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Escobedo in New York

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NOTES

ESCOBEDO IN NEW YORK

Prior Law and Escobedo

The sixth amendment to the Constitution provides: "In all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." [1] In *Crooker v. California*,[2] the landmark case interpreting this right, the defendant requested and was denied an opportunity to call a lawyer while he was in police custody. After detention for fourteen hours, he confessed to murder. The Supreme Court held that the defendant's rights were not violated and that his confession was therefore admissible. The denial of counsel in *Crooker* was considered only *one* of many relevant factors in the determination of whether the defendant's confession was involuntary.[3] Thus, the Court reaffirmed a "totality of circumstances" test, which requires the exclusion of a confession only where all the circumstances indicate that the defendant has been denied "fundamental fairness." [4] Consequently, the denial of a request for counsel was not, in and of itself, considered a denial of due process and the confession was admitted since it was voluntary.[5] To rule otherwise, the Court said, "would effectively preclude police questioning, fair as well as unfair—until the accused was afforded opportunity to call his attorney." [6]

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[1] U.S. CONST. amend. VI. This right applied to federal proceedings and to state prosecutions involving capital offenses. Johnson v. Zerbst, 304 U.S. 458 (1938); Powell v. Alabama, 287 U.S. 45, 71 (1932).

[2] 357 U.S. 433 (1958).

[3] The fourteenth amendment prohibits use of coerced confessions in state prosecutions. *E.g.*, Fikes v. Alabama, 352 U.S. 191 (1957); Watts v. Indiana, 338 U.S. 49 (1949); Brown v. Mississippi, 297 U.S. 278 (1936). Denial of counsel, however, was only one salient factor in determining whether an accused's confession was coerced and the conviction based thereon violative of the right to due process. See Bram v. United States, 168 U.S. 532 (1897); Wilson v. United States, 162 U.S. 613 (1896).

[4] The Court felt that other factors to be considered were, for example, the length of the interrogation and the conditions under which it took place. Crooker v. California, *supra* note 2, at 439, quoting the essential test relied upon in Lisbena v. California, 314 U.S. 219, 236 (1941).

[5] Crooker v. California, *supra* note 2, at 439-40.

[6] *Id.* at 441. This ruling was predicated on Betts v. Brady, 316 U.S. 455, 473 (1942), where it was said that "while want of counsel in a particular

The abject appreciation of the necessity for police interrogations, so apparent in *Crooker,* was conspicuously absent in *Escobedo v. United States.*[7] There, on somewhat similar facts, the Court held that the defendant must be accorded the right to counsel the moment the process becomes accusatory.[8] The *Escobedo* Court, stressing the *defects* of police interrogation as a method of law enforcement, felt that a *system* based on such interrogation was undesirable.[9] In *Escobedo,* the defendant had been arrested and was questioned without being advised of his right to remain silent. His repeated requests to confer with his attorney, who was waiting in an adjoining room, were denied, and he was finally duped into making inculpatory admissions, which formed the basis for his conviction. The Court reversed this conviction, holding that

> where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, *and* the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment" . . . and . . . no statement elicited by the police during the interrogation may be used against him at a criminal trial.[10]

While *Escobedo* apparently established an objective standard,[11] confusion arises because the facts of the case were stated in its

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case may result in a conviction lacking in . . . fundamental fairness, we cannot say that the [Fourteenth] Amendment embodies an inexorable command that no trial for any offense . . . can be fairly conducted and justice accorded a defendant who is not represented by counsel."

[7] 378 U.S. 478 (1964).

[8] *Id.* at 492. Prior to *Escobedo* the Supreme Court eliminated the fundamental fairness test at the trial level, and held the sixth amendment applicable to the states, thus making effective appointment of counsel mandatory in all criminal proceedings. Gideon v. Wainwright, 372 U.S. 335 (1963). Although the original rule was that counsel must be appointed sufficiently in advance of trial to adequately prepare a defense (Powell v. Alabama, *supra* note 1, at 59), later cases have apparently extended the right to the arraignment proceeding (Hamilton v. Alabama, 368 U.S. 52 (1961)), and the preliminary hearing (White v. Maryland, 373 U.S. 59 (1963)). *Gideon* provided what might be called a "horizontal" extension of the right to all criminal cases, while the other cases mentioned extended the right "vertically" within a particular prosecution.

[9] Escobedo v. United States, 378 U.S. 478, 488-90 (1964).

[10] *Id.* at 490-91. (Emphasis added.) See also Massiah v. United States, 377 U.S. 201 (1964), which holds that post-indictment statements made in the absence of counsel are inadmissible.

[11] See Note, 19 RUTGERS L. REV. 111, 139 (1965).

holding. Unfortunately, most state courts have been unable to discern which one, if any, of the enumerated factors was controlling.[12] The scope and purpose of this note will be limited to an exploration of the effect of *Escobedo* on the New York courts as exemplified by the interpretation of several significant recent cases which purport to enunciate principles attributable to *Escobedo*.

Recent New York Cases

The problems created by the joinder of facts in the *Escobedo* holding are apparent in recent New York cases, wherein determinations have been based upon fine factual distinctions. Thus, while one appellate division department ruled a confession inadmissible where the *accused* had requested and was denied [13] permission to see his *family*,[14] a Court of Appeals case held that the denial of a *father's* request to see his accused *son* was "not in and of itself" a sufficient basis for excluding the son's confession.[15]

The appellate division ruling was based on the fact that it was the *accused* who requested aid. The court, in denying any distinction between a request for a conference with an attorney or with a member of the family, complied with the underlying rationale of the *Escobedo* decision, *i.e.*, that the social interest in protecting the individual exceeds the social interest in criminal law enforcement.

> Many persons accused of crime are not wise enough, without suggestion, to ask to see a lawyer, or are so impecunious that they believe they cannot obtain one without outside aid; and the request of such a person to see his family may be his way of seeking legal assistance. But even if he does not rationalize his reasons for asking for his family, we must assume that he makes such request in order to obtain help; and he is entitled to have the benefit of their advice and aid, which may include retention of counsel for him.[16]

The necessity for aid emphasized here was ignored by the Court of Appeals when it considered the second case mentioned, that is, where the *father's* request for a conference was denied. A con-

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[12] *Compare* People v. Dorado, 42 Cal. Rep. 169, 398 P.2d 361 (1965), *with* People v. Gunner, 15 N.Y.2d 226, 205 N.E.2d 852, 257 N.Y.S.2d 924 (1965).

[13] The denial seemingly need not be explicit. One case held that merely *ignoring* the defendant's inquiry as to whether he might remain silent until he obtained counsel was a violation of the privilege against self-incrimination. People v. Noble, 9 N.Y.2d 571, 175 N.E.2d 451, 216 N.Y.S.2d 79 (1961).

[14] People v. Taylor, 22 App. Div. 2d 524, 256 N.Y.S.2d 944 (1st Dep't 1965).

[15] People v. Hocking, 15 N.Y.2d 973, 207 N.E.2d 529, 259 N.Y.S.2d 859 (1965).

[16] People v. Taylor, *supra* note 14, at 525-26, 256 N.Y.S.2d at 946.

ference here might well have resulted in the employment of, or request for, an attorney. The defendant was as helpless in this case as where the *accused* had requested a conference with his family. Since the purpose of a request of this nature is to seek or provide *aid* for the accused individual, the origin of the request should be of no consequence. By a parity of reasoning, the appellate division rationale should have been applied to the Court of Appeals decision. Instead, a "totality of circumstances" test was applied, and the case was remanded for a determination of the voluntariness of the confession.[17] This was seemingly incorrect, since the Court apparently utilized *"Crooker* reasoning" in a case within the *Escobedo* ambit. The *Crooker* "totality of circumstances" test, wherein denial of counsel is only one factor of many, is no longer the issue.[18] Under *Escobedo* there is a self-sustaining right to counsel. A violation of this right, without reference to any other circumstance, prohibits admission of a confession subsequently obtained.

The landmark New York case excluding statements made by the accused after the denial of a request for counsel is *People v. Donovan.*[19] This decision presaged *Escobedo* and was cited with approval by the Supreme Court.[20] The *Donovan* rule, making the right to counsel applicable at the interrogation stage, has been restrictively applied in *People v. Gunner,*[21] a recent New York Court of Appeals case. In order to prevent expansion[22] of the rule, the Court in *Gunner* stated that *where there is no request* the accused need not be made aware of his right to counsel and to remain silent.[23] In effect, the Court held that there is *no duty* on the police to apprise the defendant of his rights,[24] even though

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[17] People v. Hocking, *supra* note 15.

[18] Escobedo v. Illinois, *supra* note 9, at 490-91. Denial of counsel was a factor on the issue of voluntariness under prior cases, *e.g.,* Watts v. Indiana, *supra* note 3.

[19] 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963). The *Donovan* decision was the culmination of other New York cases extending the right to counsel. *E.g.,* People v. Di Biasi, 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960) (absence of counsel at post-arraignment questioning in capital case held a denial of due process); People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961) (post-indictment statements in a non-capital case excluded where the accused was not advised of his rights); People v. Meyer, 11 N.Y.2d 162, 182 N.E.2d 103, 227 N.Y.S.2d 427 (1962) (statements made after arraignment or indictment excluded in felony case where there was an absence of counsel).

[20] Escobedo v. Illinois, *supra* note 9, at 486.

[21] *Supra* note 12.

[22] *Cf.* People v. Dorado, *supra* note 12.

[23] People v. Gunner, *supra* note 12. It should be noted, however, that the Court, although limiting the right in one respect, actually extended it in another, by holding an attorney's request equivalent to that of the accused.

[24] The question of whether there was such a duty was initially posed—and left unanswered in People v. Stanley, 15 N.Y.2d 30, 203 N.E.2d 475, 255 N.Y.S.2d 74 (1964).

he is the "target of the investigation and stands in the shoes of an accused." [25] Prima facie, these statements are contrary to *Escobedo,* where it was said:

> when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and under the circumstances here, the accused must be permitted to consult with his lawyer.[26]

It would appear then, that the purported limitation of the *Donovan* rule enunciated in *Gunner* partially negates the right to counsel as it is prescribed by the Supreme Court.

To recapitulate, the law in New York seems well established that an accused's confession is inadmissible if either *he* or his *attorney* has requested a conference, and there has been a denial. It is also inadmissible where permission to see his family is refused. An accused's rights are held not violated if his family's request to confer with him is denied, or if he himself makes no request and the police do not apprise him of his rights.

The Necessity for a Request

The policy considerations involving the right to counsel were recognized early in New York and were restated in the *Donovan* opinion, where the Court explained that the essential problem is one of achieving "a balance between the competing interests of society in the protection of cherished individual rights . . . and in effective law enforcement and investigation of crime." [27] The *Donovan* decision embodied the spirit of many prior Supreme Court cases such as *Powell v. Alabama,*[28] where it was recognized that the accused "requires the guiding hand of counsel at every step in the proceedings against him." [29] This was not a mere factual observation, but a constitutional principle. The Court considered the right involved "of such a character that it could not be denied without violating those fundamental principles of liberty and justice which lie at the base of our civil and political institutions." [30] This attack on a summary type justice, which is inattentive to the

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[25] People v. Gunner, *supra* note 12, at 233, 205 N.E.2d at 856, 257 N.Y.S.2d at 929.

[26] Escobedo v. Illinois, *supra* note 9, at 492.

[27] People v. Donovan, 13 N.Y.2d 148, 150, 193 N.E.2d 628, 243 N.Y.S.2d 841, 842 (1963).

[28] 287 U.S. 45 (1932); see also Bram v. United States, 168 U.S. 532 (1897), where the confession doctrine was confused with the privilege against self-incrimination.

[29] Powell v. Alabama, 287 U.S. 45, 69 (1932).

[30] *Id.* at 67.

needs of the accused, was waged successfully on many fronts.[31] It culminated in *Escobedo,* where the Court condemned police practices designed to prey on the individual who is unaware of his rights.

It appears that the Supreme Court now considers the police to be in a superior position if the individual under interrogation is unaware that he has the right to remain silent. This position is obviously maintained and the attendant ability to elicit a confession is improved, if the police are under "no duty" to apprise the accused of this right. The *Escobedo* Court attacked this imbalance in favor of law enforcement and stated that "no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights." [32]

Although the basis of decision in recent New York cases has not been explicity stated as being the felt necessity to preserve "prime confession time" (usually the period between arrest and arraignment), this policy has, no doubt, been the subject of serious consideration.[33] Its real, if only implicit, effect has been to narrow the operative area of right to counsel, and to accord police interrogation a greater latitude. *Escobedo,* on the other hand, strikes at the very heart of any decision based on preserving the effectiveness of a system of law enforcement at the expense of the individual. "No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of and exercise these [constitutionall rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system." [34] In view of this statement, it would seem that a "no duty" philosophy, such as that espoused in *Gunner,* signifies a retreat, rather than an advancement over prior law.[35]

The *Escobedo* Court, noting the high percentage of confessions obtained at the interrogation stage, concluded that where

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[31] *E.g.,* Wong Sun v. United States, 371 U.S. 471 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); McNabb v. United States, 318 U.S. 332 (1943).

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

[33] See, *e.g.,* People v. Gunner, *supra* note 12 (dissenting opinion).

[34] *Supra* note 32.

[35] The deficiencies inherent in the *Gunner* decision were recognized in a recent California case (People v. Dorado, *supra* note 12, at 177-78, 398 P.2d at 369-70), wherein it was stated: "[T]he imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status had fortuitously prompted him to make it."

the productivity of police investigation is increased, so also is the necessity for counsel.[36] "The fact that many confessions are obtained during this period points up its critical nature as a stage when legal aid and advice are sorely needed." [37] To avoid any imbalance in favor of the police rather than the individual, the Court announced that "our constitution unlike some others strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self incrimination."[38] But how can the accused be advised *by his lawyer,* if he is unaware of his right to counsel? The individual can only take proper advantage of his right to remain silent, if he is first advised and then avails himself of his right to counsel. If the accused declines counsel, it would appear that the separate right to remain silent persists,[39] and that the police *must* apprise him of this right before attempting to elicit a confession.[40]

Mallory in the State Courts

In *Mallory v. United States,*[41] the Supreme Court prescribed a formula for restricting violations of the accused's rights in the federal system. The decision severely limited the operable area of federal law enforcement by holding that confessions elicited in violation of the federal "early arraignment" statute [42] are inadmissible. This ruling restricted enforcement procedures and thereby minimized incommunicado interrogation. The federal process, as defined by the *Mallory* Court, requires that police effectuate an arrest only on probable cause. The next prescribed step is arraignment before a judicial officer as quickly as possible, so that the accused may be advised of his rights and so that

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[36] *Supra* note 32, at 488.

[37] *Ibid.*

[38] *Ibid.*

[39] "After he has been arrested, a suspect may not be interrogated unless he has been fully and effectively warned of his right to remain silent." Spanogle, *Immunity Through Confession?,* 18 VAND. L. REV. 37, 44-45 (1964).

[40] This view is predicated on the fact that the *Escobedo* Court distinguished *Crooker* on the ground that the defendant there had been "explicitly advised by the police of his constitutional right to remain silent. . . ." The *Escobedo* Court regarded this factor as a "critical circumstance" separating the two cases. *Supra* note 32, at 491-92. However, it seems reasonable to assume that the requirement to advise excludes so-called "threshold" confessions, *i.e.,* made before or at the moment the process becomes accusatory, where police have not had an opportunity to advise the accused. See Note, 19 RUTGERS L. REV. 140, 148-49 (1965).

[41] 354 U.S. 449 (1957).

[42] FED. R. CRIM. P. 5(a). To the same effect, see N.Y. CODE CRIM. PROC. § 165; N.Y. PEN. LAW § 1844.

probable cause may be determined. The *Mallory* opinion also added a caveat to this procedure:

> the arrested person may, of course, be "booked" by the police. But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt.[43]

The *Mallory* decision was not originally applicable to the states, since it was grounded on the Supreme Court's supervisory power over the federal system. However, it apparently now applies to the states in *spirit,* if not as a mandatory rule. *Escobedo* seemingly attempted to raise the "supervisory" *Mallory* decision to the status of a constitutional principle applicable to the states. Surely, the *Mallory* decision was expressed in terms akin to those employed in *Escobedo.* The *Mallory* intention to restrict police investigatory power was the *Escobedo* "cause." And the procedure prescribed in *Escobedo,* one which affords the accused an opportunity to *utilize* his rights, was within the *Mallory* design. Unfortunately, *Escobedo* has apparently failed to accomplish its end because of its indiscriminate enumeration of the circumstances of the case. Its standard has faltered at the precise moment when courts are most in need of guides to decision—that is, when there is a slight variation in circumstances.

Although it may well be argued that the line purportedly drawn in *Escobedo* is ambiguous and wavering, nevertheless, decisions such as *Gunner* are clearly without the general philosophy expressed by the Supreme Court. The basic proposition espoused in *Escobedo,* that the accused must be accorded the right to counsel whether or not there is a request, is not easily misunderstood.

The right to counsel is seriously hampered in operation and effect where it is made dependent upon a request. The Supreme Court, in a pre-*Escobedo* decision, stated: "[W]here the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." [44] Moreover, any failure on the part of the accused to make a request cannot be considered an implied waiver of his rights. Waiver has been defined as "an *intentional* relinquishment or abandonment of a known right or privilege." [45] Only when the accused is aware of his rights can he effectively waive them, since an "intentional relinquishment" imports intellectual awareness of what his action involves.

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[43] Mallory v. United States, *supra* note 41, at 454.
[44] Carnley v. Cochran, 369 U.S. 506, 513 (1962).
[45] Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

Conclusion

The joinder of facts in the *Escobedo* holding has wrought serious controversy over its meaning and effect. It is submitted, however, that the path hewn by the New York courts is at best tangential. This position is substantiated by the general tenor of the *Escobedo* opinion, and by the recent history of the Supreme Court which evidences a marked tendency toward proscribing prior law enforcement practices in favor of a countervailing interest in the protection of the individual.

Certainly, the underlying problem, that is, a denial of substantial justice to one accused of crime, remains the same whether there is a request for counsel or not. Vital individual rights cannot be mechanically denied, and the formalistic distinctions made in New York regarding the origin of a request are not even logically satisfying. When the accused is unaware, and is not advised of his rights, he is prone to the loss of defenses and privileges. It is this occurrence which truly makes the trial no more than an appeal from the interrogation, and this is exactly what the *Escobedo* Court attempted to eliminate. In fact, *Escobedo* concluded that a system of law enforcement which depends for success upon obtaining a confession will be less reliable and more subject to abuse than a system which depends on extrinsic evidence independently secured through skillful investigation.

ELECTRONIC EAVESDROPPING—THE INADEQUATE PROTECTION OF PRIVATE COMMUNICATION

Introduction

Electronic eavesdropping devices, the "tools" [1] which enable one to surreptitiously monitor and record a private conversation not conducted within his physical presence,[2] have become a problem

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[1] For a description of directional microphones, tape recorders, induction coils, and various other electronic eavesdropping devices currently available see DASH, SCHWARTZ & KNOWLTON, THE EAVESDROPPERS 305-81 (1959). For a discussion of the use of miniature microphones and radio transmitters, and the possibility of eavesdropping by laser light, see Time, March 6, 1964, pp. 55-56.

[2] Electronic eavesdropping may be classified into three general categories: (1) wiretapping, which may be accomplished by means of a physical connection to the tapped line, or by means of an induction coil, in which case no direct connection is necessary;