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People v. Hodge: The Preliminary Hearing as a Critical Stage and More

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People v. Hodge: The Preliminary Hearing as a Critical Stage and More

I. Introduction

In New York a felony prosecution is commenced either by filing a felony complaint[1] in a local criminal court, or by filing a grand jury indictment in a superior court.[2] Section 180.10(2) of the New York Criminal Procedure Law[3] provides that a defendant who has been arraigned on a felony complaint in a local criminal court has the right to a prompt hearing[4] to determine whether there is "sufficient evidence to warrant the court in holding him for the action of a grand jury."[5] The defendant has a statutory[6] and a constitutional[7] right to counsel at this hearing, most often referred to as the preliminary hearing or felony hearing.[8] The hearing was not intended as a discovery device,[9]

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1. A felony complaint is:

> [A] verified written accusation by a person, filed with a local criminal court, charging one or more persons with the commission of one or more felonies. It serves as a basis for the commencement of a criminal action, but not as the basis for prosecution thereof.

N.Y. CRIM. PROC. LAW § 100.10(5) (McKinney Supp. 1981).

2. *Id.* § 100.05 (McKinney Supp. 1981). The criminal courts of New York comprise the superior courts and the local criminal courts. The supreme and county courts constitute the superior courts. District, city, town and village courts, and the New York City Criminal Court constitute the local criminal courts. N.Y. CRIM. PROC. LAW § 10.10 (McKinney 1971).

3. *Id.* § 180.10(10) (McKinney 1971) [hereinafter referred to as C.P.L.].

4. If the defendant is in custody the hearing must commence within seventy-two hours of his confinement. N.Y. CRIM. PROC. LAW § 180.80 (McKinney 1971).

5. N.Y. CRIM. PROC. LAW § 180.10(2) (McKinney 1971).

6. N.Y. CRIM. PROC. LAW § 180.10(3) (McKinney 1971) provides that:

> The defendant has a right to the aid of counsel at the arraignment and at every subsequent stage of the action, and, if he appears upon such arraignment without counsel, has the following rights: (a) To an adjournment for the purpose of obtaining counsel; and (b) To communicate, free of charge, by letter or telephone, for the purpose of obtaining counsel and informing a relative or friend that he has been charged with an offense; and (c) To have counsel assigned by the court in any case where he is financially unable to obtain the same.

7. Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearing is a "critical stage" of State's criminal process at which the accused is entitled to the aid of counsel).

8. There is no absolute right to a preliminary hearing; it can be waived by the de-

yet the availability of discovery at this type of preliminary proceeding has long been recognized.[10]

Relying upon a grand jury's power to indict a person regardless of whether there has been a preliminary hearing and regardless of the outcome of the preliminary hearing,[11] the New York courts have consistently held that a subsequent indictment excuses errors of the preliminary hearing.[12] The courts have held

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fendant under N.Y. CRIM. PROC. LAW § 180.10(2) (McKinney 1971), and the District Attorney can bypass the hearing altogether by proceeding directly to a grand jury following the defendant's arraignment. *See infra* notes 28-33 and accompanying text. For a general discussion of the preliminary hearing in New York see M. WAXNER, 1 NEW YORK CRIMINAL PRACTICE ¶ 7-4 (1977).

9. *See, e.g.*, People v. Landers, 97 Misc. 2d 274, 411 N.Y.S.2d 173 (Crim. Ct. Bronx County 1978); People v. Stanton, 94 Misc. 2d 1002, 406 N.Y.S.2d 242 (Crim. Ct. N.Y. County 1978); People v. Martinez, 80 Misc. 2d 735, 364 N.Y.S.2d 338 (Crim. Ct. N.Y. County 1975); People *ex rel.* Pierce v. Thomas, 70 Misc. 2d 629, 334 N.Y.S.2d 666 (Crim. Ct. Bronx County 1972).

10. *See, e.g.*, Coleman v. Alabama, 399 U.S. 1 (1970): "[T]rained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial." *Id.* at 9; *See* M. WAXNER, 1 NEW YORK CRIMINAL PRACTICE ¶ 7-4 (1977); F. BAILEY & H. ROTHBLATT, SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS § 18 (1971); Graham & Letwin, *The Preliminary Hearing in Los Angeles: Some Field Findings and Legal Policy Observations*, 18 U.C.L.A. L. REV. 635, 639-640 (1971); R. CIPES, 1 CRIMINAL DEFENSE TECHNIQUES § 8.01 (1970); Note, *Preliminary Examination Potential*, 58 MARQ. L. REV. 159, 170-171 (1974); For a detailed discussion of discovery at the preliminary hearing, see Note, *Preliminary Hearing in the District of Columbia - An Emerging Discovery Device*, 56 GEO. L.J. 191 (1967).

11. N.Y. CRIM. PROC. LAW § 190.65(1) (McKinney 1971) provides that:

> [A] grand jury may indict a person for an offense when (a) the evidence before it is legally sufficient to establish that such person committed such offense and (b) competent and admissible evidence before it provides reasonable cause to believe that such person committed such offense.

Id. See People *ex rel.* Hirschberg v. Close, 1 N.Y.2d 258, 134 N.E.2d 818, 152 N.Y.S.2d 1 (1956) where the court of appeals stated:

> The infringements of right asserted by relator are alleged to have occurred when the case was before the Justice of the Peace. But that magistrate's proceeding . . . . was distinct from the Grand Jury's inquiry. Under section 6 of article I of the New York State Constitution and sections 252 and 259 of the Code of Criminal Procedure, the Grand Jury had power to investigate and indict regardless of what had occurred before the magistrate and regardless of whether the magistrate had held or discharged the prisoner or still had the matter pending, or of whether there had ever been such a preliminary hearing.

Id. at 260, 134 N.E.2d at 819, 152 N.Y.S.2d at 2-3 (citations omitted).

12. People v. Tornetto, 16 N.Y.2d 902, 212 N.E.2d 63, 264 N.Y.S.2d 557 (1965), *cert. denied*, 383 U.S. 952 (1966); People *ex rel.* Hirschberg v. Close, 1 N.Y.2d 258, 134 N.E.2d 818, 152 N.Y.S.2d 1 (1956); People v. Aaron, 55 A.D.2d 653, 390 N.Y.S.2d 157 (2d Dep't 1976); People v. Winch, 50 A.D.2d 948, 376 N.Y.S.2d 21 (3d Dep't 1975); *See* People v.

that the proper remedies to redress such errors are the preliminary writs of habeas corpus[13] and mandamus.[14] Failure to utilize these remedies has been considered a waiver of the defect complained of.[15]

In contrast, in *Coleman v. Alabama*,[16] the United States Supreme Court, remanding the case to the state courts, prescribed a harmless error analysis when the right to counsel at the preliminary hearing was compromised.[17] The right to counsel at the preliminary hearing was also violated in *People v. Hodge*,[18] yet the New York Court of Appeals, by a 4-3 decision, reversed the defendant's conviction[19] without conducting a thoughtful harmless error analysis.

Part II of this note examines the background of the preliminary hearing. Part III sets forth the facts of *Hodge*. Part IV presents the court's decision. Part V analyzes the court's decision. Part VI concludes that the *Hodge* court unwisely exceeded

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Abbatiello, 30 A.D.2d 11, 12, 289 N.Y.S.2d 287, 287(1st Dep't 1968); Friess v. Morganthau, 86 Misc. 2d 852, 383 N.Y.S.2d 784 (Sup. Ct. N.Y. County 1975).

13. A habeas corpus proceeding, as authorized by New York Civil Practice Law and Rules §§ 7001-7012 may be used by the defendant to challenge his improper detention resulting from defects at the preliminary hearing. N.Y.C.P.L.R. §§ 7001-7012 (McKinney 1980); *See* People v. Tornetto, 16 N.Y.2d 902, 212 N.E.2d 63, 264 N.Y.S.2d 557 (1965), *cert. denied*, 383 U.S. 952 (1966); People *ex rel.* Hirschberg v. Close, 1 N.Y.2d 258, 134 N.E.2d 818, 152 N.Y.S.2d 1 (1956); People v. Abbatiello, 30 A.D.2d 11, 289 N.Y.S.2d 287 (1st Dep't 1968).

14. Mandamus seeks to compel the performance of a ministerial duty imposed by a constitution or a statute. It is authorized by New York Civil Practice Law and Rules §§ 7801-7806 and may be used by the defendant to reopen the preliminary hearing to redress errors committed thereat. N.Y.C.P.L.R. § 7801-7806 (McKinney 1981 & Supp. 1981-82). For a general discussion of the availability of mandamus in New York, *see* 23 CARMODY-WAIT 2d §§ 145.78-106 (1968 & Supp. 1981); *See* Blue v. United States, 342 F.2d 894, 900 (D.C. Cir.), *cert. denied*, 380 U.S. 944 (1965); Friess v. Morganthau, 86 Misc. 2d 852, 383 N.Y.S.2d 784 (Sup. Ct. N.Y. County 1975).

15. *See, e.g.*, Blue v. United States, 342 F.2d 894 (D.C. Cir.), *cert. denied*, 380 U.S. 944 (1965) where the court stated "unless some reason is shown why counsel could not have discovered and challenged the defect before trial, it will generally be assumed that any objections to the preliminary proceedings were considered and waived, and no post-conviction remedies will be available." *Id.* at 900-01.

16. 399 U.S. 1 (1970).

17. *Id.* at 10-11. *See infra* notes 72-73 and accompanying text.

18. 53 N.Y.2d 313, 423 N.E.2d 1060, 441 N.Y.S.2d 231 (1981). Judge Fuchsberg wrote the opinion of the court in which Chief Judge Cooke and Judges Meyer and Jones concurred. Judge Gabrielli wrote the dissenting opinion in which Judges Jasen and Wachtler concurred.

19. *Id.* at 318-321, 423 N.E.2d at 1063-64, 441 N.Y.S.2d at 234-35.

Coleman v. Alabama by not conducting a thoughtful harmless error analysis and by creating instead a per se rule which grants a new trial whenever the defendant's right to counsel at the preliminary hearing is violated.

II. Background

A. *General*

The benefits of the preliminary hearing at common law inured solely to the prosecution; hearings were conducted in secrecy by local justices and were inquisatorial in nature.[20] In 1848, in England, the hearing became a judicial proceeding which afforded some procedural safeguards to the accused.[21] The hearing was introduced in New York in 1881 with the enactment of the Code of Criminal Procedure.[22]

The purpose of the preliminary hearing is to determine whether there is reasonable cause to believe that the defendant committed a felony.[23] If the evidence establishes reasonable cause, the court must hold the defendant over for the action of a grand jury.[24] There is no general constitutional right to a prelim-

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20. Two statutes of Philip and Mary's reign conferred powers on justices of the peace to examine prisoners arrested for felonies before they were released on bail: An Act appointing an Order to Justices of Peace for the Bailment of Prisoners, 1 & 2 Phil. & M., ch. 13 (1554) (repealed); An Act to take Examination of Prisoners suspected of Manslaughter or Felony, 2 & 3 Phil. & M., ch. 10 (1555) (repealed). For a discussion of the common law history of the preliminary hearing *see* Note, *The Preliminary Hearing - An Interest Analysis*, 51 IOWA L. REV. 164, 165-67 (1965).

21. W. HOLDSWORTH, 1 A HISTORY OF ENGLISH LAW, 295-97 (3d ed. 1945).

22. N.Y. CODE CRIM. PROC. §§ 8, 188, 190, 213 (McKinney 1881).

23. N.Y. CRIM. PROC. LAW § 180.70 (McKinney 1971). N.Y. CRIM. PROC. LAW § 70.10(2) (McKinney Supp. 1981) provides that:

> "Reasonable cause to believe that a person has committed an offense" exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it.

The statutory definition of "reasonable cause" in New York Criminal Procedure Law is essentially the same as the definition by the federal and state courts of the "probable cause" requirement of the fourth amendment. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471 (1963) in which the Supreme Court stated "[t]he quantum of information which constitutes probable cause [is] evidence which would 'warrant a man of reasonable caution in the belief' that a felony has been committed." *Id.* at 479 (citation omitted).

24. N.Y. CRIM. PROC. LAW § 180.70(1) (McKinney 1971).

inary hearing,[25] and the hearing is not a condition precedent to a valid indictment.[26]

The District Attorney chooses the method of commencing the felony prosecution, either by filing a felony complaint in a local criminal court or by filing a grand jury indictment in a superior court.[27] The former method is used almost exclusively by New York prosecutors.[28] After the felony complaint has been filed and the defendant has been arraigned thereon, the District Attorney has the additional option of either conducting the hearing under C.P.L. section 180.10(2)[29] or presenting the case directly to a grand jury under section 190.55(2)(a).[30] A grand jury indictment supersedes and displaces local criminal court proceedings, including preliminary hearings.[31] Thus, a defendant's statutory right to a preliminary hearing is not absolute; it is conditioned on the District Attorney's decision not to present the case directly to a grand jury.[32]

New York prosecutors differ in the exercise of their option

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25. In Gerstein v. Pugh, 420 U.S. 103 (1975), the Supreme Court held that "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." *Id.* at 115. The Court further stated, however, that "a judicial hearing is not prerequisite to prosecution by information." *Id.* at 119. Thus, the probable cause determination is not a constitutional prerequisite to the charging decision, but is required only for those suspects who suffer a significant restraint on liberty. *See id.* at 127. n. 26. *See also* People v. Shing, 83 Misc. 2d 462, 371 N.Y.S.2d 322 (Crim. Ct. N.Y. County 1975).

26. *See* People v. Abbatiello, 30 A.D.2d 11, 12, 289 N.Y.S.2d 287, (1st Dep't 1968); *See also* People *ex rel.* Hirschberg v. Close, 1 N.Y.2d 258, 134 N.E.2d 818, 152 N.Y.S.2d 1 (1956); *cf.* Gerstein v. Pugh, 420 U.S. 103, 119 (1975) ("[n]or do we retreat from the established rule that illegal . . . detention does not void a subsequent conviction").

27. N.Y. CRIM. PROC. LAW § 100.05 (McKinney Supp. 1981); *See* Friess v. Morganthau, 86 Misc. 2d 852, 857, 383 N.Y.S.2d 784, 788 (Sup. Ct. N.Y. County 1975); *See also* People v. Ferry, 49 Misc. 2d 361, 267 N.Y.S.2d 649 (County Ct. Schuyler County 1966); McKenna, *Criminal Law and Procedure*, 18 SYR. L. REV. 207, 214 (1966).

28. Approximately 15% of New York's District Attorney's offices, representing jurisdictions of varying populations and geographic locale, responded to a student questionnaire seeking information on the commencement of felony prosecutions. The statistics thus furnished indicated that over 90% of felony prosecutions in those counties are commenced by the filing of a felony complaint.

29. N.Y. CRIM. PROC. LAW § 180.10(2) (McKinney 1971).

30. *Id.* § 190.55(2)(a) (McKinney Supp. 1981).

31. *See supra* cases cited in notes 12, 26; *See also* People v. McDonnell, 83 Misc. 2d 907, 373 N.Y.S.2d 971 (Sup. Ct. Queens County 1975); People v. Belmont, 48 Misc. 2d 1057, 266 N.Y.S.2d 752 (Sup. Ct. Queens County 1966).

32. *See* M. WAXNER, 1 NEW YORK CRIMINAL PRACTICE ¶ 7.3(2) (1977).

to bypass the preliminary hearing.[33] In most counties, a grand jury sits only one or a few days each week,[34] in which case the District Attorney's option is, for the most part, illusory. In counties where there are one or more grand juries sitting several days of the week, the District Attorney enjoys, as a practical matter, the option to bypass the preliminary hearing. The policy of the particular District Attorney's office, as well as the facts of each case, determine the prosecutor's choice.[35] Despite the alternative of bypassing the preliminary hearing, the proceeding is utilized with sufficient frequency to sustain its viability in New York criminal procedure.

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33. For example, the current policy in the District Attorney's office of New York's most densely populated county, Kings County, is to avoid the preliminary hearing as often as is feasible for the following reasons: (1) By eliminating the preliminary hearing the witness is spared the inconvenience of appearing to testify. Many times a witness will make the trip to the courthouse, spend several hours there, then later be told that the hearing has been postponed. The prosecutor is also spared some inconvenience in that he conducts the hearing and is responsible for contacting the witnesses and insuring their presence at the hearing: (2) The witness at the preliminary hearing is subject to the cross-examination of counsel. Regardless of the limitations imposed on the cross-examination by the hearing court, this testimony can be avoided altogether by proceeding to the grand jury. From the prosecutor's standpoint, avoiding the cross-examination of his witness at the hearing diminishes the possibility of having the testimony impeached at trial, and it avoids pre-trial discovery of the State's case. (3) The grand jury functions to screen the charges that the prosecutor is not interested in prosecuting. Although a stricter burden is placed upon the State when the case is presented to the grand jury than the reasonable cause standard of the preliminary hearing, if the prosecutor determines that he does not have "legally sufficient evidence" he can exercise his option and conduct a preliminary hearing. *See infra* note 43.

The policy of the District Attorney of Broome County, a county with average population density, contrasts with the policy of Kings County. Broome County uses the preliminary hearing far more frequently and regards the hearing as its principal screen for weak cases.

34. N.Y.CRIM. PROC. LAW § 190.10 (McKinney 1971) provides that "[t]he appellate division of each judicial department shall adopt rules governing the number and the terms for which grand juries shall be drawn and impaneled by the superior courts within its department." *Id.* The ability of Kings County to proceed to the grand jury following arraignment in approximately 86% of felony cases, is possible since each of four impaneled grand juries sit five days of the week. Whether a grand jury is sitting becomes especially significant when the defendant is in custody, since he must be set free on his own recognizance unless he receives a hearing or is indicted by a grand jury within seventy-two hours of incarceration. *See* N.Y. CRIM. PROC. LAW § 180.80 (McKinney 1971).

35. *See supra* note 33.

B. *Purpose and Scope of the Preliminary Hearing*

The primary purpose of the preliminary hearing is to insure that an accused is not improperly detained or prosecuted.[36] The hearing functions as an early screening of cases that should not be prosecuted.[37] At the hearing, which is neither a criminal prosecution nor a trial,[38] the court decides neither guilt, innocence nor evidentiary issues.[39] Moreover, the exercise of the accused's constitutional and statutory rights to produce evidence in his own behalf, and to subpoena and cross-examine witnesses[40] are limited by the court's discretion.[41] The reasonable cause burden does not require that the State present a prima facie case,[42] and it does not require as high a degree of proof or quality of evi-

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36. The judicial determination that there is "reasonable cause to believe" that the defendant committed an offense safeguards against an improper prosecution. *See supra* note 25 and text accompanying note 5.

37. *See, e.g.*, Coleman v. Alabama, 399 U.S. 1, 9 (1970). The screening function not only safeguards the accused from an improper prosecution, it aids the prosecutor in the orderly disposition of insubstantial cases. On this point *see generally* M. WAXNER, 1 NEW YORK CRIMINAL PRACTICE ¶ 7-4 (1977); Graham & Letwin, *The Preliminary Hearing in Los Angeles: Some Field Findings and Legal Policy Observations*, 18 U.C.L.A. L. REV. 635, 639-640 (1971); Note, *The Preliminary Hearing - An Interest Analysis*, 51 IOWA L. REV. 164 (1965).

38. *See* F. BAILEY & H. ROTHBLATT, SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS § 14 (1971).

39. *See, e.g.*, People v. Martinez, 80 Misc. 2d 735, 364 N.Y.S.2d 338 (Crim. Ct. N.Y. County 1975); People *ex rel.* Pierce v. Thomas, 70 Misc. 2d 629, 334 N.Y.S.2d 666 (Sup. Ct. Bronx County 1972).

40. The right to confront witnesses and to produce witnesses and evidence is preserved for trial; their denial at the preliminary hearing is discretionary with the hearing court. *See* People v. Campbell, 88 Misc. 2d 732, 736, 401 N.Y.S.2d 152, 154 (Crim. Ct. Kings County 1978); *In re* Davis, 88 Misc.2d 938, 389 N.Y.S.2d 1015 (Crim. Ct. N.Y. County 1976); People *ex rel.* Pierce v. Thomas, 70 Misc. 2d 629, 334 N.Y.S.2d 666 (Sup. Ct. Bronx County 1972). For the conduct of the preliminary hearing *see* N.Y. CRIM. PROC. LAW § 180.60 (McKinney 1971 & Supp. 1981).

41. N.Y. CRIM. PROC. LAW § 180.60(7) (McKinney Supp. 1981) provides:

> Upon request of the defendant, the court may as a matter of discretion, permit him to call and examine other witnesses or to produce other evidence in his behalf.

Id.

42. People v. Soto, 76 Misc. 2d 491, 495, 352 N.Y.S.2d 144, 149 (Crim. Ct. Bronx County 1974); People *ex rel.* Fox v. Sherwood, 73 Misc. 2d 101, 102, 341 N.Y.S.2d 161, 163 (Sup. Ct. Orange County 1973); *See also* R. Denzer, N.Y. CRIM. PROC. LAW § 180.70, *Practice Commentary* (McKinney 1971). For the statutory definition of "reasonable cause" *see supra* note 23.

dence as is necessary for an indictment[43] or a conviction after trial.[44] Accordingly, at the preliminary hearing, the State is merely required to present a broad outline of the facts.[45]

New York courts have held that the preliminary hearing was not intended to be a discovery device or to serve as a trial substitute.[46] The availability of discovery was regarded as a subsidiary benefit of the proceeding. Nevertheless the discovery interest was one of the reasons the United States Supreme Court in *Coleman v. Alabama*,[47] termed the preliminary hearing a "critical stage."[48] Although discovery may indeed be a subsidiary benefit of the preliminary hearing, it has nonetheless achieved some limited constitutional protection.[49]

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43. N.Y. CRIM. PROC. LAW § 190.65(1) (McKinney 1971) sets forth the burden on the prosecution before a grand jury: "[T]he evidence before it [the grand jury] is legally sufficient to establish that such person committed such offense . . ." *Id.* N.Y. CRIM. PROC. LAW § 70.10(1) (McKinney Supp. 1981) defines "legally sufficient evidence" as "competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof . . ." *Id. See* Mattioli v. Brown, 71 Misc. 2d 99, 101, 335 N.Y.S.2d 613, 616 (Sup. Ct. Fulton County 1972).

44. N.Y. CRIM. PROC. LAW § 70.20 (McKinney Supp. 1981) sets forth the standards of proof for conviction:

> No conviction of an offense by verdict is valid unless based upon trial evidence which is legally sufficient and which established beyond a reasonable doubt every element of such offense and the defendant's commission thereof.

45. People *ex rel.* Pierce v. Thomas, 70 Misc. 2d 629, 334 N.Y.S.2d 666 (Sup. Ct. Bronx County 1972).

46. *See, e.g.*, People v. Landers, 97 Misc. 2d 274, 411 N.Y.S.2d 173 (Crim. Ct. Bronx County 1978); People v. Staton, 94 Misc. 2d 1002, 406 N.Y.S.2d 242 (Crim. Ct. N.Y. County 1978); People v. Martinez, 80 Misc. 2d 735, 364 N.Y.S.2d 338 (Crim. Ct. N.Y. County 1975); People *ex rel.* Pierce v. Thomas, 70 Misc. 2d 629, 334 N.Y.S.2d 666 (Crim. Ct. Bronx County 1972).

47. 399 U.S. 1 (1970). The Court stated:

> Plainly the guiding hand of counsel at the preliminary hearing is essential to protect . . . against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial.

Id. at 9.

48. *See infra* text accompanying note 61.

49. The *Coleman* Court ordered a harmless error analysis to determine whether the right to counsel violation at the preliminary hearing deprived defendants of their right to

C. *The Right to Counsel in New York and the Preliminary Hearing as a "Critical Stage"*

The constitutional right to counsel in New York[50] has developed independently and more extensively than its federal counterpart.[51] The Supreme Court in *Gideon v. Wainwright*[52] incorporated the federal guarantee of right to counsel into the due process clause of the fourteenth amendment. Yet this does not preclude a state from establishing stricter standards to ensure the protection of rights under its own constitution and statutes. Hence, the New York Court of Appeals went beyond the mandates of *Miranda v. Arizona*[53] by requiring that:

> [O]nce an attorney enters the proceeding, the police may not question the defendant in the absence of counsel, unless there is an affirmative waiver, in the presence of an attorney, of the defendant's right to counsel . . . . There is no requirement that the attorney or the defendant request the police to respect this right of the defendant.[54]

The court has also established stricter standards under the New York Constitution regarding waiver of the right to counsel. The United States Supreme Court recognized in *Brewer v. Williams*[55] that under some circumstances a defendant, represented by counsel, could waive his right to counsel without notice to counsel. Yet the New York Court of Appeals has ruled that once

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a fair trial. *See* Coleman v. Alabama, 399 U.S. at 10-11.

50. N.Y. CONST. art. I, § 6 provides:

> No person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel . . . nor shall he be compelled in any criminal case to be a witness against himself.

Id.

51. U.S. CONST. amend. VI. *See, e.g.*, People v. Harris, 84 A.D.2d 63 (2d Dep't 1981) where the appellate division stated that "[t]he courts of this state have shown a 'special solicitude' for an accused's right to counsel, affording protections well beyond those required by the Federal Constitution." *Id.* at 108 (citations omitted).

52. 372 U.S. 335 (1963).

53. 384 U.S. 436 (1966). Under *Miranda*, a person subjected to a custodial interrogation must be warned that he has the right to remain silent, that any statement he makes may be used in evidence against him, and that he has the right to the presence of an attorney, either retained or appointed. *Id.* at 444.

54. People v. Arthur, 22 N.Y.2d 325, 329, 239 N.E.2d 535, 539, 292 N.Y.S.2d 663, 666 (1968).

55. 430 U.S. 387 (1977).

a defendant has requested counsel, he is represented by counsel, or the right to counsel has attached, the right cannot be validly waived in the absence of counsel under the New York Constitution.[56] Significantly, the court has demonstrated its protection of the right to counsel by expanding this right beyond the federal mandates in cases where self-incriminating and other damaging evidence was derived from the counselless confrontation.[57]

The United States Supreme Court declared in *Powell v. Alabama*[58] that a person accused of a crime "requires the guiding hand of counsel at every step in the proceedings against him."[59] Using the *Powell* principle, the Court established a test in *United States v. Wade*[60] to determine whether a proceeding is a "critical stage," requiring counsel. The Court defined "critical stage" as follows:

> In sum, the principle of *Powell v. Alabama* and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confron-

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56. In People v. Samuels, 49 N.Y.2d 218, 400 N.E.2d 1344, 424 N.Y.S.2d 892 (1980), the defendant made oral and written statements to the police after he was arrested and given *Miranda* warnings, but prior to an arraignment. The court ruled that these statements must be suppressed since the obtaining of an arrest warrant based upon a felony complaint was significant judicial activity which triggered the right to counsel, which once attached could not be waived in the absence of counsel. In People v. Cunningham, 49 N.Y.2d 203, 400 N.E.2d 360, 424 N.Y.S.2d 421 (1980), the defendant was arrested and given *Miranda* warnings, after which he requested counsel. The police did not question him further; they placed him in a jail cell pending arraignment. However, the defendant, after a conversation with his wife, told police he wanted to make a statement. He signed a preprinted form waiving his constitutional right to counsel and thereafter made inculpatory statements. The court held that once a defendant in custody has asserted his right to the assistance of counsel, he cannot validly waive that right in the absence of counsel. *See* People v. Rogers, 48 N.Y.2d 167, 397 N.E.2d 709, 422 N.Y.S.2d 18 (1979) where the court ruled that the police may not question defendant about unrelated matters in the absence of counsel if the defendant is represented by counsel on a pending charge.

57. *See supra* note 56.

58. 287 U.S. 45 (1932).

59. *Id.* at 69.

60. 388 U.S. 218 (1967).

tation and the ability of counsel to help avoid that prejudice.[61]

The Supreme Court used the *Wade* "critical stage" test in *Coleman v. Alabama*[62] to hold that counsel was essential at the defendants' preliminary hearing to protect against an erroneous or improper prosecution.[63] According to the *Coleman* Court, the most significant protection afforded the defendant by counsel at the hearing was the exposition of a "fatal weakness in the State's case," which would result in the magistrate's refusal to hold the accused over for the action of the grand jury.[64] The Court acknowledged that "*in any event*" the "*experienced* lawyer" can fashion a vital impeachment tool for use at trial, and that "*trained* counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial."[65]

D. *Error at the Preliminary Hearing*

A rule had developed in New York that errors at the preliminary hearing were cured upon the return of a valid indictment.[66] This rule reflected the courts' recognitition of the independent powers of a grand jury to indict under C.P.L. section 190.65.[67] The rule also reflected the courts' recognition of the limited purpose and scope of the preliminary hearing, namely, to determine reasonable cause, which is necessarily determined by a subsequent indictment.[68]

Despite this rule, the New York courts neither sanctioned a violation of a defendant's statutory right to a properly con-

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61. *Id.* at 227.

62. 399 U.S.1 (1970).

63. *Id.* at 9.

64. *Id.*

65. *Id.* (emphasis added). The emphasized words illustrate the Court's implicit recognition that discovery at a preliminary hearing is not only incidental, but depends in part on the quality of representation. *See supra* note 47 for the text of the excerpted words.

66. People *ex rel.* Hirschberg v. Close, 1 N.Y.2d 258, 134 N.E.2d 818, 152 N.Y.S.2d 1 (1956); *See supra* notes 11-12 and accompanying text. This judicial rule has also been relied upon to excuse no hearing at all, *e.g.*, People v. Aaron, 55 A.D.2d 652, 390 N.Y.S.2d 157 (2d Dep't 1976).

67. N.Y. CRIM. PROC. LAW § 190.65 (McKinney 1971). *See supra* note 11.

68. In New York the prosecution's burden before the grand jury is the production of legally sufficient evidence, which is defined *supra* in note 43.

ducted preliminary hearing, nor foreclosed remedial action for the redress of errors committed at the hearing.[69] The appropriate relief, though, was limited to the preliminary writs of habeas corpus and mandamus.[70] Failure to seek such relief was regarded as a waiver of any defects.[71]

In *Coleman v. Alabama*[72] the Supreme Court did not apply the rule that a subsequent indictment cures the errors of the preliminary hearing. By remanding the case to the state courts and ordering a harmless error analysis, the Court implicitly found that the defendants had not waived the defect of absence of counsel at their preliminary hearing even though they first raised the issue at their post-conviction appeal.[73]

Nevertheless, the rule that the indictment excuses the errors of the preliminary hearing persists in New York lower courts.[74]

III. Facts of *Hodge*

The defendant Hodge was in custody at the Schenectady County Jail in connection with a multicount indictment for burglary.[75] On February 5, 1979 he was unaccountably absent from the jail.[76] On February 7, 1979 Hodge was arraigned[77] on the

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69. *See supra* New York cases cited in notes 13 & 14.

70. *Id.*

71. *Id.*

72. 399 U.S. 1 (1970) (defendants' hearing was conducted in the absence of counsel).

73. *Id.* at 11.

74. In People v. Aaron, 55 A.D.2d 652, 390 N.Y.S.2d 157 (2d Dep't 1976), the appellate division reversed the Dutchess County Court which had dismissed the indictment because the Town Justice had failed to inform the defendant of his rights under C.P.L. § 180.10(2). The court restated the rule that a subsequent indictment automatically eliminates any and all errors of the preliminary hearing. In People v. Winch, 50 A.D.2d 948, 376 N.Y.S.2d 21 (3d Dep't 1975), the appellate division ruled that despite the local court's failure to appoint counsel for the defendant upon arraignment, such error was cured by the return of the indictment.

75. People v. Hodge, 53 N.Y.2d 313, 317, 423 N.E.2d 1060, 1062, 441 N.Y.S.2d 231, 233 (1981).

76. *Id.*

77. Hodge was arraigned before the Town Court, Princeton, New York. *See supra* notes 1-4 and accompanying text. N.Y. CRIM. PROC. LAW § 180.10(1) (McKinney 1971) provides that:

> Upon the defendant's arraignment before a local criminal court upon a felony complaint, the court must inform him, or cause him to be informed in its presence, of the charge or charges against him and that the primary purpose of the

charge of escape in the first degree.[78] The case was postponed for one week to give Hodge the opportunity to retain an attorney. Hodge hired an attorney but he appeared without counsel at the preliminary hearing before the Town Court.[79] Although Hodge objected to going forward with the hearing without counsel, the court insisted that he proceed.[80]

At the hearing's conclusion the court determined that there was reasonable cause to believe Hodge had escaped from jail.[81] A grand jury subsequently indicted[82] him on the same charge and the Schenectady County Court convicted him after trial.[83]

Hodge appealed and argued that because the preliminary hearing was conducted in the absence of counsel he was entitled to a reversal.[84] The Appellate Division Third Department affirmed his conviction[85] and Hodge appealed to the Court of Appeals.

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proceedings upon such felony complaint is to determine whether the defendant is to be held for the action of a grand jury with respect to the charges contained therein. The court must furnish the defendant with a copy of the felony complaint.

Id.

78. N.Y. PENAL LAW § 205.15 (McKinney 1975).

79. The attorney's absence at the preliminary hearing was unexplained. People v. Hodge, 76 A.D.2d 985, 429 N.Y.S.2d 284 (3d Dep't 1980).

80. The record before the court of appeals indicated that the Town Court insisted that "You [defendant] have had a chance to obtain counsel [who is] not present. So we are going to proceed without your counsel for this matter." *Id.*, 53 N.Y.2d at 317, 423 N.E.2d at 1062, 441 N.Y.S.2d at 233.

81. *Id* N.Y. CRIM. PROC. LAW § 180.70(1) (McKinney 1971) provides that if the court finds reasonable cause to believe that the defendant committed a felony, the court must hold him over for the action of a grand jury.

82. *See supra* note 11.

83. People v. Hodge, 53 N.Y.2d 313, 317, 423 N.E.2d 1060, 1062, 441 N.Y.S.2d 231, 233 (1981).

84. People v. Hodge, 76 A.D.2d 985, 429 N.Y.S.2d 284 (3d Dep't 1980).

85. *Id.* The appellate division stated:

The conduct of this hearing did not serve to deprive the defendant of his freedom because he was already being held upon the burglary charge to which he ultimately pleaded guilty. Also, it appears that defendant's attorney was advised of the hearing and had ample opportunity to be present, and his absence therefrom is unexplained. Significantly, it is likewise clear that the prosecution obtained no inculpatory statements or other damaging evidence as a result of the hearing and that defendant was not otherwise prejudiced because of the conduct of the hearing.

Id. at 985, 429 N.Y.S.2d at 285-86.

IV. The *Hodge* Decision

A. *Majority*

Judge Fuchsberg commenced the majority's analysis by declaring that the right to counsel is the "most basic" constitutional right because counsel helps to insure the protection of a defendant's other rights.[86] Judge Fuchsberg commented on the extensive protection afforded the right to counsel in New York and he noted the United States Supreme Court's designation in *Coleman v. Alabama* of the preliminary hearing as a "critical stage."[87] The majority found that the hearing court erred in its assessment of the scope of the right to counsel under C.P.L. section 180.10,[88] and stated that under C.P.L. section 180.10(3)[89] the defendant has an "absolute right to counsel," and that under C.P.L. section 180.10(4)[90] the court must take affirmative action to insure that the defendant has an opportunity to exercise that right.[91] Judge Fuchsberg then observed that the hearing serves many functions including bail reduction, release from detention where appropriate, and, above all, early screening of improper charges.[92]

Looking to the conduct of the hearing, the majority stated that since the prosecution must present a prima facie case, the hearing serves as a virtual minitrial.[93] The majority termed the hearing a "vital opportunity" for discovery since discovery is generally unavailable in criminal cases.[94] After noting that the observation and cross-examination of witnesses at the hearing might provide attentive counsel with invaluable tools in his trial

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86. People v. Hodge, 53 N.Y.2d 313, 317, 423 N.E.2d 1060, 1062, 441 N.Y.S.2d 231, 233 (1981).

87. *Id.* at 318, 423 N.E.2d at 1062, 441 N.Y.S.2d at 233. *See supra* notes 58-65 and accompanying text.

88. N.Y. CRIM. PROC. LAW § 180.10 (McKinney 1971). The Town Court had stated to the defendant "[i]n the criminal procedure law, if your attorney is not present after adequate time the court can proceed to examine the case." People v. Hodge, 53 N.Y.2d at 317, 423 N.E.2d at 1062, 441 N.Y.S.2d at 233 (footnote omitted).

89. N.Y. CRIM. PROC. LAW § 180.10(3) (McKinney 1971). *See supra* note 6 for text of statute.

90. N.Y. CRIM. PROC. LAW § 180.10(4) (McKinney 1971).

91. People v. Hodge, 53 N.Y.2d at 317, 423 N.E.2d at 1062, 441 N.Y.S.2d at 233.

92. *Id.* at 318, 423 N.E.2d at 1062, 441 N.Y.S.2d at 234.

93. *Id.*

94. *Id. See infra* notes 119-122 and accompanying text.

preparation,[95] the majority observed that counsel might be able to subpoena witnesses on his own behalf under C.P.L. section 180.60(7).[96]

The majority refused to apply the rule that a subsequent indictment excuses the errors of the preliminary hearing,[97] reasoning that although the State could have bypassed the hearing altogether,[98] once the State chose to conduct the hearing, the defendant was entitled to full respect for his right to counsel.[99] The majority further reasoned that the subsequent grand jury proceeding did not compensate the defendant for the foreclosed discovery opportunities at the hearing.[100]

Judge Fuchsberg then noted that the distinction between the absence of counsel at a preliminary hearing and the denial of effective counsel at trial was of no consequence.[101] Yet he recognized that the infringement of the right to counsel at the hearing "may very well be subject to harmless error analysis."[102] The majority did not remand the case, however, to the lower courts, as was done in *Coleman v. Alabama*,[103] but concluded that it was "impossible to assert 'beyond a reasonable doubt' that the deprivation of counsel produced no adverse consequences."[104]

After finding that violation of the defendant's right to counsel entitled him to a reversal, the majority discussed the appropriate remedial action.[105] Although it again recognized the rule

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95. *Id.* at 319, 423 N.E.2d at 1063, 441 N.Y.S.2d at 234. *See supra* note 65 and accompanying text.

96. *Id.* N.Y. CRIM. PROC. LAW § 180.60(7) (McKinney 1971). *See supra* note 41 for text of statute.

97. The majority stated "[w]e must reject, as did the Supreme Court in *Coleman* . . . the People's suggestion that, because the Grand Jury subsequently indicted the defendant any infirmities that occurred at the flawed hearing may be excused." People v. Hodge, 53 N.Y.2d at 319, 423 N.E.2d at 1063, 441 N.Y.S.2d at 234. *See supra* notes 12, 66-68 and accompanying text.

98. *See supra* notes 27-35 and accompanying text.

99. People v. Hodge, 53 N.Y.2d at 319-320, 423 N.E.2d at 1063, 441 N.Y.S.2d at 234.

100. *Id.* at 320, 423 N.E.2d at 1063, 441 N.Y.S.2d at 234.

101. *Id.*, 423 N.E.2d at 1064, 441 N.Y.S.2d at 235.

102. *Id.* The court referred to the harmless error test of Chapman v. California, 386 U.S. 18 (1967). The *Chapman* test requires that for harmless error the court must find that there is no reasonable possibility that the error complained of might have contributed to defendant's conviction.

103. 399 U.S. 1 (1970). *See supra* notes 72-73 and accompanying text.

104. People v. Hodge, 53 N.Y.2d at 320, 423 N.E.2d at 1064, 441 N.Y.S.2d at 235.

105. *Id.* at 321, 423 N.E.2d at 1064, 441 N.Y.S.2d at 235.

that an indictment excuses the errors of the preliminary hearing,[106] the majority found that the rule was inapplicable in the present case because a full trial had transpired and the grand jury proceedings did not compensate defendant for the foreclosed discovery opportunities.[107] Finally, to put the defendant in a position comparable to the one he would have enjoyed had counsel been at his hearing, the majority ordered a new trial.[108]

B. *Dissent*

Judge Gabrielli[109] noted that the rule that an indictment excuses preliminary hearing errors was displaced by *Coleman v. Alabama*,[110] which required a harmless error analysis when the defendant's right to counsel was violated.[111] Like the majority, Judge Gabrielli recognized that the availability of discovery at the hearing was one of the reasons the *Coleman* Court determined that the preliminary hearing was a "critical stage."[112] Nevetheless, Judge Gabrielli disagreed with the majority's notion of the prelimimary hearing as a virtual minitrial: "The People need only produce a modicum of evidence sufficient to demonstrate reasonable cause to believe that the defendant

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106. *Id. See supra* note 97-100.

107. *Id.* In New York defense counsel is allowed to be present during grand jury proceedings only when his client, the witness, has affirmatively waived his right to immunity. N.Y. CRIM. PROC. LAW § 190.45 (McKinney 1971 & Supp. 1981), N.Y. CRIM. PROC. LAW § 190.52 (McKinney Supp. 1981). Hence, the benefits available at the preliminary hearing through cross-examination and the introduction of evidence and witnesses, are unavailable to the defendant when his case is presented directly to the grand jury. However, N.Y. CRIM. PROC. LAW § 240.45(1) (McKinney Supp. 1981) provides that:

> After the jury has been sworn and before the prosecutor's opening address, the prosecutor shall make available to the defendant: (a) Any written or recorded statement, including any testimony before a grand jury, made by a person whom the prosecutor intends to call as a witness at trial, and which relates to the subject matter of the witness's testimony.

Id.

108. People v. Hodge, 53 N.Y.2d at 321, 423 N.E.2d at 1064, 441 N.Y.S.2d at 235.

109. *Id.* at 322, 423 N.E.2d at 1065, 441 N.Y.S.2d at 236 (Gabrielli, J., dissenting).

110. 339 U.S. 1 (1970).

111. *Id.* at 10-11. *See supra* notes 72-73 and accompanying text and text accompanying note 17.

112. People v. Hodge, 53 N.Y.2d at 324, 423 N.E.2d at 1066, 441 N.Y.S.2d at 237 (Gabrielli, J., dissenting). The dissent looked to the specific language of *Coleman* reprinted in relevant part in note 47 *supra*.

committed a felony."[113] The dissent noted that although discovery might be available "as a practical matter," it was regarded as incidental to the hearing's purpose of determining reasonable cause.[114] The dissent found it significant that the defendant did not allege, much less establish, that he was in any way prejudiced in his trial preparation by the absence of counsel.[115] Thus, the analysis prescribed by *Coleman*, when undertaken by the dissent, yielded a finding of harmless error.[116] The dissent believed that the majority went beyond the dictates of *Coleman* by effectively creating a per se rule requiring a new trial whenever the right to counsel is compromised at the preliminary hearing.[117]

V. Analysis

A. *Purpose and Scope of the Preliminary Hearing*

The majority premised its view of the preliminary hearing as a "vital opportunity" for discovery on the notion that the hearing serves as a minitrial of the prima facie case.[118] The court's observation that "the prosecutor must present proof of every element of the crime claimed to have been committed, no matter how skeletally"[119] reflects a view that was prevalent before the enactment of current C.P.L. section 70.10(2) in 1970.[120] That view is outdated, however, and is a misstatement

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113. *Id.* at 323, 423 N.E.2d at 1065-66, 441 N.Y.S.2d at 237. *See supra* notes 42-45 and accompanying text.

114. *Id.*

115. *Id.* at 324, 423 N.E.2d at 1066, 441 N.Y.S.2d at 237. The dissent stated that "[i]n fact, defendant merely asserts that counsel is important at a preliminary hearing because it permits defense counsel to observe the demeanor of his client as a witness." *Id.*

116. Judge Gabrielli stated:

> Since only defense counsel is in a position to comment on how he may have altered his trial strategy had he been given a meaningful opportunity for discovery at a preliminary hearing, to hold that the failure to provide defendant with this opportunity for discovery resulted in some prejudice, absent some allegations by defendant to this effect, requires an exercise of judicial speculation . . . .

Id.

117. *Id.*

118. *See supra* text accompanying note 93.

119. *Id.* at 318, 423 N.E.2d at 1063, 441 N.Y.S.2d at 234.

120. N.Y. CRIM. PROC. LAW § 70.10(2) (McKinney Supp. 1981). *See supra* note 23 for statutory definition of "reasonable cause."

of the State's burden at the hearing.[121] Not only must the State merely present a modicum of evidence, but if the court finds reasonable cause that the defendant committed a felony other than the one charged, it must hold the defendant over for the grand jury on that charge.[122] Certainly, if the burden on the prosecution was to present a prima facie case, the opportunities for discovery would be greater than what is currently obtainable under the "reasonable cause to believe" standard.

When the majority stated "discovery and deposition, by and large are not available in criminal cases,"[123] it did not consider the criminal discovery provisions of the C.P.L.[124] which provide for discovery of non-exempt tangible and existing property by both the defendant and the prosecutor.[125] C.P.L. sections 240.10.-.90 are the culmination of the legislature's lengthy examination and thorough debate of criminal discovery in New York.[126] The legislature has considered discovery at the preliminary hearing, yet it has rejected measures which would expand the scope of the hearing by mandating any such discovery.[127]

The court's misperception of the nature and scope of the preliminary hearing[128] resulted in an exaggerated view of the degree of discovery obtainable at the hearing.[129] This view, in turn, supported the court's notion that counsel, had he been present, might have obtained valuable discovery.[130] The legal support for the court's holding is thus exaggerated and erroneous, and it be-

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121. *See supra* notes 42-45 and accompanying text.

122. N.Y. CRIM. PROC. LAW § 180.70(1) (McKinney 1971) requires that the court hold the defendant over for the action of a grand jury "[i]f there is reasonable cause to believe that the defendant committed a felony." *Id.*

123. People v. Hodge, 53 N.Y.2d at 318, 423 N.E.2d at 1063, 441 N.Y.S.2d at 234.

124. N.Y. CRIM. PROC. LAW §§ 240.10 -.90 (McKinney Supp. 1981).

125. *Id.* For a discussion of the development of criminal discovery in New York see Note, *Criminal Discovery in New York: The Effect of the New Article 240*, 8 FORD. URB. L. J. 731 (1980);

126. *See* J. Bellacosa, N.Y. CRIM. PROC. LAW §§ 240.10 - .90, *Practice Commentary* (McKinney Supp. 1981).

127. For example, Senate Bill 9104 introduced by the Committee on Rules in the Senate in 1970, would have mandated the cross-examination of witnesses and the production of other evidence in the defendant's behalf at the preliminary hearing. The bill passed the Senate but was never considered by the Assembly. *See* N.Y. LEGISLATIVE RECORD AND INDEX (1970).

128. *See supra* text accompanying notes 93-94.

129. *See supra* notes 38-49, 65 and accompanying text.

130. *See supra* notes 93-96 and accompanying text.

lies the firm support which should accompany the drastic remedy of granting a new trial.[131]

In *Coleman v. Alabama*,[132] the Supreme Court remanded a case similar to *Hodge* to the state courts to determine whether the counselless hearing was harmless error.[133] The test to be used as set forth in *Chapman v. California*,[134] was whether there was any possibility that the error complained of might have contributed to defendant's conviction.[135] At Hodge's trial no incriminating statements or other damaging evidence obtained at the hearing was introduced against him.[136] Additionally, Hodge did not allege prejudice in his ability to obtain discovery.[137] The majority's determination that he may have been deprived of some discovery benefit is not only speculative, but also is premised on the misperception of the hearing as a virtual minitrial and the erroneous view that discovery is generally unavailable in criminal cases.[138] The majority's summary conclusion, "it is impossible to assert 'beyond a reasonable doubt' that the deprivation of counsel produced no adverse consequences,"[139] rejects the thoughtful analysis prescribed by *Coleman* and creates instead a per se rule requiring a new trial whenever a defendant is deprived of counsel at his preliminary hearing. The *Hodge* court, in contrast to *Coleman*, thus places a burden on the criminal justice system to conduct a new trial without adequately showing that the defendant was significantly prejudiced in the trial already had.[140]

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131. *See, e.g.*, Blue v. United States, 342 F.2d 894, 900 (D.C. Cir.), *cert. denied*, 380 U.S. 944 (1965).

132. 399 U.S. 1 (1970).

133. *Id.* at 11. *See supra* notes 17 and 73 and accompanying text.

134. 386 U.S. 18 (1967). *See supra* note 102.

135. *Id.* at 23. The Supreme Court stated that " '[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' " *Id.* (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)).

136. People v. Hodge, 76 A.D.2d 985, 429 N.Y.S.2d 284 (3d Dep't 1980). *See supra* note 85.

137. People v. Hodge, 53 N.Y.2d at 322, 324, 423 N.E.2d at 1065, 1066, 441 N.Y.S.2d at 236, 237. *See supra* note 115 and accompanying text.

138. *See supra* notes 42-45, 93-96, 118-127 and accompanying text.

139. People v. Hodge, 53 N.Y.2d at 320-21, 423 N.E.2d at 1064, 441 N.Y.S.2d at 235.

140. *See* C. WHITEBREAD, CRIMINAL PROCEDURE, AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS § 2.03 at 26 (1980):

[A]ny question of harmless error is a highly fact-specific one to be resolved by the

B. *Right to Counsel at the Preliminary Hearing*

Right to counsel analysis utilized by most courts focuses on the ability of counsel to protect his client's rights to a fair trial and to safeguard his priviledge against self-incrimination.[141] When substantial prejudice inheres in a pre-trial confrontation so that those rights are implicated, the confrontation is deemed a "critical stage" to which the right to counsel attaches.[142] Compromising the right to counsel triggers the inquiry as to whether the rights sought to be protected are, in fact, violated. The harmless error doctrine requires an analysis of the nature and the extent of prejudice to defendant's right to a fair trial caused by the violation of the right to counsel.

Coleman v. Alabama[143] designated the preliminary hearing a "critical stage," since counsel is essential to protect against an erroneous or improper prosecution. A responsible harmless error analysis necessarily would review the record before the court to see what counsel might have done, had he been present, to protect against such a prosecution. The *Hodge* record disclosed that the defendant's privilege against self-incrimination was not violated.[144] The record also indicates that the charge against Hodge would not have been dismissed or reduced to a misdemeanor.[145] The only way Hodge may have been deprived of a fair trial would be if the absence of counsel deprived him of some valuable discovery that could have been used at trial.[146] Some factors noticeably overlooked by the majority are: 1) Counsel allegedly had notice of the hearing with ample opportunity to participate

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exercise of sound judicial discretion . . . . Courts have focused on certain factors, such as the amount of illegally obtained evidence in comparison with the other evidence of defendant's guilt and the nature of the illegally acquired evidence.

141. For a general discussion of the right to counsel and the role of the lawyer under the sixth amendment of the federal constitution, *see id.* at §§ 25.01 -.06.

142. United States v. Wade, 388 U.S. 218, 227 (1967). *See supra* notes 58-61 and accompanying text.

143. 399 U.S. 1 (1970).

144. *See supra* note 85 and text accompanying note 136.

145. The likelihood that counsel would have been able to have the case dismissed or reduced is remote since Hodge was subsequently indicted and ultimately convicted of the crime. The burden on the State at the preliminary hearing is set forth *supra* in note 23; its burden before the grand jury is set forth *supra* in note 43; and its burden at trial is set forth *supra* at note 44.

146. This issue is itself conjectural; its resolution demands careful scrutiny of the facts of the case. *See supra* note 140.

thereat;[147] 2) Counsel never sought a pre-trial remedy, but waited until the post-conviction appeal to raise the preliminary defect;[148] and, 3) Counsel never argued that his case was in any measurable way prejudiced by his absence at the hearing.[149] These factors, together with the stated purpose and scope of the preliminary hearing,[150] render the finding of substantial prejudice extraordinary. The court's finding that Hodge may have been prejudiced is based on speculation, and thus stands in contrast to findings of substantial prejudice in the prior cases in which the court exhibited its solicitude for the right to counsel.[151] By sidestepping the harmless error analysis in its summary finding of prejudice, the majority created an absolute right to counsel at the preliminary hearing, without adequate regard to the limited nature of this proceeding and the underlying role of counsel.

C. *Effect of Hodge*

Although the *Hodge* court has made it clear that a counselless preliminary hearing entitles a defendant to a reversal of his subsequent conviction and to a new trial, left unclear are some peripheral issues which will ultimately require resolution by either the courts or the legislature. For example, the legal consequences of a complete denial of a defendant's right to a preliminary hearing are now unclear.[152] Under such circumstances, if the District Attorney had conducted the required hearing, the defendant, with counsel at his side, would have had the opportunity, under *Hodge*, to obtain valuable discovery.[153] Another issue

147. People v. Hodge, 76 A.D.2d 985, 429 N.Y.S.2d 337 (3d Dep't 1980).

148. It is generally undesirable to allow a dilatory defense counsel to wait until the post-conviction appeal to challenge a preliminary defect. *See, e.g.*, Blue v. United States, 342 F.2d 894, 900-01 (D.C. Cir.), *cert. denied*, 380 U.S. 944 (1965). *See supra* note 15 and accompanying text.

149. People v. Hodge, 53 N.Y.2d at 324, 423 N.E.2d at 1066, 411 N.Y.S.2d at 237.

150. *See supra* notes 36-49 and accompanying text.

151. *See supra* notes 56-57 and accompanying text.

152. *See* People v. Aaron, 55 A.D.2d 652, 390 N.Y.S.2d 157 (2d Dep't 1976). The defendant was denied his statutory right to a preliminary hearing. The court ruled that this error was cured upon the return of the indictment. *See supra* note 74.

153. The significant distinction between the counselless hearing and no hearing at all might be the difference between the violation of the constitutionally protected right to counsel, and the violation of the statutory right to a preliminary hearing. Whereas the

implicated by *Hodge* is whether a defendant has been denied his constitutional right to counsel, when counsel is ineffective at obtaining discovery at the preliminary hearing. Still another issue is whether the scope and function of the preliminary hearing have been judicially altered so that discovery must be permitted by the magistrate after he has determined probable cause.[154]

In its zeal to protect the right to counsel, the court has elevated the role of discovery at the preliminary hearing, in addition to, and in support of, its per se rule which grants a new trial when that right has been violated. Regardless of the intentions of the court in fashioning this rule, the net result may well be that a District Attorney, who has heretofore preferred using the preliminary hearing to screen his cases, may instead exercise his option to present the cases directly to a grand jury.[155] This result is anomalous since defendants generally are not entitled to discovery of the grand jury's minutes and records until the trial commences,[156] whereas the transcript of the preliminary hearing can be obtained immediately.

VI. Conclusion

In *Coleman v. Alabama* the United States Supreme Court designated the preliminary hearing a "critical stage," and cited discovery as one of the reasons counsel is required at such hearing. That Court ordered a harmless error analysis when it was shown that the defendants' preliminary hearing was conducted in the absence of counsel. In *People v. Hodge* the New York Court of Appeals recently went beyond *Coleman*. Instead of undertaking the prescribed harmless error analysis, the court found

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violation of the constitutional right might trigger the utmost vigilance of the court, the violation of the statutory right might be more prone to the application of the time-honored rule that the indictment cures the errors of the preliminary hearing.

154. *See supra* notes 40-41 and accompanying text.

155. *See supra* notes 27-35 and accompanying text.

156. N.Y. CRIM. PROC. LAW § 240.45(1) (McKinney Supp. 1981) requires that after the jury is sworn and before the prosecutor's opening address, the prosecutor must disclose to the defendant grand jury testimony made by any person the prosecutor intends to call as a witness at trial, and which relates to the subject matter of the witness's testimony. Brady v. Maryland, 373 U.S. 83 (1963) imposes the continuing constitutional duty on the prosecutor to disclose evidence favorable to the defendant. This duty extends to the disclosure of exculpatory grand jury testimony. *See* People v. Frias, 102 Misc. 2d 482, 423 N.Y.S.2d 810 (1979).

that since the defendant *may* have been deprived of some discovery at the preliminary hearing, he was entitled to a reversal of his conviction and to a new trial.

Indeed, Hodge may have been deprived of a fair preliminary hearing by the absence of counsel. Had he sought preliminary relief, he probably would have received another hearing. That Hodge was necessarily deprived of a fair trial because of this defect is an unprecedented and sweeping assertion by the court. The burden on the courts of giving Hodge a new trial was justified by the court's solicitude for the right to counsel. But that solicitude was prompted not by an adequate showing of prejudice, but by speculation of prejudice based on an expanded and unprecedented view of the preliminary hearing. And the court's solicitude results in an order which conflicts with the policy of judicial economy which frowns on a dilatory defendant who has waited until his post-conviction appeal to challenge a preliminary error.

The bright line rule of *Hodge* nonetheless shines: Absence of counsel at the preliminary hearing is grounds for a reversal and a new trial. The legal consequences of the compromise of any of the defendant's *other* rights and privileges at the preliminary hearing are not so clear. The preliminary hearing, which has subsisted in New York in relative judicial obscurity, may be on the brink of fundamental changes which will elevate this proceeding to a major adversarial confrontation.

Mary C. Neary