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Constitutional Law -- Right of Counsel -- State and Lower Federal Court Interpretations of Escobedo

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ducted where the original proceedings were held, the burden of the numerous petitions for such relief is more evenly spread among the superior courts throughout the state, since the courts located near prisons may no longer be overburdened with habeas corpus petitions.

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Constitutional Law—Right of Counsel—State and Lower Federal Court Interpretations of Escobedo

The historic Supreme Court decision of *Escobedo v. Illinois*,[1] which extended the right to counsel to some point prior in time to the actual trial of an accused,[2] has engendered a wealth of theoretical discussion of the problems it encompassed.[3] The state and lower federal courts have had to face many of these problems on a practical rather than theoretical plane. The following categories constitute some of the most critical areas that have required interpretation.

I. FAILURE TO INFORM THE ACCUSED OF HIS CONSTITUTIONAL RIGHTS AND THE ABSENCE OF A REQUEST FOR COUNSEL

In situations where an accused was not advised of his right to counsel or to remain silent in the accusatory stage of an investiga-

[1] 378 U.S. 478 (1964).

[2] The defendant Escobedo was arrested, handcuffed, and taken to police headquarters for interrogation concerning the murder of his brother-in-law. A lawyer, previously retained, made two futile attempts to see Escobedo at headquarters. During the interrogation the defendant was confronted with a statement solicited from another suspect accusing him of the crime. Without the benefit of his attorney's advice, the defendant made incriminating statements in response to this accusation that lead to his subsequent conviction. The Supreme Court reversed and remanded stating:

> We hold, therefore, that where, as here, 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 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," Gideon v. Wainwright, 372 U.S., at 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.

Id. at 490-91.

[3] See, *e.g.*, Enker & Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 MINN. L. REV. 47 (1964); Note, 43 N.C.L. REV. 187 (1964).

tion,[4] a prevalent method of avoiding direct confrontation with the *Escobedo* dilemma has been to distinguish *Escobedo* on the basis of a particular aspect of the Supreme Court decision that was absent from the situation facing the lower court.[5] The fact situation of *Escobedo* had many facets, and courts taking this approach have not found the task of containing its ruling particularly troublesome.

In *State v. Howard*[6] the Missouri court upheld the conviction of a defendant who had not been advised of his right to counsel prior to making incriminating statements that were used against him. The court held that since the defendant had not been prevented from seeing a lawyer previously retained (as had defendant Escobedo) *Escobedo* was not applicable.

The Illinois court in upholding the conviction of a defendant who had not been advised of his rights before making incriminating statements, confronted the issue on the basis of the voluntariness of the confession rendered.[7] The court stated that "we do not, however, read the Escobedo case as requiring the rejection of a voluntary confession because the State did not affirmatively caution the accused of his right to have an attorney and his right to remain silent before his admissions of guilt."[8] This rationale was also employed by the North Carolina court[9] in upholding the conviction of a defendant who had made incriminating statements to an officer after being advised of his right to remain silent but not of his right to counsel. The court concluded that *Escobedo* had no effect on "free and voluntary conversation."[10]

A contrary view is exemplified in *People v. Stewart*[11] where the California Supreme Court, showing a tendency to apply *Escobedo* liberally, held that once the investigatory process had reached the stage where the right of counsel would attach, "the record must

[4] The accusatory stage is descriptive of the time when the investigation has begun to "focus" on the suspect as described in note 2 *supra*.

[5] See, *e.g.*, State v. Worley, 178 Neb. 232, 132 N.W.2d 764 (1965); Bean v. State, 398 P.2d 251 (Nev. 1965); State v. Darst, 399 P.2d 618 (Wash. 1965).

[6] 383 S.W.2d 701 (Mo. 1964).

[7] People v. Hartgraves, 31 Ill. 2d 375, 202 N.E.2d 33 (1964).

[8] *Id.* at —, 202 N.E.2d at 36.

[9] State v. Fletcher, 264 N.C. 482, 141 S.E.2d 873 (1965).

[10] *Id.* at 485, 141 S.E.2d at 875.

[11] 43 Cal. Rptr. 201, 400 P.2d 97 (1965).

indicate that the defendant was advised of his right to counsel and to remain silent or that he knew of these rights and intelligently and knowingly waived them."[12]

The California court again showed its liberal inclination in *People v. Dorado*.[13] It was held that once the stage is set for the right of counsel to attach, the accused does not specifically have to request legal assistance in order to make incriminating statements elicited by the police during an accusatory investigation inadmissible.[14] The court did not concern itself with the voluntariness of a confession obtained under such circumstances, but felt that the right of counsel overrides such a consideration, even in the absence of any evidence of coercion.

Courts opposing this interpretation have concerned themselves with the absence of a specific request for counsel as well as the voluntariness of the confessions obtained.[15] In *Sturgis v. State*[16] a defendant had confessed after being confined for four days without a hearing or the services of an attorney. The Maryland court, refusing to apply *Escobedo,* found no evidence of mistreatment of the accused or that his confession was in any way the product of coercion. In addition the court found neither a request for counsel by the accused nor a denial of such on the part of the police. In the absence of these elements, the court was convinced that the defendant's confession was voluntary and therefore admissible.

The Pennsylvania court interjected the theory of unreasonable curtailment of police investigatory methods into its approach to the problem. In *Commonwealth v. Maroney*[17] the police found the defendant Maroney wounded at the feet of a murder victim. He was immediately taken to the hospital for an emergency operation and interrogated later the same morning. At this time the accused

[12] *Id.* at 207, 400 P.2d at 103.
[13] 42 Cal. Rptr. 169, 398 P.2d 361 (1965).
[14] For courts following this interpretation, see, *e.g.,* United States v. Myers, 240 F. Supp. 39 (E.D. Pa. 1965); Galarza Cruz v. Delgado, 233 F. Supp. 944 (D.P.R. 1964); State v. Mendes, 210 A.2d 50 (R.I. 1965).
[15] See, *e.g.,* United States v. Ogilivie, 334 F.2d 837 (7th Cir. 1964); Woodard v. State, 171 So. 2d 462 (Ala. Ct. App. 1965); State v. Worley, 178 Neb. 232, 132 N.W.2d 764 (1965); State v. Darst, 399 P.2d 618 (Wash. 1965); State v. Burke, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).
[16] 235 Md. 343, 201 A.2d 681 (1964).
[17] 416 Pa. 331, 206 A.2d 288 (1965).

was informed that anything he said could be used against him. He was not offered, nor did he request, the services of counsel. He proceeded to describe the murder and four days later signed a typewritten statement of the same. In holding the confession admissible the court said:

> To hold now that his description of the event at that time is inadmissible, because he did not have counsel or waive his right thereto beforehand, is tantamount to precluding the police from ever interrogating individuals suspected of crime, and could result in barring from evidence all admissions obtained in the course thereof.[18]

Though not discussing law enforcement expediency, the Fourth Circuit took a dim view of the defendant's failure to request counsel in *Davis v. North Carolina.*[19] The defendant, an escapee from a state prison, was taken into custody by the police and kept in jail a total of sixteen days until he confessed to the crime of murder.[20] In upholding the admission of the confession, the court refused to apply *Escobedo* on the basis that the defendant had, according to police testimony, been informed of his rights and had not requested the assistance of counsel. The police arrest sheet, however, clearly indicated that Davis was to be held without the privileges of using a telephone or seeing anyone. It was established that the police had aided Davis in contacting his sister, the only person he had requested to see. The dissenting opinion, agreeing with the *Dorado* interpretation of *Escobedo,*[21] pointed out that it would have been useless for the defendant to request an attorney when the arrest sheet indicated that such a request would have been rejected.

The Texas Court of Criminal Appeals[22] coupled the lack of a request for counsel with the fact that the accused had been advised of her constitutional right of silence in declaring an incriminating statement admissible. The court evidently felt that an affirmative request and denial of counsel was necessary to bring *Escobedo* into play once the warning against self-incrimination was given.

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[18] *Id.* at —, 206 A.2d at 290-91.
[19] 339 F.2d 770 (4th Cir. 1964).
[20] The prison warden had granted the officers permission to detain the accused instead of returning him to the state prison.
[21] See text accompanying note 13 *supra.*
[22] Miller v. State, 387 S.W.2d 401 (Tex. Crim. App. 1965).

II. The Necessity of the Physical Presence of an Attorney at the Interrogation of the Accused

Courts have been reluctant to hold that the mere physical absence of an attorney, at the time the accused was interrogated, is sufficient to render a confession inadmissible under *Escobedo*.[23] The District of Columbia Court of Appeals in *Long v. United States*[24] declared that no court or legislative body has held that statements made voluntarily to the police are inadmissible regardless of the circumstances. The Washington Supreme Court used the same reasoning[25] in holding that a confession obtained in the absence of counsel was not "per se inadmissible."[26] In that case defendant had confessed after being warned by his attorney (who was not present at the time of the confession) against making any statements to the police.

The same District of Columbia court that rendered the *Long*[27] decision, was faced with a somewhat different situation in *Queen v. United States*.[28] There they considered the absence of counsel at the time of confession to be critical. The defendant had been advised of her right of silence and was granted a continuance for the purpose of obtaining counsel. She was interrogated during this continuance, at which time she made incriminating statements that were subsequently used against her. The court refused to uphold the admission of the statements recognizing that the untimely interrogation had frustrated the defendant's right of counsel.

III. The Necessity for the Presence of All of the Elements in *Escobedo* To Bring a Case Within the Scope of its Ruling

The cases previously discussed would seem to indicate that *Escobedo* is often distinguished on the basis of a particular element

[23] *E.g.*, Watson v. Gaughan, 338 F.2d 659 (1st Cir. 1964); Jackson v. United States, 337 F.2d 136 (D.C. Cir. 1964); Hayes v. United States, 236 F. Supp. 225 (E.D. Mo. 1964); Davidson v. United States, 236 F. Supp. 264 (W.D. Okla. 1964); Mitchell v. Stephens, 232 F. Supp. 497 (E.D. Ark. 1964); Hayden v. State, 201 N.E.2d 329 (Ind. 1964); State v. Fox, 131 N.W.2d 684 (Iowa 1964); People v. Sanchez, 15 N.Y.2d 387, 207 N.E.2d 356, 259 N.Y.S.2d 409 (1965); Sturgis v. State, 235 Md. 343, 201 A.2d 681 (1964); Marion v. State, 387 S.W.2d 56 (Tex. Crim. App. 1965).

[24] 338 F.2d 549 (D.C. Cir. 1964).

[25] State v. Young, 400 P.2d 374 (Wash. 1965).

[26] *Id.* at 375.

[27] Note 24 *supra*.

[28] 335 F.2d 297 (D.C. Cir. 1964).

of the decision that is somewhat different from the case under consideration. However, some courts have ventured further and professed an intention to apply *Escobedo only* in situations where the various conditions that prompted the Supreme Court opinion itself were present.[29] For example, the Delaware court[30] stated that several factors seem to be necessary for the *Escobedo* rule to apply and a case must be considered in the light of the facts that were before the Supreme Court.[31] The Wisconsin court, in *State v. Burke*,[32] expressed the feeling that the most *Escobedo* did was to say that failure to inform a criminal suspect under arrest of his constitutional right against self-incrimination, coupled with other circumstances, may be enough to exclude any confession made by him.

Without being overly concerned with the boundaries of *Escobedo*, courts not wishing to limit the decision to its facts have applied the principle of pre-trial right of counsel to a variety of case situations.[33] A notable example is the District of Columbia case in which the committing magistrate had appointed counsel for the defendant,[34] but the attorney was not informed when his client was called before the grand jury and repeated former confessions. The court held that such failure to inform the attorney was ground for reversal since the defendant would have refrained from the additional incrimination with his counselor's advice.

IV. The Ingredients of an "Intelligent Waiver" of the Right of Counsel

In situations where a court is convinced that the circumstances necessary for the right of counsel to attach were present, the de-

[29] *E.g.*, Edwards v. Holman, 342 F.2d 679 (5th Cir. 1964); Cephus v. United States, 33 U.S.L. Week 2674 (D.C. Cir. June 21, 1965). United States v. Pate, 240 F. Supp. 237 (N.D. Ill. 1965); Davidson v. United States, 236 F. Supp. 264 (W.D. Okla. 1964); State v. Fox, 131 N.W.2d 684 (Iowa 1964); Commonwealth v. Tracy, 207 N.E.2d 16 (Mass. 1965); State v. Howard, 383 S.W.2d 701 (Mo. 1964); Bean v. State, 398 P.2d 251 (Nev. 1965); Commonwealth v. Maroney, 416 Pa. 331, 206 A.2d 288 (1965).

[30] King v. Delaware, 212 A.2d 722 (Del. 1965).

[31] The Delaware court placed a further limitation on *Escobedo* by saying that it was not applicable to pre-arrest situations.

[32] 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

[33] See cases discussed in previous categories.

[34] Jones v. United States, 342 F.2d 679 (D.C. Cir. 1964).

cisions have presented a broad spectrum of interpretation as to what constitutes a waiver of this right.[35]

Criminal technique was evidently a major consideration in the Kentucky case of *Scamahorne v. Commonwealth*[36] where the court concluded that since the defendants were intelligent enough to park a car a mile from the scene of the crime; carry tools to get into the back of the building; crawl across a field to avoid detection; hide when the police approached; and come out with their hands up asking not to be shot, they must surely have the intelligence to be aware of their right to counsel. The defendants did not request an attorney; therefore the court concluded that they had waived their rights to do so.

The Third Circuit in *Russo v. New Jersey*,[37] without delving into the mechanics of the crime as a criterion for intelligence, held that the failure to request counsel at the interrogation level did not in itself constitute a waiver of the right. The Oregon court in *State v. Neely*[38] held that to be sure that an accused knew of his right to counsel, steps must be taken to insure that he is effectively informed. The court held that there could be no waiver of the right if there was any doubt that the accused was aware of it. The burden of defendant enlightenment, under this rationale, falls squarely on the shoulders of the law enforcement officers.

Age and experience have received consideration by some courts. The Indiana court[39] allowed the admission of the signed incriminating statement of an accused of "tender years"[40] who had been twice advised of his right to counsel prior to the taking of the statement and had failed to request legal aid. The court held that he had

[35] *E.g.*, Otney v. United States, 340 F.2d 696 (10th Cir. 1965); Miller v. Warden, Md. Penitentiary, 338 F.2d 201 (4th Cir. 1964); United States v. Pate, 240 F. Supp. 696 (N.D. Ill. 1965); Richards v. Holman, 239 F. Supp. 137 (M.D. Ala. 1965); Ledbetter v. Warden, Md. Penitentiary, 239 F. Supp. 369 (D. Md. 1965); People v. Stewart, 43 Cal. Rptr. 201, 400 P.2d 97 (1965); People v. Dorado, 42 Cal. Rptr. 169, 398 P.2d 361 (1965); Commonwealth v. Maroney, 416 Pa. 331, 206 A.2d 288 (1965); Marion v. State, 387 S.W.2d 56 (Tex. Crim. App. 1965); State v. Darst, 399 P.2d 618 (Wash. 1965).

[36] 394 S.W.2d 113 (Ky. 1965).

[37] 33 U.S.L. WEEK 2621 (3d Cir. May 20, 1965).

[38] 395 P.2d 557 (Ore. 1964).

[39] Hayden v. State, 201 N.E.2d 329 (Ind. 1964).

[40] *Id.* at 329.

effectively waived his right of counsel despite his age, as he was "worldly wise far beyond his years."[41]

The Fifth Circuit declined to comment on the issue of unequivocal waiver (as exemplified in the Indiana case where the defendant was both advised of his right to counsel and failed to request aid), but allowed the age and experience of the defendant to weigh heavily in his favor.[42] The accused was nineteen years old and had been confined for two months at the time of his confession. Counsel had been appointed, and the attorney had warned him against making any statements to federal officers. The attorney was absent from the interrogation in question, the defendant having neglected to request his presence. The interrogating officers were unaware that the defendant was even represented by counsel. In declaring the confession inadmissible, the court suggested that the officers could have easily determined from the record that the defendant had been provided with an attorney, and because of the defendant's youth and inexperience they had a duty to do so. The court extended this duty by declaring that if officers discovered that the defendant was represented by counsel, they must ascertain if the accused desired his presence at the interview.[43]

V. The Problem of Retroactivity

Courts that have held that *Escobedo* is to be given retroactive application have done so without a great deal of fanfare.[44] The Ninth Circuit decision in *United States v. Fogliani,*[45] for example, merely said that *Escobedo* should without a doubt be retroactive along with *Gideon v. Wainwright.*[46]

Courts opposing retroactive application[47] have concerned themselves with an analysis of the purpose of the *Escobedo* decision—

[41] *Id.* at 330.

[42] Clifton v. United States, 341 F.2d 649 (5th Cir. 1965).

[43] The Fifth Circuit made reference to the age and experience factor in Edwards v. Holman, 342 F.2d 679 (5th Cir. 1965). The court distinguished *Escobedo* on several grounds, one being that the defendant had previous convictions while Escobedo was twenty-two years old and of Mexican extraction.

[44] See, *e.g.,* Fugate v. Ellenson, 237 F. Supp. 44 (D. Neb. 1964).

[45] 343 F.2d 43 (9th Cir. 1965).

[46] 372 U.S. 335 (1963). See also Wright v. Dickson, 336 F.2d 878 (9th Cir. 1964).

[47] *E.g.,* United States v. Pate, 240 F. Supp. 237 (N.D. Ill. 1965); Hayes v. United States, 236 F. Supp. 225 (E.D. Mo. 1964); King v. Delaware, 212 A.2d 722 (Del. 1965); State v. Johnson, 43 N.J. 572, 206 A.2d 737 (1965).

i.e., what was the true nature of the injustice it sought to correct, and would this correction be served by retroactivity.

In the case of *In re Lopez*,[48] the California court declined retroactive application on the ground that the true purpose of *Escobedo* was to curtail future police practices that might lead to involuntary confessions. The court did not deny that such practices were unhealthy in the past, but felt that they had not necessarily resulted in a "substantial risk"[49] to the rights of an individual who had voluntarily confessed. As to confessions that might have been coerced from defendants in the past, the court expressed the hope that such injustice had been uncovered at the trial.[50]

In addition to discounting retroactivity on the basis of its relationship to the truth or falsity of a confession, the California court referred to placing of "impossible burdens upon the administration of criminal justice"[51] that such a ruling would create. The court felt that viewing long-forgotten cases would obviously involve the rehashing of hazy fact situations and the time-dulled memory of past witnesses.

The same rationale was evidenced in the Seventh Circuit's refusal to apply *Escobedo* to the past. In *Walden v. Pate*[52] the court stated

> Nothing expressed in either the Mapp[53] or Escobedo opinion required retrospective application of the rule announced . . . . a condition existed where ignorance of constitutional rights and absence of counsel operated to the prejudice of persons in custody. In order to put an end to a system so fraught with potential abuses, the Supreme Court in Escobedo decided to remove the incentive to deny an accused the right to counsel by rendering inadmissible any confession obtained while such denial was in effect.[54]

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[48] 42 Cal. Rptr. 188, 398 P.2d 380 (1965).

[49] *Id.* at 194, 398 P.2d at 386.

[50] It is interesting to note that the *Lopez* decision was delivered the same day as People v. Dorado, 42 Cal. Rptr. 169, 398 P.2d 361 (1965). See text accompanying note 13 *supra.*

[51] *In re* Lopez, 42 Cal. Rptr. at 198, 398 P.2d at 390.

[52] 350 F.2d 240 (7th Cir. 1965).

[53] Mapp v. Ohio, 367 U.S. 643 (1961). The Court held that any evidence obtained during the course of an illegal search and seizure would be inadmissible against the accused.

[54] Walden v. Pate, 350 F.2d 342-43 (7th Cir. 1965). If *Escobedo* is truly analogous to *Mapp*, the Seventh Circuit's reasoning may well become the law of the land. The Supreme Court declared that *Mapp* will not be given retroactive application in Linkletter v. Walker, 381 U.S. 618 (1965).

VI. "Trial Tactics" and the Appeal of a Defendant Whose Attorney Did Not Raise the Issue of Deprivation of Constitutional Rights in the Trial Court

When the question of the denial of the right of counsel during the pre-trial stage arises for the first time on appeal, the possibility of a waiver of such rights takes on a new aspect. In addition to a consideration of the facts surrounding the alleged constitutional violation, the court must determine whether or not the defendant's attorney has closed the issue by failing to raise it in the trial court.[55] Hence the defendant is faced with two possible adversaries to his fundamental rights, *i.e.* his own lawyer, as well as the individuals who have allegedly violated his right to counsel.

In *Timmons v. Peyton*[56] the Virginia district court was of the opinion that mistakes in judgment or trial tactics of the defendant's counsel do not deprive a defendant of his constitutional rights and cannot be reviewed on a writ of habeas corpus. The Ninth Circuit did not completely close the door to review,[57] but did hold that where the question was not raised in the district court, it could not be heard on appeal unless a failure to do so would constitute a "manifest miscarriage"[58] of justice.

The Nevada Supreme Court discussed this problem in *Bean v. State*.[59] The court held that the defendant had not been deprived of his rights at the pre-trial level, but indicated that if this had been the case, the failure of his attorney to object to the confessions obtained thereby would throw a different light on the subject. The defendant had pleaded insanity in the original trial, and the court

[55] The issue was confronted by the Supreme Court in Henry v. Mississippi, 379 U.S. 443 (1965). The attorney had failed to object to the introduction of illegally seized evidence at the trial, and the defendant was subsequently convicted. The question raised was whether the attorney had thereby waived the defendant's right by knowingly bypassing his remedy in the lower court. The Supreme Court, remanding for further State consideration of the significance of procedural defects, warned that a dismissal of the case on the basis of adequate state grounds would not end the litigation:

> [P]etitioner might still pursue vindication of his federal claim in a federal habeas corpus proceeding in which the procedural default will not alone preclude consideration of his claim, at least unless it is shown that petitioner deliberately bypassed the orderly procedure of the state courts.

Id. at 452.

[56] 240 F. Supp. 749 (E.D. Va. 1965).

[57] Davis v. California, 341 F.2d 982 (9th Cir. 1965).

[58] *Id.* at 986.

[59] 398 P.2d 251 (Nev. 1965).

was aware that his attorney may have wanted the jury to consider the confessions as evidence of a deranged mind.

Contrary to the rationale in the aforementioned cases, the defendants have not always found themselves stymied by the actions of their attorneys in the trial courts. The Rhode Island Supreme Court ruled that the defendants confession was inadmissible on the basis of *Escobedo,* even though the issue was not raised at the trial.[60] The court's ruling was based on the fact that there was no evidence that the defendant had acquiesed in his attorney's decision not to object to the introduction of the incriminating statements, and therefore he had waived no rights.

The relationship of the time lapse between the defendant's original trial and the *Escobedo* decision was a major factor in the defendant's favor in *Ledbetter v. Warden, Md. Penitentiary.*[61] The defendant had made both oral and written confessions that were introduced at the trial level without objection. The court concluded that the confessions, which were the only evidence of the defendant's guilt, were obtained in violation of the principles laid down in *Escobedo.* As the *Escobedo* case had not been decided at the time of the trial in question, the failure of the attorney to object would not constitute a waiver of the defendant's rights.

VII. Conclusion

The categories discussed above illustrate the extent to which the web of implications surrounding *Escobedo* has developed. In all likelihood no single Supreme Court decision will eliminate this confusion. There seems to be no definite line of division between the various lower court approaches to a given problem that will allow opposing viewpoints to be neatly classified. For example, the attitudes toward waiver are particularly inconsistent. Not only do courts vary in their interpretation of the circumstantial prerequisites for a valid waiver, but the background of the individual accused may be a critical consideration. A defendant who has experienced previous criminal proceedings may find it hard to persuade a court that he was unaware of his constitutional rights.

One reason for this diversity of interpretation is that fundamental methods of law enforcement procedure are at stake in the

[60] State v. Mendes, 210 A.2d 50 (R.I. 1965).
[61] 239 F. Supp. 369 (D. Md. 1965).

application of *Escobedo*. A liberal approach requires an adjustment by police and courts alike. A liberal interpretation of *Escobedo* requires the investigating officer to determine, at that time, if the person questioned is an accused, or face the possibility of a voluntary confession's being excluded. This quasi-judicial determination may well affect the outcome of subsequent litigation. Even though the officer makes such a determination, there is no certainty that the court will concur in his finding. If the accused's request for counsel is required, the interrogator is able to proceed with some degree of certainty, and the court is spared from confrontation with *Escobedo* in such a situation where only hindsight can establish its applicability.

The relationship of *Escobedo* to the guilt or innocence of an accused is another consideration that might persuade a court to limit the Supreme Court ruling. It is conceivable that a guilty defendant might find *Escobedo* a valuable tool with which to prolong litigation of his case in a jurisdiction that gives it a broad application. In such instances, invoking *Escobedo* might not affect the final outcome of the trial but would hamper the ability of the court to administer justice within a reasonable time.

A further consideration that has caused apprehension among lower courts is that a liberal application of *Escobedo* would result in an unreasonable burden on police ability to investigate crime.[62] The majority opinion in *Escobedo* suggested that a law enforcement system built on confessions would be less reliable in the long run than one built on independently secured evidence through investigation.[63] It has been suggested, however, that if it is necessary for an attorney to be present at an interrogation, the result would be a suppression rather than a disclosure of evidence.[64] It is submitted that the suppression of evidence is not the goal of any legitimate law enforcement system.

It has been suggested that a possible solution to these conflicts would be to require that interrogations be conducted in the presence of witnesses at places controlled by the police.[65] Requiring recording of the interviews would be a further deterrent to coercive police methods.[66]

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[62] See text accompanying note 18 *supra*.
[63] Escobedo v. Illinois, 378 U.S. 478, 488-89 (1964).
[64] Enker & Elsen, *op. cit. supra* note 3.
[65] *Id.* at 85.
[66] *Ibid.*

If a solution is achieved in addition to the problems that now frequent the courts, however, there are others that may become significant in the future. For example, does a collateral attack on a criminal judgment become merely a civil proceeding in which the sixth amendment does not apply? This expanding involvement of *Escobedo* into other areas of criminal litigation points to the need for a more definite enunciation of its limitations. It would seem desirable for courts to be required to consider such a fundamental right with some degree of uniformity.

WILLIAM H. FAULK, JR.

Criminal Procedure—Sixth Amendment Right of Confrontation Made Obligatory in State Prosecutions

> [T]he privilege to confront one's accusers and cross-examine them face to face is assured to a defendant by the Sixth Amendment in prosecutions in the federal courts, and in prosecutions in the state courts is assured very often by the constitutions of the states. *For present purposes we assume that the privilege is reinforced by the Fourteenth Amendment, though this has not been squarely held.*[1]

So wrote Mr. Justice Cardozo some thirty-one years ago. But it was not until 1965, in the cases of *Pointer v. Texas*[2] and *Douglas v. Alabama*,[3] that this assumption was squarely affirmed.

In *Pointer* defendant was accused of robbery, and at a preliminary hearing the victim testified, giving a detailed account of the crime and identifying Pointer as its perpetrator. Neither Pointer nor Dillard, an alleged accomplice, were represented by counsel at the hearing, but Dillard tried to cross-examine the victim, and Pointer was said to have attempted cross-examination of some of the other witnesses.[4] At Pointer's trial, because the robbery victim had moved permanently out of the jurisdiction, the state offered as evidence a transcript of this witness's prior testimony. Pointer's counsel objected, arguing that the right to confrontation had been denied at the hearing. The objection was overruled because Pointer had been "accorded the opportunity of cross examining the wit-

[1] Snyder v. Massachusetts, 291 U.S. 97, 106 (1934). (Emphasis added.)
[2] 380 U.S. 400 (1965).
[3] 380 U.S. 415 (1965).
[4] 380 U.S. at 401.