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Criminal Procedure—Counsel at Interrogation: Pece v. Cox, 74 N.M. 591, 396 P.2d 422 (1964)

William H. Carpenter

COMMENTS

CRIMINAL PROCEDURE—COUNSEL AT INTERROGATION*—Recent decisions by the United States Supreme Court in the criminal procedure area have given rise to a flood of state habeas corpus petitions. The decisions in *Gideon v. Wainwright*,[1] *Massiah v. United States*,[2] *Jackson v. Denno*,[3] and *Escobedo v. Illinois*[4] have caused concern about their effect on efficient law enforcement.[5] State courts have gone to great lengths to resist the full impact of a liberal reading of these decisions.[6] The purpose of this Comment is to examine the New Mexico decision, *Pece v. Cox*,[7] in light of *Escobedo v. Illinois*, and to show that a limited interpretation of the right to counsel at interrogation will not meet the constitutional requirements established by the United States Supreme Court.

Pece v. Cox[8] related to the admissibility of a statement made in the absence of counsel by an accused prior to a judicial hearing. A

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* Pece v. Cox, 74 N.M. 591, 396 P.2d 422 (1964) (appeal pending, U.S. Court of Appeals, 10th Cir.). *Pece* involved several important problems in the area of criminal procedure that remain unsettled. Unfortunately, the New Mexico Supreme Court has contributed little to the solution of these problems. No facts were given in the *Pece* opinion; therefore, it is of little value to the practicing attorney.

1. 372 U.S. 335 (1963). *Gideon* applied the sixth amendment right to counsel to the states at the time of trial.

2. 377 U.S. 201 (1964). *Massiah* applied the sixth amendment right to counsel to the states during post-arraignment interrogation.

3. 378 U.S. 368 (1964). *Jackson* declared unconstitutional the procedure of jury determination of voluntariness of confessions.

4. 378 U.S. 478 (1964). *Escobedo* applied the sixth amendment right to counsel to the states at the pre-arraignment stage.

5. Upon rehearing of a recent California Supreme Court decision applying *Escobedo v. Illinois*, the Attorney General of California and fifty-five district attorneys filed an amici curiae brief asking for a strict interpretation of *Escobedo* because, they argued, a liberal reading of *Escobedo* would make law enforcement impossible in many instances. Comment, 5 Santa Clara Law. 75 (1964); People v. Dorado, 398 P.2d 361, 42 Cal. Rptr. 169, *cert. denied*, 381 U.S. 987 (1965).

6. Pece v. Cox, 74 N.M. 591, 396 P.2d 422 (1964); Otney v. United States, 340 F.2d 696 (10th Cir. 1965); Payne v. United States, 340 F.2d 748 (9th Cir. 1965); United States v. Gilmore, 334 F.2d 837 (7th Cir.), *cert. denied*, 379 U.S. 984 (1964); Queen v. United States, 335 F.2d 297 (D.C. Cir. 1964); Carson v. Commonwealth, 382 S.W.2d 85, 95 (Ky. 1964); Sturgis v. State, 235 Md. 343, 201 A.2d 681 (1964); Parker v. Warden, 236 Md. 236, 203 A.2d 418 (1964); Green v. State, 236 Md. 324, 203 A.2d 870, 873-74 (1964); Morford v. State, 395 P.2d 861, 864 (Nev. 1964); State v. Virgiano, 43 N.J. 44, 202 A.2d 657 (1964); Browne v. State, 24 Wis. 2d 491, 131 N.W.2d 169, 171 (1964). See Defender Newsletter, March 1, 1965, for a recent summary of state interpretations of *Escobedo* and *Massiah v. United States*.

7. 74 N.M. 591, 396 P.2d 422 (1964).

8. *Ibid.*

few weeks after his arrest on a charge of rape,[9] the petitioner and two co-defendants agreed to accompany officers on a one day trip from Roswell, New Mexico, to Lubbock, Texas, for purposes of taking a lie detector test.[10] While there, all three signed confessions. The circumstances surrounding these confessions were as follows: The polygraph operator, after asking questions in connection with the test, told the petitioner that on the basis of the test, he would advise him to make a statement.[11] At that point, the operator left the room and the New Mexico law officers entered and informed the petitioner that his two co-defendants had made confessions.[12] The petitioner replied that he might as well make a statement. The officers testified that the petitioner was fully advised of his right to remain silent, and printed in bold type at the top of the confession was the traditional warning that he did not have to make a statement at all and, if he did, it could be used against him at trial.[13]

More than three weeks after the trip to Lubbock, the petitioner was served with an information.[14] A few days later he was finally

9. Although the exact date and circumstances of the arrest are not available from the partial record submitted as exhibits in the habeas corpus proceeding, the sentence was set to run from that date. Record, Exhibit I, Pece v. Cox, New Mexico Supreme Court Docket No. 85-H.C., United States District Court, Albuquerque, Docket No. 5904.

10. Record of Preliminary Hearing, Pece v. Cox, 74 N.M. 591, 396 P.2d 422 (1964).

11. This would seem to be a flagrant abuse of the administration of the polygraph test. However, the trial judge was not concerned by the procedure used in eliciting the confessions and ruled them to be voluntary. Record, Pece v. Cox, 74 N.M. 591, 396 P.2d 422 (1964).

12. One of the co-defendants had retained counsel who had consented to let his client go to Lubbock for the lie detector test, with the restriction that he not be interrogated and only after telling his client not to answer any questions not a part of the test. This provided little barrier because the lie detector operator asked all the questions that were needed (Record, Pece v. Cox, *supra* note 9). Massiah v. United States, 307 F.2d 62 (2d Cir. 1962), *rev'd* 377 U.S. 201 (1964), raised an interesting question concerning this point. That is, whether the questioning of an accused who has retained counsel, in the absence of that counsel, is a violation of Canon 9 of the Canons of Professional Ethics of the American Bar Association prohibiting a lawyer from conferring with an opposing party without that party's counsel present. The Second Circuit Court assumed that for a prosecutor or his alter ego (the police) to interview a criminal defendant in the absence of his retained counsel would be a violation of canon 9, the sixth amendment, and due process, and would render any statements made inadmissible at trial. Massiah v. United States, *supra*. Also, the Ethics Committee has held:

> Where three persons are accused of related thefts, the prosecutor may not, in the proceedings of any one of them, interview another of them represented by counsel, except with the latter's lawyer.

American Bar Ass'n, Canons of Professional and Judicial Ethics, Opinions of Comm. on Professional Ethics and Grievances 640, Opinion 249. See Broeder, *Wong Sun—A Study in Faith and Hope*, 42 Neb. L. Rev. 483, 599-603 (1962).

13. Record, Pece v. Cox, *supra* note 9.

14. *Ibid.*

taken before a justice of the peace for a preliminary hearing, without counsel, but he made no plea.[15] Counsel was appointed for him on August 14, 1961 (forty-six days after arrest).[16] The petitioner entered a plea of not guilty at his arraignment.[17]

At trial, the petitioner's counsel objected to admission of the confessions that had been given in Lubbock on the ground that they were involuntary.[18] A *voir dire* examination by the trial judge was held, and the petitioner admitted that he read and understood the written advice as to his right to remain silent. The trial judge held the confessions to be admissible with the condition that the issue of voluntariness also be ruled on by the jury.[19] No mention was made of the fact that the confessions were taken in the absence of counsel. The petitioner was found guilty by the jury with a recommendation for clemency and sentenced from one to ninety-nine years—all suspended, except for ten years to be served concurrently with sentences on other counts.[20]

The following reasons supported the habeas corpus petition presented to the New Mexico Supreme Court in *Pece*: (1) the petitioner was not represented by counsel at his preliminary hearing; (2) the petitioner was not represented by counsel at the time he made the inculpatory statements in Lubbock, and (3) the petitioner's confession was not properly determined to be voluntary by the

15. N.M. Stat. Ann. § 41-3-1 (Repl. 1964) provides:

> When the defendant is brought before the magistrate upon an arrest . . . the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and also his right to waive an examination [preliminary hearing] before any further proceedings are had.

The magistrate has no authority to appoint counsel for indigents. *But see* N.M. R. Civ. P. 92. See Comment, 4 Natural Resources J. 616, 617 nn.10, 11, 13; 624 n.54 (1965).

16. Record, Pece v. Cox, *supra* note 10.

17. Record, Pece v. Cox, *supra* note 9.

18. *Ibid.*

19. Record, Pece v. Cox, *supra* note 9. This is the Massachusetts procedure as opposed to the Wigmore or "orthodox" procedure of an independent determination by the trial judge with no determination by jury. Both procedures were approved in Jackson v. Denno, 378 U.S. 368 (1964). In *Jackson*, the Supreme Court held that a determination of voluntariness by jury alone was unconstitutional. The New Mexico or Massachusetts procedure has many of the same problems as the procedure condemned in *Jackson*. It is very difficult to determine whether the judge in New Mexico is using a weaker standard because he knows there will be a second determination by jury or whether he actually makes an *independent* determination as constitutionally required by *Jackson*. See Jackson v. Denno, *id.* at 436 (dissenting opinion, Harlan, J.).

20. Record, Pece v. Cox, *supra* note 9.

trial court.[21] The New Mexico Supreme Court by per curiam opinion *held*, Quashed.[22]

The New Mexico court rejected the position taken by the petitioner that the recent case of *Escobedo v. Illinois*[23] was dispositive of his petition. The court, instead, relied on the prejudice test of *Crooker v. California*,[24] that the admission of statements taken after a denial of counsel requires a reversal only if the defendant had been denied "fundamental fairness" and would not have been convicted in the absence of the statements. In so holding, *Pece v. Cox* is contrary to the spirit and principles set forth in *Escobedo v. Illinois*. The effect of *Escobedo* is that when an investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has an absolute and fundamental constitutional right to be represented by counsel at any interrogation.

In *Escobedo*, the defendant was arrested and taken to police headquarters for interrogation in connection with the fatal shooting of his brother-in-law. Escobedo made repeated requests to see his lawyer. His lawyer, though present in the building and demanding to see his client, was denied access to him. After persistent questioning and after being told that another suspect had implicated him in the crime, Escobedo made several inculpatory statements,[25] subsequently used at his trial. Escobedo was convicted of murder. The Supreme Court of Illinois affirmed,[26] but the United States Supreme Court reversed.[27] The Supreme Court ostensibly held that

> where . . . 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

21. Pece v. Cox, 74 N.M. 591, 396 P.2d 422 (1964).

22. *Ibid.* The court disposed of the issue of lack of counsel at the preliminary hearing by reference to Sanders v. Cox, 74 N.M. 525, 395 P.2d 353, *cert. denied*, 379 U.S. 978 (1964), 4 Natural Resources J. 616.

23. 378 U.S. 478 (1964).

24. 357 U.S. 433 (1958).

25. The statements consisted of an admission of complicity in the murder plot. Mr. Justice Goldberg noted that the defendant's ignorance of Illinois law and the effect of an admission of "mere" complicity was legally as damaging as admission of firing the shots. "The 'guiding hand of counsel' was essential to advise petitioner of his rights in this delicate situation." Escobedo v. Illinois, 378 U.S. 478, 486 (1964).

26. Illinois v. Escobedo, 28 Ill. 2d 41, 190 N.E.2d 825 (1963). It is interesting to note that the Illinois court in its original opinion of February 1, 1963, held the statement to be inadmissible and reversed the conviction on the basis that the statement was not voluntary.

27. Escobedo v. Illinois, 378 U.S. 478 (1964).

> process of interrogations 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 that no statement elicited by the police during the interrogation may be used against him at a criminal trial.[28] [Citation omitted.]

The New Mexico Supreme Court's interpretation of *Escobedo*, as set forth in *Pece v. Cox*, allows the court to "indulge in nice calculations as to the amount of prejudice arising" from a denial of counsel,[29] and to limit *Escobedo* strictly to its facts. Mr. Justice Goldberg, who wrote the majority opinion in *Escobedo*, does purport to limit his decision to the particular facts surrounding Escobedo's confession. However, a careful reading of *Escobedo* in light of other recent Supreme Court opinions[30] brings one to the conclusion that *Escobedo* goes far beyond what the New Mexico court held in *Pece v. Cox*.

Even the New Mexico court would not hold that the right to counsel would depend upon whether a lawyer was outside the interrogation room demanding access to his client. Nor would it be a rational limitation to predicate this right upon the fortuitous event that a defendant had anticipated arrest and retained counsel, or that a relative had retained counsel for him upon hearing of his arrest.

Another limitation present in the "limiting" facts of *Escobedo* is a request by the defendant to have counsel. It is hard to see how a constituitonal right can be dependent on a request. In *Escobedo* the Court said:

> We have also learned the companion lesson of history 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.[31]

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28. *Id.* at 490-91.

29. Pece v. Cox, 74 N.M. 591, 396 P.2d 422 (1964). The New Mexico court gave no basis for distinguishing *Escobedo*, except that they felt that Crooker v. California, 357 U.S. 433 (1958), was controlling. Because the defendant had been warned of his right to remain silent, and because the confession was voluntary, the New Mexico court probably felt these were the distinguishing factors. However, in *Escobedo*, it is *conceded* that the confession was voluntary, and there is strong evidence that the defendant Escobedo knew of his right to be silent. See text at note 38 *infra*.

30. See note 35 *infra*.

31. Escobedo v. Illinois, 378 U.S. 478, 490 (1964).

Such a limitation would deny the right expressed by *Escobedo* to the unwary, the vagrant, the slum dweller, and to the poverty-ridden Negroes, Mexicans, and other minority groups who need most the "guiding hand of counsel."[32] The hardened professional criminal would undoubtedly be aware of a technical necessity of request.[33]

Equally nebulous is the condition that police did not effectively warn the accused of his right to remain silent. *Escobedo* would be meaningless if, as one recent commentator has said, it requires the alternative of either (1) allowing the accused to see counsel, or (2) advising him of his right to remain silent.[34] The requirement to preface an interrogation with a warning of one's fifth amendment right to remain silent is basic and goes to the heart of a determination of voluntariness.[35] One of the major problems with the warning of the right to be silent, in lieu of the right to have counsel, is the insuperable burden of proof that the defendant would have in showing a warning was not made. The typical situation would have the defendant denying that he had been warned and the policeman testifying that the warning was given. A judicial determination, at best, would be a guess with the odds weighed against the defendant.

Construing *Escobedo* to hold that an effective warning to be silent is a substitute for the sixth amendment right to counsel is to say that the only function of counsel is to give the warning. The

32. Mr. Justice Traynor, concurring in People v. Garner, 57 Cal. 2d 135, 165, 367 P.2d 680, 698 (1961), also recognized the disadvantage inflicted upon an accused who is ignorant of legal process: "Giving an accused who has the means and foresight to retain an attorney (frequently the 'professional criminal') a right to counsel's presence during interrogation, would widen the gulf between the rights of a person with and one without counsel." Cited in People v. Dorado, 398 P.2d 361, 42 Cal. Rptr. 169, n.6 (1965). Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. Chi. L. Rev. 1, 23 (1962).

33. The United States Court of Appeals for the Third Circuit has ruled that the right to counsel is not dependent upon a request by the person interrogated. United States *ex rel.* Russo v. New Jersey, May 20, 1965. See also People v. Dorado, 398 P.2d 361, 42 Cal. Rptr. 169 (1965); State v. Neeley, 398 P.2d 482 (Ore. 1965); State v. Dufour, 206 A.2d 82 (R.I. 1965).

34. 5 Santa Clara Law. 75, 77 (1964).

35. In Haynes v. Washington, 373 U.S. 503, 511 (1963), the Court referred to the "right to remain silent." See also Culombe v. Connecticut, 367 U.S. 568, 631 (1961); Crooker v. California, 357 U.S. 433 (1958). In State v. Dufour, 206 A.2d 82, 85 (R.I. 1965), the Supreme Court of Rhode Island cited and followed People v. Dorado, 394 P.2d 952 (Cal. 1964) [opinion vacated and new opinion filed, 398 P.2d 361, 42 Cal. Rptr. 169 (1965)], holding that when a defendant has not requested counsel prior to making a confession, he "must not only have been advised of his right to assistance of counsel when requested but he must also have been warned of his right to remain silent." See also People v. Dorado, *supra*; People v. Neely, 398 P.2d 482 (Ore. 1965). ***But see*** cases cited note 6 *supra*.

right to counsel has far more value to an accused than to warn him of his rights. The presence of counsel provides a defendant with moral support, if nothing else, needed to withstand the pressures of confinement.[36] Counsel is needed for investigative purposes. Under existing state procedure, evidence is often destroyed or witnesses have disappeared before a lawyer has the opportunity to make an investigation. The lawyer can contact friends, arrange bail, and provide other services important to the protection of the defendant's rights.[37]

Furthermore, the facts of *Escobedo* strongly indicate that Escobedo knew—from gestures made to him by his lawyer while the door to the interrogation room was open—that he should not say anything.[38] This was not much of a warning, but it was as effective as a printed statement on a confession form or half-hearted advice by a policeman, either of which are often held to be sufficient. Therefore, one must conclude that Escobedo's confession was held inadmissible because it was taken following an interrogation in the absence of counsel, not because it was involuntary.

Other elements of the *Escobedo* opinion support the conclusion, not reached by the New Mexico court in *Pece v. Cox*, that an accused has the absolute right to counsel at interrogation. Examination of the footnote citations in *Escobedo* gives one an insight into the philosophy behind the principle stated in that case. The citation of the New Judges' Rules in England provides a clear indication that the court intended to abolish any distinction between post-indictment interrogation and pre-indictment interrogation.[39] The New

36. On the effect of the superego and the masochistic need for punishment compelling one to confess after a period of detention, see People v. Garner, 57 Cal. 2d 135, 164, 367 P.2d 680, 697 n.3 (1961). It is also evident that the people of the intelligence level that are likely to be abused are sometimes quite susceptible to suggestion. A lawyer is needed to protect them from themselves. See Koestler, Darkness at Noon (1948).

37. The value of counsel is limited only by counsel and what he would do in behalf of his client. It is not clear how much the lawyer would be *required* to do in behalf of his client. Seemingly, as a bare minimum, he is required to go to the police station when called and talk to his client. Additionally, he would probably be required to do anything that requires immediate action for the welfare of his client, such as arranging bail if the client can afford it.

The attorney can, of course, ethically refuse to accept employment unless appointed by the court. However, as the right to counsel shifts to the pre-indictment stage, some procedure for prompt appointment of counsel must be made. See note 15 *supra*.

38. Escobedo v. Illinois, 378 U.S. 478, 480 n.1 (1964).

39. *Id.* at 487 n.6:

> The English Judges' Rules also recognize that a functional rather than a formal test must be applied and that, under circumstances as those here, no special significance should be attached to formal indictment. The applicable Rule

Judges' Rules abolished the distinction between the time when a policeman in England has "reasonable grounds for suspecting" and the time when the policeman "makes up his mind to charge" the suspect, for purposes of the policeman's duty to caution the defendant of his rights.[40]

The reference in *Escobedo* to the American Bar Association's Canon 9 is another illustration of the general attitude of the Court in this area.[41] It would seem to follow that if it is unethical and possibly illegal for a prosecuting attorney to talk to a defendant without his counsel present, then surely the prosecuting attorney could not avoid the command of this canon by condoning police interrogation in absence of counsel.[42] This, taken with the fact that police advice by definition is poor advice, should lend considerable weight to the importance the Court has placed on the sixth amendment right to counsel.

The Court in *Escobedo* seems to be analogizing our present system to that of the Soviet Union by its reference to the Soviet system.[43] Both systems have been referred to as an "appeal from pretrial investigation." Prior to *Escobedo* and *Massiah*, the American system did not require a lawyer to be present at the pretrial interrogation.

Other footnotes to the *Escobedo* opinion indicate concern by the

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does not permit the police to question an accused, except in certain extremely limited situations not relevant here, at any time after the defendant 'has been charged *or informed that he may be prosecuted.*' Crim. L. Rev. 166-70 (1964). [Emphasis by the Court.]

40. 11 Crim. L. Rev. 166, 167 (1964): "It should be noted that the requirement of cautioning the defendant of his rights where there is reasonable grounds for suspecting in no way affects the persons right to consult privately with a solicitor."

41. Escobedo v. Illinois, 378 U.S. 478, 487, n.7 (1964), quoting from American Bar Association's Canons of Professional Ethics:

'A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.'

See Broeder, *supra* note 12, at 599-604, and note 12 *supra* generally.

42. See note 12 *supra*. The assumption that the canon 9 violation would also be a denial of due process is saying a great deal. This first thought on the subject might well serve as a warning to zealous prosecutors who may condone police advising the criminal accused of his legal alternatives.

43. Escobedo v. Illinois, 378 U.S. 478, 488 n.9 (1964):

The Soviet Criminal Code does not permit a lawyer to be present during the investigation. The Soviet trial has thus been aptly described as 'an appeal from the pretrial investigation.' Feifer, Justice in Moscow 86 (1964).

Supporting the American view is *In re* Groban, 352 U.S. 330, 344 (1957).

Escobedo Court about the possibility of coerced confessions.[44] A major cause for concern about the right of counsel at this early stage relates to the fifth amendment privilege against self-incrimination. If *Escobedo* is limited by a restrictive standard of the voluntariness-involuntariness test, as suggested by the New Mexico court, little would be added to existing safeguards of fifth amendment privileges.

At first impression, this may seem an unwarranted emphasis on footnote references. However, footnotes help illuminate what the Court is saying. A reading of the materials cited in *Escobedo* makes clear the Court's conclusion on the issue of the absolute right to counsel at interrogation. The fact that the Supreme Court has relied on commentaries of this nature has independent value in the interpretation of *Escobedo*; commentators with a more moderate view would have been cited if theirs had been the position the Court was taking. There can be little doubt that members of the majority in *Escobedo* knew the views advanced in the materials they relied upon; though not a formal part of the opinion, these citations give a good idea of the philosophy of the Court in this area.[45]

The dissent in *Escobedo* by Mr. Justice White suggests a possible intermediate position to the one taken here:

> At the very least the Court holds that once the accused becomes a suspect and, presumably, is arrested, any admission made to the police thereafter is inadmissible in evidence unless the accused has waived his right to counsel.[46]

This is a reasonable interpretation of the majority opinion. However, to hold that a defendant could waive his right to counsel at a time prior to arraignment considerably weakens the sixth amendment right to counsel. If the majority opinion is grounded in a concern about "third degree" practices used by police in obtaining confessions, then to place the *judicial* function of determining the existence of an "intelligent waiver" with the police defeats the end

44. Escobedo v. Illinois, 378 U.S. 478, nn.10-13 (1964).

45. The materials cited by the majority in *Escobedo* are uniformly of the view that the criminal defendant should be provided with counsel at the critical stage of his prosecution. These authorities feel, and a majority of the United States Supreme Court have now held, that the "critical stage" is reached when the police focus their attention on one suspect.

46. Escobedo v. Illinois, 378 U.S. 478, 495 (1964).

sought by requiring the presence of counsel at interrogation.[47] Stated bluntly, if a policeman would lie about the "flattery of hope" or the "impression of fear,"[48] he would lie about a defendant waiving his right to counsel. Exactly what an "intelligent waiver" means is not clear. It does seem that the standards for determining whether a defendant waived his right to counsel should be at least as strict as the waiver of any other fundamental constitutional right. Specifically, the waiver should only be allowed to be effective if made in the presence of a judicial officer, such as a magistrate.[49] The magistrate would have a very important responsibility to see that any waiver is made with full knowledge by the defendant of what his rights are. This might entail further questioning by the magistrate if it is not absolutely clear that the defendant fully understands his right and still does not want counsel.[50] It is quite clear in *Escobedo* that if the officers question a person before he has waived his right to counsel, or question him in the absence of counsel when he has not waived counsel, the results of the questioning should be inadmissible at trial.[51]

47. For a discussion of waiver of the right to have counsel, see Comment, 4 Natural Resources J. 616 (1965).

48. Bram v. United States, 168 U.S. 532, 547 (1897).

49. If the Court in Jackson v. Denno, 378 U.S. 368 (1964), was concerned about permitting a jury to determine the voluntariness of a confession, it would seem incongruous to place protection of an equally important constitutional safeguard—the right to counsel—in police officers. Other cases provide that a strong presumption arises against a waiver of a "fundamental right" and such determination should be by a judge. Fahy v. Connecticut, 375 U.S. 85 (1963); Carnley v. Cochran, 369 U.S. 506 (1962); Glasser v. United States, 315 U.S. 60 (1942); Aetna Ins. Co. v. Kennedy, 301 U.S. 389 (1937).

50. Johnson v. Zerbst, 304 U.S. 458 (1938).

51. It has been suggested that appointment of counsel at, or immediately before, the preliminary hearing is the earliest practicable time that it can be insisted upon under existing conditions. See Beaney, *The Right to Counsel: Past, Present, and Future*, 49 Va. L. Rev. 1150, 1158 (1963). Several years ago it was suggested that perhaps the Court would see the link between the right to prompt arraignment and the right to counsel as requirements under the fourteenth amendment. Yet another solution would overrule *Crooker* and require counsel during interrogation. Note, *Right to Counsel During Police Interrogation*, 16 Rutgers L. Rev. 573 (1962).

It is now submitted that a requirement of right to counsel during interrogation necessarily carries with it the incorporation of Rule 5, Federal Rules of Criminal Procedure, which says that "an officer . . . shall take the arrested person without unnecessary delay before the nearest available commissioner." See Broeder, *supra* note 12, at 564-94. A few constitutional problems arising from a failure to arraign promptly, as pointed out by Professor Broeder, include: (1) a deprivation of the right to bail as guaranteed by the eighth amendment and due process of law; (2) cruel and unusual punishment proscribed by the eighth amendment and due process of law; (3) violation of article I, §§ 9 and 10, prohibiting bills of attainder; (4) unconstitutional suspension of the writ of habeas corpus in violation of article I, § 9, and (5) failure to promptly

In rejecting the petitioner's argument under *Escobedo*, the New Mexico Supreme Court held that *Crooker v. California*[52] was controlling, and based its decision on the ground that Pece was not prejudiced. In *Crooker*, the defendant was a thirty-one year old college graduate who had attended one year of law school. After several hours of questioning, he confessed to killing his paramour. Crooker had not been advised of his right to remain silent, but he had requested counsel; this request was denied. The Supreme Court of the United States held that in the absence of a showing that the defendant's trial was lacking in basic fairness, a denial of counsel did not violate due process.

Crooker v. California is not controlling under the facts of *Pece v. Cox* for several reasons. First, the facts are different, and second, *Crooker* is not good law, in light of *Gideon, Escobedo*, and other recent decisions. Compared to Crooker's one year of law school, Pece had a third grade education. Crooker had an awareness of his right to counsel. Pece never indicated that he thought he had the right to appointed counsel if he desired it. Equally disturbing is the fact that it was impossible under procedure existing in New Mexico for the authorities to have *fully* advised Pece of his right to counsel. *Gideon v. Wainwright* was not then decided; and, unless the New Mexico police were far more sophisticated than most, they would not have known that the right to *appointed* counsel follows the sixth amendment guarantee of counsel whenever circumstances require it.

The other problem raised by reliance on *Crooker* is that the prejudice test is, and should be, ignored when a confession is involved. This "basic fairness," or prejudice, test relating to a denial of counsel was a product of the Supreme Court decision in *Betts v. Brady*.[53] The *Betts* case, of course, has now been overruled by *Gideon v. Wainwright*.[54] The *Gideon* decision made the sixth amendment

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arraign violators and arrested persons violates their due process right to prepare an adequate defense. Professor Broeder, *id.* at 570, also set forth an argument under *Wong Sun* that the right to prompt arraignment has been placed on a fourth amendment ground and is applicable to the states.

52. 357 U.S. 433 (1958).

53. 316 U.S. 455 (1942). *Betts* held that

> the 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 light of other considerations, fall short of such denial.

316 U.S. at 462.

54. 372 U.S. 335, 339 (1962).

guarantee of counsel obligatory on the states through the fourteenth amendment. In doing so, it abolished the test of "fundamental fairness" in considering the effect of a denial of counsel.

In light of the *Gideon* decision, the effect of *Escobedo* is to move the time that the right to counsel accrues back to the point of any interrogation of the accused.[55]

The decisions in *Hamilton v. Alabama*,[56] *White v. Maryland*,[57] and *Massiah v. United States*,[58] had already weakened the authority of *Crooker v. California*.[59] *Hamilton* held that when a defendant does not have counsel present at a preliminary hearing when that stage is critical in his criminal proceeding, the absence of counsel then constitutes a violation of his rights under the due process clause of the fourteenth amendment. The Supreme Court in *Hamilton* said:

> When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted. . . . In this case . . . the degree of prejudice can never be known. Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently.[60] [Citations omitted.]

White v. Maryland reiterates the holding in *Hamilton v. Alabama*.

Chief Justice Kenison said in his dissent to the New Hampshire court's reliance on the test of prejudice:

> It is difficult to see how the secret detention and denial of counsel during lengthy interrogation can be approved if the right to counsel demanded by *Gideon v. Wainwright* and *White v. Maryland* is to be meaningful and effective. . . .[61] [Citations omitted.]

55. While it may not be clear regarding the absolute right to counsel, it is clear that an interrogation cannot be undertaken in the absence of counsel if counsel has been retained.

56. 368 U.S. 52 (1961).

57. 373 U.S. 59 (1963).

58. 377 U.S. 201 (1964).

59. 357 U.S. 433 (1958).

60. Hamilton v. Alabama, 368 U.S. 52, 55 (1962).

61. State v. Nelson, 105 N.H. 184, 196 A.2d 52, 60 (1963). The court in *Nelson, supra*, noted that Professor Sutherland, a perceptive commentator on constitutional law, had described the inconsistency between the *Crooker-Cicenia* prejudice doctrine and the rationale of *White v. Maryland*: "Time seems to be running against *Crooker* and *Cicenia*." Sutherland, Detention, Interrogation, and the Right to Counsel, Address Delivered to the Conference of Chief Justices, Aug. 15, 1963.

The dissent in *Massiah* likewise conceded the weakening effect of that decision on *Crooker*: "[U]ntil *now*, the Court has expressly rejected the argument that admissions are to be deemed voluntary if made outside the presence of council."[62]

Finally, the *Escobedo* opinion itself in no way limits the exclusion of the defendant's statements by the amount of prejudice he suffered. The Court in *Escobedo* was commanding in its holding, "that no statement elicited by the police during the interrogation may be used against him at a criminal trial."[63]

The Supreme Court has not hesitated to use the exclusionary rule and doctrine of automatic reversal in other areas. It is difficult to see why state courts have problems with the rule concerning right to counsel at interrogation. *Mapp v. Ohio* called for the exclusion of evidence obtained in an illegal search.[64] Coerced confessions have long been held to result in automatic reversal.[65] Likewise, the knowing use of perjured evidence has resulted in automatic reversals for many years.[66]

The Second Circuit Court of Appeals has correctly interpreted the impact of the *Gideon* decision on the *Crooker* test of prejudice:

> Before *Gideon*, it may have been possible to argue that the more egregious cases or prejudice could be rectified if pleas of guilty were reviewed for 'fundamental fairness.' But it is precisely this sort of elusive and unsatisfactory inquiry into the possibility of prejudice which *Gideon* sought to inter once and for all. Indeed, the overruling of *Betts* by *Gideon* seems grounded on two fundamental assumptions: that a criminal defendant compelled to act without the advice of counsel will always be disadvantaged thereby, and that the precise

62. Massiah v. United States, 377 U.S. 201, 210 (1964). (Emphasis added.)

63. Escobedo v. Illinois, 378 U.S. 478, 491 (1964).

64. Mapp v. Ohio, 367 U.S. 643 (1961).

65. Lynumn v. Illinois, 372 U.S. 528 (1963); Blackburn v. Alabama, 361 U.S. 199 (1960); Spano v. New York, 360 U.S. 315 (1959).

66. Mesarosh v. United States, 352 U.S. 1 (1956); Coggins v. O'Brien, 188 F.2d 130 (1st Cir. 1951).

Chief Justice Magruder of the First Circuit Court of Appeals, in *Coggins, supra*, made an eloquent statement concerning the use of tainted evidence:

> I take it that such constitutional claim is not to be defeated merely because there may have been other evidence, untainted, sufficient to warrant a conviction; that the burden is not on the petitioner to show a probability that in the jury's deliberations the perjured evidence tipped the scales in favor of conviction. If the prosecutor is not content to rely on the untainted evidence and chooses to 'button up' the case by the known use of perjured testimony, an ensuing conviction cannot stand, and there is no occasion to speculate upon what the jury would have done without the perjured testimony before it.

188 F.2d at 139.

> degree of that disadvantage can never be satisfactorily measured by an after-the-fact search for prejudice. . . . [T]here would seem no warrant for resurrecting a rule of law which has been so thoroughly discredited.[67]

Over twenty years ago the Supreme Court said: "The right to have counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. . . ."[68] How, then, could it be said, as it was in *Pece v. Cox*, that a denial of counsel at interrogation is not reversible error if not prejudicial?

The state courts, including New Mexico in *Pece v. Cox*, seem to base their refusal to adhere strictly to the requirements of *Escobedo* because of its supposedly adverse effect on law enforcement. There are several answers to this concern. Mr. Justice Goldberg provided the alternative in his opinion in *Escobedo*:

> 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 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.[69]

If the state courts do not agree with the United States Supreme Court, they should not attack its decisions by watering down their effectiveness; they should work for a new system. However, our system is not so bad. Mr. Justice Douglas has said that our system "by respecting the dignity of the least worthy citizen, raises the stature of all of us and builds an atmosphere of trust and confidence in government."[70]

Neither New Mexico nor any other state lacks the resources to create an effective system of criminal justice for all. Professor Beaney has made the intelligent suggestion that perhaps the most effective way to prevent judicial intervention in the future is to establish as soon as feasible criminal justice procedures that more than meet the *minimum* standards now imposed by the United States Supreme Court.[71]

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67. United States *ex rel.* Durocher v. LaVallee, 330 F.2d 303, 308-09 (2d Cir.), *cert. denied*, 377 U.S. 998 (1964), cited in Comment, 4 Natural Resources J. 616, 622 n.45 (1965).

68. Glasser v. United States, 315 U.S. 60, 70 (1942).

69. Escobedo v. Illinois, 378 U.S. 478, 490 (1964).

70. Stein v. New York, 346 U.S. 156 (1953) (Douglas, J., dissenting).

71. Beaney, *supra* note 51, at 1158.

As a final note on *Escobedo*, Professor Kamisar has said that the law will cease to grow when it fails to absorb new principles and slough off old ones; and further:

> 'If it is true as I think it is, that since changing the law is like making a change in the intricate part of an organized drama, you cannot change one part without other parts being affected in unexpected ways.' [Quoting Cohen, Reason and Nature 421 (2d ed. 1953).]
>
> A moment's reflection brings one to the fore of another truth: neither can you leave one part, at least a major part, unaltered without it affecting the other changing parts in unexpected ways. . . . Because this is so, the failure to advance on the right to counsel front seriously undermines the advances we have made in other sectors.[72]

Perhaps one could justify the New Mexico court's action concerning *Escobedo* in the sense that it prevents the severe handicap on law enforcement which would result in a liberal reading of that opinion. The answer is that a too restricted and limited reading of the decisions of the United States Supreme Court will harm, not help, law enforcement officers.[73] For a state supreme court to advise law enforcement officers that *Escobedo* has no great effect on existing procedure is not a help but a hindrance. Police relying on the typical state court interpretation of *Escobedo* will find that convictions based on confessions taken without counsel, or without an intelligent waiver of counsel, will fail upon examination by the United States Supreme Court. As a result, police work in that situation would come to naught.[74] The public would be better protected by avoiding unnecessary reversals, not promoting them.

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72. Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of the Accused*, 30 U. Chi. L. Rev. 1, 21 (1962).

73. People v. Dorado, 398 P.2d 361, 42 Cal. Rptr. 169, *cert. denied*, 381 U.S. 987 (1965).

74. *Ibid.*