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Constitutional Law - Right to Counsel

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rearing that accompany illegitimacy invite a comparison to defamation and support actions. Similar comparisons can be made with other tort actions that should provide additional bases for compensation in illegitimacy cases.

Negligence that causes a person to be born a bastard is actionable. The bastard child should be awarded sufficient damages to compensate him for a disability arising from that wrong. It is incumbent upon our courts and skilled counsel to create a standard to determine the scope and extent of damages that will constitute substantial redress. Their efforts may well result in damages that are "bastards" among traditional tort damages.

> It is fundamental to our common-law system that one may ask redress for every substantial wrong. . . . Although fraud, extra litigation and a measure of speculation are, of course, possibilities, it is no reason for a court to eschew a measure of its jurisdiction.[13]

Charles J. Weyandt

CONSTITUTIONAL LAW—Right to Counsel—Accused's right to counsel attaches at the accusatory stage of the proceedings even though no request for counsel is made.

> *United States ex rel. Russo v. New Jersey*, 351 F.2d 429 (3d Cir. 1965).

Petitioners Russo and Bisignano, and a fellow defendant, LaPierre, were arrested after an attempted robbery of a Newark, New Jersey tavern in which an off-duty policeman was killed and one of the robbers wounded. Russo, who was suffering from a gunshot wound, was taken to a hospital where the bullet was removed. Having implicated himself in the crimes, Russo signed a confession shortly after his release from the hospital. Bisignano had already admitted his role in the crimes, and, after several hours of questioning, he signed a confession. Neither Russo nor Bisignano was advised of his right to counsel before signing a confession.

The trio was indicted and convicted of murder. Having exhausted their state remedies and rights of appeal,[1] defendants Russo and Bisignano applied to the federal district court in New Jersey for writs of habeas corpus. The writs were sought by the defendants on the ground, *inter*

13. Battella v. State of New York, 291 N.Y.S.2d 34, 36, 176 N.E.2d 729, 730 (1961), where the court overruled a case that was followed for sixty-five years.

1. State v. LaPierre, 39 N.J. 156, 188 A.2d 10 (1963). Certiorari was denied Bisignano. Bisignano v. New Jersey, 374 U.S. 852 (1963). See 28 U.S.C.A. § 2254.

alia,[2] that they had been denied their right to counsel. The district court denied the writs. On appeal, the United States Court of Appeals for the Third Circuit reversed and remanded, holding that defendants had been denied their constitutional right to counsel.[3]

In so holding, the court found the rule established in *Escobedo v. Illinois*[4] to apply even though no request for counsel was made. In *Escobedo* the Supreme Court held that "when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer."[5] Since Danny Escobedo had requested and been denied the advice of counsel, that case is factually distinguishable from the instant case where no request was made. Speaking for the court, Chief Judge Biggs found that the factual distinction did not require application of a different legal standard. "We can perceive no sound basis for holding that a request for counsel is a prerequisite for the right to counsel at the interrogation stage while it is not at any other . . . ."[6] The court's refusal to distinguish *Escobedo* places it in opposition to numerous other decisions. Many courts, state and federal, have found *Escobedo's* proscription of confessions obtained in the absence of counsel to be contingent upon a prior request for counsel by the accused.[7] The court in the instant case also rejected the assertion that the accused had waived counsel by failing to make such a request.

No sound reasoning that we can discover will support the

2. The court held that petitioners' assertions of physical coercion and mental overbearing were untenable in view of the evidence. Petitioners also contended that the confessions were obtained during a period of illegal detention. The court stated that the exclusionary rule expressed in Mallory v. United States, 354 U.S. 449 (1957) and McNabb v. United States, 318 U.S. 332 (1943) did not give rise to a constitutional prohibition since that rule was the result of the Supreme Court's supervisory powers over federal prosecutions.

3. United States *ex rel.* Russo v. New Jersey, 351 F.2d 429 (3d Cir. 1965), *petition for rehearing and petition for leave to intervene as amici curiae denied.*

4. 378 U.S. 478 (1964).

5. *Id.* at 492.

6. United States *ex rel.* Russo v. New Jersey, *supra* note 3, at 437.

7. Jackson v. United States, 337 F.2d 136 (D.C. Cir. 1964), *cert. denied*, 380 U.S. 935 (1965); United States *ex rel.* Townsend v. Ogilvie, 334 F.2d 837 (7th Cir. 1964), *cert. denied*, 379 U.S. 984 (1965); Mitchell v. Stephens, 232 F. Supp. 297 (E.D. Ark. 1964); People v. Hartgraves, 31 Ill. App. 2d 375, 202 N.E.2d 33 (1964), *cert. denied*, —— U.S. —— (1965); Sturgis v. State, 235 Md. 343, 201 A.2d 681 (1964); State v. Scanlon, 84 N.J. Super. 427, 202 A.2d 448 (1964); Commonwealth *ex rel.* Linde v. Maroney, 416 Pa. 331, 206 A.2d 288 (1965); Browne v. State, 24 Wis. 2d 491, 131 N.W.2d 169 (1964). This court, however, is not alone in its interpretation of Escobedo. See People v. Dorado, 42 Cal. Rptr. 169, 398 P.2d 361 (1965), *cert. denied*, 381 U.S. 937 (1965); Commonwealth v. McCarthy, —— Mass. ——, 200 N.E.2d 264 (1964); State v. Dufour, —— R.I. ——, 206 A.2d 82 (1965).

> conclusion that although at other stages in the proceedings in which the right attaches there must be an intelligent waiver, at the interrogation level a failure to request counsel may be deemed a waiver.[8]

Although the rule established by the Supreme Court in *Escobedo* did not specify whether a request for counsel was necessary, Justice White, in his dissent, indicated that the decision was not so limited.

> Although the opinion purports to be limited to the facts of this case, it would be naive to think that the new constitutional right announced will depend upon whether the defendant has retained his own counsel . . . or has asked to consult with counsel in the course of the interrogation . . . . At the very least the court holds that once the accused becomes a suspect and, presumably, is arrested, any admission made to police thereafter is inadmissible in evidence unless the accused has waived his right to counsel.[9]

It would appear that the right was not dependent upon Danny Escobedo's request, but that the right matured at the critical accusatory stage of the proceedings.

Of what value is such a constitutional right if it is available only to those making such a request? It would seem that the policy of the Supreme Court with respect to the rights of the accused would be hindered by a narrow interpretation of *Escobedo*. The purpose of the *Escobedo* rule is to assure the defendant a fair trial by rendering a confession obtained from him inadmissible when he has been denied his constitutional right to counsel at the accusatory stage of the proceeding. Knowledge of the right to counsel is essential to all defendants, ignorant as well as knowledgeable, so that they may prepare their defense and in this way be assured a constitutionally fair trial. When such a fundamental right is involved it should not be left to the hazard of a request.[10]

Although the holding in the instant case has created what has been called a "judicial power struggle,"[11] the merits of the court's reasoning cannot be ignored. In the case of *Carnley v. Cochran*,[12] the Supreme Court concluded that "it is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not de-

8. United States *ex rel.* Russo v. New Jersey, *supra* note 3, at 438.

9. Escobedo v. Illinois, *supra* note 4, at 495.

10. Comment, 53 CALIF. L. REV. 337 (1965); Comment, 25 MD. L. REV. 165 (1965).

11. Trial, June-July, 1965, p. 45. "Chief Judge Joseph Weintraub of the New Jersey Supreme Court on June 9 directed all state judges to ignore the landmark decision—an extremely unusual action."

"The state directive was not made public. It creates a judicial power struggle which must be resolved only by the U.S. Supreme Court."

12. 369 U.S. 506 (1962). See also Rice v. Olson, 324 U.S. 786 (1945).

pend on a request."[13] The Court in that case noted that the failure to provide counsel to the accused in a case as complex as the one before the Court resulted in a violation of the defendant's right to "due process" under the Fourteenth Amendment.

The court in *Russo* also indicated that advising the defendant of his right to remain silent would not be sufficient, but that he should also be explicitly advised of his right to counsel.

> In reviewing the facts of Escobedo, it is apparent that Escobedo was well informed of his constitutional rights since some days previously he had conferred with counsel and it must be assumed, as the Supreme Court did assume, that counsel had informed Escobedo of his right to remain silent and the effect any statement that he made might have. Yet the Supreme Court held that such prior instructions were inadequate when Escobedo was faced with the incriminating statements of his alleged partner in crime.[14]

Although the *Russo* decision did not establish a rule on the retrospective application of *Escobedo*,[15] it appears from the facts before the court that *Escobedo* was applied retrospectively. Senior Judge Forman, concurring with the *Per Curiam* denial on Petition for Rehearing and on Petition for Leave to Intervene as *Amici Curiae*, noted that Russo's conviction was final in 1963 as determined by the test of finalization announced by the Supreme Court in *Linkletter v. Walker*,[16] while *Escobedo* was not decided until 1964.[17]

The Court in *Linkletter* decided that *Mapp v. Ohio*[18] was not to be applied retrospectively. The Supreme Court in that case held that it "must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective application will further or retard its operations,"[19] in deciding whether or not a decision is to be applied retrospectively. The conclusion in that case was that Linkletter was not denied a fundamentally fair trial

13. Carnley v. Cochran, *supra* note 12, at 513.

14. United States *ex rel.* Russo v. New Jersey, *supra* note 3 at 438.

15. See Commonwealth v. Negri, 419 Pa. 117, 213 A.2d 670 (1965).

16. 381 U.S. 618, 622 (1965). The Supreme Court pointed out that a judgment is final when the "conviction was rendered, the availability of appeal exhausted, and the time for certiorari had elapsed . . . ."

17. Russo's conviction was affirmed by the New Jersey Supreme Court in 1963. See State v. LaPierre, 39 N.J. 156, 188 A.2d 10 (1963). The United States Supreme Court denied certiorari in the same year. See Bisignano v. New Jersey, 374 U.S. 852 (1963).

18. 367 U.S. 643 (1961). The Mapp case held that evidence obtained through an illegal search and seizure could not be admitted into evidence in a state trial. The Supreme Court applied the "illegal search and seizure" clause of the Fourth Amendment to the states through the "due process" clause of the Fourteenth Amendment.

19. Linkletter v. Walker, *supra* note 16, at 629.

since the evidence introduced was reliable despite the fact that it had been illegally seized.

At least two courts have concluded that under the *Linkletter* holding, *Escobedo* should be applied only *prospectively*.[20] A contrary view was expressed by Judge Forman in his opinion on the Petition for Rehearing in *Russo*.[21] Justice Black, dissenting in *In Re Groban*,[22] noted that "[T]he right to use counsel at the formal trial is a very hollow thing when, for all practical purposes the conviction is assured by pretrial examination."[23] *Escobedo* remedied this factor by extending the right to counsel to the accusatory stage of the proceedings. The purpose of this extension was to insure protection of the constitutional rights of the accused so that he may not be denied a fundamentally fair trial. The Court in *Linkletter* noted that retrospective application has been given to three recent decisions involving constitutionally protected rights.[24] That Court stated that ". . . in each of the three areas in which we have applied our rule retrospectively the principle went to the fairness of the trial—the very integrity of the fact finding process."[25] One of the cases referred to by the Court was *Gideon v. Wainwright*[26] which guaranteed the accused the right of counsel at the trial. *Escobedo* is a logical extension of this right to the pretrial interrogation. As Judge Forman in *Russo* concluded, the pretrial interrogation also affects the "very integrity of the fact finding process." It would seem, therefore, that the correct application of *Linkletter* to the rule in *Escobedo* would require that that decision be applied retrospectively.

Steven K. Yablonski

CONSTITUTIONAL LAW—Right to Counsel—The right to counsel attaches at an accusatorial proceeding even though not requested. The rule announced in *Escobedo v. Illinois* will not be applied retrospectively to cases finally adjudicated before *Escobedo v. Illinois* was decided.

Commonwealth v. Negri, 419 Pa. 117, 213 A.2d 670 (1965).

May all those incarcerated in a Pennsylvania penal institution who had their cases finally adjudicated prior to June 22, 1964, and had been denied the right of counsel before trial, rest in peace. Their hopes of gaining freedom under the rule of *Escobedo v. Illinois*[1] have vanished with the

20. United States *ex rel.* Walden v. Pate, 350 F.2d 240 (7th Cir. 1965).
21. United States *ex rel.* Russo v. New Jersey, *supra* note 3.
22. 352 U.S. 330 (1956).
23. *Id.* at 345.
24. Linkletter v. Walker, *supra* note 16, at 628, n.13.
25. *Id.* at 639.
26. 372 U.S. 335 (1963).
1. 378 U.S. 478 (1964).