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Constitutional Law - Right to Counsel - When Does it Accrue?

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principal commendation of open balancing is that it "compels a judge to take full responsibility for his decisions, and promises a particularized, rational account of how he arrives at them--more particularized and more rational at least than the familar parade of hallowed abstractions, elastic absolutes, and selective history."[26] Open balancing would ensure the protection to the press and at the same time provide a safeguard against the danger of allowing the press an inordinate amount of freedom. Essential protection would thus be afforded all rights embodied in the Constitution. Therefore, it is hoped, that in deciding future free speech cases, the Court will return to the use of the balancing concept.

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[26] MENDELSON, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821, 828 (1962). *Contra*, FRANTZ, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729 (1963).

CONSTITUTIONAL LAW–RIGHT TO COUNSEL–WHEN DOES IT ACCRUE?

Danny Escobedo, a twenty-two-year-old resident of Chicago, was arrested without a warrant about 8:00 P.M. on January 30, 1960, and taken to a police station for interrogation about the murder of his brother-in-law without formal charges being placed against him. The police told him about an incriminating statement made by another suspect, and urged him to admit the crime. Escobedo repeatedly requested to consult with his attorney. The police answered that the lawyer did not want to see him. About 11:00 P.M., Escobedo's lawyer, who had been trying to meet with his client since 9:30 P.M., caught a glimpse of him, and they exchanged waves before the lawyer was escorted away. Escobedo interpreted the wave as an instruction to keep quiet. Nevertheless, by midnight, he made a statement incriminating himself in the crime.

At the trial, the state introduced the confession. A defense motion to suppress it was overruled and Escobedo was convicted of murder. On appeal to the Illinois Supreme Court, the judgment was reversed on the ground that certain evidence tended to show that the statement had been the result of a promise of immunity from prosecution by the state.[1] On rehearing, the judgment was affirmed.[2] The United States Supreme Court granted certiorari and in a 5 to 4 opinion held that Escobedo's right to

[1] People v. Escobedo, No. 36707, Ill., Feb. 1, 1963 (copy on file in the library of the Chicago Bar Association).

[2] People v. Escobedo, 28 Ill. 2d 41, 190 N.E.2d 825 (1963).

counsel under the sixth amendment had been infringed and reversed the judgment. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

The issue is, "whether, under the circumstances the refusal . . . to honor petitioner's rights to consult with his lawyer during the course of an interrogation constitutes a . . . violation of the Sixth Amendment."[3] The Court reasons that the interrogation was at a crucial stage when the accused could be made to give extremely damaging statements if not protected by competent counsel. The presumption that the accused knows the law is no longer to be indulged. Counsel could have warned his client of the intricacies of Illinois law regarding complicity in murder. It was the denial of the right to counsel which caused the client to be deprived of this vital knowledge. The police failed to alert the accused of his constitutional right not to make a statement. This failure, when coupled with police refusal of the right to counsel, will void any confession obtained.

The Court feels that we must maintain an adversary system of justice, and not lapse into a system which depends on "confessions," with their tendency to perpetuate coercive police methods. Fairness requires that the accused be somewhat evenly matched against his accusers. The Court concludes that once the inquiry has begun to focus on a suspect, the right to counsel becomes absolute.

The real crux of the Escobedo case is its answer to the question: When does the prosecution begin, since the sixth amendment gives the right to counsel from the start of the "prosecution," not the "trial"? The case of *Powell v. Alabama* held that once the right to counsel is conceded, the defendant must have counsel soon enough to prepare a defense.[4] A later case, held that four days was adequate time for counsel to prepare for trial.[5] Refusal to grant any time is clearly a violation of due process.[6]

In the preceding cases, the denial of counsel occurred at the trial itself. In *Massiah v. United States*, the right was held to accrue before the trial.[7] The Court held that in *post*-indictment and *post*-arraignment situations an accused is entitled to his lawyer's help and when admissions are taken outside of counsel's presence, they will be inadmissible at the

[3] 378 U.S. at 479. The sixth amendment has been made applicable to the states through the fourteenth amendment. Gideon v. Wainwright, 372 U.S. 335 (1963).

[4] 287 U.S. 45 (1932).

[5] Avery v. Alabama, 308 U.S. 444 (1940). Compare the non-capital case of Canizio v. New York, 327 U.S. 82 (1946).

[6] Hawk v. Olson, 326 U.S. 271 (1947).

[7] 377 U.S. 201 (1964). After being indicted and arraigned on a violation of a federal narcotics law, a federal agent had Massiah's confederate elicit a set of admissions from him which were relayed to the agent by secret radio and later introduced at the trial.

trial. The *Massiah* case is actually the last link between those cases explaining the right to counsel at trial and those which deal with *post*-indictment and *pre*-arraignment situations.

In *Spano v. New York*, the accused had been indicted for murder and, after consulting with his attorney, surrendered to the police.[8] Before his arraignment, Spano was questioned for eight hours (in order for the police to elicit a confession), while frequently requesting to speak with his lawyer. The police refused to permit him to see his lawyer and, using Spano's sympathy for an old buddy who had just become a rookie patrolman, got a confession out of him. The majority reversed the conviction saying that (1) the police practiced an unfair deception on Spano by refusing him access to counsel and by using his "old buddy" to obtain the confession, and (2) the police were not trying to solve a crime since Spano was already indicted. Justice Douglas, concurring, felt that the accused's right to counsel should be absolute.

In *Hamilton v. Alabama*, the defendant, after indictment, appeared at the arraignment without counsel and since "arraignment under Alabama law is a critical stage in a criminal proceeding," a violation of due process was found.[9] A later case was remanded for further consideration in the light of the *Hamilton* decision, where the petitioner, at his arraignment, acknowledged the confession which was used to convict him. But he did not have counsel, nor was he informed of this right to have counsel, so that he might have intelligently waived it.[10] In another case based on the *Hamilton* holding, a plea of guilty was entered at a preliminary hearing, before counsel was appointed for the indigent defendant. The plea was later changed to "not guilty" and "not guilty by reason of insanity" after appointed counsel conferred with the defendant. Because of the admission of the first plea at the trial, the Court held that the hearing where the plea was entered was equivalent to Hamilton's arraignment and the denial of counsel voided the conviction.[11]

In *Reece v. Georgia*, the Court decided that the right to counsel existed *prior* to indictment since state procedure requires that the composition of the grand jury must be challenged before the indictment.[12] In the case of *Payne v. Arkansas*, a mentally dull nineteen year old was, *inter alia*, denied a hearing before a magistrate where he would have been told of his right to counsel and his right to silence.[13] He was held incommuni-

[8] 360 U.S. 315 (1959).

[9] 368 U.S. 52 (1961).

[10] Walton v. Arkansas, 371 U.S. 28 (1962) (per curiam).

[11] White v. Maryland, 373 U.S. 59, 60 (1963) (per curiam). This seems too verrule the case of Canizio v. New York, supra note 6.

[12] 350 U.S. 85 (1955).

[13] 356 U.S. 560 (1958). *Accord*, Hardy v. United States, 186 U.S. 224 (1902).

cado for three days without access to friend, counsel or family, and then confessed. The Court held that "the *totality* of this course of conduct" voided the confession.[14] The Court was later faced with a denial of counsel to a college graduate with a year of law school. It decided, in the case of *Crooker v. California*,[15] that mere custody and interrogation, without bringing the accused before a magistrate, would not void a state court determination as to a confession's validity.

In *Cicenia v. Lagay*,[16] petitioner was an average person who reported to the police at 9 A.M. at their request, after talking with his lawyer. They immediately began to interrogate him about an unsolved murder of which he had been accused. Cicenia's repeated requests to see his lawyer were denied. At 2 P.M., the lawyer came to the station, asked to see his client, and was refused. About 9:30 P.M., Cicenia broke, confessed, and was then permitted to see his attorney. On these facts, and on the basis of the *Crooker* case, it was held that it was not a violation of due process to interrogate a suspect before permitting him to see counsel. The *Crooker* decision announced a new rule, affirmed by the *Cicenia* decision, that

> [S]tate refusal of a request to engage counsel violates due process . . . if [the accused] is deprived of counsel for any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of 'that fundamental fairness essential to the very concept of justice'. . . . The latter determination necessarily *depends upon all the circumstances of the case.*[17]

The *Escobedo* case seems to adopt this general rule while holding that neither the *Crooker* case nor the *Cicenia* case are to be regarded as controlling.[18]

Generally, as in the *Escobedo* case, a denial of the right to counsel is coupled with a failure to advise the accused of his rights to counsel and to silence. When the Court tries to interpret statutes from different jurisdictions, conflicting decisions do result. One case upheld a statute which said that before the state could grant counsel to a deserving man, he must first state under oath that he is unable to employ counsel and that his case entitled him to counsel. This same case held that the trial court had no duty

[14] *Id.* at 567. (Emphasis in original).

[15] 357 U.S. 433, 441 (1958). Justice Douglas' dissent noted that the pretrial period is too dangerous, and the third degree too common, to even let an intelligent man be without counsel. *Accord,* Powell v. Alabama, *supra* note 4.

[16] 357 U.S. 504 (1958).

[17] Crooker v. California, *supra* note 15, at 439-40 (1958) (Emphasis added.).

[18] 378 U.S. at 492. This may not clarify how the Court feels about the *Crooker* case (due to the high educational level of the defendant) but it does show a full reversal of the *Cicenia* case as its facts so closely parallel the *Escobedo* case.

to advise the accused of his rights to counsel.[19] Later, it was held that failure to request counsel did not waive the right where the trial court had not advised the defendant of it. The onus was placed on the trial court to affirmatively protect the defendant's rights.[20] However, if after being advised of his rights, a defendant persists against his own interest, he does so at his own risk.[21]

Much of the insistence, in due process cases, of warning a defendant of his rights is used to overcome the failure of the local police to obey statutes requiring the suspect to be brought before a magistrate within a reasonable time after arrest.[22] Federal cases deal head on with this requirement. In *McNabb v. United States*,[23] the Court voided the conviction obtained through the use of a confession which was the product of a lengthy incommunicado detention, which contravened a requirement that a suspect must first be brought before a magistrate and told of his rights. This holding was widely attacked as hurting police efficiency but was affirmed by the Court as good law in a case with similar facts.[24] Later, in *Mallory v. United States*, where the facts were also similar to those in the *McNabb* case, a confession was held to be inadmissible on the basis of the *McNabb* decision and the sixth and fourteenth amendments.[25]

The now famous McNabb-Mallory Rule has its counterpart in a series of due process decisions which deal with one of the crucial problems of the *Escobedo* case: the incommunicado detention and secret interrogation. If a person is logged into a police station for interrogation without being formally booked or arraigned, this procedure is known as the "small book system." This is precisely what happened to Escobedo.[26] The Court has already established, in a famous series of cases, that confessions which are the product of long incommunicado detention and interrogation are clear violations of due process.[27] This was not a serious problem in the *Crooker*

[19] Bute v. Illinois, 333 U.S. 640 (1948). The dissent urged that the average man does not know of his right to counsel and the help offered by the statute is ineffective when the accused is not told of his rights. *Id.* at 679–81.

[20] Gibbs v. Burke, 337 U.S. 773 (1949).

[21] Gryger v. Burke, 334 U.S. 728 (1948); Stroble v. California, 343 U.S. 181 (1952); Ashdown v. Utah, 357 U.S. 426 (1958).

[22] Compare Payne v. Arkansas, *supra* note 13, with Crooker v. California, *supra* note 15. See also White v. Maryland, *supra* note 11. For an example of statutory authority see ILL. REV. STAT., ch. 38, § 108-1 (1963).

[23] 318 U.S. 332 (1943).

[24] Upshaw v. United States, 335 U.S. 410 (1948).

[25] 354 U.S. 449 (1957).

[26] Record pp. 16, 20 and 29, Escobedo v. Illinois, 378 U.S. 478 (1964).

[27] Chambers v. Florida, 309 U.S. 227 (1940); Haley v. Ohio, 332 U.S. 596 (1948); Watts v. Indiana, 338 U.S. 49 (1949); Payne v. Arkansas, 356 U.S. 560 (1958).

case, since the interrogation was not too lengthy.[28] Two later cases again reviewed this topic and condemned the system. However, they were weak precedents, since both defendants were mentally subnormal, while Escobedo was about average.[29] Finally, in *Haynes v. Washington*, the Court ended the "small book system" in aw, but not in practice.[30]

While Escobedo's detention was not comparable to that of Haynes, the Court refers to it by way of principle in its desire to avoid a system which depends on "confessions" rather than justice. Where the voluntariness of any confession is in doubt, it is the Court's duty to make its own examination of the record.[31] Thus the Court renders justice by remanding the case and forcing the state to produce other sufficient evidence.[32]

Danny Escobedo was twenty-two years of age and of Mexican parentage. There was no showing that he was uneducated or otherwise deprived by virtue of his age or minority group or that he was of less than average mentality. While many other confessions have been overturned because of youth, minority group, low intelligence, mental illness, lack of education or other coercion, these reasons do not apply here.[33] The confession was virtually the only proof in the case and Danny Escobedo is now a free man. Should he be free?

The Court seems to set up a tri-partite classification of persons who can be subjects of police interrogation: witnesses, suspect persons and accused persons. From witnesses, the police hope to secure either general background information or specific information as to the actual commission of the crime. A witness who is closely linked to the crime may be elevated to the level of suspect. When the "investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect"[34] and the suspect is then arrested, he "had become the accused, and the purpose of the interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so."[35] At this level, the *Escobedo* case decides that the right to counsel accrues.

[28] *Supra* note 15.

[29] Reck v. Pate, 367 U.S. 433 (1961); Culombe v. Connecticut, 367 U.S. 568 (1961).

[30] 373 U.S. 503 (1963). See note 42 *infra.*

[31] See Escobedo v. Illinois, 378 U.S. at 479, n. 4. *Accord,* Ashcraft v. Tennessee, 322 U.S. 143 (1944).

[32] *Cf.* Payne v. Arkansas, *supra* note 13; Rogers v. Richmond, 365 U.S. 534, 541 (1961).

[33] *Cf.* Malinski v. New York, 324 U.S. 401 (1945); Wade v. Mayo, 334 U.S. 672 (1948); Gallegos v. Nebraska, 342 U.S. 55 (1951); Leyra v. Denno, 347 U.S. 556 (1954); Moore v. Michigan, 355 U.S. 155 (1957); Blackburn v. Alabama, 361 U.S. 199 (1960); McNeal v. Culver, 365 U.S. 109 (1961); Gallegos v. Colorado, 370 U.S. 49 (1962). In most of these cases there was held to be, *inter alia,* a denial of the right to counsel which helped to void the confession.

[34] Escobedo v. Illinois, 378 U.S. 478, 490 (1964).

[35] *Id.* at 485.

In *Watts v. Indiana,* Justice Jackson, concurring, noted one extreme in police experience, and sought to protect society from it:

These murders were unwitnessed, and the only positive knowledge on which a solution could be based was possessed by the killer. In each there was reasonable ground to *suspect* an individual but not enough legal evidence to *charge* him with guilt. . . . [T]he police attempted to meet the situation by taking the suspect into custody and interrogating him. . . . The alternative was to close the books on the crime and forget it. . . . This is a grave choice for a society in which two-thirds of the murders are already closed as insoluble.[36]

Justice Goldberg, who wrote the opinion in the *Escobedo case,* held in the *Haynes* case that not all "interrogation of witnesses and suspects is impermissible. Such questioning is undoubtedly an essential tool in effective law enforcement."[37] If this still holds, then the *Escobedo* decision shows how far Justice Goldberg will go to uphold the right to counsel for accused persons.

Chief Justice Warren once warned that "the police must obey the law while enforcing the law."[38] He noted that, "as law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated . . . our duty to enforce federal constitutional protection does not cease. It only becomes more difficult because of the more delicate judgments to be made."[39] If the police are to become more responsible, new dangers must be controlled at the same time as the old ones are abolished.

Among the worst of the old methods are the "small book system" and incommunicado detention. It has been held that mere custody and examination is not dangerous and will not void a confession.[40] But the *Watts* case held:

It would be naive to think that this protective custody was less than an inquisition. The man was held until he broke. . . . We should unequivocally condemn the procedure and stand ready to outlaw any confession obtained during the period of unlawful detention. The procedure breeds coerced confessions. It is the root of the evil.[41]

Yet it continues and the police have learned no lesson from prior decisions prohibiting this procedure.[42] Writers of texts for the police still

[36] 338 U.S. 49, 58 (1949). (Emphasis in original).

[37] 373 U.S. at 514–15 (1963).

[38] Spano v. New York, 360 U.S. 315, 321 (1959).

[39] *Id.* at 322.

[40] Ziang Sung Wan v. United States, 266 U.S. 1 (1924).

[41] Watts v. Indiana, *supra* at 57.

[42] This seems to be especially true of the Chicago Police Department. See Monroe v. Pape, 365 U.S. 167 (1961); Lynumn v. Illinois, 372 U.S. 528 (1963).

advocate the use of the basics of the procedure along with "justifiable" uses of deceit.[43]

Roscoe Pound, in recognizing the problem caused by incommunicado grilling, arrived at the solution achieved in *Escobedo*.[44] The *Escobedo* decision mentions the English Judge's Rules which provide for a warning of a set form to be administered to a suspect before questioning. They further state that,

> when after being cautioned a person is being questioned or elects to make a statement, a record shall be kept . . . [and that] every person at any stage of the interrogation should be able to communicate and consult privately with a solicitor. This was so even if he were in custody provided in such a case no unreasonable delay or hindrance was caused to the processes of investigation or the administration of justice by his own doing so.[45]

The *Escobedo* case requires that the attorney should be available; whereas the English Judge's Rules might permit a delay of a few hours.

It may be that the decision in *Escobedo v. Illinois* is not as radical as some would say. It is now only logical to extend this protection to suspected persons as well as to accused persons.[46] A recent New York case, cited with approval by the Court, held that the request for counsel creates a right to counsel at that moment and if the request is denied, any subsequent confession is void.[47] Although police work may be somewhat limited by the decision, the Court feels that this area should be strongly limited in order to protect individual rights.

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[43] See INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS, 203–204 (1962). See especially page 207 where the author states: "For related psychological considerations, if an interrogation is to be had at all, it must be one based on an unhurried interview, the necessary length of *which will in many instances extend to several hours* depending upon various factors, such as the nature of the case situation and the personality of the suspect." (Emphasis added).

[44] 24 J. CRIM. L. & C. 1014, 1017 (1934). He stated: "I submit that there should be express provision for a legal examination of suspected or accused persons before a magistrate; that those to be examined should be allowed to have counsel present to safeguard their rights; that provision should be made for taking down the evidence so as to guarantee accuracy."

[45] Announcement of the New Judge's Rules, London Times, Jan. 25, 1964, quoted in 49 CORNELL L. Q. 418 (1964).

[46] Note Justice White's prediction of the result in *Escobedo* and where else it will apply. Massiah v. United States, 377 U.S. 201, 208–209 (1964) (dissent).

[47] People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628 (1963), cited in Escobedo v. Illinois, 378 U.S. 478, 486 (1964). There is a more extreme case where prosecution was completely held precluded by a denial of counsel occurring after the obtaining of the evidence sought to be introduced at the trial. See State v. Krozel, 24 Conn. Supp. 266, 190 A.2d 61 (1963).