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Constitutional Law--Right to Counsel

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relieve the actor of liability, except where that force is the intentionally tortious or criminal act of a third person.⁸

According to comment b of Sec. 442B, it is immaterial to the actor's liability that the harm is brought about in a manner which no one in his position could possibly have been expected to foresee or anticipate. The Restatement rule, if adopted by the court, would give trial courts and lawyers a more concrete standard to work with in dealing with cases involving intervening cause. The rule would lend itself to a more consistent application than the present Kentucky rule. Finally, it would force citizens to become more cognizant of the dangers and traps which they, through their negligence, lay for an ever increasing number of people likely to come into contact with them.

If, however, the court considers the tentative Restatement rule too harsh, it should at least widen the gap between those acts which it considers to be foreseeable and those which it considers to be unforeseeable and hold only those truly extraordinary acts to be superseding causes.

Robert J. Greene

CONSTITUTIONAL LAW—RIGHT TO COUNSEL.—Danny Escobedo, a twenty-two-year-old was arrested and taken to police headquarters for interrogation in connection with a fatal shooting. Escobedo made several requests to see his lawyer which were denied even though the lawyer was present in the building. The accused was not advised by the police of his right to remain silent and, after persistent questioning by the police, made a damaging statement which was admitted at the trial. The state's highest court saw the confession as voluntary, and sustained the conviction.¹ *Held*: Reversed.

Where . . . 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 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. *Eccobedo v. Illinois*, 378 U.S. 478 (1964).

The question is when the right to counsel begins. *Escobedo* provides that it attaches when the police investigation has begun to

⁸ RESTATEMENT (SECOND), TORTS § 442B (Tent. Draft No. 9, 1963).

¹ *People v. Escobedo*, 28 Ill. 2d 41, 190 N.E.2d 825 (1963).

"focus" on a particular suspect. Although the decision is anchored upon the right to counsel, it inherently involves the privilege against self-incrimination, since the primary aim of the police interrogation is to obtain a confession or implicating statement from the accused. *Escobedo* makes it clear that in a pretrial police interrogation the accused has a right to remain silent, which he must competently and intelligently waive before any self-incriminating statements will be admissible at the trial. "At the very least the Court held that where the accused has not been effectively warned of his right to remain silent, he is entitled to counsel to enforce that right if he has retained and requested counsel."² But neither retention of nor request for counsel seems essential, for in other situations the right to counsel, once established, has not depended upon these factors.³

The Court emphasizes that the period of interrogation even before an indictment may be so critical as to require the presence of counsel. The Court reasons that no meaningful distinction can be drawn between interrogation of an accused before and after formal indictment.⁴ When *Escobedo* was denied the opportunity to consult with his attorney, his status changed from suspect to accused, and the purpose of the interrogation changed from an investigation of an unsolved crime to the elicitation of a confession. *Escobedo* had, for all practical purposes, already been charged with murder.⁵ Thus, the Court held that when the process shifts from investigatory to accusatory, that is, when it focuses on the accused and its purpose is to elicit a confession, our adversary system begins to operate, and the accused must be permitted to consult with his lawyer.⁶ Anything less might deny a defendant "effective representation at the only stage when legal aid and advice would help him."⁷

The key to *Escobedo* is the realization that the decision aims at pretrial abuses of police power, with the purpose of preserving the trial itself in the adversary context of our legal system. In holding that the right to counsel attaches when the process changes from investigatory to accusatory, the Court recognized that the coercive power of the state may confront the suspect prior to the initiation of

² Kurland, *The Supreme Court, 1963 Term*, 78 Harv. L. Rev. 143, 219 (1964).

³ *Escobedo v. Illinois*, 378 U.S. 478, 495 (1964), (White J., dissenting); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Lee v. United States*, 322 F.2d 770 (5th Cir. 1963).

⁴ *Escobedo v. Illinois*, *supra* note 3, at 486; *Massiah v. United States*, 377 U.S. 201 (1964); *People v. Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628 (1963).

⁵ *Escobedo v. Illinois*, *supra* note 3, at 485-86.

⁶ *Id.* at 492.

⁷ *Massiah v. United States*, 377 U.S. 201, 204 (1964), quoting Douglas, J., concurring in *Spano v. New York*, 360 U.S. 315, 326 (1959).

formal judicial proceedings, and that the interrogation that follows upon arrest is a crucial stage in the attempt to establish guilt. In excluding incriminating statements obtained by the police as involuntary, the Court, in the past, has based involuntariness on physical or psychological pressures that overpower the accused's will to remain silent. The accused's ignorance of his right to remain silent and denial of counsel were merely relevant factors in that determination.⁸ But *Escobedo* stresses that a suspect physically within the power of interrogators is inevitably under coercive pressure unless he knows of his right to remain silent and has no fear that he will suffer if he asserts that right.

Once the investigation has ceased to be a general inquiry of an unsolved crime and has begun to focus on a particular suspect, the question arises as to exactly what right comes into play. Does the suspect have the right to consult with his attorney before resuming the interrogation, or the right to have the lawyer's continued presence from that point on? The decision indicates that the latter is the rule, for only by the presence of counsel can the rights of the accused be effectively protected. As long as the interrogation process is conducted in secrecy, without a transcript, and without an impartial observer, the accused may be unable to prove that he did not waive his privilege, but with counsel present, the police would not be as likely to violate the rights of the accused.

A significant aspect of *Escobedo* may be its effect in cutting into the state's "head start" in preparing its case. The state is represented by skilled investigators, whereas previously, the accused has been forced to stand alone at least until the interrogation period has ended. The right to counsel during pre-indictment interrogation in the absence of intelligent waiver, if made absolute by the Court, will be of special importance to the indigent defendant as it will afford him the early representation that will enable his counsel to face the prosecutor on more even terms. It should be obvious that only if the defense has an opportunity to prepare for trial substantially equal to that enjoyed by the prosecution can a criminal proceeding be considered fair in any realistic sense. This means that counsel must have access to the accused soon after arrest.⁹ Aside from the ability to advise the accused during the actual interrogation, this early contact

⁸ *Haynes v. Washington*, 373 U.S. 503, 516-17 (1963); *Culombe v. Connecticut*, 367 U.S. 568, 601-02 (1961).

⁹ See *Beane, Right to Counsel Before Arraignment*, 45 *Minn. L. Rev.* 771 (1961).

with the client may produce the names of potential witnesses, evidence, and other factors which might contribute to the defense.¹⁰

Escobedo appears to be contrary to the leading case in Kentucky on the right to counsel during pre-indictment interrogation. In *Bauer v. Commonwealth*,¹¹ the defendant, on advice of his counsel, reported to police headquarters after having learned he was sought by the police. He was questioned for several hours during which time his attorney was not allowed to see him. During the interrogation period, Bauer confessed. Convicted of murder, he appealed, in part on the ground that the Commonwealth's refusal to allow his counsel to be present during the interrogation invalidated any statement he had made. The court of appeals affirmed, basing its decision on *Cicenia v. LeGay* and *Crooker v. California*.¹² The *Bauer* case falls within the narrowest possible interpretation of *Escobedo*, and although the Court in *Escobedo* does not expressly overrule either *Cicenia* or *Crooker*,¹³ it does state that "to the extent that *Cicenia* or *Crooker* may be inconsistent with the principles announced today, they are not to be regarded as controlling."¹⁴

In the last analysis, *Escobedo* is a landmark decision in a trend of recent cases¹⁵ recognizing demands that the accused be represented by counsel at an early stage of the pretrial proceedings in order to afford protection of his right against self-incrimination. The decision raises many questions as to its scope and effect on criminal procedure. Will the right to counsel during interrogation be made absolute? Will it be extended to the time of arrest? Does the decision apply to misdemeanors? In reality, one can confidently say of *Escobedo* only that its meaning depends on how far and fast the Court is willing to use the opinion's potential for expansion.

Alex W. Rose

¹⁰ See Allison, *He Needs A Lawyer Now*, 42 J. Am. Jud. Soc'y 113 (1958); Right to Counsel During Police Interrogation, 16 Rutgers L. Rev. 573 (1962).

¹¹ 364 S.W.2d 655 (Ky. 1963).

¹² *Cicenia v. LaGay*, 357 U.S. 504 (1958). The case is factually similar to *Bauer*. *Cicenia* was charged with murder, surrendered on advice of his attorney, and during interrogation confessed. His lawyer was denied access to his client throughout the day. The Court held that *Cicenia* had no right to consult counsel during the police investigation. In *Crooker v. California*, 357 U.S. 504 (1958), petitioner complained that his confession was obtained after he had several times requested and been refused the services of an attorney. The Court affirmed the conviction emphasizing that *Crooker* was an educated man with some knowledge of criminal procedure, having completed one year of law study.

¹³ *Escobedo v. Illinois*, 378 U.S. at 491-92. The Court rather unsuccessfully attempts to distinguish them.

¹⁴ *Id.* at 492.

¹⁵ *Massiah v. United States*, 377 U.S. 201 (1964); *White v. Maryland*, 373 U.S. 59 (1963); *Hamilton v. Alabama*, 368 U.S. 52 (1961); *Spano v. New York*, 360 U.S. 315 (1959); *People v. Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628 (1963).