RECENT DEVELOPMENTS

CRIMINAL PROCEDURE: CONFESSION SOLICITED WITHOUT NOTIFYING APPOINTED COUNSEL HELD ADMISSIBLE

THOUGH recent Supreme Court decisions considering the admissibility of pre-trial, inculpatory statements made by an accused in the absence of counsel have emphasized the desiderative interrelation of the fifth amendment privilege against self-incrimination and the sixth amendment right to counsel,[1] the role to be afforded retained or appointed counsel in a waiver of these rights is not yet clear. William J. Coughlan, a nineteen-year-old indigent, was arrested for aiding and abetting in the robbery of a federally insured bank.[2] An agent of the F.B.I. advised Coughlan of his *"Miranda* rights" [3] and attempted to question him, but Coughlan indicated that he did not wish to make a statement. At the next day's arraignment, counsel was appointed by a United States Commissioner. Later, while in jail awaiting trial, Coughlan was brought before the same F.B.I. agent and two other investigators; the *Miranda* warning was repeated; and Coughlan consented to an interview, though refusing to sign a waiver form. The interviewers, *aware that counsel had been appointed,* made no effort to notify him of the impending interrogation, and he was not present. Coughlan's non-jury trial resulted in conviction largely because of the admission, over objection, of an inculpatory statement made during the second interrogation. Claiming that he had been effectively denied his sixth amendment right to counsel, Coughlan appealed. Over the strong dissent of Judge Hamley, the Court of Appeals for the Ninth Circuit, relying upon the district court's finding of waiver, affirmed the conviction per curiam.[4]

The fifth amendment privilege to remain silent "in any criminal case" becomes a hollow guarantee if, prior to trial, an accused incriminates

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[1] *See* Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); *Developments in the Law—Confessions,* 79 HARV. L. REV. 935 (1966); Comment, *The New Definition: A Fifth Amendment Right to Counsel,* 14 U.C.L.A.L. REV. 604, 607-10 (1967); Note, *The Curious Confusion Surrounding Escobedo v. Illinois,* 32 U. CHI. L. REV. 560, 570, 579, & n.88 (1965); *cf.* People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169, *cert. denied,* 381 U.S. 937 (1965); Schaefer, *Federalism and State Criminal Procedure,* 70 HARV. L. REV. 1, 8 (1956).

[2] Coughlan v. United States, 391 F.2d 371 (9th Cir. 1968).

[3] Miranda v. Arizona, 384 U.S. 436, 444-45, 467-74, 478-79 (1966).

[4] 391 F.2d at 372.

himself due to ignorance of the guarantee, lack of comprehension as to the import of the right, or subjection to physical or psychological coercion.[5] Similarly, denial of counsel during the investigatory stages of the criminal process seriously hampers efficacious adversary representation,[6] since, to as large a degree as is ethically and practically possible, counsel shapes the evidence police obtain.[7] The Supreme Court has endeavored to assure the marriage of the fifth and sixth amendments by expanding the concept of "criminal case" [8] and "criminal prosecution" [9] to include post-indictment,[10] and later pre-indictment,[11] and "custodial interrogation."[12]

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[5] Escobedo v. Illinois, 378 U.S. 478 (1964) (physical coercion); Massiah v. United States, 377 U.S. 201 (1964) (deceit); Spano v. New York, 360 U.S. 315 (1959) (psychological coercion); Walker v. Johnson, 312 U.S. 275 (1941) (same); Bram v. United States, 168 U.S. 532 (1897) (ignorance); Hancock v. White, 378 F.2d 479 (1st Cir. 1967) (same); *see* notes 43-45 *infra* and accompanying text.

[6] Hamilton v. Alabama, 368 U.S. 52, 54 (1961) (counsel needed to safeguard possible defense); Powell v. Alabama, 287 U.S. 45, 69 (1932) (counsel needed to alleviate defendant's lack of knowledge and skill); Ricks v. United States, 334 F.2d 964, 965-71 (D.C. Cir. 1964) (danger of absence of counsel demonstrated by chain of events).

[7] *See* Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring).

[8] U.S. CONST., amend. V.

[9] U.S. CONST., amend. VI.

[10] Massiah v. United States, 377 U.S. 201 (1964); Spano v. New York, 360 U.S. 315 (1959); *see The Supreme Court, 1963 Term*, 78 HARV. L. REV. 143, 217 (1964); *cf.* Hancock v. White, 378 F.2d 479 (1st Cir. 1967); People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961). Subsequent decisions indicate that courts disagree as to the basis of the holding in *Massiah*. *Compare* Hancock v. White, 378 F.2d 479, 481-82 (1st Cir. 1967); Beatty v. United States, 377 F.2d 181, 188-91 (5th Cir.), *rev'd per curiam*, 389 U.S. 45 (1967), *and* McLeod v. Ohio, 173 Ohio St. 520, 184 N.E.2d 101 (1962), *conviction aff'd*, 1 Ohio St. 2d 60, 203 N.E.2d 349 (1964), *rev'd per curiam*, 381 U.S. 356 (1965), *with* United States v. Garcia, 377 F.2d 321, 324 (2d Cir. 1967); Gascar v. United States, 356 F.2d 101, 102-03 (9th Cir. 1965); United States v. Gardner, 347 F.2d 405, 408 (7th Cir. 1965), *cert. denied*, 382 U.S. 1015 (1966), *and* United States v. Accardi, 342 F.2d 697, 701 (2d Cir.), *cert. denied*, 382 U.S. 954 (1965). *See also* United States v. Edwards, 366 F.2d 853, 872-73 (2d Cir. 1966), *cert. denied*, 386 U.S. 908 (1967); Stowers v. United States, 351 F.2d 301, 302 (9th Cir. 1965).

[11] Escobedo v. Illinois, 378 U.S. 478 (1964).

[12] Miranda v. Arizona, 384 U.S. 436 (1966); *see* Grahm, *What Is "Custodial Interrogation?": California's Anticipatory Application of Miranda v. Arizona*, 14 U.C.L.A.L. REV. 59, 78-117, 132-33 (1966); 18 WESTERN RESERVE L. REV. 1777 (1967).

Under *Escobedo v. Illinois*[13] and *Miranda v. Arizona*,[14] therefore, both rights arise at the moment the investigation begins to "focus" on the accused[15] or when he is taken into custody.[16] As was stated recently in *United States v. Wade*,[17] which extended the right to counsel to the post-indictment lineup as a "critical stage" in the criminal process,[18] the Court intends to "scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial . . . ." [19] In order to protect against the pressures inherent in an investigation, the *Miranda* Court prescribed that every custodial interrogation must be preceded by a comprehensive warning of fifth and sixth amendment rights, in the absence of which evidence obtained will be inadmissible in any future trial.[20] Similarly, in *Wade*, the Court ruled that a courtroom identification, "tainted" by a pretrial lineup in the absence of engaged counsel, was inadmissible.[21] The *Miranda* and *Wade* exclusionary rules contain a significant limitation, however; an accused may *waive* his fifth and sixth amendment rights if done "voluntarily, knowingly, and intelligently." [22]

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[13] 378 U.S. 478 (1964); *see* Enker & Elsen, *Counsel for the Suspect:* Massiah v. United States *and* Escobedo v. Illinois, 49 MINN. L. REV. 47 (1964); *The Supreme Court, 1963 Term*, 78 HARV. L. REV. 143, 217 (1964); Comment, Linkletter, Shott, *and the Retroactivity Problem in* Escobedo, 64 MICH. L. REV. 832 (1966); Comment, *The Curious Confusion Surrounding* Escobedo v. Illinois, 32 U. CHI. L. REV. 560 (1965). *See also* Rothblatt, *Police Interrogation and the Right to Counsel, Post* Escobedo v. Illinois: *Application v. Emasculation*, 17 HASTINGS L.J. 41 (1965).

[14] 384 U.S. 436 (1966); *see* Elsen & Rosett, *Protections for the Suspect under Miranda v. Arizona*, 67 COLUM. L. REV. 645 (1967); Kamisar, *A Dissent from the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966); *The Supreme Court, 1965 Term*, 80 HARV. L. REV. 91, 201 (1966); Note, *Consent Searches; A Reappraisal After* Miranda v. Arizona, 67 COLUM. L. REV. 130 (1967).

[15] 378 U.S. at 490-91.

[16] 384 U.S. at 444 & n.4.

[17] 388 U.S. 218 (1967).

[18] 388 U.S. at 227-39; *see, e.g.*, Escobedo v. Illinois, 378 U.S. 478, 486 (interrogation period was a "most critical" stage for the defendant); Hamilton v. Alabama, 368 U.S. 52, 53-54 (1961) (arraignment was "critical stage" under applicable state law); Powell v. Alabama, 287 U.S. 45, 57 (1932) (from arraignment until trial was a "critical period" in the proceedings).

[19] 388 U.S. at 227 (emphasis in original).

[20] 384 U.S. at 444-45, 467-73, 476, 478-79.

[21] 388 U.S. at 223-24, 228-39, 241 (1967); *see* Gilbert v. California, 388 U.S. 263, 272-73 (1967); Stovall v. Denno, 388 U.S. 293, 297, 299 (1967).

[22] 384 U.S. at 444, 475-76, 479; 388 U.S. at 237.

Subject to the provisos that the court is to "indulge every reasonable presumption against waiver of fundamental rights," [23] and that waiver is not to be presumed from silence by the accused,[24] determination of a "knowing and intelligent" waiver has traditionally been the province of the trial court.[25] While expressly endorsing these standards, the *Miranda* majority went significantly further, placing the burden of demonstrating a valid waiver on the Government.[26] However, neither *Miranda* nor *Wade* particularized the elements of a "knowing and intelligent waiver." Language in *Fay v. Noia* [27] that there can be no waiver unless there exists a "considered choice" by the petitioner suggests that a true waiver involves more than mere acquiescence, requiring instead an affirmative decision by the accused, arrived at with knowledge of the available right *and* through an understanding of the various ramifications of waiver and non-waiver.[28] The degree of legal sophistication necessary to accommodate the *Noia* comprehension test and the *Miranda* intelligence standard would seemingly dictate access to the advice, if not the actual presence, of *engaged* counsel whenever an accused is confronted with the waiver option.[29] Indeed, one circuit court has predicated in dictum that *Miranda*

[23] Glasser v. United States, 315 U.S. 60, 70 (1942); *accord,* Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937).

[24] Carnley v. Cochran, 369 U.S. 506, 516-17 (1962); Glasser v. United States, 315 U.S. 60, 70-72 (1942); Johnson v. Zerbst, 304 U.S. 458, 465 (1938); United States v. Slaughter, 366 F.2d 833, 840-41 (4th Cir. 1966).

[25] *See e.g.,* Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938); *Symposium: Administration of Criminal Justice,* 26 LA. L. REV. 666, 694 (1966); Comment, *Waiver of Constitutional Rights by Counsel in a Criminal Proceeding,* 1 J. MARSHALL J. 93, 97 (1967).

[26] *Compare* 384 U.S. at 475, *with* Johnson v. Zerbst, 304 U.S. 458, 468-69 (1938) (burden on defendant in a habeas corpus proceeding), *and* Spanbauer v. Burke, 374 F.2d 67, 74-75 (7th Cir. 1966) *cert. denied,* 389 U.S. 861 (1967) (burden of showing non-waiver not met by accused).

[27] 372 U.S. 391, 439 (1963); *see* Carnley v. Cochran, 369 U.S. 506, 513-17 (1962); Moore v. Michigan, 355 U.S. 155, 162-65 (1957).

[28] *See* Moore v. Michigan, 355 U.S. 155, 159 (1957) (must be "intelligently waived"); Von Moltke v. Gillies, 332 U.S. 708, 727 (1948) (must be waived "competently, intelligently, and with full understanding of the implications"); Maldonado v. Eyman, 377 F.2d 526, 528 (9th Cir. 1967) (waiver must be "intelligent choice" of the defeudant); Wade v. Yeager, 377 F.2d 841, 846 (3d Cir. 1967) (waiver must be "deliberate choice" by client and counsel); Meadows v. Maxwell, 371 F.2d 664, 668 (6th Cir. 1967) (counsel should have been appointed to assure that defendant understood his rights); Day v. United States, 357 F.2d 907, 909-11 (7th Cir. 1966) (court inquiry as to intelligent and intentioual waiver mandatory despite defendant's exteusive criminal history); United States v. Curtiss, 330 F.2d 278, 279-81 (2d Cir. 1964) (waiver must be preceded by clear-cut explanation of rights).

[29] *See* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 282 (1942)

prohibits *ex parte* interrogation where counsel has been appointed or retained.[30]

While noting that the "better, fairer, and safer practice is to afford the defendant's attorney reasonable opportunity to be present," the Ninth Circuit in *Coughlan* was concerned that a reversal of Coughlan's conviction would signify that custodial interrogations must be attended by engaged counsel and was unwilling to so "expand" *Miranda*.[31] Instead, the court searched the record for a "clear and knowing" waiver and, satisfied that the prosecution had met the burden of demonstrating such a waiver, affirmed the conviction.[32] The dissent contended that a special exception to the *Miranda* waiver rule had been created by the failure of investigating authorities to notify *appointed* counsel.[33] By failing to inform defense counsel of the intended interview and thereby foreclosing his opportunity to be present, the investigators had as effectively denied Coughlan his constitutional and statutory[34] guarantees of the assistance of counsel as if they had barred counsel from the jail, the dissent maintained.[35] Thus, without the advice and presence of counsel, Coughlan's waiver did not meet the "voluntary, knowing and intelligent" standard of *Miranda*.[36] Further, as Judge Hamley observed, the practice of the prosecutor of dealing directly with a represented defendant through the

(Douglas, J., dissenting) (under the circumstances, waiver without the advice of counsel was not "intelligent and competent"); Jones v. United States, 342 F.2d 863, 869 (D.C. Cir. 1964) (incapable of intelligent waiver without advice of counsel); Enker & Elsen, *Counsel for the Suspect:* Massiah v. United States *and* Escobedo v. Illinois, 49 MINN. L. REV. 47, 55, 64, 66, 69 (1964); 16 BUFFALO L. REV. 439, 447-48 (1967).

[30] Mathies v. United States, 374 F.2d 312, 316 n.3 (D.C. Cir. 1967); *see* Misner v. United States, 384 F.2d 130, 131 (5th Cir. 1967) (semble); United States v. Smith, 379 F.2d 628, 633-34 (7th Cir.) *cert. denied,* 389 U.S. 993 (1967); Jones v. United States, 342 F.2d 863, 871 (D.C. Cir. 1964); Lee v. United States, 322 F.2d 770, 777 (5th Cir. 1963). *See* Bator, *Criminal Justice in the Mid-Sixties:* Escobedo *Revisited,* 42 F.R.D. 463, 472 (1966).

[31] 391 F.2d at 372.

[32] *Id.* See notes 22-26 *supra* and accompanying text.

[33] 391 F.2d at 372, 374 & nn.2-3 (Hamley, J., dissenting).

[34] Criminal Justice Act of 1964 § 2, 18 U.S.C. § 3006A(c) (1964) ("A defendant for whom counsel is appointed shall be represented at every stage of the proceedings . . . ."); FED. R. CRIM. P. 5 & 44(a); *see* Ray v. United States, 367 F.2d 258, 264-65 (8th Cir. 1966), *cert. denied,* 386 U.S. 913 (1967).

[35] 391 F.2d at 375 (Hamley, J., dissenting).

[36] *Id.* at 374-75 (Hamley, J., dissenting); *see* notes 22-30 *supra* and accompanying text; *cf.* Escobedo v. Illinois, 378 U.S. 478, 488-91 (1964); Massiah v. United States, 377 U.S. 201, 204-05 (1964); Comment, *Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest,* 54 CALIF. L. REV. 1262, 1270, 1295-96 (1966).

medium of "government agents" is violative of Canon 9 of the Canons of Professional Ethics.[37] By admitting Coughlan's statement, the majority was, in effect, encouraging future unethical prosecutorial conduct.[38]

The majority's reliance upon the lower court's determination of waiver is consistent with the explicit waiver provisions of *Miranda* and *Wade*.[39] Arguably, however, the decision betrays the spirit of these cases and their predecessors,[40] disregards the fundamental interdependency of the fifth and sixth amendments, and dilutes the scope and import of the right to counsel. Moreover, in light of the undesirable policy being fostered by the *Coughlan* opinion, the majority's refusal to incorporate an exception to the *Miranda* waiver doctrine in those instances where counsel has been retained or appointed would appear to be overly cautious. Instead of requiring investigatory bodies to cooperate with defense counsel in the hope of forging a viable, pretrial role for counsel commensurate with both the rights of the accused and the legitimate needs of law enforcement agencies,[41] the Ninth Circuit has suggested that governments may avoid the dampening effect of defense counsel by dealing directly with the defendant.[42] The *Miranda* Court sought to eliminate disparate judicial treatment of the informed and the naive by providing all suspects with a comprehensive warning of the sixth amendment right to counsel at the critical investigatory stage. It seems unlikely that the *sixth amendment* right to counsel would have been required at the *investigatory* stage if a perfunctory warning of the right to remain silent alone were sufficient to assure that the *fifth amendment* privilege against self-incrimination did

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[37] 391 F.2d at 376; ABA CANONS OF PROFESSIONAL ETHICS No. 9; *accord*, Mathies v. United States, 374 F.2d 312, 316-17 (D.C. Cir. 1967); Jones v. United States, 342 F.2d 863, 871 (D.C. Cir. 1964); Ricks v. United States, 334 F.2d 964, 970 & n.18 (D.C. Cir. 1964); Lee v. United States, 322 F.2d 770, 777 (5th Cir. 1963); *see* Escobedo v. Illinois, 378 U.S. 478, 487 n.7 (1964). *But see* United States v. Smith, 379 F.2d 628, 633 (7th Cir. 1967); United States v. Massiah, 307 F.2d 62, 66 (2d Cir. 1962), *rev'd on other grounds*, 377 U.S. 201 (1964). *See generally* H. DRINKER, LEGAL ETHICS 201-02 (1953); Broeder, Wong Sun v. United States, *A Study in Faith and Hope*, 42 NEB. L. REV. 483, 599-604 (1963).

[38] Were interrogation of an accused to be classified as a "deposition," FED. R. CRIM. P. 15 could be invoked to require the presence of counsel for all parties at the investigation. 391 F.2d at 378 n.11 (Hamley, J., dissenting); Ricks v. United States, 334 F.2d 964, 969-70 & nn.15, 19 (D.C. Cir. 1964).

[39] See notes 22-26 *supra* and accompanying text.

[40] *See* 391 F.2d at 374 (Hamley, J., dissenting); notes 1 & 5-21 *supra* and accompanying text.

[41] Comment, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1049-50 (1964).

[42] *But see* United States v. Wade, 388 U.S. 218, 237-38 (1967).

not become illusory.[43] Indeed, the identical factors,[44] such as nervousness, lack of comprehension as to the need for exercising the right, and psychological pressure, which induce a suspect to incriminate himself, despite a warning of the right to remain silent, could act to convince an accused to waive his right to the presence of counsel already engaged.[45] Knowing this, police might be persuaded to repeatedly isolate a defendant prior to trial, using clandestine custodial interrogations to elicit the desired inculpatory statement. Should that practice occur, the buffer between the state and the individual which counsel is designed to provide[46] is eliminated; and the impressionable, the ignorant, and the uninitiated would again be subjected to unequal judicial treatment. Finally, as is suggested by the analogous factual situation in *Wade*, where appointed counsel was not notified of his client's participation in a post-indictment lineup, the effective denial of access to engaged counsel resulting from solicitation of a waiver in counsel's absence may be a denial of due process that sabotages the defendant's right to a fair trial.[47] Such an analysis is strengthened by the Canon 9 proscription against "communication upon the subject of controversy with a party represented by counsel."[48]

The dissent in *Coughlan* does not conclude whether "timely notification" of appointed counsel would be satisfactory, or whether counsel must actually be present before an interrogation can take place. Mandatory presence of counsel, however, would probably offer too great an opportunity for tactical delay, while mere notification could be readily abused by law enforcement agencies. Thus, where counsel has been retained or appointed, the proper test might be timely notification and

[43] *See* Broeder, *supra* note 37, at 521-22; Schwartz, *Criminal Justice in the Mid-Sixties:* Escobedo *Revisited*, 42 F.R.D. 463, 469 (1966); Note, 78 HARV. L. REV. 426, 429 (1964) (perfunctory warning in conjunction with police authority may induce incriminating statements).

[44] *See* Faculty Note, *A Postscript to the* Miranda *Project: Interrogation of Draft Protestors*, 77 YALE L.J. 300, 312-18 (1967).

[45] *See* Faculty Note, *A Postscript to the* Miranda *Project: Interrogation of Draft Protestors*, 77 YALE L.J. 300, 310-19 (1967); Comment, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1048 (1964); *The Supreme Court, 1963 Term*, 78 HARV. L. REV. 143, 219 & n.11, 220 (1964).

[46] Comment, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1034, 1048 (1964).

[47] United States v. Wade, 388 U.S. 218, 223-24 (1967); *see* Stovall v. Denno, 388 U.S. 293, 297-99 (1967); Gilbert v. California, 388 U.S. 263, 279 (1967) (Black, J., concurring in part, dissenting in part); note 19 *supra* and accompanying text.

[48] ABA CANONS OF PROFESSIONAL ETHICS No. 9; Broeder, *supra* note 37, at 604 (author suggests that Canon 9 violation by prosecutor or his agents is a denial of right to counsel and due process).

reasonable opportunity to be present. Requiring that counsel be apprised of an impending interrogation is not to foreclose waiver of constitutional guarantees. Rather, such a procedural safeguard would tend to ensure that a waiver was entered into freely and with cognizance of the alternatives and ramifications.[49]

[49] *See Developments in the Law—Confessions,* 79 HARV. L. REV. 935, 1020 (1966); Comment, *The New Definition: A Fifth Amendment Right to Counsel,* 14 U.C.L.A.L. REV. 604, 618, 623, 627 (1967).

In Hodge v. United States,——F.2d——(9th Cir. 1968), decided after *Coughlan,* the Ninth Circuit appeared to apply a more stringeut standard in waiver cases, at least as to waiver of counsel at trial, requiring the trial court to conduct a "penetrating and comprehensive examination" in order to assure that the accused was adequately informed of the risks involved in the waiver of constitutional guarantees. *Id.* at——.