y.S.2d at 678 (citing *Coleman v. Alabama* 399 U.S. 1, 10 (1970)).

1032. *Id.* (citing *People v. Hodge*, 53 N.Y.2d 313, 423 N.E.2d 1060, 441 N.Y.S.2d 231 (1981)).

1033. 76 N.Y.2d 128, 556 N.E.2d 409, 556 N.Y.S.2d 970 (1990).

1034. *Margan*, 157 A.D.2d at 67, 554 N.Y.S.2d at 678 (citing *People v. Wicks*, 76 N.Y.2d 128, 132, 556 N.E.2d 409, 411, 556 N.Y.S.2d at 970, 972 (1990)).

1035. 47 N.Y.2d 287, 391 N.E.2d 1274, 418 N.Y.S.2d 295 (1979).

harmless error.¹⁰³⁶ In *Felder*, reversal was required because the defendant had been represented by someone who “claimed to be an attorney but who had neither completed law school nor been admitted to the bar.”¹⁰³⁷

In the last case, *People v. Hilliard*,¹⁰³⁸ the court reversed a criminal conviction, even in the absence of prejudice, because a local arraignment court had ordered defense counsel not to communicate with the defendant for thirty days. The court reversed the conviction, even though the defendant was eventually represented by counsel at his trial.¹⁰³⁹

The court in *Margan*, relying on the strong precedent set in the cases discussed above, ordered a reversal even though it concluded that the brief absence of counsel was “unlikely to have affected the outcome of the trial.”¹⁰⁴⁰ Further, the court believed that this ruling was required regardless of whether or not the tardiness of defense counsel at trial was wilful.¹⁰⁴¹

In its second holding, that appellate review was appropriate as a matter of law despite the lack of objection at trial, the court distinguished the facts of this case from the decision reached in *People v. Narayan*.¹⁰⁴² In *Narayan*, the court of appeals denied review to a defendant on his appeal because his defense attorney did not object at trial. The appeal was denied even though the appeal involved the trial judge’s refusal to allow defendant an opportunity to speak with his attorney during court recesses. Although the trial judge’s rulings might have been erroneous, they did not involve “the absence of counsel at the critical time”¹⁰⁴³ and, hence, the lack of objection was seen as acquiescence. In contrast, the errors committed against the defendant in *Margan* were made in the total absence of counsel,

1036. *Id.* at 295, 391 N.E.2d at 1277, 418 N.Y.S.2d at 299.

1037. *Margan*, 157 A.D.2d at 67, 554 N.Y.S.2d at 678.

1038. 73 N.Y.2d 584, 540 N.E.2d 702, 542 N.Y.S.2d 507 (1989).

1039. *Id.* at 586-87, 540 N.E.2d at 702-03, 542 N.Y.S.2d at 507-08.

1040. *Margan*, 157 A.D.2d at 68, 554 N.Y.S.2d at 678.

1041. *Id.* at 71, 554 N.Y.S.2d at 680. In the present case, the defense counsel had an adequate explanation for his delay. *Id.*

1042. 54 N.Y.2d 106, 429 N.E.2d 123, 444 N.Y.S.2d 604 (1981).

1043. *Id.* at 113, 429 N.E.2d at 125, 444 N.Y.S.2d at 606.

leaving him no opportunity to cure the errors and their resulting prejudice.¹⁰⁴⁴ Thus, reversal and review fell under the general rule permitting a violation of the right to counsel to be raised for the first time on appeal as a matter of law.

The court also cited several federal cases that support its decision. Under the Federal Constitution, *Gideon v. Wainwright*¹⁰⁴⁵ established the right for an accused to have the assistance of counsel.¹⁰⁴⁶ In *Hamilton v. Alabama*,¹⁰⁴⁷ the United States Supreme Court held that denial of counsel to a defendant at his arraignment constituted automatic reversible error, regardless of the prejudicial effect of that error.¹⁰⁴⁸ The *Margan* court reasoned that if counsel is required at arraignment, presence of counsel at the trial itself should be more carefully protected. Similarly, in *United States v. Cronin*,¹⁰⁴⁹ the Court stated that the complete denial of counsel is so likely to prejudice the accused, that litigating the case is unjustified.¹⁰⁵⁰ Finally, the court relied on *Green v. Arn*¹⁰⁵¹ for its similarity to the facts of *Margan*. In *Green*, the defense attorney was voluntarily absent from portions of one afternoon of the trial during which time his co-defendant's counsel was cross-examining one of the state's witnesses. The court found that this brief absence required a presumption of prejudice and automatic reversal.¹⁰⁵² The *Margan* court reasoned that the facts in the present case, where counsel was involuntarily delayed and the state had begun directly examining its own witness, necessitated reversal regardless of prejudice.¹⁰⁵³

1044. *Margan*, 157 A.D.2d at 70, 554 N.Y.S.2d at 680.

1045. 372 U.S. 335 (1963).

1046. *Id.* at 344.

1047. 368 U.S. 52 (1961).

1048. *Id.* at 55.

1049. 466 U.S. 648 (1984). The court stated that it had "uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Id.* at 659 n.25.

1050. *Id.* at 658-59.

1051. 809 F.2d 1257 (6th Cir.), *vacated*, 484 U.S. 806 (1987).

1052. *Id.* at 1263.

1053. *Margan*, 157 A.D.2d at 71, 554 N.Y.S.2d at 680.