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Criminal Law: Right to Counsel During Interrogation in State Prosecutions

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CRIMINAL LAW: RIGHT TO COUNSEL DURING INTERROGATION IN STATE PROSECUTIONS

Escobedo v. State of Illinois, 84 Sup. Ct. 1758 (1964)

Petitioner was taken into custody between 8:00 and 9:00 p.m., January 30, 1960, for questioning concerning the murder of his brother-in-law. During the interrogation he repeatedly asked to see his attorney, with whom he had discussed the case a few days before. His attorney arrived at the police station at 10:30 p.m., but was refused permission to talk with petitioner, although he did motion to him through an open door not to say anything. Petitioner confessed at 11:30 p.m., which led to his conviction of murder by the Criminal Court of Cook County, Illinois. The Illinois Supreme Court affirmed,[1] finding the confession to be voluntary and therefore admissible as evidence. On certiorari to the United States Supreme Court, HELD, the confession, although voluntary, was inadmissible because petitioner was denied the right to assistance of counsel, which accrued to him when the investigation ceased to be a general inquiry and began to "focus"[2] on him. Judgment reversed, Justices Clark, Harlan, Stewart, and White dissenting.

The sixth amendment right to assistance of counsel during a criminal prosecution[3] applies to the states by virtue of the due process clause of the fourteenth amendment.[4] Until *Escobedo*, however, the Court had never held the term "criminal prosecution" to include any point in time prior to the filing of formal charges against the accused.[5] In *Crooker v. California*[6] and *Cicenia v. Lagay*,[7] decided together, the Court was called upon for the first time to decide whether denial of counsel during an interrogation held prior to formal charging was per se a violation of due process.[8] The defendant in *Crooker*, a thirty-one-year-old college graduate with one year of law school study, was arrested on suspicion of murder. During the fourteen hours of sporadic questioning between his arrest and confession, the defendant's repeated requests to contact an attorney were denied. In

1. People v. Escobedo, 28 Ill. 2d 41, 190 N.E.2d 825 (1963).
2. Escobedo v. Illinois, 84 Sup. Ct. 1758, 1765 (1964).
3. U.S. CONST. amend. VI.
4. Gideon v. Wainwright, 372 U.S. 335 (1963).
5. See, *e.g.*, Hamilton v. Alabama, 368 U.S. 52 (1961) (arraignment); Spano v. New York, 360 U.S. 315 (1959) (indictment).
6. 357 U.S. 433 (1958).
7. 357 U.S. 504 (1958).
8. The Court had previously held that denial of counsel during an interrogation occurring after police booking, but before indictment, was relevant only as one factor in determining whether a confession was coerced or made voluntarily. Lisenba v. California, 314 U.S. 219, 240 (1941).

Cicenia, the defendant had no legal training and both his requests to see his retained attorney and his attorney's requests to see him were refused during a twelve-and-one-half hour interrogation prior to his confession. The Supreme Court upheld both convictions, finding the confessions to be voluntary and therefore admissible. In each case the Court specifically held the denial of counsel involved did not violate the fourteenth amendment.

As emphasized by two of the dissents in *Escobedo*,[9] *Cicenia* logically appears to be directly controlling on the present case; the only distinction between the two is that the interrogation period was longer in *Cicenia*. The *Escobedo* majority, however, based its holding on *Massiah v. United States*,[10] which involved a federal narcotics violation in which the defendant was indicted, obtained a lawyer, and entered a formal plea of not guilty. Several days after the defendant was released on bail, federal narcotics agents obtained incriminating statements from him by concealing a microphone in a codefendant's car. The Supreme Court held the statements inadmissible, reasoning that the defendant was denied the right to counsel by this eavesdropping scheme. In fitting the present case within the *Massiah* holding, the majority ignored the fact that *Massiah* was a federal case and disposed of the distinction that the admissions were obtained *after* indictment in *Massiah*, but *before* formal charging or any type of judicial proceeding in *Escobedo* by saying, "that fact should make no difference."[11] *Crooker* was distinguished on the ground that the defendant knew his rights because of his one year of law study. The majority then stated that *Cicenia* adds nothing to *Crooker* and to the extent that either case "may be inconsistent with the principles announced today, they are not to be regarded as controlling."[12] Apparently, therefore, *Cicenia* is impliedly overruled and *Crooker* is limited to its facts.

Implicit in *Escobedo* is a distrust of law enforcement officials. This, of course, is not stated in the opinion, but it is emphasized by the dissents in *Crooker* and *Cicenia*, which with Mr. Justice Goldberg's additional vote became the majority position in *Escobedo*. The *Crooker* dissent states that the right to counsel during interrogation may be "necessary as a restraint on the coercive power of the police."[13] and that the "mischief and abuse of the third degree will continue as long as an accused can be denied the right to counsel"[14] during

9. 84 Sup. Ct. 1758, 1766 (1964) (Harlan and Stewart, J. J., dissenting).

10. 377 U.S. 201 (1964).

11. Escobedo v. Illinois, 84 Sup. Ct. 1758, 1762 (1964).

12. *Id.* at 1766.

13. Crooker v. California, 357 U.S. 433, 443 (1958) (Warren, C.J., Black, Brennan, and Douglas, J.J., dissenting).

14. *Id.* at 444.

interrogation. The *Escobedo* majority believes the voluntary-involuntary test, which depends upon proof of coercion, is simply not practicable. That is, in many cases it is impossible for a lone defendant to prove his confession was coerced. This also was indicated by the *Crooker* dissent: "The trial on the issue of coercion is seldom helpful. Law officers usually testify one way, the accused another. The citizen who has been the victim of these secret inquisitions has little chance to prove coercion."[15]

Basically, *Escobedo* involves an insolvable dilemma: on one hand is the need for protection of the individual against dishonest and overzealous law enforcement officers; on the other is the need for fair, effective interrogation as an instrument of efficient law enforcement. The importance of interrogation to law enforcement is difficult to measure, but a recent study indicates that it plays a significant role.[16] After the *McNabb-Mallory* rule[17] had curtailed the use of interrogation in the District of Columbia, the chief of police testified that interrogation was necessary for the solution of almost ninety per cent of the crimes in the District.[18] Many judges and writers argue that if counsel is present during police questioning, the number of confessions will decrease greatly and the number of unsolved crimes will increase significantly.[19] The contention is that any conscientious attorney will prevent his client from talking,[20] which will effectively

15. *Id.* at 443, 444.

16. The study included all adult felony arrests within a three-month period in two California cities. In city *A* (250,000-500,000) of the 399 persons arrested, 232 (58.1%) gave either confessions or admissions. Of the 262 who were charged, 198 (75.6%) gave either confessions or admissions. Of the 232 who made confessions or admissions, 38 (16.4%) made them when they had been in custody one hour or less; 100 (43%) within 8 hours; and 183 (79%) within 24 hours. In city *B* (100,000-250,000) of the 59 arrested, 52 (88.1%) gave either confessions or admissions. Of the 48 who were charged, 43 (89.6%) gave either confessions or admissions. Of the 52 who made confessions or admissions, 39 (75%) made them within one hour; 42 (80.8%) within 8 hours; and 48 (92.3%) within 24 hours. Barrett, *Police Practices and the Law—From Arrest To Release on Charge*, 50 CALIF. L. REV. 11, 43 (1962).

17. Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943).

18. *Hearing Before the Special Subcommittee To Study Decisions of the Supreme Court of the United States*, 85th Cong., 2d Sess., ser. 12, pt. 1, at 43 (1958).

19. See, *e.g.*, Culombe v. Connecticut, 367 U.S. 568, 571 (1961); Cicenia v. Lagay, 357 U.S. 504, 509 (1958); Crooker v. California, 357 U.S. 433, 441 (1958); Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring); People v. Harrington, 9 Misc. 2d 216, 219, 169 N.Y.S.2d 342, 345 (Queens County Ct. 1957); Commonwealth v. Agoston, 364 Pa. 464, 480, 72 A.2d 575, 583 (1950); Note, 12 DE PAUL L. REV. 115, 122 (1962); Note, 2 OKLA. L. REV. 337, 343 (1949).

20. "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring).

tie the hands of the police in many cases.[21] Those who agree point to work by psychiatrists and other authorities to show that guilty persons have a psychological compulsion to confess soon after arrest, whereas innocent persons have no such compulsion.[22] Some argue that to deny the police an opportunity to take valid confessions and to pick up valuable leads during fair interrogations is a high price to pay for whatever deterrent effect the presence of counsel might have on police abuses.[23]

The *Escobedo* majority, however, contends that these arguments merely lend support to their reasoning that the interrogation is a critical period during which the defendant should have the right to counsel.[24] They state that a system of law enforcement that relies upon confessions is less reliable than one that depends on extrinsic evidence independently secured through skillful investigation.[25] The majority sees a danger to individual freedom in a system of law enforcement that tends to rely upon accusatory rather than investigatory methods.[26]

Escobedo poses more questions than it answers. Of course, the most apparent one is: when does an investigation cease to be a general inquiry and begin to "focus" upon an individual? Suppose the police had three suspects in a murder case and all were vigorously interrogated at different times. One might say the investigation had "focused" upon each suspect during his particular interrogation. It could also be argued, however, that the investigation was still a general inquiry because it had not been narrowed to one person. *Escobedo* offers no guidelines to this question; consequently the practical effect of the decision upon existing interrogation practices cannot be measured accurately until "focus" is more clearly defined. It seems safe to predict, however, that *Escobedo* will restrict police interrogation to a significant degree.

One also wonders what effect the *Escobedo* rationale might have on the right to counsel in other types of state investigative proceedings. In *In re Groban*[27] the petitioners were imprisoned for refusing to testify, unless their lawyer could be present, at a closed investigative hearing conducted by the state fire marshall who believed that petitioners had committed a recent arson. The Supreme Court, with Mr. Chief Justice Warren and Justices Black, Brennan, and Douglas

21. 3 WIGMORE, EVIDENCE §851, at 319 (3d ed. 1940).

22. See the authorities collected by Traynor, J., concurring in People v. Garner, 367 P.2d 680, 697 (1961).

23. See Note, 12 DE PAUL L. REV. 115, 122 (1962).

24. 84 Sup. Ct. 1758, 1764 (1964).

25. *Ibid.*

26. See Escobedo v. Illinois, 84 Sup. Ct. 1758, 1766 (1964).

27. 352 U.S. 330 (1957).

dissenting, held that although there was a right against self-incrimination, the fourteenth amendment did not guarantee the right to counsel during such an investigation. The majority recognized a presumption of fair conduct and lack of coercion by the state authorities and held that even though a witness might make statements resulting in criminal proceedings against him, his right to counsel did not attach until the proceedings were formally initiated. By way of dictum the majority also said there was no right to counsel before other investigative bodies, including grand juries.[28] Notice that the four *In re Groban* dissenters also dissented in *Crooker* and that with Mr. Justice Goldberg's added vote they became the *Escobedo* majority. Thus it may be only a matter of time until the right to counsel is extended to various types of closed state investigations, because Mr. Justice Goldberg apparently agrees with the *In re Groban* dissent.

Another problem presented by *Escobedo* concerns the *Gideon v. Wainwright*[29] requirement that counsel be provided for all indigent defendants in state criminal prosecutions. Because *Escobedo* expands the definition of "criminal prosecution" to include interrogations that have "focused" on a suspect, the question arises whether *Gideon* requires the state to provide counsel for all indigents questioned during such interrogations. Although the answer is not readily apparent, it is unlikely that the courts, in light of the *Gideon* rationale, will hold that a suspect's right to counsel during interrogation depends on his ability to pay. Unfortunately, this problem comes at a time when many states are still unable to assure effective representation even at the trial. One further question arises: should *Escobedo* be applied retroactively, as *Gideon* has been in Florida?[30] If so, surely there are many inmates who would like to contest their convictions.

The *Escobedo* majority specifically limited its holding to those situations in which the suspect has requested and been refused the right to counsel. But if the person being questioned is unaware of his fourteenth amendment rights, which is often the case, the limitation may break down. The Supreme Court does not place a premium on ignorance of constitutional rights; indeed, the Court has repeatedly held that the protection afforded by the right to counsel is not lost unless the right is intelligently and understandingly waived.[31] The request-refusal limitation will initially provide a way for lower courts

28. *Id.* at 333.

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

30. See Roy v. Wainwright, 151 So. 2d 825 (1963). See generally Note, *Florida's Criminal Procedure Rule Number One*, 17 U. FLA. L. REV. 617 (1965).

31. *E.g.*, Gibbs v. Burke, 337 U.S. 773, 780 (1949); Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948); Rice v. Olson, 324 U.S. 786, 788 (1945).