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Argued by WILLIAM I. SIEGEL

IN THE

Supreme Court of the United States

October Term, 1965

No. 760

MICHAEL VIGNERA,

Petitioner,

—against—

NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT

AARON E. KOOTA
District Attorney, Kings County
Municipal Building
Brooklyn, New York
Attorney for Respondent

WILLIAM I. SIEGEL
Assistant District Attorney
Of Counsel

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Statement

The writ of certiorari is addressed to the New York Court of Appeals in review of its order dated April 15, 1965 which affirmed a judgment of the Appellate Division of the Supreme Court, Second Judicial Department dated May 4, 1964. That judgment affirmed (i) a judgment of the former Kings County Court rendered November 3, 1961 convicting petitioner after a jury trial of Robbery in the First Degree and sentencing him as a third felony offender to a term of imprisonment of thirty to sixty years; and (2) a judgment of the Supreme Court, Kings County, dated February 6, 1963 which, after a hearing, resentenced him as a second felony offender to the same term of imprisonment (R 31-33). The resentence was necessitated by the vacature by

the United States District Court for the Western District of New York by order made December 31, 1962 (R 31-32), *Vignera* v. *Wilkins,* Fed. Supp. of an underlying Florida judgment of conviction on the ground of constitutional invalidity.

Opinions Below

The memorandum decision of the Appellate Division affirming the judgments of conviction is reported at 21 A D 2d 752 (R 33) and the memorandum decision of the New York Court of Appeals is reported at 15 N Y 2d 970. The certification by the Court of Appeals of a constitutional question, by order amending the remittitur, is reported in 16 N Y 2d 614. It reads (R 40-41):

> "1. Whether, in the circumstances of this case, the admission in evidence of a confession elicited prior to arraignment by an Assistant District Attorney from defendant-appellant and recorded by a stenographer constituted a denial of his rights under the Fourteenth Amendment to the United States Constitution;
>
> 2. Whether, in the circumstances of this case, the admission in evidence of police testimony as to statements elicited from defendant-appellant constituted a denial of his rights under the Fourteenth Amendment of the United States Constitution.
>
> The Court of Appeals held that no rights of the defendant-appellant under the Fourteenth Amendment to the United States Constitution has been violated" (16 N Y 2d 614, 209 N.E. 2d 110 (1965)) (R 40-41).

Jurisdiction

The petition for the writ of certiorari was granted by this Court on November 22, 1965 and is reported in 86 Sup. Ct. 320 (R 41). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

Questions Presented

Petitioner contends:

(1) That a confession elicited from an arrestee by an Assistant District Attorney and recorded by a stenographer, prior to arraignment but at a time when the questioned person had for some hours been under police detention as the prospective accused, and who was not advised of his right to counsel or of his right not to speak, was constitutionally inadmissible against him despite his failure to request counsel.

(2) That detention without arraignment for the period involved in the case at bar "for the purpose of eliciting incriminating statements prior to arraignment" violates the arrestee's constitutional rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments and thus renders inadmissible against him in a State criminal trial the statements elicited through questioning by State authorities.

With respect to the first contention, it is New York's position that the incriminatory product of the questioning is admissible.

Concerning the alleged purpose of the detention prior to arraignment, New York denies that there is evidence of such purpose; and in any event contends that even if such were the purpose, detention of this character does not in and of itself render incriminatory statements or full confessions inadmissible as evidence against their maker.

Record Facts Material to the Questions Presented

In the late afternoon of October 11, 1960 Harry Adelman, the owner of a Brooklyn dress shop, was robbed by a man armed with a knife. His wife was also threatened with the knife by the robber (R 6), as was a saleswoman (R 8). Adelman was deprived of considerable cash (R 9-10). He next saw the robber (whom he identified in open Court as the petitioner) on October 14th in the police station (R 10). There he also identified him (R 11).

Mrs. Gertrude Adelman corroborated the testimony of her husband concerning the robbery, the detention of the saleswoman at knife point (R 13), and her husband's forced surrender of money (R 14). She, too, made a Courtroom identification of the petitioner as the robber (R 15).

Anita Waldinger, the saleswoman, testified in substance as had Mr. and Mrs. Adelman (R 16). She had been present in the police precinct and had heard petitioner answer "from the dress shop" when a detective asked him "How do you know these people?" (R 17).

Vito Lentini, a stenographer employed by the District Attorney, verified a statement (R 19) given to the District Attorney's representative on October 14, 1960 by petitioner in which he admitted the perpetration of the robbery (R 20-21). It was taken at 11:05 P.M. October 14, 1960 (R 30).

Detective John Gillen received the first report of the robbery on October 11th, almost immediately after its occurrence. He arrested petitioner on October 14th at 3:00 P.M. (R 22) after petitioner had admitted his guilt of the robbery while armed with a toy gun. On the next day, however, "going to Court", he told Gillen that the weapon was a knife. When the victims came to the precinct, Gillen asked petitioner: "Michael, do you know who these people are?" and the petitioner answered: "That's the man I held up", referring to Mr. Adelman (R 23).

When, under cross-examination, Gillen was asked if he had advised petitioner "of his right of counsel", the trial Court sustained the prosecutor's objection (R 24).

There is no affirmative evidence in the record that petitioner was not advised and warned. We concede for purposes of this case, however, that the trial Court's ruling effectively prevented petitioner from proving the absence of advice and warning, if such absence there were. We further concede that in this posture of the record the questions presented to the Court are properly before it.

Similarly we raise no objection to the consideration of the confession made by petitioner to the District Attorney. Here again, no proof exists in the record whether or not appellant was given the advice and warning. However, the recorded confession (R 30-31) contains none. Therefore we again concede that the questions presented to the Court concerning this recorded confession are properly before it.

He also testified that Adelman and Mrs. Waldinger had identified petitioner as "the man that held him up" (R 24).

Edward Nemeth was given Mr. Adelman's Diners Club card by petitioner on the early morning of October 14, 1960.

He was arrested while attempting to utilize it in the purchase of jewelry which, according to their mutual plan, petitioner would "give me some money for it" (R 27).

POINT I

It is not required of the several States by any provision of the Federal Constitution that an arrestee be advised at any stage of interrogation by the public authority of his right to counsel or of his right to keep silent: Nor is there any constitutional requirement that he be warned of a possible use of these statements against him.

Petitioner's argument, concisely put, is that because he was at the time of his interrogation by the District Attorney not only formally arrested but, more, the intended accused in subsequent judicial proceedings, he was constitutionally entitled, as an obligatory preliminary to interrogation, to be advised and warned. The failure thus to advise and warn him rendered his confession constitutionally inadmissible in evidence against him.

He bases this contention upon a number of grounds which we shall discuss in this brief. At this point it is New York's answer that the Federal Constitution lays no such obligation upon the several States; that this Court has never declared the existence of such obligation; and that the Court should not now for the first time bring it to life.

Petitioner's first reliance is upon the Court's ruling in *Escobedo* v. *Illinois,* 378 U.S. 478, which, he argues, either directly or by necessary intendment surrounds him with the protections which he claims for himself. He seeks to

buttress this case by decisions of which *People* v. *Dorado,* 42 Cal. 169, 398 P. 2d 361, cert. den. 381 U.S. 937, is typical. Our answer is that neither directly nor by necessary intendment can *Escobedo* be considered as supporting petitioner's argument.

This Court first took jurisdiction to review judgments of conviction in States Courts based upon coerced confessions in 1936 (*Brown* v. *Mississippi,* 297 U.S. 278). It declared that a conviction resting either in whole or in part upon confessions coerced from the defendants by horrible and almost medieval mistreatment violated the Due Process Clause of the Fourteenth Amendment. It rejected the contention that Mississippi's misconduct was, if violative at all, violative of the Fifth Amendment—then not obligatory upon the several States. *Twining* v. *New Jersey,* 211 U.S. 78; *Snyder* v. *Massachusetts,* 291 U.S. 97. The Court unanimously held that it was not the Fifth Amendment, but the Fourteenth, which controlled. Hughes, C.J. wrote for a unanimous Court:

> "The compulsion to which the quoted statements refer is that of the process of justice by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter."

This Court has since passed upon the constitutional validity of confessions grounding some three dozen State judgments of conviction. Most of these judgments have been reversed because of the coerced nature of the confessions as tested by the standards which the Court has evolved within the framework of the Due Process Clause. It suffices to mention but a few: *Chambers* v. *Florida* (1939), 309 U.S.

227; *Malinsky* v. *New York* (1945), 324 U.S. 401; *Haley* v. *Ohio,* 332 U.S. 596 (1948); *Spano* v. *New York,* 360 U.S. 315 (1959); *Fikes* v. *Alabama,* 352 U.S. 191; *Rogers* v. *Richmond,* 365 U.S. 534 (1961); *Culombe* v. *Connecticut,* 367 U.S. 568 (1961); *Lynumn* v. *Illinois,* 372 U.S. 528 (1963); *Haynes* v. *Washington,* 373 U.S. 503 (1963).

Through all these cases runs, as the principle of decision, the philosophy expressed by Frankfurter, J. in *Culombe, supra*:

> "In light of our past opinions and in light of the wide divergence of views which men may reasonably maintain concerning the propriety of various police investigative procedures not involving the employment of obvious brutality, this much seems certain; it is impossible for this Court, in enforcing the Fourteenth Amendment, to attempt precisely to delimit, or to surround with specific, all-inclusive restrictions, the power of interrogation allowed to state law enforcement officers in obtaining confessions. No single litmus-paper test for constitutionally impermissible interrogation has been evolved; neither extensive cross-questioning—deprecated by the English judges; nor undue delay in arraignment—proscribed by McNabb; nor failure to caution a prisoner—enjoined by the Judges' Rules; nor refusal to permit communication with friends and legal counsel at stages in the proceeding when the prisoner is still only a suspect —prohibited by several state statutes. See Lisemba v. California, 314 U.S. 219, 87 L. ed. 166, 62 S. Ct. 280; Crooker v. California, 357 U.S. 433, 2 L. ed. 1448, 78 S. Ct. 1287; Ashdown v. Utah, 357 U.S. 426, 2 L. ed. 1443, 78 S. Ct. 1354.
>
> Each of these factors in company with all of the surrounding circumstances—the duration and condi-

> tions of detention (if the confessor has been detained), the manifest attitude of the police toward him, his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self control—is relevant. The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years; the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. Rogers v. Richmond, 365 U.S. 534, 5 L. ed. 2d 760, 81 S. Ct. 735. The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession."

In more summarized form this principle is thus expressed in *Culombe, supra*:

> "Its essence is the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips."

In *Lynumn, supra,* the Court reaffirmed the underlying rule and governing principle that:

> " * * * the question in each case is whether the defendant's will was overborne at the time he confessed."

In *Spano, supra*:

> "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; * * * "

And as late as 1963 the Court held in *Haynes, supra*:

> "In short, the true test of admissibility is that the confession was made freely, voluntarily, and without compulsion or inducement of any sort."

There have of course been instances among these three dozen cases where members of the Court have differed with each other as to final decision. The differences, however, have not been grounded on conflicting points of view concerning the test, but on differing estimates as to voluntariness or involuntariness of the facts of the cases.

New York's own test for determining voluntariness of confessions is identical with the one adhered to by this Court. It is crystallized in Code Crim. Pro. § 395:

> § 395. Confession of defendant, when evidence, and its effect.
>
> A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the District Attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed."

Petitioner contends that *Escobedo* supersedes,—and if it does not supersede, at least supplements—this long-standing State and Federal rule, by requiring that not only shall a confession be voluntary and free from coercive taint, whether physical or mental, but that in addition it must have been elicited from the arrestee in his full knowledge of his right to counsel and to silence after advice and warning thereof by the public authority. We have referred to support for his contention in *People* v. *Dorado, supra.* There are other cases, both State and Federal, in agreement: *People* v. *Neely,* 395 P. 2d 557 (Oregon, 1964); *State* v. *Dufour,* 206 A. 2d 82 (Rhode Island, 1965); *Campbell* v. *State,* 384 S.W. 2d 4 (Tennessee); *United States ex rel. Russo* v. *New Jersey,* 351 F. 2d 429.

There are, however, many cases, both State and Federal, which, supporting our position, have determined that *Escobedo* enunciated no general rule requiring warning; that it holds only that where counsel is denied access to a defendant then already suspect, or the defendant is denied access to counsel, there occurs a violation of the Sixth Amendment right to the assistance of counsel.

We cite *People* v. *Gunner,* 15 N Y 2d 226; *People* v. *Dusablon,* 16 N Y 2d 9; *People* v. *Hartgraves,* 31 Ill. 2d 375, cert. den. 380 U.S. 961; *Commonwealth* v. *Tracy,* 207 N.E. 2d 16 (Massachusetts); *Parker* v. *Warden,* 236 Md. 236 (Maryland); *State* v. *Winsett,* 205 A. 2d 510 (Delaware); *Bean* v. *State,* 398 P. 2d 251 (Nevada); *State* v. *Smith,* 43 N.J. 67; *State* v. *Stinson,* 139 S.E. 2d 558 (North Carolina); *Commonwealth* v. *Coyle,* 415 P.A. 379 (Pennsylvania); *Ward* v. *Commonwealth,* 138 S.E. 2d 293 (Virginia); *Brown* v. *State,* 131 N.W. 2d 169 (Wisconsin);

United States v. *Cone,* 2d Cir. Court of Appeals, decided November 22, 1965; *United States* v. *Robinson,* 2nd Cir. Court of Appeals, decided November 22, 1965.

We quote from New York's *People* v. *Gunner, supra* (including the implied dissent by only two of the seven members of the Court of Appeals):

> "As previously noted, the defendant, for his part, urges that the Appellate Division directed the exclusion of too few statements; that court should, he says, have also ruled out several additional statements which he made before his attorney communicated with the police. Relying on People v. Dorado (394 P. 2d 952, on rehearing 62 Cal. 2d 350, 62 A.C. 350) and certain language in Escobedo v. Illinois (378 U.S. 478, 490 et seq.), the defendant contends that the statements obtained by the police, in the absence of counsel, after his arrest should be held inadmissible, even though he never requested a lawyer and none appeared in his behalf at the time, since he was then the 'prime suspect' and the object of interrogating him was not to solve a crime but to elicit a confession. At such point, the defendant argues, he became entitled to the aid of counsel (if he so decided) and, accordingly, it was incumbent upon the police to advise him of his right to refrain from answering any questions and also of his right to a lawyer.
>
> The Court finds this argument without merit; the majority is of the opinion that the rule heretofore announced in our decisions (see, e.g., People v. Failla, 14 N Y 2d 178, supra; People v. Donovan, 13 N Y 2d 148, supra; People v. Myers, 11 N Y 2d 162; People v. Noble, 9 N Y 2d 571; People v. Waterman, 9 N Y 2d 561; People v. DiBiasi, 7 N Y 2d 544) should not be

> extended to render inadmissible inculpatory statements obtained by law enforcement officers from a person who, taken into custody for questioning prior to his arraignment or indictment, is not made aware of his privilege to remain silent and of his right to a lawyer even where it appears that such person has become the target of the investigation and stands in the shoes of an accused. Thus, the court answers in the negative the question posed but not passed upon in People v. Stanley (15 N Y 2d 30, 32). The Chief Judge and I take a different view and would exclude the additional statements which the defendant made after his arrest and before his lawyer communicated with the police (See People v. Dorado, 62 Cal. 2d 350, 361-363, supra.)''

Petitioner's brief (p. 17 seq.) is critical of *Gunner* and similar decisions, saying *inter alia*:

> ''The Courts that have so limited application of Escobedo have acted by simple *ipsi dixit*. Their opinions have not developed a rationale for the distinction nor have they attempted to rebut criticism of it. It is remarkable that the New York Court of Appeals would take this tack in light of its significant right to counsel decisions (citing.)''

The brief also brings within the sweep of its condemnation other participants in government (p. 23):

> ''It is hardly suprising that the criticism in large part has emanated from spokesmen for law enforcement agencies, for example, Los Angeles Police Chief Parker.''

We shall, we trust, be pardoned for observing that the many Courts which disagree with petitioner's analysis of

Escobedo and the law enforcement agencies who have "criticized" the decision (and the choice of language is petitioner's and not ours) are entitled to a presumption that they are citizens as well as agents of government; and that they, too, have a concern for individual liberties. A disagreement in principle is not necessarily proof of a lesser regard for constitutional law.

We assert that petitioner can find no warrant for his position in *Escobedo, supra;* neither on its facts nor in its law.

While Escobedo was under interrogation in a police station his retained lawyer arrived and repeatedly requested, but was denied, an opportunity to speak with him. Counsel and Escobedo actually saw each other in the precinct; and the police knew this. Escobedo's repeated requests during his interrogation to speak to counsel were denied. Eventually—and after these refusals—he confessed to an Assistant States Attorney the commission of murder. In holding, for a majority of five of this Court, that Escobedo's confession was constitutionally barred by the Sixth, (through the Fourteenth) Amendment, Goldberg J. noted that Escobedo had already

> "become the accused, and the purpose of the interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so."

The majority opinion makes it clear beyond possibility of partisan extension that *Escobedo* was intended to be, and must be, limited to these exact facts. Its first paragraph reads:

> "The critical question in this case is whether, under the circumstances, the refusal by the police to honor

> petitioner's request to consult with his lawyer during the course of an interrogation constitutes a denial of '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. 335, 342, and thereby renders inadmissible in a State criminal trial any incriminating statement elicited by the police during the interrogation.''

Its concluding paragraph reiterates the limited application of its holding:

> ''Nothing we have said today affects the powers of the police to investigate 'an unsolved crime', Spano v. New York, 360 U.S. 315, 327 (Stewart, J. concurring), by gathering information from witnesses and by other 'proper investigative efforts' Haynes v. Washington, 373 U.S. 503, 519. We hold only 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.*'' (Italics ours).

Certainly this is the understanding of *Escobedo* not only of New York's Court of Appeals (*People* v. *Gunner, supra*), but by the respected Court of Appeals for the Second Circuit (*United States* v. *Cone, supra*) in which at least six of the ten Judges sitting *en banc* concurred in the statement by Lombard, C.J.:

> ''While Escobedo may have extended the Sixth Amendment's protection by shifting the focus of the examination by which the admissibility of pre-arraignment statements is tested, that decision can-

> not be divorced from its particular facts; we would be misreading Escobedo if we extended it to embrace every inculpatory statement, made prior to arraignment and without full warning, by any person whom the police suspected of crime. Wherever the bar created by the Escobedo decision may ultimately be held to fall, it does not come so early in the process of police investigation as the interrogation here."

But one Judge (Smith, C.J.) dissented; and three Judges concurred.

Nor is it unimportant that four members of this Court dissented even from the limited application which the majority of five gave it. Mr. Justice Stewart in dissent, while recognizing the right of a defendant not to be interrogated in the absence of counsel *after indictment,* insisted that Sixth Amendment rights affecting a criminal prosecution do not come into play until "the institution of formal, meaningful judicial proceedings, by way of indictment, information, or arraignment, * * * " and that it is this "institution" which " * * * marks the point at which a criminal investigation has ended and adversary proceedings have commenced. It is at this point that the constitutional guarantees attach which pertain to a criminal trial," including "the guarantee of the assistance of counsel".

Mr. Justice White in a dissenting opinion in which Clark and Stewart, J.J. joined, viewed the majority opinion in *Escobedo* as an unnecessary, erroneous and hampering abandonment of "the voluntary-involuntary test for admissibility of confessions." He referred to *Hamilton* v. *Alabama,* 368 U.S. 52; *White* v. *Maryland,* 373 U.S. 59; *Gideon* v. *Wainwright, supra,* and noted strongly that:

> "These cases dealt with the requirement of counsel at proceedings in which definable rights could be won or lost, not with stages where probative evidence might be obtained."

He concluded with this observation:

> "Until now there simply has been no right guaranteed by the Federal Constitution to be free from the use at trial of a voluntary admission made prior to indictment."

Harlan, J.'s agreement with White, J. was succinctly expressed:

> "Like my Brother White, Post p. 988, I think the rule announced today is most ill-conceived and that it seriously and unjustifiably fetters perfectly legitimate methods of criminal law enforcement."

It is beyond contradiction that in the case at bar there is not even a suggestion of impermissible coercion in the procurement of the confession.

The same thought was cogently expressed by Lombard, C.J. in *Cone, supra*:

> "We do not agree and we find nothing in Escobedo which supports such a rule or which requires its extension to defendants who are questioned immediately upon their arrest. Text, context and history of the Sixth Amendment lead to the conclusion that the framers were addressing themselves to judicial proceedings, where a person is obliged to defend himself in a process fraught with the technicalities and the procedural niceties of the criminal law. This protection has been extended to preliminary hearings before a Magistrate, also part of the criminal prosecution."

Petitioner adds another string to his bow. He urges that if *Escobedo* does not compel the reversal of his conviction, this Court should effectuate that result because a confession was procured "during a period of illegal detention". He says that "a confession obtained during periods of unlawful detention should be subjected to a scrutiny similar although not identical to that demanded by *McNabb* v. *United States,* 318 U.S. 332, and *Mallory* v. *United States,* 354 U.S. 449."

Initially we deny that petitioner was illegally detained in violation of either New York's Code of Criminal Procedure, § 165 or of constitutional principle. That statute provides:

> "§ 165. Defendant, upon arrest, to be taken before magistrate.
>
> The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night."

Petitioner argues that since by 3:00 o'clock in the afternoon of October 14th there was proof of his guilt in the fact of his admission to Detective Gillen (R 23-23), he should have been arraigned before the 4:00 o'clock closing of the New York City Magistrates Court; and if not by 4:00 o'clock, at least some time during October 14th.

It is our submission that the argument does violence to any reasonable construction of the facts.

It is true that New York City Criminal Courts Act, § 101, requires the Magistrates Court to be open from 9:00 o'clock A.M. until 4:00 o'clock P.M. for the performance of judicial duties, including arraignment of defendants charged with

the commission of felonies. But small argument is needed, however, to demonstrate that the one hour which intervened between the 3:00 o'clock cut-off which petitioner assumes as the basis for his contention and the 4:00 o'clock closing time of the Magistrates Court is a demonstrably narrow and insufficient foundation for a charge of illegal delay in arraignment in obedience to Code Crim. Pro. § 165. Petitioner disregards the fact that there are police procedures (not only sanctioned by the Courts but required by statute) which must be followed before a defendant may be arraigned. Thus, an arrested person has the important right to be admitted to bail. A Magistrate, however, lacks the power to admit to bail with respect to a charge of felony without assuring himself "from the defendant's fingerprints or otherwise", that the defendant is free of such previous criminal record as deprives the Magistrate under Code Crim. Pro. § 552 of the power to admit to bail. Fingerprints disclosing prior convictions cannot be procured either immediately or in a matter of moments since a comparison must be made between those taken at the precinct (Code Crim. Pro. § 940) and those on file with the New York City Bureau of Criminal Identification.

Nor could petitioner have been arraigned after 4:00 o'clock. While the New York City Criminal Court Act does create Night Courts (§ 109) to function after the closing of the Magistrates Felony Court, the Night Courts are specifically excluded from consideration of cases involving felony charges. Only the Felony Court, specially created by Sec- to fulfill that purpose, has such power. Therefore, even if it had been improbably physically possible in petitioner's

case to have performed the obligatory check of his fingerprints with past records on the day of his arrest, no Court was in session in which he could be arraigned (except in the improbable case that the check would have been made within less than an hour). It is for this reason that we assert with complete confidence that under no view of New York law can a case be found which holds that failure to arraign within one hour constitutes "unnecessary" and therefore illegal, delay in arraignment. We are equally confident that there is no Federal case which, reviewing State judgments of conviction, has so held.

The contrary practise in Federal prosecutions is the product of the *McNabb-Mallory* rule, implemented by Rule 5-a of the Federal Rules of Criminal Procedure. This was the rule of which Frankfurter, J. said in *Columbe, supra*:

> "The McNabb case was an innovation which derived from our concern and responsibility for fair modes of criminal proceeding in the Federal Courts. The States, in the large, have not adopted a similar exclusionary principle. And although we adhere unreservedly to McNabb for federal criminal cases, we have not extended its rule to State prosecutions as a requirement of the Fourteenth Amendment. Gallegos v. Nebraska, 342 U.S. 55, 63, 64, 96 L. ed. 86, 93, 94, 72 S. Ct. 141 (opinion of Reed, J.); Brown v. Allen, 344 U.S. 443, 97 L. ed. 469, 499, 73 S. Ct. 397; Stein v. New York, 346 U.S. 156, 187, 188, 97 L. ed. 1522, 1544, 1545, 73 S. Ct. 1077; cf. Lyons v. Oklahoma, 322 U.S. 596, 597, 598, 88 L. ed. 1481, 1483, 64 S. Ct. 1208, note 2; Townsend v. Burke, 334 U.S. 736, 738, 92 L. ed. 1690, 1692, 68 S. Ct. 1252; Stroble v. California, 343 U.S. 181, 197, 96 L. ed. 872, 884, 72 S. Ct. 599."

We know of no case in this Court,—and we are confident that there are none,—which hold that illegal delay in arraignment is other than, or more than, a circumstance in the totality of circumstances upon which is determined the basic question of voluntary-involuntary confessions.

Petitioner continues the argument (his brief, Point II) by relating the fact of delayed arraignment to the exclusionary effect of the Fourth Amendment as imposed upon the States by *Mapp* v. *Ohio,* 367 U.S. 643. He argues that since his confession to the District Attorney was the product of the failure to arraign him pursuant to the requirements of Code Crim. Pro. § 165, that confession should be rejected by this Court under the *Mapp* rule which he characterizes (p. 28) as "* * * a true exclusionary rule that frankly operates as a chastisement of the police irrespective of whether the trial is unfair in the customary sense." As he put it (p. 29): "A constitutional rule of exclusion is equally appropriate in the case of illegal detention * * *."

We have, we submit, conclusively shown that there was in this case no illegal detention. We go further: we challenge the assumption that a defendant's rights to the due observance of Code Crim. Pro. § 165 can be secured to him only by an exclusionary rule which can be promulgated by this Court only under the aegis of the Constitution. (We say this because of the fact stressed by this Court in *Columbe, supra,* and other cases that the McNabb-Mallory rule is authorized only by its supervisory powers over the lower Federal Courts and not by the constitutional power which it possesses over the States). It is obvious that if § 165 is to be lodged within the Constitution for the same exclusionary purposes which brought the States within the

Fourth Amendment, there must be proof that a State defendant can be protected in no other way. This Court so concluded when in *Mapp* it overruled *Wolf* v. *Colorado,* 338 U.S. 25. But the contrary is true of the factor of illegal delay in arraignment in State Courts. We cite New York as an example of what is undoubtedly true throughout the country. New York juries have always been instructed by the Court concerning the existence, intent and meaning of Code Crim. Pro. § 165. They have always been charged that it was their duty to give due consideration to the time factors; and they have always been permitted to base an acquittal upon a finding that in the relevant circumstances of the case, delayed arraignment constituted an element of coercion. New York trial Courts now follow the same practice under the requirement of *Jackson* v. *Denno,* 378 U.S. 368.

It is no answer, we submit, to say as does petitioner, (p. 25) that no police officer in New York has ever been prosecuted under Penal Law, § 1844 for wilful and wrongful delay in arraigning a defendant. What is at issue,—what is desirable,—is not the punishment of the individual policeman, but the protection of a defendant's rights.

By the same token, however, is it not too great a price to compel society to pay that, because of the malfeasance or non-feasance of a policeman, society's safety, peace and good order shall suffer a serious blow in the liberation of an admitted criminal? This is by no means a rhetorical question; for there is ample evidence that an undue and unnecessary restriction of the powers of the States to protect themselves against the evil-doer makes crime flourish beyond the effective control of the authorities. If, as petitioner suggests (pp. 24-25) the majority opinions in *Cone, supra,*

and *Robinson, supra,* "all reflect a degree of impatience with certain of the Court's constitutional imperatives that appear to affect criminal investigation", it is not difficult to understand the generative causes of this "impatience". It is true that every individual is a member of society. It is just as true, however, that society is the sum total of all individuals. It would, we submit, be exalting the obligation to protect individual rights beyond all necessary proportion to elevate such rights to a point of precedence before, and predominance over, the demonstrated needs and rights of the community.

Petitioner similarly seeks to relate his cause to the Fifth Amendment. His contentions may be stated in sylogistic form. *Malloy* v. *Hogan,* 378 U.S. 1 imposes the Fifth Amendment privilege against self-incrimination upon the States. Since for all practical purposes the arrest of a citizen is the beginning of the exertion of State power against him, to arrest him and, under continued detention, to interrogate him without advice and warning is equivalent to compulsory self-incrimination; and for that reason just as impermissible as is interrogation without benefit of counsel after arraignment or indictment (which, be it noted, New York does not sanction: *People* v. *DiBiasi,* 7 N.Y. 2d 544; *People* v. *Waterman,* 9 N.Y. 2d 561; *People* v. *Meyer,* 11 N.Y. 2d 162; *People* v. *Rodriguez,* 11 N.Y. 2d 279, any more than it sanctions interrogation after denial of opportunity to consult with counsel, *People* v. *Donovan,* 13 N.Y. 2d 148; *People* v. *Friedlander,* 16 N.Y. 2d 248; *People* v. *Faila,* 14 N.Y. 2d 178; cf. *Massiah* v. *United States,* 377 U.S. 201).

With great deference to counsel, we are compelled to say that this is indeed a Gargantuan leap forward from the

premise of *Malloy* to a stage which the Court did not reach there, had not reached before, and has not since reached.

Malloy, in overruling both *Twining* v. *New Jersey, supra,* and *Adamson* v. *California,* 332 U.S. 46, held that the protections against compulsory self-incrimination guaranteed by the Fifth Amendment are "also protected by the Fourteenth Amendment against abridgement by the States". It is to be noted, however, that in *Malloy* the public compulsion was exercised upon the petitioner by a State Court which adjudged him in contempt and imprisoned him for refusal to answer questions upon the ground of incrimination. It is significant, moreover, that the Court discussed and decided *Malloy* within the framework of coercion and found that imprisonment no less than force may not be used to extort from a defendant evidence of guilt. It's ultimate, and essential, ruling barred *testimonial compulsion only.*

What we have said above is, we submit, equally applicable to petitioner's attempt to relate his situation to the Sixth Amendment and its guarantee of the right to counsel which *Gideon* v. *Wainwright,* 372 U.S. 335 makes obligatory on the States via the Fourteenth Amendment (petitioner's Points I and III). He relies upon *Massiah* v. *United States,* 377 U.S. 201, in which this Court held it to be a violation of the defendant's Sixth Amendment rights for a Federal agent to overhear, without defendant's knowledge, incriminating statements made by him in the absence of counsel *after indictment and arraignment* and while free on bail and in ignorance of the fact that he was being overheard. But *Massiah,* it is clear, rests upon the premise that once the indictment had occurred, the judicial process

had begun. Defendant therefore and thereafter became entitled to the constitutional protection of counsel. It certainly did not hold, nor did it even intimate, that this right existed before initiation of judicial processes. That this is so is demonstrated by its quotation from, and approval of *People* v. *Waterman, supra*:

> "Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal cases and the fundamental rights of persons charged with crime."

We are, we submit, not overduly simplifying petitioner's argument with respect to the relation of the Fourth, Fifth and Sixth Amendments to his case when we say that he is seeking to move back to the point of arrest the invocation and protection of the rights which he clearly has from the moment when the judicial process of the State begins to operate in relation to the charges against him by way of either indictment or preliminary arraignment. Petitioner does so in specific language (p. 37):

> "First. As we have seen, lengthy police detention often raises interrelated questions under the Fifth and Sixth Amendments (and the Fourth Amendment, as well, where the suspect is illegally seized or held over-long). Rather than decide each case according to the particular right most seriously aggravated, the Court can deal with the generality of police detention cases by articulating a rule that renders meaningful most of the protected rights of the affected amendments, in tandem. Cf. Griswold v. Connecticut, 381 U.S. 479, 484-85. Thus, beginning with the inchoate Fourth Amendment issue in-

> evitably present when a person is apprehended, the Court should expand upon the exlusionary rule of Mapp v. Ohio, 367 U.S. 643, and Wong Sun v. United States, 371 U.S. 471, to cover all police detention and all police interrogation whenever the accusatory stage of the criminal proceeding has been reached or whenever the detention has become unlawful."

(Parenthetically we note that the adoption of such an exclusionary rule would not free Courts from the burden of deciding "each case according to the particular right most seriously aggravated" because Courts would still be under the necessity of determining when the "accusatory" stage had been reached.) Petitioner is obviously, albeit without saying so, asking the Court to repudiate the very principle of decision which Frankfurter, J. enunciated in *Culombe, supra,* heretofore quoted by us (pp. 8-9 of our brief) and from which we re-quote only:

> "Due process does not demand of the States, in their administration of the criminal law, standards of favor to the accused which our civilization, in its most sensitive expression, has never found it practical to adopt."

Petitioner's brief shows little concern over the social dangers inherent in its thesis that police interrogation be so severely curtailed. Indeed, it calls to its aid the opinions of professors and commentators to the effect that such curtailment of police interrogation would not affect to any material degree the discovery and apprehension of persons guilty of crime. We have read some of these disquisitions (and particularly the energetic and bellicose writings of Professor Kamisar). We intend no disrespect to these learned pundits when we say that their opinions are of but minimal value.

We recognize their sincerity and their scholarship. At the same time, however, we are forced to be cognizant of their freedom from official responsibility in the effectuation of their opinions. Much to be preferred we submit, are the beliefs, grounded in experience, and sobered by responsibility, of those whose words are freighted with serious consequences to the community. A great member of this Court, —Mr. Justice Jackson,—wrote in *Watts* v. *Indiana,* 338 U.S. 49:

> "I suppose no one would doubt that our Constitution and Bill of Rights, grounded in revolt against the arbitrary measures of George III and in the philosophy of the French Revolution, represent the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself. They were so intended and should be so interpreted. It cannot be denied that, even if construed as these provisions traditionally have been, they contain an aggregate of restrictions which seriously limit the power of society to solve such crimes as confront us in these cases. Those restrictions we should not for that reason cast aside, but that is good reason for indulging in no unnecessary expansion of them.
>
> I doubt very much if they require us to hold that the State may not take into custody and question one suspected reasonably of an unwitnessed murder. If it does, the people of this country must discipline themselves to seeing their police stand by helplessly while those suspected of murder prowl about unmolested. Is it a necessary price to pay for the fairness which we know as 'due process of law'? And if not a necessary one, should it be demanded by this Court? I do not know the ultimate answer to these questions; but, for the present, I should not increase the handicap on society."

Mr. Justice White, dissenting in *Escobedo,* sapiently observed:

> "This new American judges' rule, which is to be applied in both federal and state courts, is perhaps thought to be a necessary safeguard against the possibility of extorted confessions. To this extent it reflects a deep-seated distrust of law enforcement officers everywhere, unsupported by relevant data or current material based upon our own experience. Obviously law enforcement officers can make mistakes and exceed their authority, as today's decision shows that even judges can do, but I have somewhat more faith than the Court evidently has in the ability and desire of prosecutors and of the power of the appellate courts to discern and correct such violations of the law.
>
> The Court may be concerned with a narrower matter: the unknowing defendant who responds to police questioning because he mistakenly believes that he must and that his admissions will not be used against him. But this worry hardly calls for the broadside the Court has now fired. The failure to inform an accused that he need not answer and that his answers may be used against him is very relevant indeed to whether the disclosures are compelled. Cases in this Court, to say the least, have never placed a premium on ignorance of constitutional rights. If an accused is told he must answer and does not know better, it would be very doubtful that the resulting admissions would be used against him. When the accused has not been informed of his rights at all the Court characteristically and properly looks very closely at the surrounding circumstances. See Ward v. Texas, 316 U.S. 547, 86 L. ed. 1663, 62 S. Ct. 1139; Haley v. Ohio, 332 U.S. 596, 92 L. ed. 224, 68 S. Ct. 302; Payne v. Arkansas, 356 U.S. 560, 2 L. ed. 2d 975, 78 S. Ct.

> 844. I would continue to do so. But in this case Danny Escobedo knew full well that he did not have to answer and knew full well that his lawyer had advised him not to answer.
>
> I do not suggest for a moment that law enforcement will be destroyed by the rule announced today. The need for peace and order is too insistent for that. But it will be crippled and its task made a great deal more difficult, all in my opinion, for unsound, unstated reasons, which can find no home in any of the provisions of the Constitution."

Chief Judge Lumbard, speaking out of the experience and wisdom garnered by his membership on a busy Court which constantly reviews both State and Federal judgments based in whole or in part upon confessions, has said:

> "The fact is that in many serious crimes—cases of murder, kidnapping, rape, burglary and robbery—the police often have no or few objective clues with which to start an investigation; a considerable percentage of those which are solved are solved in whole or in part through statements voluntarily made to the police by those who are suspects. Moreover, immediate questioning is often instrumental in recovering kidnapped persons or stolen goods as well as in solving the crime. Under these circumstances, the police should not be forced unnecessarily to bear obstructions that irretrievably forfeit the opportunity of securing information under circumstances of spontaneity most favorable to truth-telling and at a time when further information may be necessary to pursue the investigation, to apprehend others, and to prevent other crimes.
>
> Until the need for immediate advice is properly evaluated in light of the probable detrimental effect

> of such a requirement—an inquiry that cannot adequately be undertaken by courts examining the facts of particular cases—we think it highly undesirable to lay down a rule which would deprive the police of the opportunity to question suspects and to use such statements as are found to have been given voluntarily and to have been procured fairly. In our country, a most valuable right of law-abiding citizens who make up the great majority of our people is the right to be protected against law breakers and criminal interference with their liberty and property
>
> This right can be enjoyed only if those who have the responsibility for law enforcement are able to apprehend and prosecute an appreciable percentage of wrongdoers and solve an appreciable percentage of serious offenses. A time such as the present, when there is grave and growing public concern about the increasing ineffectiveness of law enforcement, and when there is growing legislative concern about the proper scope of the rights of persons accused of crime, is not a time for the courts to stifle or preempt the attempts to reach a reasoned compromise by announcing novel doctrines, constitutional or otherwise, or by extending old doctrines, in novel ways, so that law enforcement will be further crippled and made more difficult."

McLaughlin, C.J., dissenting in *Russo, supra,* wrote:

> "Fairness in crime investigation is no one-way street. A person interrogated with reference to a crime is entitled to full fair play but so is the investigative authority. Due process for law and order—for the public, by proper questioning of suspects has its rightful place under *Escobedo.* The majority here in its enthusiasm would simply eliminate lawful authority from the equal protection of due process. The

> destruction of the true balance of criminal justice could well be the net result of the court opinion."

It is of no small importance that Judge Lumbard in *Cone* accepted statistics derived from two California cities in 1960 which "revealed that between 75% and 90% of all persons charged with crime had given confessions or admissions after what the author termed "suprisingly short" periods of interrogation. It is equally significant that he similarly accepted the conclusion of Michael J. Murphy, then Police Commissioner of New York City, "that analysis of 1963 and 1964 New York City murder cases disclosed that 50% of those which had been solved had been solved in whole or in part by a confession."

New York's "growing legislative concern about the proper scope of the rights of persons accused of crime" has already been implemented in legislation.

Code Crim. Pro. § 813-f (Laws of 1965, Chapter 846, § 1, effective July 16, 1965), requires the District Attorney if he "intend to offer a confession or admission in evidence upon a trial of a defendant" to give written notice to that effect within a reasonable time before the commencement of the trial. The defendant may then move to suppress and "the Court shall hear evidence upon any issue of fact necessary to determination of the motion". An appeal from a judgment of conviction will bring up for review an order denying the motion to suppress. (Of course, the People have the right to appeal from an order granting the motion.) The success upon the motion by the defendant makes the confession or admission inadmissible in evidence "in any criminal proceeding against the moving party". As evidence that New York Courts are obeying the mandate of

the Legislature to the benefit of defendants, we cite the decision of Sobel, J. in the Supreme Court, Kings County, in *People* v. *Hernandez* and *King*. (Since the decision is unreported we append a copy to this brief).

This same legislative concern has born fruit of greatest importance. By Chapter 878, Article 18-b, of the Laws of 1965 entitled "Representation of persons accused of crime", the New York Legislature has commanded the governing bodies of all counties and cities within the State to "place in operation by December first, nineteen hundred and sixty-five a plan for providing counsel to persons charged with a crime, who are financially unable to obtain counsel". The governmental units are thereby give four choices: (1) the appointment of a public defender; (2) representation by Legal Aid Societies; (3) representation by counsel furnished by Bar Associations under a plan approved by the State's Judicial Conference; or (4) representation under a plan combining any of the foregoing. The term "crime" is defined as being broad enough to cover not only felonies and misdemeanors but even breaches "of any law of this State or of any law, local law or ordinance of a political subdivision of this State" other than traffic violations "for which a sentence to a term of imprisonment is authorized upon conviction thereof." Compensation is provided for counsel assigned by a Bar Association in what we believe to be fair measure. Compensation is payable for appellate as well as trial representation. Provision is made for payment for investigative, expert or other necessary services. The expenses of such representation and service are made a charge upon public funds.

The statute is not restricted in operation to Court appearances. It provides for compensation per hour "for time

reasonably expended out of Court", and for "reimbursement for expenses reasonably incurred". While it is too early to say exactly what representation will eventually be included within the scope of the statute, it is certainly possible to say that consultation with an arrestee is not excluded from its contemplation. It is equally possible to prophesy that under the simulus of contemporary thinking police-precinct representation will very soon be deemed to be within the intended legislative purpose.

We but echo the language of White, J. in *Escobedo* when we acknowledge that there are both law enforcement officers and prosecutors who go beyond the permissible limits of the proper performance of their duties. That perfection which is impossible of attainment by man in general cannot be expected of them. That there are instances of official imperfection is, however, not a valid reason to embed into the Constitution a total prohibition of interrogation except under the tutelage of defense counsel of whom Jackson, J. observed in *Watts* v. *Indiana, supra*:

> "Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."

It may well be that the problem presented to this Court by the case at bar and similar cases which the Court will simultaneously consider needs serious consideration and solutions supplementary to—although we do not concede that they should be in substitution of—the voluntary-involuntary test heretofore employed by State Courts and sanctioned by this Court. It is our respectful submission, however, that a judicial fiat is not the proper solution.

Court decrees relate to specific cases and are in theory, at least, binding only with respect to their facts. Nevertheless, they serve as precedents; and precedents can be misinterpreted and misapplied. Better far, we submit, is an explicit code which it lies within the province of legislatures to enact in language broad enough to furnish guidance for all types of cases. We do not share the pessimism inherent in petitioner's statement (p. 25): "Nor can the basic guarantees of counsel and freedom from testimonial compulsion be left to the states for laboratory experiment." We have shown that New York has already embarked on successful and fruitful "laboratory experiment". As experience shows necessity, New York can be trusted to add whatever safeguards of legal rights are reasonably required. And no less may be expected of all the States of the Union.

POINT II

Neither the principle of *Escobedo* v. *Illinois* nor any extension thereof should be held to be retroactive.

Linkletter v. *Walker,* 381 U.S. 618, decided that the exclusionary rule of *Mapp* v. *Ohio, supra,* does not apply to State Court convictions which had become final before its rendition. Clark, J. thus defined "final" (p. 622, footnote 5):

> "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in Mapp v. Ohio."

In the sense of this definition, the judgment under review is not final. It therefore follows that the principle of retroactivity is not here concerned and that the Court will make no decision in this case in the aspect of retroactivity.

Nevertheless, New York has a great interest in the question of retroactivity. There are numerous instances of past criminal judgment in its Courts which for one purpose or another (e.g. to secure freedom where the defendant is still imprisoned; to affect a multiple offender status; or for the more limited but still understandable purpose of erasing a criminal record) would be affected by a decision of this Court holding *Escobedo* and the extension thereof prayed for by petitioner to be retroactive. It is for this purpose that we write upon the subject although we shall not argue the point.

It was pointed out in *Linkletter* that this Court is "neither required to apply, nor prohibited from applying, a decision retrospectively." The application of the doctrine is governed by the nature of the new decision and the consequences of its application to old cases already finalized. The considerations which govern the choice were thus summarized: the purpose of the new decision (as, in *Mapp,* to compel the States to observe Fourth Amendment rights); the number of finalized cases which would be affected by the new decision; and the effect upon the administration of justice of applying the new decision retroactively.

In the same term the Court similarly decided *Angelet* v. *Fay,* 381 U.S. 654 on the authority of *Linkletter.*

Subsequently, and on January 19, 1966, the Court held in *Tehan* v. *Shott,* 34 U.S. Law Week, No. 27, p. 4095, that *Griffin* v. *California,* 380 U.S. 609 (forbidding comment by state prosecutor or Judge on defendant's failure to testify) should not have retroactive effect.

We submit that the same guidelines which led to the holdings in *Linkletter, Angelet* and *Tehan* should here be followed.

Here, too, if retroactivity were accorded there would be that serious disruption in the administration of justice of which Clark, J. spoke in *Linkletter*:

> "Finally, there are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of Mapp retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice."

Again, the States would be penalized for following a procedure which this Court had never prohibited.

> "Until Escobedo it had never been seriously urged that the mere failure to advise a suspect of his right to remain silent and his right to counsel would of itself, absent other factors evidencing unfairness or coercion, invalidate the use of any statement made thereafter by the accused" (Lombard, C.J. in United States v. Cone, supra).

This Court had itself affirmed State judgments of conviction in *Cicenia* v. *Legay,* 357 U.S. 504 and *Crooker* v. *California,* 357 U.S. 433, holding confessions to be admissible which were procured after denial of requested opportunity to consult with counsel.

Additionally, there is a great resemblance to be noted between the facts of the case at bar and one of the determining factors of which in *Linkletter* Clark, J. wrote:

> "All that petitioner attacks is the admissibility of evidence, the reliability and relevance of which is not questioned and which may well have had no effect on the outcome."

It is true that petitioner attacks both the admissibility and the reliability of his confession, claiming both to be affected by absence of counsel. The relevancy of the confessions, however, is undoubted. And most important is the probability that their absence from the case "may well have had no effect on the outcome". It is hornbook law that identification of a robber by his victim is, if it is not inherently incredible, sufficient in itself to sustain a conviction. Identification in the case at bar was made by three witnesses and in addition was a self-identification testified to not only by Detective Gillen, but by the witness Waldinger. We are therefore warranted in saying that, even absent both confessions, petitioner would unquestionably have been convicted.

It is, in sum, our respectful submission on this issue that if the judgment of conviction at bar should be affected by the decision which this Court will make, no other New York judgment, already finalized, should be thereby affected.

POINT III

The order of the New York Court of Appeals should be affirmed.

Dated: Brooklyn, New York
February 1966

Respectfully submitted,

AARON E. KOOTA
District Attorney
Kings County

WILLIAM I. SIEGEL
Assistant District Attorney
Of Counsel

APPENDIX A

Constitutional and Statutory Provisions Mentioned

CONSTITUTION OF THE UNITED STATES

Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause

of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV:

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Code of Criminal Procedure

§ 165:

The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night.

New York Penal Law

§ 1844:

A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such person before a magistrate hav-

ing jurisdiction to take his examination, is guilty of a misdemeanor.

NEW YORK CITY CRIMINAL COURT ACT

§ 101. Courts to be held daily in each district.

Except as otherwise provided in this Section, . . . each City Magistrate's Court shall be open every day at nine o'clock in the morning, and shall not be closed before four o'clock in the afternoon. . . .

§ 552. Offenses not bailable.

The defendant cannot be admitted to bail either before or after indictment except by a justice of the Supreme Court . . . when the defendant is charged

1. * * *

2. * * *

3. With a felony . . .

§ 552-a. Identification prior to bail.

No person charged with a felony . . . shall be admitted to bail until his fingerprints shall be taken to ascertain whether he has previously been convicted of crime. . . . Nor shall he be entitled to bail until his previous record, if any, shall be submitted to the judge . . . empowered to admit to bail.

§ 109. Night Courts; separate court for women.

. . . All persons who were arrested after the day courts are closed, or at an hour too late to be brought to a day

court, for offenses other than felonies . . . must be brought to the said night courts and such night courts shall have jurisdiction to hear, try and determine all cases coming within the summary jurisdiction of a city Magistrate . . .

Criminal Procedure—Crimes—Representation

Memorandum relating to this chapter, see p. A-321

CHAPTER 878

An Act to amend the code of criminal procedure and the county law, in relation to providing counsel to persons charged with a crime who are financially unable to obtain counsel and repealing sections one hundred eighty-eight, one hundred eighty-nine and three hundred eight of the code of criminal procedure.

Approved July 16, 1965, effective December 1, 1965.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The county law is hereby amended by inserting therein a new article, to be article eighteen-B, to read as follows:

ARTICLE 18-B

REPRESENTATION OF PERSONS ACCUSED OF CRIME

Section

722. Plan for representation.

Appendix A—Constitutional and Statutory Provisions Mentioned

722–a. Definition of crime.

722–b. Compensation and reimbursement for representation.

722–c. Services other than counsel.

722–d. Duration of assignment.

722–e. Expenses.

§ 722. Plan for representation

The board of supervisors of each county and the governing body of the city in which a county is wholly contained shall place in operation throughout the county by December first, nineteen hundred sixty-five a plan for providing counsel to persons charged with a crime, who are financially unable to obtain counsel. Each plan shall also provide for investigative, expert and other services necessary for an adequate defense. The plan shall conform to one of the following:

1. Representation by a public defender appointed pursuant to county law article eighteen-A.

2. Representation by counsel furnished by a private legal aid bureau or society designated by the county or city, organized and operating to give legal assistance and representation to persons charged with a crime within the city or county who are financially unable to obtain counsel.

3. Representation by counsel furnished pursuant to a plan of a bar association in each county whereby the services of private counsel are rotated and coordinated by an ad-

ministrator. Any plan of a bar association must receive the approval of the judicial conference before the plan is placed in operation.

4. Representation according to a plan containing a combination of any of the foregoing.

Any judge, justice or magistrate in assigning counsel pursuant to sections one hundred eighty-eight, three hundred eight and six hundred ninety-nine of the code of criminal procedure shall assign counsel furnished in accordance with a plan conforming to the requirements of this section

§ 722-a. Definition of crime

For the purposes of this article, the term "crime" shall mean a felony, misdemeanor, or the breach of any law of this state or of any law, local law or ordinance of a political subdivision of this state, other than one that defines a "traffic infraction," for which a sentence to a term of imprisonment is authorized upon conviction thereof.

§ 722-b. Compensation and reimbursement for representation

All counsel assigned in accordance with a plan of a bar association conforming to the requirements of section seven hundred twenty-two whereby the services of private counsel are rotated and coordinated by an administrator shall at the conclusion of the representation receive compensation at a rate not exceeding fifteen dollars per hour for time expended in court or before a magistrate, judge or justice, and ten dollars per hour for time reasonably expended out of

court, and shall receive reimbursement for expenses reasonably incurred. Where a defendant is charged with a crime punishable by death or where a defendant under eighteen years of age at the time of the commission of a crime indicted for a crime which, if committed by an adult, may be punishable by death, compensation shall not exceed one thousand five hundred dollars where one counsel has been assigned, and shall not exceed two thousand dollars where two or more counsel have been assigned. Where a defendant is charged with one or more other felonies, compensation shall not exceed five hundred dollars. Where a defendant is charged with one or more misdemeanors, compensation shall not exceed three hundred dollars. For representation in an appellate court on an appeal from a judgment of death or on an appeal as of right from a judgment of life imprisonment, imposed in accordance with section ten hundred forty-five or section ten hundred forty-five-a of the penal law, compensation shall not exceed one thousand five hundred dollars where one counsel has been assigned, and shall not exceed two thousand dollars where two or more counsel have been assigned. For representation in an appellate court on an appeal from a judgment of conviction for one or more other felonies, compensation shall not exceed five hundred dollars. For representation in an appellate court on an appeal from a judgment of conviction for one or more misdemeanors, compensation shall not exceed three hundred dollars.

For representation on an appeal, compensation and reimbursement shall be fixed by the appellate court. For all other representation, compensation and reimbursement

shall be fixed by the court where judgment of conviction or acquittal or order of dismissal was entered. In extraordinary circumstances the court may provide for compensation in excess of the foregoing limits.

Each claim for compensation and reimbursement shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensation applied for or received in the same case from any other source.

No counsel assigned hereunder shall seek or accept any fee for representing the defendant for whom he is assigned without approval of the court as herein provided.

§ 722-c. Services other than counsel

Upon a finding in an ex parte proceeding that investigative, expert or other services are necessary and that the defendant is financialy unable to obtain them, the court shall authorize counsel, whether or not assigned in accordance with a plan, to obtain the services on behalf of the defendant. The court upon a finding that timely procurement of necessary services could not await prior authorization may authorize the services nunc pro tunc. The court shall determine reasonable compensation for the services and direct payment to the person who rendered them or to the person entitled to reimbursement. Only in extraordinary circumstances may the court provide for compensation in excess of three hundred dollars.

Each claim for compensation shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensa-

tion applied for or received in the same case from any other source.

§ 722-d. Duration of assignment

Whenever it appears that the defendant is financially able to obtain counsel or to make partial payment for the representation or other services, counsel may report this fact to the court and the court may terminate the assignment of counsel or authorize payment, as the interests of justice may dictate, to the public defender, private legal aid bureau or society, private attorney, or otherwise.

§ 722-e. Expenses

All expenses for providing counsel and services other than counsel hereunder shall be a county charge or in the case of a county wholly located within a city a city charge to be paid out of an appropriation for such purposes.

APPENDIX B

Decision of Sobel, *J.*

(Peo. v. Hernandez, et al.)

SUPREME COURT

KINGS COUNTY

CRIMINAL TERM, PART V

Sobel, J.

Dated: December 28, 1965

THE PEOPLE OF THE STATE OF NEW YORK

vs.

ROLLIE HERNANDEZ and HARRY J. KING

Defendants are charged by indictment with manslaughter first degree and assault second degree.

They have moved to suppress, as involuntary, confessions made by them, in each case orally to the police and in writing (Q & A) to the district attorney.

A hearing has been held (Minutes of 9/22 and 9/23, pp. 1 to 199). In addition to the defendants an accomplice Stokes (age 15) testified.

On the issue of the use of physical force and overt threats of such force, I find in favor of the defendants and against the police officers. I find the testimony of the defendants credible and under the circumstances the testimony of the police officers not believable.

Under the "inherently coercive" rule (*Ashcroft* v. *Tennessee,* 322 U.S. 143; *Haley* v. *Ohio,* 332 U.S. 596; *Payne*

v. *Arkansas,* 356 U.S. 560; *Jackson* v. *Denno* [dissent of Justice Black], 378 U.S. 368) the conduct of the police is deemed inherently coercive and the confessions involuntary as a matter of law.

The confessions in my opinion would also be involuntary measured by the "totality of circumstances test" (*Fikes* v. *Alabama,* 352 U.S. 191; *Stein* v. *New York,* 346 U.S. 156). Both defendants were 17 years of age. For an appreciable period of time both defendants continued to deny their involvement in the crime. (The defendant King reasserted his denial to the district attorney during the Q & A questioning). The total duration of questioning, although a disputed issue, was in any event I find beyond acceptable limits. Both defendants were mentally subnormal. Deception was used by the police since neither defendant was told that the investigation was of a homicide, they were led to believe that only an assault was involved.

The defendant Hernandez was unlawfully arrested—without probable cause. I find also that he requested that his mother be called—the police advised him that the 'phone was out of order.

Neither defendant was advised of his right to silence or to the assistance of counsel.

Taken together, all of these circumstances with respect to each defendant exceeded the allowable limits (*Fikes* v. *Alabama, supra*).

* * * * *

Since much of the "external" evidence was not admissible at the hearing, I make no mention of the several

factors which tend to establish that the confessions were untrue.

But also "internally" the confessions are untrue since they do not "match" the crime in fact committed by someone.

In this regard we are, of course, cautioned by the cases, that a finding of "voluntariness" must not be influenced by the irrelevant factors that "externally" or "internally" the confessions appear to be truthworthy.

But common sense would require that the reverse situation—i.e., where the confession "externally" or "internally" appears to be false, should be relevant or "voluntariness." A false confession is much more likely to be the product of coercion than one which is true. But in view of the state of the record at the hearing, I make no finding of fact or law on trustworthiness.

* * * * *

I find solely on the issue of police-accused credibility in favor of the defendants. The People have thus failed to establish voluntariness by any degree of proof.

I find that the defendants' rights under the Fifth and Fourteenth Amendments have been violated. The confessions are suppressed.

Submit order.

SOBEL
J.S.C.