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Constitutional Law -- Right to Retained Counsel at Time of Arrest

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Either reason, considered with the growing aversion[99] toward the *in rem* action, suggests that an injunctive procedure similar to that expressly approved in *Kingsley Books* and used as a standard in *Marcus* and *Quantity of Books* would be unused or unenforceable legislation. The present North Carolina substantive statute, however, provides an adequate basis for criminal prosecution and an acceptable charge to a jury, for in all of the cases since 1957 the majority has accepted the *Roth* doctrine as controlling. This leaves as the crucial question in such prosecution the issue of obscenity in fact, and *Jacobellis* indicates that this point can be settled with finality only by the Supreme Court of the United States.

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Constitutional Law—Right to Retained Counsel at Time of Arrest

Escobedo v. Illinois[1] presented once more to the Supreme Court the problem of when the right to counsel attaches. Defendant was brought to police headquarters after being implicated in a murder. At the time of his interrogation, he was not formally charged; but he "couldn't walk out the door."[2] When told that he had been

tive magazines, *Yes,* which the committee found objectionable, and *Playboy,* which it did not. The spokesman said:

> If you look at . . . [the one from *Yes*] you'll see—I don't know what kind of a grimace you would call that on her face . . . . It is such grimaces on the faces that would allow lustful desires to be aroused . . . . [But] the picture from Playboy . . . [is] respectable photography.

Ibid. The dilemma faced by the dealers might have been expressed by the chief of police of the county seat, *a member of the committee,* who had said "I don't know what's obscene. I'd hate to be the one deciding." *Id.,* Oct. 6, 1964, § B, p. 1, col. 1.

On the limited facts reported by the newspaper the case would appear to be similar to Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963), with the position of the committee equally indefensible. See notes 75 & 76 and accompanying text *supra.* But whatever the legality of the action taken, the case illustrates several important points: "obscenity" is a subjective matter difficult of definition, especially by committee; operators of local commercial outlets will resist attempts to control distribution; those operators will be supported in their resistance by financially strong publishers; the most effective control may lie in moral suasion aimed at the general public.

[99] See text accompanying notes 78-80 *supra.*

[1] 378 U.S. 478 (1964). For a discussion of the case before the Supreme Court decision, see Comment, 73 YALE L.J. 1000 (1964).

[2] 378 U.S. at 479.

accused, defendant requested to see his lawyer.[3] This request was denied. His attorney arrived at the police station, but was not allowed to speak with him even though the attorney reminded the refusing officer of an Illinois statute that allowed the attorney to consult with his client "except in cases of imminent danger of escape."[4] Defendant confessed to the crime after a four-hour period of interrogation during which he was never advised of the constitutional right to remain silent and never allowed to see his attorney despite repeated requests by him and the attorney that they be allowed to meet. At the trial, defendant's attorney argued that the confession should be excluded since it was obtained after a denial of counsel. This argument was rejected, the confession was allowed, and defendant was convicted. On appeal, the Illinois Supreme Court affirmed.[5] It stated that a denial of counsel *during interrogation* had not been recognized, in itself, as a denial of due process of law under the fourteenth amendment.[6] The court recognized that the state statute showed a legislative policy against isolating a person from his attorney, but found that the legislature did not intend to prevent a reasonable interrogation by the police.[7] The Supreme Court granted certiorari,[8] and reversed.[9] The Court stated that when a suspect has requested and been denied an opportunity to see his retained attorney during interrogation and has not been effectively warned of the right to remain silent, he has been denied due

[3] Escobedo had retained an attorney prior to this time. He had been arrested on the day of the death, ten days before, and interrogated. After making no statement, he was released on a state court writ of habeas corpus obtained by his attorney. *Ibid.*

[4] All public officers . . . or persons having the custody of any person committed, imprisoned or restrained of his liberty for any alleged cause whatever, shall, except in cases of imminent danger of escape, admit any practicing attorney at law of this state, whom such person . . . may desire to see or consult, to see and consult such person so imprisoned, alone and in private, at the jail or other place of custody . . . .

Ill. Laws 1849, p. 99, § 1, 2. Repealed as of Jan. 1, 1964, in Ill. Laws 1963, p. ——, § 126-1.

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

[6] *Id.* at 46, 190 N.E.2d at 828. The court added that Escobedo had a ten day period since a prior release in which to consult with his attorney, and that it appeared from the record what advice the defendant thought the attorney would have given since he testified that he saw the attorney make a motion with his head which he took to mean that he should remain silent. *Id.* at 51, 190 N.E.2d at 830.

[7] *Id.* at 52, 190 N.E.2d at 831.

[8] Escobedo v. Illinois, 375 U.S. 902 (1963).

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

process of law and no statement obtained by the police during this time may be used against him.[10]

The Supreme Court has been presented with few cases involving the right to *retain* counsel for representation during formal state proceedings.[11] The right to retain counsel and to appear with him in court has been said to be the "most certain conclusion which can be drawn . . . under the constitutional provisions regarding counsel in forty-seven states and the due process clause of the Virginia constitution."[12] It was formerly unclear, however, at what time before commencement of formal state trial proceedings the right to counsel attached. In order to determine if a defendant had been denied fourteenth amendment due process at any step in the proceedings before trial, the Court established the fundamental fairness rule.[13] Under this rule, the means of determining the necessity of counsel was through an appraisal of all the facts preceding the trial to see if the absence of counsel resulted in such prejudice to the defendant as to render the trial opposed to the fundamental principles of fairness.[14] If such prejudice did result, the evidence

[10] *Id.* at 490-91.

[11] In House v. Mayo, 324 U.S. 42, 46 (1945), where the petitioner was forced, over protest, to plead to a burglary charge by information without the aid of retained counsel, the Court said he was denied a fair trial. In Chandler v. Fretag, 348 U.S. 3 (1954), the Court said that to refuse a petitioner the opportunity to retain counsel, even though waived on a specific charge, after he learned that he would be tried as an habitual criminal, was a denial of due process.

[12] BEANEY, THE RIGHT TO COUNSEL 89 (1955).

[13] Lisenba v. California, 314 U.S. 219 (1941). Convicted of murdering his wife, the defendant argued that his confession was coerced through the lack of food and sleep and continued interrogation which constituted a denial of due process. He also argued that denial of counsel after the time of arrest was a denial of due process. He was allowed counsel the day after his arrest, but the attorney was not present at the time of the accused's incriminating statements. In affirming the conviction upon appeal, the absence of counsel was considered to be only one element of fundamental fairness.

[14] As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial. Such unfairness exists when a coerced confession is used as a means of obtaining a verdict of guilt.

Lisenba v. California, *supra* note 13, at 236-37. In the federal courts the denial of counsel is a direct violation of the sixth amendment and grounds for reversal. This applies to the indigent defendant in the non-capital cases as well as the capital proceeding. Johnson v. Zerbst, 304 U.S. 458 (1938). The question of when the right attaches has been clarified by two

obtained after a denial of counsel was excluded.[15]

The fundamental fairness rule, as it included the right to retained counsel, was closely surveyed by the Supreme Court in two 1958 cases[16] factually similar to *Escobedo*. Defendants confessed to crimes after periods of interrogation during which they were refused an opportunity to consult with counsel. The attorney in each case argued that the confession, even if voluntary, should have been excluded because of the denial of counsel during the interrogation. The majority of the Court rejected the contention of the petitioners that every denial of a request for counsel would be an infringement of due process without regard to the circumstances. In the first case, *Crooker v. California*,[17] the Court recognized the right to counsel before trial as one element of fundamental fairness. However, the Court said that to make it an undeniable right with exclusion of the confession as a penalty for infringement was too

federal decisions. In McNabb v. United States, 318 U.S. 332 (1943), the Court passed on a statute, Act of 1894, ch. 301, 28 Stat. 416, which imposed a duty upon the arresting officer to take the arrested, without delay, before the nearest U.S. commissioner or judicial officer for a hearing, bail or commitment. Exercising its supervisory power over the federal courts, the Court held that evidence obtained in violation of this law must be excluded. The rule was later affirmed in Mallory v. United States, 354 U.S. 449 (1957), interpreting the same provision in FED. R. CRIM. P. 5(a) along with FED. R. CRIM. P. 5(b), which provides that the commissioner shall inform the arrested of the complaint against him, of his right to *retain* counsel, and allow him a reasonable time to consult with counsel. Since the right attaches when taken before a magistrate and the defendant must be taken to a magistrate without delay, the right to *retained* counsel attaches very close to the time of arrest.

Appointed counsel, also a right under Johnson v. Zerbst, *supra*, is covered by FED. R. CRIM. P. 44. If the defendant appears at the arraignment without counsel, the court will assign counsel to represent him at every stage in the proceedings unless he waives counsel or can obtain his own. In order to correct any deficiency in the federal proceedings, as to appointed counsel, an amendment has been proposed to rule 5(b) requiring the commissioner to advise the indigent defendant of his right to appointed counsel at the time of the preliminary hearing. More important, a proposed amendment to rule 44 is designed to provide for the assignment of counsel for indigents at the earliest possible time without waiting until the defendant appears in court. COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS (Dec. 1962). For the full text, see 31 F.R.D. 665 (1963). For a discussion of the federal rules and the right to counsel in the federal courts, see Note, 39 IND. L.J. 134 (1963).

[15] *E.g.*, Spano v. New York, 360 U.S. 315 (1959); Payne v. Arkansas, 356 U.S. 560 (1958).

[16] Cicenia v. Lagay, 357 U.S. 504 (1958); Crooker v. California, 357 U.S. 433 (1958).

[17] 357 U.S. 433 (1958).

devastating since it would "effectively preclude police questioning—'fair as well as unfair'—until the accused was afforded opportunity to call his attorney."[18] That the right to counsel before trial was only an element of fundamental fairness was stated even stronger in *Cicenia v. Lagay*:[19] "Were this a federal prosecution we would have little difficulty in dealing with what occurred under our general supervisory power over the administration of justice in the federal courts . . . . But to hold that what happened here violated the Constitution of the United States is quite another matter."[20]

In *Escobedo,* without *expressly* overruling *Crooker* and *Cicenia,*[21] the Court has established a right to retain counsel at the time of arrest. As a result, the fundamental fairness rule has been abolished, and the policy of allowing police officials a reasonable period of interrogation before an accused is entitled to see his lawyer has been terminated.[22]

In finding a violation of the fourteenth amendment in *Escobedo,* the Court viewed two factors as controlling: (1) the suspect under-

[18] *Id.* at 441.

[19] 357 U.S. 504 (1958).

[20] *Id.* at 508-09.

[21] The Court said that in these two cases it rejected the right to see counsel during interrogation without regard to the circumstances, and that *Escobedo* differed in that the circumstances necessitated the advice of counsel. To the extent that *Cicenia* and *Crooker* were inconsistent with the principle in *Escobedo,* they were said not to be controlling. Escobedo v. Illinois, 378 U.S. 478, 492 (1964).

[22] Even though most of the cases are in the area of the right to counsel in the pre-indictment period, the Court was recently faced with a post-indictment question in Massiah v. United States, 377 U.S. 201 (1964). The defendant was indicted for a federal narcotics offense and released on bail after retaining counsel. Federal agents managed to eavesdrop on a conversation between the defendant and an informer by use of an electronic device placed in the informer's car. The Court reversed a conviction on the basis of the sixth amendment right to counsel even though the decision to exclude could have been based on the supervisory power of the Court in federal proceedings. The Court followed the principle, established in Powell v. Alabama, 287 U.S. 45 (1932), that the defendant is entitled to counsel during the most critical period of the proceedings and said that the period of consultation, investigation, and preparation was just as critical as the trial itself. The fact that the defendant was not in police custody made no difference to the Court. It was held that this principle, to be effective, must apply to any indirect interrogation as well as that in the jailhouse. As a result, it appears that federal agents are prohibited from eliciting a confession after the right to counsel attaches, regardless of custody. *Quaere,* will this rule be applied to the states through the fourteenth amendment? Justice Goldberg seems to think so. See Escobedo v. Illinois, 378 U.S. 478, 484-85 (1964). For a discussion of *Massiah* after the circuit court opinion, see 76 HARV. L. REV. 1300 (1963).

going interrogation had been denied his request to consult with his counsel; and (2) the police had not effectively warned him of the constitutional right to remain silent. These two factors must be closely considered in determining whether any limitations may be placed on the right to retained counsel at the time of arrest.

Would the failure of the accused to make an affirmative request for a lawyer constitute a waiver of the right? There is little importance in the failure to request counsel in the *federal* courts since the absence of such a request would be considered a waiver of the constitutional right only if made competently and intelligently.[23] In *Carnley v. Cochran*,[24] the question arose as to the application of the principles of waiver to state courts. When the record did not show that an indigent defendant had requested counsel,[25] the Florida Supreme Court either presumed that the defendant waived counsel or that the trial judge had made an offer of counsel which the petitioner had declined.[26] The Supreme Court stated that the validity of such presumptions was questionable because the only way the accused could have protected himself was to request counsel—"a formality upon which we have . . . said his right may not be made to depend."[27] The Court then said that the federal principles were "equally applicable to asserted waivers of the right to counsel in state criminal proceedings."[28] Since *Escobedo* establishes a constitutional right to retained counsel at the time of arrest, and since a defendant can make a competent waiver only if he knows of his right, it follows that the police must advise him that he is entitled to consult with his attorney. For the same reason, a mere warning of the right to remain silent would not be sufficient to entitle police officials to a period of interrogation before a person in custody is allowed to speak with his attorney. Also, any failure by a defend-

[23] Johnson v. Zerbst, 304 U.S. 458, 469 (1938). In federal proceedings the Court has stated that the sixth amendment is designed to protect those who have no knowledge of the law, *id.* at 465, and that we do not presume acquiesence in the loss of fundamental rights, *id.* at 464.

[24] 369 U.S. 506 (1962).

[25] See note 27 *infra*.

[26] The Court said that it was not clear what the Florida court had presumed. 369 U.S. at 513-14.

[27] *Id.* at 514. The Court went further to say that a plea of guilty would raise only a question of fact as to whether there had been a competent and intelligent waiver. For a discussion of the problems of waiver and the implications of a guilty plea before this decision, see Comment, 31 U. CHI. L. REV. 591 (1964).

[28] 369 U.S. at 515.

ant to take advantage of his right after being informed of it must be viewed in light of the requirement that a waiver be competent and intelligent.[29]

While *Escobedo* clears up the problem of when the right to retained counsel attaches in the state pre-trial proceedings, it says nothing about the problem the Court now has to face: should the right to *appointed* counsel attach at the time of arrest for indigent defendants?

The effect of the denial of appointed counsel during state criminal proceedings was first squarely decided by the Supreme Court in the *Scottsboro Cases.*[30] The denial of appointed counsel *at or near the time of trial* for one's life was held to be a violation of the fundamental principles of justice. Later, the Court decided that the fundamental principles of justice did not require the appointment of counsel in every case.[31] In non-capital criminal proceedings, it was decided that due process required state appointed counsel only where special circumstances such as age, [32] mentality,[33] or experience[34] necessitated the advice of counsel for a fair trial. As a result, the absolute right to counsel was restricted to trials for capital offenses, leaving the right unclearly defined in other cases.

The absolute right to counsel in capital proceedings was expanded in 1961 when it was decided that the right attached at the time of arraignment instead of trial.[35] In 1963, attachment of the right to appointed counsel in capital cases was advanced to the time of the preliminary hearing.[36] The rationale in both cases was that after a person pleads to a capital charge, the Court will not look to see if the lack of counsel resulted in prejudice to the defendant.[37]

[29] There may be cases in which the law of a state is not settled and the advice of counsel could prevent a confession or plea to the wrong crime. See, *e.g.*, Carnley v. Cochran, 369 U.S. 506, 507-08 (1962).

[30] Powell v. Alabama, 287 U.S. 45 (1932). "[T]he intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceedings against him." *Id.* at 69. For a full discussion of this case, see 31 NEB. L. REV. 15, 16 (1952).

[31] Betts v. Brady, 136 U.S. 455 (1942).

[32] *E.g.*, Gallegos v. Colorado, 370 U.S. 49 (1962); Haley v. Ohio, 332 U.S. 596 (1948).

[33] *E.g.*, Reck v. Pate, 367 U.S. 433 (1961).

[34] *E.g.*, Lynumn v. Illinois, 372 U.S. 528 (1963); Crooker v. California, 357 U.S. 433 (1958).

[35] Hamilton v. Alabama, 368 U.S. 52 (1961).

[36] White v. Maryland, 373 U.S. 59 (1963).

[37] Prejudice was necessary for a violation of fundamental fairness, the

Each time the attachment of the right was advanced, the Court said that the stage at which the right attached was a critical stage in the proceedings where rights could be won or lost.

The last step taken by the Court with respect to appointed counsel was the decision in *Gideon v. Wainwright*,[38] where it was held that an indigent defendant was entitled to appointed counsel at the time of trial for a non-capital felony. The requirement of special circumstances, formally used for determining the necessity of counsel in such cases,[39] was abolished in felony cases, thus making the right to counsel *absolute* in all capital and felony cases *at the time of trial*.[40]

With the distinction between the two types of crimes no longer present at the trial stage, it would seem that any advisory safeguards provided in the capital case should be extended to the non-capital situation. If the right to life *and* liberty are equal fundamental human rights, and it now appears that they are,[41] it follows that the absolute right to counsel at the time of the preliminary hearing that now attaches in the proceedings for one's life should be extended to like proceedings for one's liberty. Likewise, to carry this reasoning to the logical extreme, it would seem that any right to retained counsel at the time of arrest should be extended to include a right to appointed counsel at the time of arrest, whether the defendant is to be tried for his *life* or *liberty*. Lending support to this latter conclusion are two considerations: (1) that the time of arrest was considered in *Escobedo* as critical, *i.e.*, a time when rights can be won or lost;[42] and (2) that the exercise of constitutional rights does not seem to depend on the degree of one's wealth or ability to

standard which formerly governed the necessity of counsel during the pretrial period. See notes 13-15 *supra* and accompanying text.

[38] 372 U.S. 335 (1963). For a discussion of this case, see Comment, 39 NOTRE DAME LAW. 150 (1964); Comment, 73 YALE L.J. 1000, 1006 (1964).

[39] See note 31 *supra* and accompanying text.

[40] Another view is that *Gideon* has abolished the special circumstances rule in all cases, giving an absolute right to counsel even in misdemeanor cases. "The case supports the proposition that the test for the right to counsel is not the severity of the penalty but the *need* for legal assistance." Comment, 39 NOTRE DAME LAW. 150, 157-58 (1964).

[41] Gideon v. Wainwright, 372 U.S. 335, 349 (1963).

[42] Escobedo v. Illinois, 378 U.S. 478, 486 (1964). "What happened at this interrogation could certainly 'affect the whole trial,' . . . since rights 'may be irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic proposes.'" *Ibid.* (Citation omitted.)

pay.[43] Such a conclusion, though perhaps constitutionally sound, would present grave problems of application to the states, possibly leading to the necessity of a public defender system in each state in order to comply with due process.[44]

An immediate problem with which the courts must contend is the retrospective application of the *Escobedo* case.[45] Even though decisions are usually applied retroactively with no discussion,[46] there are strong arguments to the effect that the Court has the power to define the scope and limits of a new decision and should do so. Mr. Justice Frankfurter has urged that a new requirement of due process does not necessarily have to be applied retrospectively in blind obediance to Blackstone's theory that a newly announced decision is presently and always has been the law.[47] Instead, he contented that the overruled decision should be considered as sound law up to the time overruled and that the question of retrospective or prospective application of the new rule should be determined by the Court after considering administrative expediency.[48]

An analagous situation was presented by *Gideon v. Wainwright,*[49] where the question of the retroactivity of the newly announced requirement of appointed counsel in state, non-capital trials remained unanswered. Later, because of denial of counsel at trial, the Court vacated ten non-capital, pre-*Gideon* convictions in a memorandum decision[50] and remanded the cases to the Florida courts for consideration under the new rule. Mr. Justice Harlan dissented, and without expressing an opinion as to the result that

[43] Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[44] For a detailed discussion of appointed counsel and this solution for problems arising in the state, see 38 IND. L.J. 623, 632 (1963).

[45] Retroactivity will not be discussed in detail in this note. For a complete discussion, see Comment, 71 YALE L.J. 907 (1962).

[46] See, *e.g.,* Eskridge v. Washington State Bd. of Prison Terms, 357 U.S. 214 (1958). The Court applied the due process requirement of free transcripts for the appeals of indigent defendants, a requirement announced in 1956 in Griffin v. Illinois, 351 U.S. 12 (1956), to the denial of a transcript to a man convicted in 1936.

[47] Griffin v. Illinois, 351 U.S. 12, 26 (1956) (concurring opinion). Blackstone's theory that decisions are only evidence of the law and not sources of the law is fully discussed in GRAY, THE NATURE AND SOURCES OF THE LAW 219-22 (2d ed. 1921).

[48] Justice Frankfurter advocated that such considerations would enable the Court to reverse the old law as to the defendant before the Court without applying the new decision to *anyone* convicted prior to the date of the decision. Griffin v. Illinois, *supra* note 47, at 26 (concurring opinion).

[49] 372 U.S. 335 (1963).

[50] Pickelsimer v. Wainwright, 375 U.S. 2 (1963).

should be reached,[51] said that the retroactivity of *Gideon* should be decided.

The retrospective aspect of the *Gideon* decision was discussed at last by the Second Circuit Court of Appeals when it decided that *Gideon* could be invoked in a habeas corpus proceeding by one who was convicted before Gideon was even indicted.[52] The court said that the question of retroactivity had been settled in the memorandum reversal of *Doughty v. Maxwell*,[53] where the defendant was also convicted before Gideon's indictment. The petitioner in *Doughty* had pleaded guilty to rape in 1959 without requesting to see an attorney. He petitioned the Ohio courts for habeas corpus before *Gideon* was decided, and the petition was rejected on the ground that counsel had been waived.[54] The petition for certiorari was received by the Supreme Court after *Gideon*. The Ohio court was reversed and the case remanded in light of both *Gideon* and *Carnley v. Cochran*.[55] In addition, the court of appeals said that even if the Court had decided to apply *Gideon* prospectively, it was retroactive at least as to Gideon himself because he was to receive a new trial. Therefore, said the court of appeals, the decision must be said to be retroactive to the time of Gideon's conviction and must apply to anyone denied counsel under similar circumstances since that time in order to provide equal protection of the law.[56] The latter reasoning also applies to the *Escobedo* situation. That is, if it is within the power of the courts to determine a holding to be prospective only, and a court so holds,[57] *Escobedo* must be applied

[51] *Id.* at 2. In stating that the Court did not have to apply a rule retrospectively simply because changes in constitutional principles had been so applied in the past, Justice Harlan completely agrees with the view of Justice Frankfurter that the Court does have some control over the future scope and application of a new decision. See note 47 *supra* and accompanying text.

[52] United States *ex rel.* Durocher v. LaVallee, 330 F.2d 303 (2d. Cir. 1964).

[53] 376 U.S. 202 (1963).

[54] Doughty v. Sacks, 173 Ohio St. 407, 183 N.E.2d 368 (1962).

[55] 369 U.S. 506 (1962). See notes 23-29 *supra* and accompanying text. The case was first remanded by the Court in light of *Gideon* in Doughty v. Maxwell, 372 U.S. 781 (1963). The Ohio court upheld the conviction on the basis of waiver and when the case came to the Court for a second time, the Court remanded it in light of *Gideon* and *Carnley*. Doughty v. Maxwell, 376 U.S. 202 (1963).

[56] United States *ex rel.* Durocher v. LaVallee, 330 F.2d 303, 310 n.4 (1964).

[57] It must be remembered that, so far, the Court has not made any such determination. See note 46 *supra* and accompanying text.

from the date of Escobedo's arrest, not just from the date of the decision, in order to provide equal protection of the law to those denied counsel since the time of his arrest under similar circumstances.

Since the question of retroactivity was not before the Court in *Escobedo,* and the Court did not take it upon itself to answer the question,[58] the lower federal courts will perhaps have to determine its application to prior convictions through petitions for habeas corpus. If it is decided that a change in due process requirements need not be applied retroactively, one of the main considerations in reaching a decision will be the opinion of the court as to the purpose of the *Escobedo* decision.[59] Was the purpose of the decision only to deter police from denying counsel at this stage of the proceedings, or was it to prevent convictions based on unreliable evidence which was admissible under the rule of fundamental fairness? If the court finds that the decision was simply to extend the right to counsel, it must then be decided if granting trials to those now imprisoned is necessary to deter any future violation. It appears that the old policy of allowing the police a reasonable period of interrogation before the suspect is permitted to see counsel has not resulted in unreliable convictions,[60] and that the Supreme Court's purpose was just to set a definite stage before trial when the right to counsel attached. If this reasoning prevails, it does not seem that granting new trials to those now imprisoned would be necessary to deter future violations of the right by the police. The exclusion of evidence obtained after a denial of counsel is sufficient to discourage any possible violators of the right.

Finally, it should be noted that a statute[61] similar to that in

[58] Compare Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954). Here the court made a change in the rule for determining sanity and expressly decided that the decision was for prospective application. *Id.* at 874.

[59] This same analogy was discussed in Comment, 71 YALE L.J. 907, 942 (1962), as to the retroactive application of the exclusionary rule in Mapp v. Ohio, 367 U.S. 643 (1961). See also 110 U. PA. L. REV. 650 (1962).

[60] If there was prejudice to the defendant there was an automatic reversal of a conviction under the rule of fundamental fairness which was the test for determining the need for counsel at this stage in the proceedings. See cases cited in note 15 *supra.*

[61] N.C. GEN. STAT. § 15-47 (Supp. 1963), which provides:

> Upon the arrest, detention, or deprivation of the liberties of any person by an officer in this State, with or without a warrant, . . . it shall be the duty of the officer making the arrest . . . to permit the person so arrested to communicate with counsel and friends im-

Escobedo has been the basis for a reversal of convictions by the North Carolina Supreme Court.[62] Three defendants were arrested, placed in separate jails, and not allowed to contact anyone, including each other. Even though the court stated no flat rule, it said, in construing the statute, that "rights of communication go with the man into the jail, and reasonable opportunity to exercise them must be afforded by the restraining authorities."[63] This language implies that the *Escobedo* decision will not necessitate a great change, if any, in North Carolina practices with respect to retained counsel. However, as pointed out elsewhere,[64] the North Carolina system of providing *appointed* counsel before trial may be inadequate for insuring the guidance of counsel at a sufficiently early stage in the proceedings. The statute dealing with appointed counsel now provides that the judge shall advise the indigent defendant in felony cases that he is entitled to appointed counsel "before he is required to plead."[65] The inadequacy of this statute in providing for appointed counsel in North Carolina is illustrated in the preliminary hearing procedure. Under the statutory provision for preliminary hearings,[66] a defendant is not required to plead at the hearing; therefore, the judge is not required to appoint counsel for him at this time.[67] But, as previously noted, the Supreme Court held in 1963[68] that the right to appointed counsel in *capital proceedings* attached at the time of the preliminary hearing; it is likely that the holding will be expanded to give the same right in felony cases as well.[69] Thus, the North Carolina General Assembly is presented with the immediate problem of appointment of counsel at

mediately, and the right of such persons to communicate with counsel and friends shall not be denied.

[62] State v. Wheeler, 249 N.C. 187, 105 S.E.2d 615 (1958). For other cases which have been decided in light of the statutes in other states, see 38 N.C.L. REV. 630 (1960).

[63] State v. Wheeler, *supra* note 62, at 192, 105 S.E.2d at 620.

[64] Watts, *Indigent Defendants and Criminal Justice*, 42 N.C.L. REV. 322, 337 (1964).

[65] N.C. GEN. STAT. § 15-4.1 (Supp. 1963).

[66] N.C. GEN. STAT. § 15-89 (1953).

[67] The defendant is entitled to counsel at this time under N.C. GEN. STAT. § 15-87 (1953), the pertinent part of which reads, "the defendant shall be allowed a reasonable time before the hearing begins in which to send for and advise with counsel." However, in looking at the language used, it is clear that this provision pertains only to *retained* counsel.

[68] White v. Maryland, 373 U.S. 59 (1963).

[69] See note 41 *supra* and accompanying text.

this stage in the proceedings.[70] In addition, the legislature is faced with the problem of deciding whether to provide for appointed counsel at the time of arrest.[71] Even if no immediate statutory action is taken, preparation should be made for the possibility of such a requirement through future Supreme Court decisions.

ROY H. MICHAUX, JR.

Constitutional Law—State Taxation of Interstate Commerce

The State of Washington imposed a tax upon the privilege of a foreign corporation's doing business in that state,[1] the tax being measured by the corporation's gross receipts from sales of motor vehicles, parts, and accessories to independent retail dealers in Washington. The taxpayer, General Motors, protested[2] the tax on the grounds that it constituted a levy upon the privilege of engaging in interstate business and thus was repugnant to both the due process and commerce clauses of the Constitution. Concluding that "the tax is levied on the incidents of a substantial local business,"[3] the Supreme Court of the United States sustained the tax.

As typifies such a corporate giant in this modern era, the sales organization maintained by General Motors is complex.[4] For pres-

[70] For a discussion of the amendments proposed in the federal rules to provide for appointed counsel before the defendant ever sees the judge, see note 14 *supra.*

[71] See notes 42 & 43 *supra* and accompanying text for the proposition that appointed counsel should be provided at the time of arrest in all felony cases.

[1] REV. CODE WASH. 82.04.270 (1962).

[2] The Supreme Court of Washington sustained the tax. General Motors Corp. v. Washington, 60 Wash.2d 862, 376 P.2d 843 (1962).

[3] General Motors Corp. v. Washington, 377 U.S. 436, 439 (1964).

[4] Chevrolet, Pontiac, Oldsmobile, and General Motors Parts are all substantially independent "divisions" of the corporation. For sales and administrative purposes, each "division" is geographically divided into "zones" which in turn are further sub-divided into "districts." During the period in question, all "divisions" except General Motors Parts maintained formal "zone" offices in Portland, Oregon. In Seattle, Washington, was situated a warehouse operated by the Parts Division and a "branch" office under the Chevrolet "zone" headquarters. There were no offices at the "district" level, and the "district managers" operated largely out of their homes under the jurisdiction of the Portland office. Their primary functions were to oversee the dealer organization and to otherwise work with and advise the dealers in the promotion of sales. It should be noted that these "district managers" had no authority to accept orders from the dealers; this was a function performed at the "zone" level. Note also the fact that executive personnel from the Portland office visited each dealer in the "zone" regular-