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The Right to Counsel in California

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THE RIGHT TO COUNSEL IN CALIFORNIA

Two recent decisions[1] by the California Supreme Court may have a profound effect upon the handling of future criminal cases during the investigatory and accusatory stages, and upon the admissability of evidence gathered during those stages. Both cases were decided on August 31, 1964, and each reversed a conviction for murder. The reversible error, and the one with which this paper is concerned, was that the defendant was denied his constitutional right "to have the Assistance of Counsel for his defence."[2]

Federal Cases

The California court relied heavily upon two decisions by the United States Supreme Court.[3] The first case, *Gideon v. Wainwright*, involved a defendant charged with the commission of a non-capital felony. He appeared in court without funds and asked the court to appoint counsel for him. His request was denied on the ground that Florida law permitted appointment for indigent defendants in capital cases only. The defendant conducted his own defense and was convicted. After the Florida Supreme Court denied his application for a writ of habeas corpus, he applied to the Supreme Court of the United States. The Supreme Court appointed counsel for him and "requested both sides to discuss in their briefs and arguments, 'Should the Court's holding in *Betts v. Brady* be reconsidered.' "[4]

The *Betts* case held that a "refusal to appoint counsel for an indigent defendant did not necessarily violate the Due Process Clause of the Fourteenth Amendment."[5]

> Asserted denial (of due process) is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations fall short of such denial.[6]

The opinion in *Gideon*[7] stated that since the Court in *Betts*[8] treated

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[1] People v. Anderson, 61 A.C. 903, 394 P.2d 945, 40 Cal. Rptr. 257 (1964), and People v. Dorado, 61 A.C. 892, 394 P.2d 952, 40 Cal. Rptr. 264 (1964). The Attorney General has petitioned for and the court has granted a rehearing of *People v. Dorado*. See *infra* notes 32-33.

[2] U.S. Const. Amend. VI.

[3] Escobedo v. Illinois, 378 U.S. —, 84 S. Ct. 1758 (1964) and Gideon v. Wainwright, 372 U.S. 335 (1963).

[4] Gideon v. Wainwright, 372 U.S. 335, 338 (1963).

[5] U.S. Const. Amend. XIV.

[6] Betts v. Brady, 316 U.S. 455, 462 (1942).

[7] Gideon v. Wainwright, 372 U.S. 335 (1963).

[8] Betts v. Brady, 316 U.S. 455 (1942).

Due Process as a "concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights,"[9] and since "the facts and circumstances are so nearly indistinguishable, we think the *Betts v. Brady* holding if left standing would require us to reject Mr. Gideon's claim that the Constitution guarantees him the assistance of counsel."[10] But the Court did not agree with the prior interpretation of Due Process and concluded that *Betts* should be overruled.

The Court next considered whether "right to counsel" in the Sixth Amendment[11] is made obligatory upon the states by the Fourteenth Amendment. Referring to *Betts*, which held that "appointment of counsel is not a fundamental right, essential to a fair trial,"[12] the Court said:

> Plainly, had the Court concluded that appointment of counsel for an indigent criminal defendant was 'a fundamental right, essential to a fair trial,' it would have held that the Fourteenth Amendment requires appointment of counsel in a state court, just as the Sixth Amendment requires in a federal court.[13]

In support of its position, the Court cited *Powell v. Alabama*[14] wherein the Court considered all the historical data examined in *Betts* and unequivocally declared that "the right to the aid of counsel is of this fundamental character."[15] The fundamental nature of the right was re-emphasized in later cases.[16]

In reversing the state court's decision, the Court concluded by saying:

> [T]he Court in *Betts v. Brady* made an abrupt break in its own well-considered precedents. In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice.[17]

Escobedo v. Illinois,[18] the second decision relied on by the California Supreme Court, involved a convicted murderer who was not permitted to consult his lawyer between the time he was taken into custody and the completion of questioning by police. The posi-

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[9] Id. at 462.
[10] Gideon v. Wainwright, 372 U.S. 335, 339 (1963).
[11] U.S. CONST. AMEND. VI.
[12] Betts v. Brady, 316 U.S. 455, 471 (1942).
[13] Gideon v. Wainwright, 372 U.S. 335, 340 (1963).
[14] 287 U.S. 45 (1932).
[15] *Id.* at 68.
[16] Smith v. O'Grady, 312 U.S. 329 (1941); Avery v. Alabama, 308 U.S. 444 (1940); Johnson v. Zerbst, 304 U.S. 458 (1938); Grosjean v. American Press Co., 297 U.S. 233 (1936).
[17] Gideon v. Wainwright, 372 U.S. 335, 344 (1963).
[18] Escobedo v. Illinois, 378 U.S. —, 84 S. Ct. 1758 (1964).

tion taken by the state was that the right to counsel arises after indictment. This was rejected by the court:

> It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder.[19]

The Court then cited *Gideon v. Wainwright*[20] to the effect that every person accused of a crime, whether state or federal, is entitled to a lawyer at trial, and to grant the rule contended for by the state would make the trial nothing more than an appeal from the interrogation. In other words, granting a "right to counsel" at a formal trial would guarantee nothing to the accused if the conviction was already assured by the use of statements taken during pre-trial examination when the accused was without counsel.

In *Escobedo*[21] the court indicated that there is a time at which an accused must either (1) be allowed counsel or (2) be advised of his constitutional right to remain silent. That time is when the investigation of a crime ceases to be a general inquiry and begins to "focus" upon the particular suspect; when the suspect is taken into custody and a process of interrogation is begun which lends itself to eliciting incriminating statements; or when the suspect has requested and is denied an opportunity to consult with his lawyer. This is the language the California Supreme Court relied on in reversing the convictions in *People v. Anderson*[22] and *People v. Dorado*.[23]

California Cases

In *People v. Anderson*, defendant was arrested at about 7:00 p.m. and accused of murder. The police interrogated him that night and the following morning. During the morning interrogation defendant repeatedly requested counsel and said that without a lawyer present he had nothing more to say. His requests were ignored and he finally admitted that he had engaged in prior sexual activity with the victim. This admission was relied on in support of the charge of first degree murder.

The language of the California Supreme Court was almost the same as that in *Escobedo* relative to "eliciting incriminating state-

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19 *Id.* 84 S. Ct. at 1762.
20 372 U.S. 335 (1963).
21 378 U.S. —, 84 S. Ct. 1758 (1964).
22 61 A.C. 903, 394 P.2d 945, 40 Cal. Rptr. 257 (1964).
23 61 A.C. 892, 394 P.2d 952, 40 Cal. Rptr. 264 (1964).

ments" and in differentiating between the investigatory and accusatory stages of the case.[24] The question of when the accused must request counsel was answered as follows:

> Although the defendant did not immediately request counsel but initially said he could not remember what had happened, he did not thereby forfeit his right to counsel. *Before* he gave the incriminating statements defendant asked for counsel, and such request, at the accusatory stage, under any reading of Escobedo, is more than ample. Indeed we have held in People v. Dorado [citations omitted], at this stage defendant need not even make the request.[25]

The court considered these facts determinative: (1) the investigation had "focused" upon defendant; (2) he was taken into police custody; (3) the police carried out a process of interrogation that lent itself to eliciting incriminating statements, without granting his request to consult an attorney, or without advising him of his absolute constitutional right to remain silent. Because of this:

> defendant was denied "the assistance of counsel" in violation of the Sixth Amendment "made obligatory upon the states by the Fourteenth Amendment" (Gideon v. Wainwright [citations omitted]) and no statement elicited by the police during the interrogation should have been used against him at the trial.[26]

In *People v. Dorado*[27] the defendant was convicted of malicious assault with a deadly weapon resulting in a fellow prisoner's death. Correctional officers undertook an immediate investigation and suspicion became "focused" on defendant. Defendant was interrogated and admitted the killing.

A prison official who conducted the initial interrogation, and who was present during the major part of defendant's interrogation by members of the district attorney's office, testified that he did not at any time inform defendant of his right to counsel, or of his right to remain silent, nor did he hear anyone else so inform the defendant.

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[24] "These events leave little doubt that at the time of questioning the police were engaged in a process of interrogation that lent itself to eliciting incriminating statements from the accused; the police were not merely conducting a general investigation of the crime. . . . We find no merit in the suggestion that, because defendant admitted that he must have committed the crime but did not describe the motivation, the police were merely 'investigating' the motivation and hence had not reached the accusatory stage. Such a contention confuses the meaning of the investigatory and accusatory stages. The latter begins at the point when the police have ascertained guilt; once the defendant *admits* he must have committed the crime the police are necessarily engaged in accusatory questioning." People v. Anderson, 61 A.C. 903, 906-07, 394 P.2d 945, 947, 40 Cal. Rptr. 257, 259 (1964).

[25] People v. Anderson, 61 A.C. 903, 907, 394 P.2d 945, 947, 40 Cal. Rptr. 257, 259-60 (1964).

[26] *Id.* at 904, 394 P.2d at 946, 40 Cal. Rptr. at 258 (1964).

[27] 61 A.C. 892, 394 P.2d 952, 40 Cal. Rptr. 264 (1964).

The court was then confronted with the problem of determining whether the confession, assuming it was voluntary, was properly admitted into evidence in view of two United States Supreme Court decisions.[28] Those cases were decided against the backdrop of *Gideon v. Wainwright*.[29] The court relied heavily on *Gideon* in saying:

> In essence the United States Supreme Court has chosen between two opposing clusters of convictions delineated by Justice Frankfurter in *Culombe v. Connecticut* [citations omitted]. On the one hand lies the assertion that questioning of subjects is indispensible to police work since many criminals cannot be convicted except by evidence obtained through their admissions. . . . On the other hand lies the assumption stated by Justice Frankfurter in *Watts v. Indiana* [citations omitted], that "Ours is the accusatorial as opposed to the inquisitorial system. . . . Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation."[30]

The court then interpreted *Escobedo* as concluding that once suspicion has "focused" on the accused, and the purpose of interrogating him is to obtain incriminating statements, he has a constitutional right to counsel. It also indicated that the considerations of our accusatorial, as opposed to the inquisitorial system, outweigh those which assert that questioning of suspects is indispensable to police work.

Since Dorado did not request counsel, the court had to decide whether this distinguished the case from *Escobedo*. It concluded that it did not.

> . . . the constitutional right to counsel precludes the use of incriminating statements elicited by police during an accusatory investigation unless that right is intelligently waived; no waiver can be presumed if the investigating officers do not inform the suspect of his right to counsel or his right to remain silent.
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> We reach this conclusion because (1) the Supreme Court ruled in *Massiah* that assistance of counsel under the Sixth Amendment attaches to pre-indictment interrogations since that period is crucial to a proper defence; (2) the Supreme Court held in *Escobedo* that, once investigation has focused on the accused, assistance to counsel is equally as important before indictment as after indictment.[31]

The court found "no strength in the artificial requirement that the

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[28] Escobedo v. Illinois, 378 U.S. —, 84 S. Ct. 1758 (1964); Massiah v. United States, 377 U.S. 201 (1964).

[29] 372 U.S. 335 (1963).

[30] People v. Dorado, 61 A.C. 892, 897-98, 394 P.2d 952, 955, 40 Cal. Rptr. 264, 267 (1964).

[31] *Id.* at 899, 394 P.2d at 956, 40 Cal. Rptr. 268 (1964).

defendant must specifically request counsel; the test must be a substantive one: whether or not the point of necessary protection for guidance of counsel has been reached." The court added that, "The defendant who does not realize his rights . . . and . . . does not request counsel is the very defendant who most needs counsel."[32]

The *Dorado* case has evoked expressions of considerable concern, especially among law enforcement officers.[33] On the other hand, as might be expected, the decisions have received wide acclaim from defense attorneys.[34]

CONCLUSION

The current state of the law in California can be summarized as follows: Once investigation has *focused* upon a suspect, his right to counsel arises. The right arises whether or not he requests consultation with his attorney. If he does not request counsel, he must be advised of his right to *remain silent*. Unless he *intelligently waives* right to counsel or to remain silent, he has been denied a right guaranteed him by the Constitution.

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[32] *Ibid.*

[33] A petition for rehearing has been granted in *Dorado* and the Attorney General has been joined by 55 District Attorneys in an *Amici Curiae* brief advancing the following arguments: that the decision was not compelled by *Escobedo v. Illinois*; that the two cases are distinguishable on fact; that while Dorado was a prime suspect, he was not the "accused in the sense that term was used by the Supreme Court. The decision is further challenged on the basis that there is no constitutional right to counsel during a police investigation and that the privilege against self-incrimination is never invoked by remaining silent. The Petition also contends that the decision will make the enforcement of law an impossibility in many instances; the decision is impossible to administer and apply; the "harmless error" rule should apply in cases in which a confession or admission obtained in violation of the right to counsel has been received; and the rule of the *Dorado* case should be prospective in operation.

[34] *Amici curiae* briefs have also been filed by numerous attorneys on behalf and in support of the position of defendant and appellant. The positions taken by the briefs generally are that the court has correctly interpreted and applied *Escobedo v. Illinois*; that the rule of law stated by the court is not impractical and will not unduly hamper law enforcement officers; that the respondent is in gross error in stating there is no right to silence; that the respondent is acting as a "Prophet of Doom;" that the interrogation of a suspect upon whom the accusatory process has been focused is part of a criminal prosecution within the Sixth Amendment; that the courts uniformly apply retroactively decisions upholding constitutional rights; and that the "Doctrine of *Escobedo* may not constitutionally be limited to prospective application only." *Brief* for Robert H. Lund, E. Fred Lightner, William T. Pillsbury, and David D. Battin of Long Beach, California, and Jim F. Kingham, Esq. of London, England, as Amici Curiae People v. Dorado, 61 A.C. 892, 394 P.2d 952, 40 Cal. Rptr. 264 (1964), and *Brief* for National Lawyers Guild, San Francisco Chapter Amicus Curiae People v. Dorado, 61 A.C. 892, 394 P.2d 952, 40 Cal. Rptr. 264 (1964).