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Constitutional Law--The Scope of the Escobedo Rule

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rule. The court also seemed well aware of the problems which it could be inviting through abandonment of the "place of wrong" rule. But the court stated that the fact that a new rule tended to increase litigation, or made the law more difficult to apply or more unpredictable, was not in itself sufficient reason to retain a rule which is unsound, unjust or inadequate.

Whatever may be the difficulties that lie ahead, a trend away from the "place of wrong" rule has been established. This does not necessarily mean that all American courts are quickly going to discard the old rule for the sake of something new. The law is slow to change even where there is urgent need for reform. There is not unanimity of opinion in the profession that a change is necessary, or even desirable. Sparks, *Babcock v. Johnson—a Practicing Attorney's Reflection upon the Opinion and Its Implications*, 31 INS. COUNSEL J. 428 (1964). It may very well be that experience will force some of the more venturesome courts to return to the sanctuary of the old rule. Certainly there are formidable problems ahead for those courts which choose this new approach to the choice of law. Some very anomalous results are sure to follow. It is a safe speculation that there will be much trial and error before a workable body of law evolves. Regardless of the outcome, the next few years are certain to be decisive ones in this field of conflict of laws.

Charles Edward Barnett

Constitutional Law—The Scope of the Escobedo Rule

D was taken to police headquarters where he was interrogated by officers who suspected he was in possession of obscene film. Approximately five hours after *D*'s original detention and at a time when he had not yet been advised that he was under arrest, *D* confessed. During this period *D* did not request counsel. The confession was subsequently used against *D* and he was found guilty of knowingly possessing obscene motion picture films for purpose of loan. *Held*, reversed and remanded. The chief judge, with whom one other judge agreed, held in his majority opinion that when a defendant is interrogated in an accusatory investigation while in the custody of police, he must be advised of his right to assistance of counsel as well as of his right to remain silent. The majority also justified the result on the basis of arrest without probable cause

and the use of illegal evidence which—like the confession—was fruit of the unlawful arrest. Two other judges concurred, but only because of what they considered improper procedure by the trial court regarding the question of voluntariness of the confession. They were of the opinion that the court was not called upon to determine whether a suspect who has not requested counsel is nevertheless entitled to advice by police regarding his right to counsel and of his right to remain silent. *State v. Dufour*, 206 A.2d 82 (R.I. 1965).

The landmark case of *Gideon v. Wainwright*, 372 U.S. 335 (1963), firmly established that if an indigent defendant demands counsel at trial time and is refused, his constitutional rights have been violated and he is entitled to a new trial. The decision stressed that the right of counsel is a fundamental right, essential to a fair trial. The right is applicable in a federal proceeding because of the sixth amendment and is made obligatory in a state proceeding by absorption through the due process clause of the fourteenth amendment. *Gideon*, however, left unanswered the gaping question of whether the right to counsel attaches only at trial time or at an earlier phase in the proceedings.

The Supreme Court of the United States faced precisely this issue in *Escobedo v. Illinois*, 378 U.S. 478 (1964). Prior to his confession, Danny Escobedo had conferred with counsel. When the interrogation became intensified, he made repeated requests to confer again with his counsel and his counsel did likewise. Their only communication came when Escobedo saw his attorney motion to him in the police station during the interrogation. The defendant, by his own admission, took this to impart renewed advice to maintain silence. Escobedo subsequently confessed without being permitted to talk with his attorney. Further, the officers failed to warn him of his right to remain silent.

The Court, in a five-four decision, held that Escobedo's constitutional rights had been violated. The sixth amendment assures the right to counsel from the beginning of the "prosecution," as distinguished from the "trial." Mr. Justice Goldberg, speaking for the majority, enunciated the rule that where an investigation has begun to focus upon a particular suspect, whose request for counsel has been denied and who has not received a warning as to his right to remain silent, that suspect has been deprived of his rights under

the sixth amendment. The Court thus expanded the constitutional role of legal counsel beyond the tradition functions and duties surrounding trial type proceedings. The ruling appears to make the adversary atmosphere of the courtroom a necessary ingredient of criminal investigation when the "focus is on the accused" with the "purpose to elicit a confession." Danny Escobedo was entitled to this adversary atmosphere as a matter of constitutional right. In effect, this converts the decision to confess into a tactical decision on the part of the defense. Enker and Elsen, *Counsel for the Suspect*, 49 MINN. L. REV. 47, 48 (1964). It is significant that Danny Escobedo's confession was inadmissible because it would be fundamentally unfair to admit it and not because police tactics might have rendered his admissions unreliable or untrustworthy.

The rationale of the principal case is based to a large extent on the rule in *Escobedo*. There was, however, no request by Dufour to confer with his attorney. Despite this difference, the Rhode Island court held that the right to counsel was absolute and that any rule necessitating a request for counsel is an "artificial requirement." The Rhode Island court cited a likewise liberal extension of the Escobedo rule in *People v. Dorado*, 394 P.2d 952 (Calif. 1964). In *Dorado*, the court held that when police officers failed to advise the accused of his right to remain silent or the right to consult with counsel, his subsequent confession would be inadmissible even though he had not made a formal request for counsel. In a re-hearing the California court stated in a four-three decision that the "constitutional right [to counsel] does not arise from the request for counsel but from the advent of the accusatory stage itself."

A privilege lurking just below the surface in cases of this nature merits mention. It must be remembered that an individual may knowingly waive his privilege against self-incrimination and his right to counsel either at the pretrial stage or at the trial. *Johnson v. Zerbst*, 304 U.S. 458 (1938). However, the theory behind the broad application of the *Escobedo* rule in the principal case is that if the suspect is unaware of his rights and does not request counsel, he should not be prejudiced by his ignorance. This interpretation finds further footing in *Carnley v. Cochran*, 369 U.S. 506 (1962), where Mr. Justice Brennan stated that "where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request."

A fact situation similar to those in *Dorado* and the principal case recently came before the Supreme Court of Oregon. Although skirting the issue of whether a request is a necessary requisite for right to counsel, the court interpreted the rule in *Escobedo* to mean that the state must affirmatively show a warning to the accused of his constitutional right to remain silent. *State v. Neely*, 395 P.2d 557 (Ore. 1964). The suspect is thus protected from an abdication, through unawareness, of his constitutional rights. The right protected by the Oregon court was the right to a warning concerning self-incrimination (fifth amendment), rather than a warning concerning effective representation by counsel at all stages of the criminal proceeding (sixth amendment). With this in mind, it is interesting to inspect the underlying basis for the *Escobedo* decision. Since Danny Escobedo interpreted the motions of his counsel as renewed advice to remain silent, it has been suggested that it is doubtful whether the failure of police to so advise him was central to the Court's decision. Enker and Elsen, *supra* at 60. The Court's concern with protecting an accused from coercion by police officers is obvious. In fact, the real vice in *Escobedo* seems to be the persistent and secluded questioning of the suspect.

While the decisions discussed to this point have stressed that the right to counsel accrues at some point before the actual trial, this policy has not been universally approved. Consequently, a number of state courts have refused to extend the rule in *Escobedo* as the Rhode Island court did in the principal case. The main argument against presence of counsel at this point in the proceedings is that it impedes what has traditionally been considered proper police questioning, as well as coercive tactics. It may very well result in the suppression of truth rather than its disclosure. This is because counsel, aware of the significance which an accused's admissions may have in building the prosecution's case, would normally tell his client to remain silent as a tactical decision. As a result, not only will coerced confessions be eliminated, but so will voluntary ones which will generally contain the truth. In essence, the accused's rights are increased, but at the expense of the search for truth.

One of the first cases to be decided contra to *Dufour* and *Dorado* and their liberal extensions of *Escobedo* was *People v. Hartgraves*, 202 N.E.2d 33 (Ill. 1964). The court stated that it did not "read the *Escobedo* case as requiring" the rejection of a voluntary con-

fession merely because the state did not caution the accused of his right to have an attorney and his right to remain silent before his admissions of guilt. Similarly, the Nevada court recently held that where the accused did not request counsel, the fact that he was not affirmatively warned of his attendant rights did not render his confession inadmissible. *Bean v. State*, 398 P.2d 251 (Nev. 1965). This court also pointed out that *Escobedo* was not controlling since it was necessarily limited to the facts in that particular case.

In *Commonwealth v. Patrick*, 206 A.2d 295 (Pa. 1965), a liberal extension of *Escobedo* was discarded in favor of the traditional test of voluntariness of the confession. The court stated that a "confession made during the interrogation by police, of *voluntarily made*, may be constitutionally admissible" (italicized in original) even though the accused was neither warned of his right to counsel nor his right to remain silent. The Pennsylvania court thereby applied a subjective test rather than an objective test, such as the prophylactic rule enunciated in *Dufour* and *Dorado*.

The West Virginia court may soon have an opportunity to determine the thrust of *Escobedo*. In *State v. Morris*, petition for writ of error and supersedeas filed, there is some question as to whether the defendant actually requested to consult with an attorney. Counsel for the defendant argues in his petition that the state, nevertheless, has an affirmative duty to advise the accused of his right to counsel and of his right against self-incrimination. However, counsel also relied on other grounds, including faulty arrest, search not incident to arrest, and denial of an immediate hearing.

Perhaps the full sweep of *Escobedo* will not be known until the Supreme Court of the United States passes on a case involving the "fruits of the poisonous tree" doctrine. The "focus" and "purpose" test promulgated in *Escobedo* would be greatly compounded if the Court were to hold that not only the admissions obtained but all leads developed from them were to be suppressed. Moreover, both the animate and inanimate "fruits" of an otherwise voluntary confession may become ipso facto inadmissible if the Court adopts the prophylactic rule in the principal case and holds that police officers must affirmatively advise an accused of his right to counsel and his right to remain silent.

The Supreme Court's concern with the constitutional rights of an accused in the back room of the police station is obviously legitimate. Roscoe Pound recognized in 1934 the problem caused by incommunicado grilling and suggested the solution achieved in *Escobedo* regarding right to counsel. He also submitted that there should be an express provision for a legal examination of suspected of accused persons before a magistrate as well as a provision for taking down evidence so as to guarantee accuracy. 24 J. CRIM. L. & C. 1014, 1017 (1934). If these safeguards are to be incorporated in police investigatory methods, they apparently will get there through judicial determination of constitutional rights of the accused. Whether *Dufour* is a proper extension of *Escobedo* and whether the right to counsel becomes operative only upon request are only two of many determinations which should be reached in delineating the proper balance between the accuser and the accused.

Lester Clay Hess, Jr.

Constitutional Law—Conscientious Objectors

Daniel Andrew Seeger, Arno Sascha Jakobson and Forrest Britt Peter were convicted of refusing to submit to induction into the armed forces as required by federal law. 50 U.S.C. § 456 (j) (1958). This law exempts from military service persons who by reason of religious training and belief are conscientiously opposed to any participation in war. The act defines religious training and belief as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal code."

The defendants expressed varied beliefs. Seeger stated that his belief was a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed." He did not, however, disavow a belief in relation to a Supreme Being. Jakobson said that he believed in a "Supreme Being" who was the "Creator of Man" in the sense of being "ultimately responsible for the existence of" and who was "the Supreme Reality" of which "[T]he existence of man is the result." Peter stated that the source of his conviction was "our democratic American culture