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Constitutional Law - Right to Counsel

Joseph Pass Jr.

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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).

decision of the Pennsylvania Supreme Court in *Commonwealth v. Negri*.²

Since the case of *Gideon v. Wainwright*,³ which held that the accused must be afforded counsel in all state criminal trials, the trend has been to expand the scope of this fundamental right. Thus, in *Escobedo v. Illinois*⁴ the Supreme Court held that the right of counsel attaches when police activity ceases to be investigatory and becomes accusatorial, and that the accused must be informed of his right to remain silent. Petitioner Negri in the instant case sought to further expand this fundamental right, to have the rule of *Escobedo* applied retrospectively, and thus to have his conviction reversed.

In *Commonwealth v. Negri*⁵ the petitioner was suspected of a murder in the Philadelphia area. The Pennsylvania police, relying on an informer, traveled to New York and there along with the New York police, entered the petitioner's hotel room. The police, without a warrant, placed him under arrest, and searched both his room and clothing. Later a warrant was issued and Negri was formally arrested and charged with murder. The police then began their interrogation in the hope of obtaining a confession to the Philadelphia murder. While under questioning, petitioner did not request nor was he informed of his right to counsel, or of his right to remain silent. At Negri's trial a confession made during the interrogation and without counsel was admitted in evidence. On June 17, 1963, Negri was convicted of murder in the first degree and sentenced to life imprisonment. He filed an appeal with the Pennsylvania Supreme Court, and that court affirmed his conviction on March 17, 1964.⁶ Three months thereafter the Supreme Court of the United States decided *Escobedo v. Illinois*;⁷ petitioner Negri, advocating the retrospective application of *Escobedo*, sought a reversal of his conviction.

The court, speaking through Mr. Justice Eagen, denied petitioner's request for a retrospective application of *Escobedo*, but did give a new interpretation of *Escobedo* as far as Pennsylvania law was concerned. In reviewing their previous interpretation of *Escobedo* the court found that they had understood it to be:

... where a person in police custody is not warned of his constitutional right to remain silent during the accusatorial interrogation, it is necessary that he then be given assistance of counsel to protect that right, *if such assistance is requested*.⁸

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

3. 372 U.S. 335 (1963).

4. *Supra* note 1.

5. *Supra* note 2.

6. *Commonwealth v. Negri*, 414 Pa. 21, 198 A.2d 595 (1964).

7. *Supra* note 1.

8. *Commonwealth v. Negri*, *supra* note 2, at 671.

The court, however, recognized that the other jurisdictions had interpreted *Escobedo* as affording counsel to the accused at accusatory proceedings even if not requested.⁹ Cognizant of the different interpretations of *Escobedo*, the court noted that four petitions¹⁰ advocating one of the various interpretations of *Escobedo* were appealed to the Supreme Court of the United States and in all four instances certiorari was denied, thus leaving the law in hopeless confusion. Consequently, the Pennsylvania Supreme Court proceeded to determine what the law would be in Pennsylvania by examining the recent decisions of *United States ex rel. Russo v. New Jersey* and *United States ex rel. Bisignano v. New Jersey*.¹¹ There the United States Circuit Court of Appeals for the Third Circuit held, according to the Pennsylvania Supreme Court,

. . . that no request by the accused is necessary to impose upon the interrogating police the duty to furnish the assistance of counsel . . . in the absence of a warning to remain silent or an intelligent and understanding waiver.¹²

The court, recognizing that Pennsylvania law should conform to the mandate of the Third Circuit Court of Appeals, said that “. . . the decision of the Third Circuit Court of Appeals is on this matter, for all practical purposes, the ultimate forum in Pennsylvania.”¹³

Having adopted this new interpretation of *Escobedo* as the law in Pennsylvania, the court proceeded to deal with the problem of whether *Escobedo* should be applied retrospectively to convictions finally adjudicated prior to June 22, 1964. The court recognized that while some recent decisions involving constitutional rights have been held to apply retrospectively,¹⁴ those cases applied to “. . . fundamental right[s], the denial of which [were] likely to allow the conviction of an innocent man.”¹⁵ The instant case, the court concluded, did not deal with such a crucial right and therefore would not be held retrospective, consistent with the decision

9. *Id.* at 672.

10. Compare *People v. Dorado*, 42 Cal. Rptr. 169, 398 P.2d 361 (1965), *cert. denied*, 381 U.S. 937 (1965), with *Illinois v. Hartgraves*, 31 Ill. 2d 375, 202 N.E.2d 33 (1964), *cert. denied*, — U.S. — (1965); and *United States v. Guerra*, 334 F.2d 138 (2d Cir. 1964), *cert. denied*, 379 U.S. 936 (1964), with *United States ex rel. Townsend v. Ogilvie*, 334 F.2d 837 (7th Cir. 1964), *cert. denied*, 379 U.S. 984 (1965).

11. 351 F.2d 429 (3d Cir. 1965).

12. *Commonwealth v. Negri*, *supra* note 2, at 672.

13. *Ibid.*

14. *Griffin v. Illinois*, 351 U.S. 12 (1965) (requiring states to furnish transcripts of the trial to indigents on appeal); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (requiring the appointment of counsel in all state felony trials); and *Jackson v. Denno*, 378 U.S. 368 (1964) (requiring a preliminary determination of the voluntariness of a confession before the jury can hear it).

15. *Commonwealth v. Negri*, *supra* note 2, at 675.

in *Linkletter v. Walker*.¹⁶ In so doing the court had to cope with the problem of the retrospective application of *Escobedo* in the decision of *United States ex rel. Russo v. New Jersey*,¹⁷ since the court had adopted the Court of Appeals opinion as far as the interpretation of *Escobedo* was concerned. In dealing with this perplexing problem of adopting only part of a controlling decision and refusing to adopt the Court of Appeals view on *Escobedo's* retrospective application, the Pennsylvania Supreme Court stated that:

while the inter-systematic problems which were presented by that decision [Russo] prompted us to change our position regarding the necessity of a "request" for the assistance of counsel, we cannot defer to the position which was undiscussed and only inferentially applied by the Third Circuit.¹⁸

In denying the application of *Escobedo* retrospectively, the case of *Linkletter v. Walker*,¹⁹ which held that *Mapp v. Ohio*²⁰ would not be applied retrospectively, became the guiding light for the Pennsylvania Court. The court concluded that, barring any coerced confession,²¹ the proceedings against Negri were like those against Linkletter, *i.e.*, neither case involved errors sufficiently prejudicial as to violate any "fundamental" rights of the respective petitioners.

The Pennsylvania Supreme Court's approach indicates a recognition of the hardships and possible chaos which would follow if *Escobedo* was to be applied retrospectively. The court examined the problem on what they thought to be a more practical basis than a concern for the fundamental rights of the accused. The fear of overcrowded courtrooms and of wholesale releasing of incarcerated criminals, dominated the thinking of the court. As a result, instead of overworking the judiciary, the court decided to "overimprison" those who were unfortunate enough to have had their unconstitutional convictions affirmed prior to June 22, 1964. Thus, this decision coupled with that of *Linkletter* "... seems to abandon once and for all the Blackstonian concept that judges do not make, but merely discover, the law, and that overruled decisions were never the law, but merely erroneously declared concepts."²²

It seems strange that Negri, by committing his crime in December, 1961, should be denied his constitutional rights, while Escobedo by

16. 381 U.S. 618 (1965).

17. *Supra* note 11.

18. *Commonwealth v. Negri*, *supra* note 2, at 676.

19. *Supra* note 16.

20. 367 U.S. 643 (1961).

21. However, the court did remand the case to an independent hearing to determine if the confession was coerced applying the principles of *Jackson v. Denno*, 378 U.S. 368 (1964).

22. *Commonwealth v. Negri*, *supra* note 2, at 672-673.

committing his crime in January, 1960, was afforded the very same rights denied to Negri. For such an invidious result Negri may thank the Pennsylvania Supreme Court and the speedy criminal court procedures of Pennsylvania, which the Pennsylvania Supreme Court feels should not be "slowed down" by the new trials of those incarcerated victims who were denied their constitutional rights. Furthermore, the court seems oblivious to the fact that a confession obtained at an accusatorial proceeding is just as damaging as a confession at the trial level. Also it is not reasonable to assume that the right to counsel at a trial is more "fundamental"²³ than at an accusatorial proceeding, since a confession at the accusatorial proceeding may for all practical purposes nullify the benefit of counsel at the trial level.

Thus, in the final analysis, the court has adopted the *Russo* view of *Escobedo*, requiring the police to afford counsel in an accusatory pre-trial proceeding whether counsel is requested or not and thus by necessity concedes that Negri was denied his constitutional rights. Yet, by refusing to apply *Escobedo* retrospectively, they deny him a remedy.²⁴

Joseph Pass, Jr.

TORTS—Parental Immunity—New Hampshire has now joined the trend toward the abolition of the parental immunity doctrine.

Dean v. Smith, — N.H. —, 211 A.2d 410 (1965).

In June of this year the Supreme Court of New Hampshire, in *Dean v. Smith*,¹ had occasion to re-evaluate the parental immunity doctrine. The case arose out of an automobile accident, in which the father was killed and his three unemancipated children were severely injured. It was subsequently determined that the accident had occurred due to the negligence of the father. A suit was brought against the father's estate by the mother of the children to (1) enforce her own claim for medical, hospital and nursing expenses incurred on behalf of the children, and (2) to enforce the personal injury claims of each minor child.² This presented a question to the court of whether or not an unemancipated child could maintain a suit in negligence against his parent.

The defendant Smith (the personal representative of the deceased

23. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

24. There was a dissenting opinion filed by Mr. Justice Roberts and joined by Mr. Justice Musmanno in which they advocated that the denial of the right to counsel in the accusatory pre-trial investigation was a denial of a fundamental right which is a direct prejudice against a fair trial and thus *Escobedo* should be applied retrospectively.

1. — N.H. —, 211 A.2d 410 (1965).

2. The car was insured under an effective policy of general coverage.