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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 584

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

ROY ALLEN STEWART,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

RESPONDENT'S BRIEF AND MOTION TO DISMISS WRIT OF CERTIORARI

WILLIAM A. NORRIS
609 South Grand Avenue
Los Angeles, Calif. 90017
Attorney for Respondent

Of Counsel:

TUTTLE & TAYLOR
609 South Grand Avenue
Los Angeles, Calif. 90017

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RESPONDENT'S BRIEF

Constitutional Provisions and Statutes Involved

In addition to the Sixth Amendment and section 1 of the Fourteenth Amendment to the United States Constitution, set forth in Petitioner's Opening Brief, this case involves sections 189, 825 and 849 of the California Penal Code. The texts of those statutory provisions are set forth in Appendix A hereto.

Questions Presented

1. Did the secret police interrogation of Respondent, over a period of five days following his arrest and before he was taken before a magistrate, constitute a denial of his constitutional right to the "Assistance of Counsel," and thereby render inadmissible at trial a confession elicited during the fifth day of interrogation?

2. Under the circumstances of this case, did Respondent make a knowing and intelligent waiver of any of his constitutional rights?

3. Does Respondent's failure to request counsel distinguish this case from *Escobedo* v. *Illinois*?

4. Did the police detention of Respondent beyond their legal authority constitute a denial of liberty without due process of law in violation of the Fourteenth Amendment, and thereby render inadmissible at trial the confession elicited during the illegal detention?

In the motion to dismiss the writ of certiorari as improvidently granted, Respondent raises the further question whether the judgment of the California Supreme Court below is "final" within the meaning of 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

Summary Statement of the Case

At 7:15 P.M. on January 31, 1963, Respondent, Roy Allen Stewart, was standing on the front porch of his home when he was approached by officers of the Los Angeles City Police Department and placed under arrest for "a series of purse-snatching robberies" (Rep. Tr. 691-692, 696-698, 707-708).

Stewart's wife and three other persons who were at his house were also arrested and taken into custody (Rep. Tr. 776-777). After searching the house, the officers took Stewart to the University Station of the Police Department, where he was incarcerated in a cell until February 5, 1963, when he confessed that he "snatched" the purse of a Miss Lucille Mitchell (Rep. Tr. 698-699, 710-711, 735-736, 784, 791).

During his incarceration at University Station, Stewart was interrogated by police on nine different occasions; each time he was alone with his interrogators—except during a portion of the first session on the night of January 31 when he was confronted with an accusing witness (Rep. Tr. 710-712, 716-727, 755-756, 967-968, 971). Stewart was questioned about robberies of six different women, one of which also involved rape. Finally, during the ninth interrogation, Stewart confessed that he took Miss Mitchell's purse (Rep. Tr. 736-739, 744-745). He at all times denied knowing anything about the other crimes.

Stewart testified that he gave the confession so that the police would release his wife from custody (Rep. Tr. 823-825, 880-881). This testimony was disputed by the police (Rep. Tr. 940). Shortly after Stewart confessed on February 5, his wife and the three others also arrested on January 31 were released from custody, because "there was no evidence to connect them with any crime" (Rep. Tr. 936-937).

Stewart was not taken before a magistrate until February 5, following his confession.[1]

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[1] Counsel for petitioner has authorized counsel for respondent to represent that the records of the Superior Court of Los Angeles County in this case show this statement to be true.

An information was filed charging Stewart with kidnapping, robbing and raping a Miss Ruby Champaine, kidnapping and robbing a Mrs. Meriwether Wells, and robbing a Mrs. Tsuru Miyauchi, a Mrs. Beatrice Dixon, and a Miss Maria Louisa Ramirez (Clk. Tr. 1-6, 8-9). It also charged him with murder of Miss Mitchell "with malice aforethought" (Clk. Tr. 7). Miss Mitchell, whose purse Stewart confessed taking, had been found on the steps of a porch bleeding from the head (Rep. Tr. 607). She died the next day from head injuries (Rep. Tr. 620-631).

The jury found Stewart not guilty of the charges of kidnapping, robbing and raping Ruby Champaine and not guilty of kidnapping Mrs. Wells (Clk. Tr. 27). He was found guilty of the remaining counts of robbery and of murder of Miss Mitchell in the first degree (Clk. Tr. 27-28).[2] After a separate penalty trial, the jury fixed the penalty at death, and he was so sentenced by the court (Clk. Tr. 41). On an automatic appeal (Calif. Penal Code § 1239b), the California Supreme Court reversed the judgment of conviction as to all counts on the ground that Stewart's confession was constitutionally inadmissible under the authority of *Escobedo* v. *Illinois,* 378 U.S. 478, and *People* v. *Dorado,* 62 Cal. 2d 338, 398 P.2d 361. *People* v. *Stewart,* 62 Cal. 2d 571, 400 P.2d 97.

At the time of trial, Stewart was 28 years old (Rep. Tr. 1237). He was born the son of an illiterate Arkansas sharecropper, and he dropped out of school in the sixth grade (Rep. Tr. 1237, 1239-1240). At the time of his arrest, he

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[2] Under California's felony-murder doctrine, murder committed in the perpetration of robbery is murder in the first degree. Calif. Penal Code § 189. The prosecution proceeded on that theory (Rep. Tr. 1063), and the jury was instructed accordingly (Supp. Clk. Tr. 28, 30-31).

said he had been working as a helper on a refuse truck (Rep. Tr. 1029-1033). At the age of 18, he was convicted of possession of one marijuana cigarette and was sent to the Youth Authority (Rep. Tr. 1241). At 23, he was convicted of second degree robbery involving three of his friends and an unknown man; he testified that the man "wanted to have some fun with a girl. So we just took him outside and took his money" (Rep. Tr. 1241-1242). He served a prison term of 2½ years (Rep. Tr. 1035).

Evidence Available to Police Before Interrogation

Prior to Stewart's arrest, the University Division of the Los Angeles Police Department had been investigating a series of robberies on the streets of a Los Angeles neighborhood during December 1962 and January 1963 (Rep. Tr. 673-682). The robberies were similar in that they all involved women whose purses or handbags were taken.

(1) On December 21, 1962, Mrs. Wells was robbed of her purse which contained, among other things, $5 to $10 in cash and three dividend checks payable to her husband, Robert K. Wells, in the sums of $10.45, $17.00, and $5.32 (Rep. Tr. 385-393). Mrs. Wells said she was "struck on the head by a colored man," who was otherwise unidentified (Rep. Tr. 379-380).

(2) On January 10, 1963, Mrs. Tsuru Miyauchi received a blow on the head and was robbed of a leather lunch bag which contained a change purse and $9 or $10 in cash (Rep. Tr. 506-509, 588). Mrs. Miyauchi did not see anyone attack her; she remembered only "collapsing to the ground" (Rep. Tr. 509).

(3) On January 19, 1963, Miss Lucille Mitchell was found on the steps of a porch bleeding from the head (Rep. Tr.

607). She died the next day, without having identified the assailant (Rep. Tr. 604-609, 611-616, 620).[3]

(4) On January 25, 1963, Mrs. Beatrice Dixon was robbed of a leather bag that contained, among other things, a coin purse and $23 in cash (Rep. Tr. 525-530). She testified that she was hit on the head by an unidentified person (Rep. Tr. 528-529).

(5) On January 30, 1963, Miss Maria Louisa Ramirez was robbed of a purse containing a wallet and $2 in cash (Rep. Tr. 551-555). Miss Ramirez said she was struck on the back of the head by someone whom she did not see (Rep. Tr. 554-557). A witness to the incident said the assailant was a colored man (Rep. Tr. 562).[4]

Stewart was never positively identified as the person who committed any of these crimes. He was linked to the robberies by the dividend checks which were in the purse taken from Mrs. Wells. The checks were negotiated with endorsements by "Robert K. Wells" and "Lena M. Franklin," including Mrs. Franklin's address and telephone number (Rep. Tr. 385-388, 485-487). On January 30, 1963, the police were supplied with copies of the negotiated checks, and the next day they located Mrs. Franklin (Rep. Tr. 684-686). Apparently, she told the police that she had co-signed the checks to help a friend, who had been introduced to her as "Roy Wells," cash them at a market where she traded (Rep. Tr. 489, 686, 697, 1044, 1055-1057).

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[3] Several items, identified as belonging to her, including a silver cuff link, an earplug for a transistor radio, and a lady's watch, were found in Stewart's home (Rep. Tr. 598-602, 701-702, 707-708).

[4] At the trial, this witness testified that while she was "not sure," she was of the "opinion" that Stewart was the assailant, based upon the fact that, at the trial, Stewart was wearing clothes that looked to her like the clothes the assailant was wearing at the time of the incident (Rep. Tr. 571-572, 574, 576-577).

Mrs. Franklin then led Logue and other officers to Stewart's home at 1912 West 39th Street, Los Angeles, where they found him standing outside on his porch (Rep. Tr. 502, 690-692, 698). Mrs. Franklin identified Stewart to the officers as the person who had endorsed and cashed the checks as "Robert K. Wells" (Rep. Tr. 491).

Logue immediately placed Stewart under arrest for "a series of purse-snatching robberies" (Rep. Tr. 696-698). The time of the arrest was 7:15 P.M., January 31, 1963 (Rep. Tr. 698).

Logue testified that at the time of the arrest he asked Stewart if he could "look around" the house, and Stewart said, "Go ahead" (Rep. Tr. 698). Logue and two other officers then conducted a "very thorough" two-hour search of Stewart's residence, including "every drawer and every closet" (Rep. Tr. 758). They found various purses and wallets taken from Mrs. Wells, Mrs. Miyauchi, Mrs. Dixon and Miss Ramirez, and the watch taken from Miss Mitchell (Rep. Tr. 384-393, 512-517, 526-530, 550-558, 600-601, 699-704).

The Incarceration and Interrogation of Respondent

Three Los Angeles police officers, Sergeants Logue, Mangiameli and Jensen, interrogated Stewart nine times during the five days he was incarcerated at the University Police Station (Rep. Tr. 755-756). Following is their version of the interrogations:

(1) *January 31, 1963, "sometime after 10:00 P.M."* (Rep. Tr. 710).

Logue and Mangiameli interrogated Stewart for "approximately 20 minutes" (Rep. Tr. 712, 717).[5] After pre-

[5] The conversation was taped and a corrected transcript read to the jury (Rep. Tr. 973, 989, 1044-1057).

liminary questioning (Rep. Tr. 1026-1035), Logue and Stewart had the following colloquy:

> Logue: "Well, Roy,—"
>
> Stewart: "Yes, sir."
>
> Logue: "You've got yourself a problem—I don't know what experiences you've had in the past, but I would think that if you had been around a little bit, as you may have been, that you'd know that the desire to try straighten things out—"
>
> Stewart: "Yes, sir."
>
> Logue: "And feeling sorry for what happened, you know, means a great deal to a great many people that you're going to be coming in contact with."
>
> Stewart: "Yes, sir."
>
> Logue: "The thing that we're after is the truth."
>
> Stewart: "Uh-huh."
>
> Logue: "And, I don't know how smart you are, but if you're as smart as I think, you'll tell the truth."
>
> Stewart: "I'll tell the truth."
>
> Logue: "Now, we've got a pretty fair idea of what you've been doing. . . . " (Rep. Tr. 1035-1036).

Logue then produced two of the Wells dividend checks, and asked Stewart whether he had ever seen them before (Rep. Tr. 717, 970-971, 1036). Stewart denied knowing anything about them (Rep. Tr. 717, 970-971, 1036). He also denied knowing Lena Franklin (Rep. Tr. 717, 971, 1036-1037). At that point, Logue left the room and returned with Lena Franklin (Rep. Tr. 971, 1037-1038). She identified Stewart as the person who endorsed the checks as

"Robert K. Wells" and cashed them (Rep. Tr. 971-972, 1038-1039). Stewart did not comment on Lena Franklin's statements (Rep. Tr. 1057-1058).

(2) *February 1, 1963, at 11:00 A.M.* (Rep. Tr. 718).

Logue and Jensen interrogated Stewart on this occasion for "approximately 20 minutes" (Rep. Tr. 718). Again Stewart was asked about the Wells checks, which he again denied cashing, and about Lena Franklin, whom he again denied knowing (Rep. Tr. 718-719). Stewart "voluntarily gave a handwriting exemplar and certain procedural matters were involved" (Rep. Tr. 719).

(3) *February 1, 1963, at 3:00 P.M.* (Rep. Tr. 719).

Logue and Jensen interrogated Stewart for "about five or six minutes" (Rep. Tr. 719). Jensen told Stewart that in the opinion of the handwriting expert who had made a comparison, Stewart had signed the name "Robert K. Wells" on the checks (Rep. Tr. 719). Stewart again denied it, but said he wanted to speak to Lillian Lara, his wife,[6] and that he might have something to tell the officers after he had talked to her (Rep. Tr. 719-720).

(4) and (5) *February 3, 1963, commencing at 11:00 A.M.* (Rep. Tr. 720).

This time Logue and Mangiameli talked to Stewart for "about five minutes" (Rep. Tr. 720-721). Stewart again stated he wanted to talk to Lillian Lara and following that

[6] Stewart's testimony that he had married Lillian Lara in Mexico in October 1964 is corroborated elsewhere in the record (Rep. Tr. 851, 751, 793). Of the four other persons who were arrested along with Stewart, Lillian Lara was the only one who had also been living at the house (Rep. Tr. 750, 776-777, 793-794, 937).

he might have something to say to the officers (Rep. Tr. 721). Logue testified: "We agreed to let him talk to Lillian Lara" (Rep. Tr. 721). After talking to Lillian Lara, Stewart was questioned "again . . . for about five minutes" (Rep. Tr. 721). During this session, he admitted endorsing and cashing the Wells checks, but said he had found them "at the base of a tree at 37th and Western" (Rep. Tr. 721-722). The officers then showed him Mrs. Wells' purse and wallet, which he denied ever having seen (Rep. Tr. 722).

Shortly after 1:00 P.M. on February 3, Logue returned to Stewart's home in the company of several other officers and Lillian Lara (Rep. Tr. 705-706). The officers again searched the premises and found Miss Ramirez' glasses and case in a drawer (Rep. Tr. 557, 707) and Miss Mitchell's silver cuff link and transistor earplug "lying on top of a television set" in Stewart's living room (Rep. Tr. 598-600, 707-708).

(6) and (7) *February 4, 1963, at 11:45 A.M.* (Rep. Tr. 722-723).

Logue and Mangiameli conducted this interrogation (Rep. Tr. 723). Logue said on direct examination that it lasted for "about 30 minutes" (Rep. Tr. 723). Logue showed Stewart various items identified as having been taken from the five robbery victims. He denied knowledge of them, with one exception: He said that the purse identified as Mrs. Wells' had been in his possession at an earlier time (Rep. Tr. 723-725). Also on the morning of February 4, 1963, Stewart was interrogated for an "hour and a half to two hours" by other officers (Rep. Tr. 756).

(8) *February 4, 1963, in the afternoon* (Rep. Tr. 725).

Logue and Mangiameli interrogated Stewart for "approximately one hour" during the afternoon of February 4 (Rep. Tr. 725-726). Logue testified that on this occasion Stewart said that Miss Ramirez' purse had been brought to the back porch of his home by someone; that Miss Mitchell's watch had been brought to his house by someone, but a few moments later said that he had bought it on the street as a present for Lillian Lara; and that he had found Mrs. Miyauchi's coin purse on the street and had given it to Lillian Lara (Rep. Tr. 726). For the first time, he was asked about robbing and raping Miss Ruby Champaine, which he denied (Rep. Tr. 757).[7]

(9) *February 5, 1963, at 8:30 A.M.* (Rep. Tr. 727).

Logue and Mangiameli interrogated Stewart for "approximately 20 minutes" beginning at 8:30 A.M. February 5 (Rep. Tr. 727). The latter portion of the conversation was taped (Rep. Tr. 727-728, 732-733). The pre-recording portion of the interrogation (from Logue's testimony on redirect examination) was as follows:

> "Yes, the defendant was in a room and I entered the room and sat down and I said to him, 'Roy, you killed that old woman over on Cimarron Street and you are not even sorry.'
>
> "And then there was no reply, and I waited for a period of time.

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[7] Logue's testimony on Stewart's answer to the question about Miss Champaine was: "He said no, that he hadn't. He further stated that he had done lots of things but that he had never snatched a purse or committed a crime against a woman" (Rep. Tr. 757).

"Then I again said, 'Roy, you killed that old woman over on Cimarron Street and you are not even sorry.'

"And after a few moments he said, 'Yes, I'm sorry. I'm sorry I killed her. I didn't mean to kill her.' [8]

"I then took out the pictures of the scene on Cimarron Street, and the color photographs of the person of Mrs. Mitchell, and I pointed to the photograph showing the birch trees in front of the location—

* * * * *

"Then the defendant told me that he had run up behind her and grabbed her purse and she had fallen down and he had kicked her. He stated he didn't hit her. He said that he had gone home and given Lillian the watch, and at about that time I stood up, excused myself for a moment, and left the room, and turned on the tape recorder and again reentered the room.

"My final statement was, before I left, I told him I thought he would now feel better that he was telling the truth.

"Q. Then you left the room and turned on the tape recorder, is that correct?

"A. That's correct" (Rep. Tr. 789-790).

The taped portion of the interrogation started, with Logue asking the questions, as follows:[9]

"Q. Well, Roy, as I said before, as I said all along, I think you are going to feel much better now that you

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[8] On cross-examination Logue had been asked: "As a matter of fact, he never did say that he had killed her, did he?" Logue answered: "No, he never used that word" (Rep. Tr. 782).

[9] An edited typewritten transcription of the taped interrogation was read to the jury (Rep. Tr. 733-734).

have laid this business right out in the open, and just as I told you, believe me, now, what you tell us are the things that we will tell other people.

"Now, you said you did it, you're sorry, and that is just exactly what the word is going to be as far as we are concerned" (Rep. Tr. 734).

After further questioning during which Logue pointed out the details of the Mitchell case to Stewart (Rep. Tr. 734-736), the interrogation proceeded as follows:

"Q. And then you say you ran up behind her and snatched her purse?

"A. Snatched her purse, yes, sir, that is what I done.

"Q. And that you didn't hit her on the head?

"A. No, I didn't hit her on the head, sir. I didn't. Anything, I could have kicked her, you know, after she fell. I was running. I could have kicked her in the head, but I'm not sure of that.

"Q. Did you grab her by the arm at all?

"A. No, I didn't.

* * * * *

"Q. You didn't?

"A. I grabbed her purse.

"Q. You see, the reason I am asking, here is a picture of her arm.

* * * * *

"—and it shows bruise marks on the side of the arm, and we were—

"A. I didn't grab her arm at all.

"Q. You didn't?

"A. Honestly I didn't.

"Q. You—do you recall which arm she had her purse on?

"A. It was on the right arm.

"Q. It was on the right arm?

"A. Yes, sir.

"Q. You see, here are the scrape marks on the side of the face.

* * * * *

"A. Uh-huh.

"Q. And this photograph, here, and you say, I believe, that as she fell she struck the sidewalk—

* * * * *

"A. Yes, she did, that is what happened, I remember that because I snatched her purse, see, I was running, I snatched her purse and that is where she fell. I could have kicked her.

"Q. Now, this is—you see the injury right here on top of the head in this photograph and I'm—

* * * * *

"And this is the one that caused her death, you see, it is on the left side, see, back about in this position, and it looks like a round, circular thing with several lacerations around it.

"A. But I didn't hit her. I know I didn't hit her. I am positive of that, sir. I know I did not hit her.

"Q. Then, Roy, as soon as this had happened, what did you do, go directly home?

"A. Yes, I did.

"Q. Uh-huh, and gave Lillian the watch?

"A. No, I didn't give it to her just then.

"Q. Oh, didn't you?

"A. No.

"Q. When did you give it to her, if you remember?
"A. Later on that evening" (Rep. Tr. 736-739).

Logue then questioned Stewart further about the Wells, Ramirez and Miyauchi cases, and Stewart again denied any involvement (Rep. Tr. 739-743). Logue returned to the Mitchell case, and the interrogation concluded as follows:

"Q. Well, tell me how it happened. You turned the corner and she's up, part way up the block there?
"A. I just started walking. As I got almost to her I just started running and snatched her purse; that is how it happened.
"Q. Do you recall what you did with the purse?
"A. No, no, I can't.
"Q. As soon as you snatched it she fell down and you may have kicked her?
"A. I may have. I really didn't hit her with nothing.
"Q. And then you ran from there directly home, and then sometime a little later in the evening gave Lillian the watch and told her that you had bought it and you put the cufflink and little earplug on the television" (Rep. Tr. 744-745).

Respondent's Version of the Facts

At the trial, Stewart took the stand and denied kidnapping, raping or robbing Miss Champaine (Rep. Tr. 816-817).

He also denied robbing Mrs. Wells, although he admitted that he had cashed the dividend checks (Rep. Tr. 818). He testified that he had obtained the checks from his niece, Jackie Jackson, and cashed them at her request

in the presence of Lena Franklin (Rep. Tr. 818-819).[10] He denied having seen the Wells purse prior to the first interrogation by Sergeant Logue on January 31, 1963 (Rep. Tr. 820-822).

Stewart denied having anything to do with the robbery of Miss Mitchell or any of the injuries she sustained (Rep. Tr. 822). He testified that he bought the watch, identified as Miss Mitchell's, from Louis Bookman for $15.00 on the evening of January 19, 1963 (Rep. Tr. 825, 841-842). He testified further that he had seen the transistor radio earplug and a charge-a-plate with Miss Mitchell's name on it, each for the first time, on January 26, 1963, in his home; the latter item, he said, was then in the possession of Jackie Jackson (Rep. Tr. 878-879).[11] He denied ever having seen the cuff link (Rep. Tr. 878).

Stewart did not testify about the Dixon, Ramirez, or Miyauchi robberies (Rep. Tr. 816-829).

As to the confession, Stewart testified that the only reason he gave Logue the confession was in order to get his pregnant wife, Lillian Lara, released from custody. According to Stewart, Logue had told him that they would not let her go until he confessed, despite the fact that she was ill (Rep. Tr. 823-825, 880-881).

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[10] Jackie Jackson testified that she bought the checks from a Louis Bookman and asked Stewart to cash them for her (Rep. Tr. 889-893).

[11] Jackie Jackson testified that she was present when Stewart bought the watch from Louis Bookman (Rep. Tr. 887-888). She further testified that she got the charge-a-plate with Miss Mitchell's name on it from Louis Bookman (Rep. Tr. 887). According to Miss Jackson, Louis Bookman made a living "snatching purses and knocking peoples in the head" (Rep. Tr. 885). Linda Lara, Lillian Lara's 14-year-old daughter, testified that when she arrived home from school one day, Jackie Jackson and Louis Bookman were there, and that Jackie left the house with the Mitchell charge-a-plate, which Linda had never seen before (Rep. Tr. 795-796).

On rebuttal, Logue denied that he had told Stewart that Lillian was sick or upset or that Lillian would be released if Stewart confessed (Rep. Tr. 940).

Summary of Argument

I.

This case is controlled by *Escobedo* v. *Illinois,* 378 U.S. 478. It is factually indistinguishable from *Escobedo,* save for the absence of a request to consult with counsel. A request, however, is unnecessary to bring into play the constitutional right to counsel. E.g., *Carnley* v. *Cochran,* 369 U.S. 506.

The State in its Opening Brief makes no serious attempt to distinguish this case from *Escobedo* except for the absence of a request. The State's attacks on the so-called "*Dorado* rule" are directed at *Escobedo* itself. The facts of the present case offer a compelling answer to such attacks. These facts illustrate that *Escobedo* is necessary to the full development of the constitutional right to the "Assistance of Counsel."

In *Escobedo* the Court rejected the sterile notion that a criminal prosecution, with the attendant right to counsel, does not begin until the initiation of formal judicial proceedings. In determining that a criminal prosecution begins when a person effectively stands accused of a crime by the forces of the State, the Court reaffirmed the functional approach to the Sixth Amendment taken in such cases as *Powell* v. *Alabama,* 287 U.S. 45, *Hamilton* v. *Alabama,* 368 U.S. 52, *White* v. *Maryland,* 373 U.S. 59, and *Massiah* v. *United States,* 377 U.S. 201. *White* and *Massiah* directly

compelled the result in *Escobedo,* for the cases are substantively indistinguishable.

The five-day secret pre-trial proceeding against Stewart demonstrates that the rule of *Escobedo* is necessary to prevent law enforcement officers from circumventing the safeguards of the accusatorial, adversary trial. For all practical purposes, the State tried and convicted Stewart in a back room of the University Police Station. On the fifth day of interrogation about a string of crimes including robbery, rape and murder, they elicited from him a simple confession that he "snatched" one woman's purse. But this confession was sufficient to send him to the gas chamber. What Stewart could hardly be expected to know, in the absence of legal advice, was that under the felony-murder doctrine he was confessing to first-degree murder. The harshness of the felony-murder doctrine as applied in this case dramatizes the empty formalism of a rule that would deny an accused the right to counsel until after the return of formal charges, an event that police may delay by prolonged detention.

Proceedings against Stewart had reached "the accusatory stage" before the confession, and the State does not argue to the contrary in its Opening Brief. On this point, the present case is indistinguishable from *Escobedo.* The police investigation sharply focused on Stewart as an accused when Lena Franklin identified him as the one who cashed dividend checks taken from Mrs. Wells, one of the robbery victims. He was then placed under arrest for "a series of purse-snatching robberies" and held in police custody for five days without being taken before a magistrate. The police engaged in a process of interrogations clearly lending itself to eliciting incriminating statements.

Stewart was denied his right to counsel because the police conducted an adversary proceeding against him in the absence of counsel, and he did not waive his right to counsel. The State's arguments suggesting that Stewart made a knowing and independent waiver are specious. There is no suggestion that he was advised by his interrogators or anyone else of his right to counsel or of any of the other rights that counsel would protect, especially the right to be taken before a magistrate without unnecessary delay and the right to remain silent. Nor did anyone advise him of the fatal implications of the felony-murder doctrine.

The State's argument that this case should be distinguished from *Escobedo* on the absence of a request conflicts sharply with established constitutional principles. *Escobedo* established the assistance of counsel as a constitutional requirement once the accusatory stage is reached. *Carnley* v. *Cochran* established that where the assistance is a constitutional requisite the right to counsel does not depend upon a request.

Escobedo v. *Illinois,* when coupled with *Carnley* v. *Cochran,* provides ample authority for affirming the judgment of the California Supreme Court reversing Stewart's conviction.

II.

The judgment reversing Stewart's conviction may be affirmed on the alternative ground that his confession was elicited during a period of unauthorized police detention. California statutory law requires that the police take an arrested person before a magistrate "without unnecessary delay" and establishes a two-day maximum period of detention. Stewart was detained and not taken before a

magistrate until his confession was elicited on the fifth day following his arrest. In thus acting beyond the limits of their legal authority, the police deprived Stewart of his liberty without due process of law in violation of the Fourteenth Amendment.

This Court has recognized that the only effective deterrent to unconstitutional police conduct is to exclude evidence unlawfully obtained. E.g., *Mapp* v. *Ohio,* 367 U.S. 643. The exclusionary rule should be applied to render inadmissible Stewart's confession elicited during his illegal detention.

Wong Sun v. *United States,* 371 U.S. 471, and *Traub* v. *Connecticut,* 374 U.S. 493, compel this result. The unlawful imprisonment of Stewart is no less repugnant to our constitutional liberties than the unlawful invasion of privacy in *Wong Sun.*

ARGUMENT

I.

The Judgment of the California Supreme Court Should Be Affirmed on the Authority of Escobedo v. Illinois.

We submit that the California Supreme Court correctly decided, on the authority of *Escobedo* v. *Illinois,* 378 U.S. 478, that Stewart's confession was inadmissible at trial because it was elicited by police during the course of an interrogation at which Stewart was denied the "Assistance of Counsel" guaranteed by the Constitution in all criminal prosecutions. The present case is factually indistinguishable from *Escobedo,* save that Escobedo requested counsel and Stewart did not. A request, however, is unnecessary to

bring into play the constitutional right to counsel. E.g., *Carnley* v. *Cochran,* 369 U.S. 506.

A. The Facts of the Present Case Forcefully Illustrate That the Rule of Escobedo v. Illinois is Necessary if the "Assistance of Counsel" Is to Be a Meaningful Constitutional Right.

The State makes no serious argument that the present case is distinguishable from *Escobedo,* except with respect to the absence of a request for counsel. In arguing that *Escobedo* should not be "extended" to include what it calls the *"Dorado* rule," the State ignores *Carnley* v. *Cochran, supra,* and other precedents that the right to counsel does not depend on a request.

The State's attacks on the so-called *"Dorado* rule" go beyond the request issue and become transparent attacks on *Escobedo* itself. For example, the State frets in its Brief about the problem of determining what is "a process of interrogations that lends itself to eliciting incriminating statements." Petitioner's Opening Brief 42-45. Yet that question is not in dispute here because the State concedes by its silence that such a process of interrogations had been undertaken against Stewart before his confession was elicited.

We submit that a compelling answer to the State's attacks on *Escobedo* derives from the facts of the present case. For those facts illustrate why *Escobedo* is necessary to the full development of the constitutional right to the "Assistance of Counsel," the "most pervasive" of all the rights of an accused person. Schaefer, *Federalism and State Criminal Procedure,* 70 Harv. L. Rev. 1, 8 (1956).

In *Escobedo,* this Court examined the concept of a "criminal prosecution" within the meaning of the Sixth and Fourteenth Amendments and explored its initial boundaries. The Court rejected the sterile notion that a criminal prosecution, with the attendant right to counsel, does not begin until the initiation of formal judicial proceedings. Rather, reaffirming its functional approach to the interpretation of the Sixth Amendment, the Court determined that a criminal prosecution begins when a person effectively stands accused of a crime by the forces of the State. That point is reached, the Court said, ". . . when the process shifts from the investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession . . . ." 378 U.S. at 492. At that point, the adversary system begins to operate against an accused, and his right to counsel comes into play.

The result in *Escobedo* followed inexorably from a series of cases in which this Court took a functional rather than a formalistic approach to the "right-to-counsel" issue, beginning with *Powell* v. *Alabama,* 287 U.S. 45, and continuing to *Massiah* v. *United States,* 377 U.S. 201.[12] In *Powell,* the Court held that an accused in a capital case "requires the guiding hand of counsel at every step in the proceedings against him" including a stage sufficiently before trial to give the lawyer time for adequate preparation of the defense. 287 U.S. at 59, 69. In *Hamilton* v. *Alabama,* 368 U.S. 52, 54, the Court held that "every step in the proceedings" against the accused included arraignment, for that was "a critical stage in a criminal proceeding. What happens there may affect the whole trial."

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[12] For a comprehensive treatment of pre-*Escobedo* trends, see Herman, *The Supreme Court and Restrictions on Police Interrogation,* 25 Ohio St. L.J. 449 (1964).

White v. *Maryland,* 373 U.S. 59, and *Massiah* v. *United States,* 377 U.S. 201, directly compelled the result in *Escobedo*—unless constitutional rights were made to hinge on distinctions devoid of substance. In *White,* the Court held that a guilty plea entered at a preliminary hearing in the absence of counsel was inadmissible at trial, and surely no significant distinction can be drawn between an uncounseled confession given to a judge in open court and one given to the police in a secret jailhouse interrogation. In *Massiah,* the Court assured the right to counsel during police interrogation after indictment, thereby erasing the line between judicial and extrajudicial proceedings in determining the stages at which an accused is entitled to legal aid and advice.[13] The Court there (377 U.S. at 204) relied upon the sound reasoning of Mr. Justice Stewart's concurring opinion in *Spano* v. *New York,* 360 U.S. 315, 327:

> "Our Constitution guarantees the assistance of counsel to a man on trial for his life in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law. Surely a Constitution which promises that much can vouchsafe no less to the same man under midnight inquisition in the squad room of a police station."

After *Massiah,* the only remaining question was whether a line drawn between police interrogations before and after indictment was rational. Such a line had already been criti-

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[13] The result in *Escobedo* was predicted by Mr. Justice White in his dissenting opinion in *Massiah*: "The reason given for the result here—the admissions were obtained in the absence of counsel —would seem equally pertinent to statements obtained at any time after the right to counsel attaches, whether there has been an indictment or not . . . . " 377 U.S. at 208.

cized by the Chief Justice of California as "formalistic." *People* v. *Garner,* 57 Cal. 2d 135, 160, 367 P.2d 680, 695 (Traynor, *J.,* concurring). And Mr. Justice Douglas, joined by the Chief Justice, Mr. Justice Black and Mr. Justice Brennan, had argued against such a distinction because "what takes place in the secret confines of the police station may be more critical than what takes place at the trial." *Crooker* v. *California,* 357 U.S. 433, 444-445 (dissenting opinion).

In *Escobedo,* the question was laid to rest; the Court rejected a distinction between interrogation of an accused before and after formal indictment as not "meaningful." 378 U.S. at 486.[14]

Not only is *Escobedo* firmly grounded in precedent, it is also firmly grounded in the underlying principle that "ours is the accusatorial as opposed to the inquisitorial system" of criminal justice. *Watts* v. *Indiana,* 338 U.S. 49, 54. The doctrine of *Escobedo* is necessary to prevent law enforcement authorities from circumventing the safeguards

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[14] That the right to counsel may accrue during pre-indictment interrogation had been acknowledged by the majority in *Crooker* v. *California, supra.* The Court decided, however, that the right was not absolute, but was qualified by a standard of "fundamental fairness" that depended upon such circumstances as the age, intelligence, and education of the accused (357 U.S. at 438-439), a decision, in the view of the majority, consistent with *Betts* v. *Brady,* 316 U.S. 455. When *Betts* v. *Brady* was overruled by *Gideon* v. *Wainwright,* 372 U.S. 335, and the right to counsel at trial was made absolute, a major premise of *Crooker* was undermined. *Escobedo,* therefore, may be said to be an offspring of *Crooker,* which conceded that the right to counsel might accur during pre-indictment interrogation, and *Gideon,* which established that the right to counsel is so "fundamental," it is available unqualifiedly to every accused. 372 U.S. at 342. See Comment, 53 Calif. L. Rev. 337, 348-353 (1965); Comment, 73 Yale L.J. 1000, 1001-1002, 1012-1014 (1964).

of the accusatorial, adversary trial.[15] The facts of the present case demonstrate that necessity. Indeed, the evils of the inquisitorial system come to mind as we visualize Stewart's secret detention for five days of questioning and recall Mr. Justice Frankfurter's reference in *Watts* v. *Indiana* to "the practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end." *Ibid.*

Stewart's plight during his five days of incarceration demonstrates why the right to counsel would indeed be "a very hollow thing" (*In re Groban,* 352 U.S. 330, 344 (Black, *J.,* dissenting)) if it were not afforded until after the police chose to take a suspect before a magistrate to be formally charged. For Roy Stewart, just as for Danny Escobedo, the right to a lawyer at the pleading or trial stage was a right of little worth; he had already lost his case in a secret pre-trial proceeding conducted in a back room of the University Police Station. The State emerged the clear winner of the five-day contest; Stewart, armed with his sixth-grade education, had hardly provided the challenge that is "the essence of our adversary system." REPORT OF ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE 10 (1963).

Without the "guiding hand of counsel," Stewart was no match for the adversary power represented by Sergeant

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[15] See the following on the point that the principal rationale of *Escobedo* is that certain police interrogations are realistically part of the adversary process: Robinson, *Massiah, Escobedo, and Rationales for the Exclusion of Confessions,* 56 J. Crim. L. 412, 421-422 (1965); Comment, 53 Calif. L. Rev. 337, 361 (1965); Note, 78 Harv. L. Rev. 143, 219 (1964); Note, 32 U. Chi. L. Rev. 560, 570-571 (1965). See also Comment, 73 Yale L.J. 1000, 1041, 1051 (1964). Before *Escobedo,* the adversary nature of our criminal system was suggested as the rationale of recent coerced confession cases. Note, 31 U. Chi. L. Rev. 313, 320-327 (1964).

Logue and his fellow officers, a power doubtless exaggerated by Stewart's prolonged detention in jail. Stewart faced his accusers and interrogators alone. There was no one to advise him how to remedy the flagrantly illegal conduct of the police in holding him for five days without taking him before a magistrate;[16] there was no one to advise him that the police had no legal power to compel him to talk; there was no one to advise him of the legal consequences of the answers he might give. There was no one, for example, to tell him that to confess to taking Miss Mitchell's purse was to confess to first-degree murder under California's felony-murder doctrine, that to admit purse-snatching was to send himself to the gas chamber.

We submit that the harshness of the felony-murder doctrine illustrates the empty formalism of a rule that would deny an accused the right to counsel until after indictment—an event that the police have the power to delay by prolonging the detention until they get their confession. On this record, one could easily imagine that after five days of secret interrogation on a string of crimes, including robbery, rape and murder, Stewart decided to end the seemingly interminable jailhouse proceedings by confessing simply that he took one woman's purse. In short, he may have thought he could "plea bargain" for himself, thereby avoiding the risk of a more serious conviction, whether guilty or innocent.[17] If this was Stewart's game, the stake

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[16] California law requires that a person arrested must be taken before a magistrate "without unnecessary delay" and, in any event, within 48 hours after arrest. Calif. Penal Code §§ 825, 849.

[17] Professor Kamisar has noted that a "good deal" of plea bargaining takes place in the police station. Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure,* CRIMINAL JUSTICE IN OUR TIME 37 (1965).

was his life, for under the felony-murder doctrine, he confessed to an offense that carried the death penalty.[18]

We can have little confidence, of course, in our knowledge of what really happened during Stewart's five days at the University Station. Such uncertainty is inherent in the process of secret detention and interrogation. Indeed, it is secrecy that is at the root of the problem. See Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure,* CRIMINAL JUSTICE IN OUR TIME 86 (1965). But a careful reading of the available record suggests that the prolonged detention and the talk of more serious crimes very well may have driven Stewart to give a confession limited to taking Miss Mitchell's purse. Before his confession on February 5, he had denied any involvement in the various crimes he was asked about. His admissions that he had possession of some of the stolen purses and other items were always accompanied by exculpatory explanations (Rep. Tr. 722, 724-725, 726, 818-819, 820-822, 825, 841-842, 878-879).

The transcript of the February 5 confession (Rep. Tr. 732-745) suggests that Stewart avoided saying that he killed Miss Mitchell or intentionally hit or kicked her. He admitted that he "snatched her purse, yes, sir, that is what I done," but when asked whether he hit her on the head,

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[18] We submit that *Escobedo* aside, Stewart's confession should be inadmissible on the authority of the dictum in *Crooker* v. *California,* 357 U.S. at 439. Stewart's inadequate education, his obvious lack of sophistication, the failure to inform him of his right to counsel or his right to remain silent, the pressures of the long detention and the persistent questioning about serious crimes, his isolation and the secrecy of the whole process, the ramifications of the felony-murder doctrine—these circumstances must add up to fundamental unfairness deriving from the absence of counsel.

he replied: "No, I didn't hit her on the head, sir. I didn't. Anything, I could have kicked her, you know, after she fell, I was running. I could have kicked her in the head, but I'm not sure of that" (Rep. Tr. 736). Toward the end of the interrogation he was again asked how it happened (Rep. Tr. 744). He answered, "I just started walking. As I got almost to her I just started running and snatched her purse; that is how it happened" (Rep. Tr. 744-745).

On cross-examination, Sergeant Logue testified that he turned on the tape recorder "after he [Stewart] told me that he had killed her" (Rep. Tr. 782). He was asked further, however, "As a matter of fact, he never did say that he had killed her, did he?" And Logue answered, "No, he never used that word" (Rep. Tr. 782). Yet a few minutes later on redirect, Sergeant Logue, apparently in a burst of zeal, contradicted himself by quoting Stewart as having said, "Yes, I'm sorry. I'm sorry I killed her. I didn't mean to kill her" (Rep. Tr. 789).[19]

[19] The State argues: "Stewart's confession, however, was the product of his own will and his own remorse. Otherwise, why would he have admitted killing Miss Mitchell and denied having robbed the other four women? Even a 6-year-old child knows that killing is worse than stealing." Petitioner's Opening Brief 38. This argument ignores Sergeant Logue's testimony that Stewart never admitted "killing" Miss Mitchell, a fact corroborated by the transcript of the recorded portion of the confession. At trial Stewart testified that he "copped to the murder beef" (to get his wife released) (Rep. Tr. 823-824), but his hindsight version of the confession was denied by Logue (Rep. Tr. 940) and is not supported by the transcript of the confession. That testimony of Stewart's could hardly support an argument that he knew, back there in the jail, that he was confessing to murder.

B. Respondent's Confession Was Obtained at a Stage in the Proceedings When He Was Constitutionally Entitled to the Assistance of Counsel.

The proceedings against Stewart had reached "the accusatory stage" by the time his confession was elicited, and the State does not argue to the contrary in its Opening Brief.

To be sure, marking the beginning of a criminal prosecution at the accusatory stage makes it more difficult to decide, in individual cases, when the attendant right to counsel attaches, than marking it at the initiation of formal judicial proceedings. Simplicity, however, is hardly a reason for artificially restricting constitutional rights. With time, the operation of the judicial process will inevitably work out detailed guidelines for determining when the right to counsel accrues before indictment.

In *Escobedo,* three circumstances were cited to show that the accusatory stage had been reached: (1) "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect"; (2) "the suspect has been taken into police custody"; and (3) "the police carry out a process of interrogations that lends itself to eliciting incriminating statements." 378 U.S. at 490-491.

Whether these circumstances represent necessary or merely sufficient conditions to the establishment of the right to counsel is a question that must await further adjudication testing the limits of *Escobedo.* The present case does not test those limits, for Stewart's position at the time of his confession is indistinguishable from Escobedo's. Here, as in *Escobedo,* the State had clearly proceeded to

the accusatory stage and Stewart was constitutionally entitled to the assistance of counsel.

(1) *The Los Angeles Police were no longer investigating an unsolved crime but had begun to focus on Stewart as a particular suspect.*

The point at which the investigation ceased being a general inquiry into an unsolved crime and began to focus on Stewart is distinctly marked. Until January 30, 1963, the day before Stewart was arrested, the University Division of the Los Angeles Police Department had been conducting a general investigation of a series of unsolved purse-snatching robberies. The nature of the investigation changed abruptly when the police obtained copies of the Wells dividend checks bearing Lena Franklin's signature and address as a co-endorser. Lena Franklin was found the next day, and she promptly identified Stewart as the one who had cashed the checks. The checks, when coupled with Lena Franklin's identification, constituted strong evidence linking Stewart to the crimes and providing the basis for his arrest for "a series of purse-snatching robberies." At that point the inquiry focused on Stewart as an accused.[20]

If more evidence was needed to sharpen the focus, the police quickly obtained it. At the time of his arrest, they searched Stewart's home and found personal items that had been taken from each of the five robbery victims. Sev-

[20] The California Supreme Court pointed out in the opinion below that the arrest itself was evidence that the investigation had begun to focus on Stewart because of the requirement of California Penal Code § 836 that an arrest must be based upon the officer's reasonable cause for believing the person committed the offense. 62 Cal. 2d at 577; 400 P. 2d at 101.

eral of the items were easily identifiable: one was a wallet bearing Mrs. Wells' maiden name; another was a purse and a key holder bearing the name "Takiko Miyauchi"; another was a wallet with the initial "R" for "Ramirez"; they also found Miss Mitchell's watch (Rep. Tr. 384-393, 512-517, 550-558, 600-601, 699-704).

By the time Stewart was taken to the University Police Station, he had, for all practical purposes, been charged with the crimes. Compare *Escobedo* v. *Illinois,* 378 U.S. 478, 486. During the first interrogation on January 31, the police told him, "Now we've got a pretty fair idea of what you've been doing," and when he denied having seen the Wells checks, he was told, "You know we're gonna be able to prove differently, don't you?" (Rep. Tr. 1036-1037) He was then confronted with Lena Franklin, who accused him to his face with having endorsed and cashed the checks.[21]

On February 1, he was told that a handwriting expert had expressed the opinion that he had written the name "Robert K. Wells" on the checks; on February 3, the police extracted the first incriminating statement—that he had signed and cashed the Wells checks; on February 4, he admitted having seen the Wells, Ramirez, and Miyauchi purses and the watch taken from Miss Mitchell, although not in connection with any of the crimes (Rep. Tr. 719, 721-722, 724-727). By the beginning of the interrogation on February 5, which produced the confession, the case against Stewart had focused to the point that Sergeant Logue opened the session by stating: "Roy, you killed that old woman" (Rep. Tr. 789).

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[21] In his closing argument, the prosecuting attorney referred to the confrontation with Lena Franklin as "an accusatory circumstance" (Rep. Tr. 1099).

(2) *Stewart was in custody.*

Danny Escobedo was in custody perhaps five hours before his confession was elicited; Roy Stewart was in custody five days.[22]

(3) *The police engaged in a process of interrogations lending itself to eliciting incriminating statements.*

As in *Escobedo,* the Los Angeles Police were obviously out to "get" Stewart to confess his guilt. Beginning with the first interrogation on the night of the arrest, Sergeant Logue and the other officers leaned hard on Stewart for a confession. There is no indication that he was ever told that he was not required to answer their questions; they led him to believe they had the "goods" on him;[23] they confronted him with Lena Franklin, who accused him of cashing the Wells checks; they hinted at leniency if he would "straighten things out."[24] This was not general questioning about an unsolved crime; nor was it questioning intended to give Stewart an opportunity to explain suspicious circumstances. *Cf. Gallegos* v. *Nebraska,* 342 U.S. 55, 71 (Jackson, J., concurring).

Then there is the matter of the length of the interrogations. As the California Supreme Court concluded: "Such

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[22] Custody is an element of arrest by definition under California Penal Code § 834.

[23] "Now, we've got a pretty fair idea of what you've been doing. . . . [D]on't argue with us about what we know and what we can prove, you see—you see my point?" (Rep. Tr. 1036). And after a denial, "You know we're gonna be able to prove differently, don't you?" (Rep. Tr. 1037).

[24] "And feeling sorry for what happened, you know, means a great deal to a great many people that you're going to be coming in contact with" (Rep. Tr. 1035).

extensive interrogations during the period of [Stewart's] incarceration could serve no other purpose than to elicit incriminating statements." 62 Cal. 2d at 579, 400 P.2d at 102.

C. Stewart Did Not Waive His Right to the Assistance of Counsel, and His Confession Is Therefore Inadmissible Against Him at Trial.

Once it is established that the adversary process had begun to operate against Stewart as an accused person, and his constitutional right to counsel had come into play, the remaining question is whether his right was denied at the time the confession was elicited. In the absence of the aid and advice of a lawyer, the question here becomes one of waiver. For once the right to counsel is established, the accused is entitled to the help of a lawyer at "every step in the proceedings against him." *Powell* v. *Alabama,* 287 U.S. 45, 69. Once established, the right continues until it is effectively waived.[25] See Note, 78 Harv. L. Rev. 143, 219 n. 11.

The first three factual circumstances cited in *Escobedo* —focus on the suspect, custody, and the beginning of the process of interrogation—are relevant to the first question: Did the right to counsel accrue? The final two circumstances—"the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent"—are relevant only to the

[25] Compare Rule 44, Fed. R. Crim. P., which enbodies the principle that the accused is entitled to have counsel representing him "unless he elects to proceed without counsel."

separate question of waiver. The California Supreme Court interpreted *Escobedo* correctly, we submit, when it said:

> "Only when the investigatory stage has become an accusatory one, that is, when it has begun to focus on a particular suspect, the suspect has been taken into police custody, and the police have carried out a process of interrogations that lends itself to eliciting incriminating statements, does the doctrine of *Escobedo* apply and the confession given without the required warning *or other clear evidence of waiver* become inadmissible evidence." *People* v. *Dorado,* 62 Cal. 2d 338, 354, 398 P. 2d 361, 371. [Emphasis added.]

Guidelines for establishing waiver of the right to counsel pre-date *Escobedo.* The test of an effective waiver is "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst,* 304 U.S. 458, 464. Failure to request counsel will not be deemed a waiver, nor will waiver be presumed from a silent record. This was made clear in *Carnley* v. *Cochran,* 369 U.S. 506, 516:

> "Presuming waiver [of the right to counsel] from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

And see *Johnson* v. *Zerbst, supra* at 464; Note, *The Right of an Accused to Proceed Without Counsel,* 49 Minn. L. Rev. 1133, 1138-45 (1965).

In *Escobedo,* waiver presented an interesting question which divided the Court. In his dissenting opinion, Mr.

Justice White said: "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." 378 U.S. at 495, 499. The Court concluded, on the other hand, that Escobedo had not made a waiver because "[a]lthough . . . there is testimony in the record that petitioner and his lawyer had previously discussed what petitioner should do in the event of interrogation, there is no evidence that they discussed what petitioner should, or could, do in the face of a false accusation that he had fired the fatal bullets." *Id.* at 485 n.5. The question of waiver was thus complicated by the fact that Escobedo had retained a lawyer, had been advised by his lawyer not to say anything, had made a request to see his lawyer, and yet answered the police's questions in disregard of the advice of his lawyer.

The question of waiver is much simpler here. We seem to have the "narrower matter" referred to by Mr. Justice White in his *Escobedo* dissent. *Id.* at 499. Here there is no possible basis for a finding of waiver. A knowing and intelligent waiver presupposes knowledge of the right to counsel, and a finding of such knowledge is not possible on this record. There is no suggestion that Stewart was advised by his interrogators or anyone else of his right to counsel, or of any other rights that counsel would protect, especially the right to remain silent and the right to be taken before a magistrate without unnecessary delay.[26]

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[26] At the trial police officers testified in detail about the various conversations with Stewart; there was never any suggestion that they advised Stewart of any of his constitutional rights, although on a number of occasions the officers were asked to relate everything, or indicated that they related everything, that was said in the conversations (Rep. Tr. 716-718, 969-973 (night of January 31, 1963), 718 (morning of February 1, 1963), 719-720 (after-

Yet the State seems to urge this Court to find that Stewart made a knowing waiver of his constitutional rights. Petitioner's Opening Brief 40-41, 45, 50. We have sorted out what appear to be four different arguments by the State on waiver:

> (1) Stewart is a cunning criminal, "cunning enough to use his hands and feet as his principal weapons, cunning enough to leave no fingerprints. . . . " etc., and that this presumably makes him cunning about his constitutional rights. *Id.* at 40. Aside from assuming Stewart's guilt, which the State cannot do when the question is the admissibility of a confession upon which the guilty verdict rests, the argument is about as valid as saying that a good constitutional lawyer necessarily qualifies as a cunning street robber.
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> (2) At trial Stewart said he would "rather not answer" a question on cross-examination about what he had in mind in telling the officers that if he could talk to Lillian Lara he might have something to tell them, and "when the judge directed him to answer, he flatly refused to comply." *Id.* at 40-41. The State concludes from this: "Since Stewart was sufficiently firm to defy the judge and the district attorney in open court, he must surely have known that he did not have to respond to questioning by the police." *Id.* at 41. What the State fails to point out is that Stewart did not refuse to answer the question until after the trial court told him that if he refused to answer there was nothing the court

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noon of February 1, 1963), 720-721 (morning of February 3, 1963), 721-722 (February 3, 1963), 723-725 (morning of February 4, 1963), 725-727 (afternoon of February 4, 1963), 727, 733-746, 963 (morning of February 5, 1963)).

was going to do about it[27] (Rep. Tr. 859). Moreover, between the time of the interrogations in the police station and the trial, it is reasonable to infer that Stewart consulted with the lawyer who represented him at trial and was advised of his rights (Clk. Tr. 11).

(3) Stewart had two prior felony convictions, during the course of which he presumably learned of his right to counsel and his right to remain silent during police interrogation. Petitioner's Opening Brief 50. It is inconceivable that a finding of knowledge of such constitutional rights would be made on the bare facts that at 18 Stewart was convicted of possession of one marijuana cigarette and at age 23 of robbery in the second degree. There is no evidence whether or in what manner he was advised of his constitutional rights on those occasions or that he remembered at the time of his arrest in 1963 whatever he may have been told years earlier. Moreover, there is no showing that he was advised of the risks of proceeding without counsel,

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[27] The colloquy was as follows:

"Q. And what something did you have in mind about telling Sergeant Logue if you could see Lillian?

"A. Well, I rather not answer that.

* * *

"THE COURT: I think counsel is entitled to an answer, Mr. Stewart.

"THE WITNESS: Well, er—can I answer—maybe I had several things in mind to tell her.

* * *

"THE COURT: Mr. Stewart, I think counsel is within his rights to expect an answer. Now, if you refuse to answer the question there is nothing I am going to do about it. Do you refuse to answer it?

"THE WITNESS: I refuse to answer it.

"THE COURT: That is all I can do. That will be all. Let us proceed" (Rep. Tr. 858-859).

such as the fatal consequences of the felony-murder doctrine. *Cf. Escobedo* v. *Illinois,* 378 U.S. 478, 485 n.5; *Carnley* v. *Cochran,* 369 U.S. 506, 511.

(4) Since the voluntariness of Stewart's confession was in issue at trial, and ignorance of rights is relevant, "surely that fact, if it was a fact, would have been brought out during the course of his own testimony." Petitioner's Opening Brief 50. This argument, we submit, is specious; it runs directly contrary to the teaching of *Carnley* v. *Cochran,* 369 U.S. 506, 516, that waiver will not be presumed from a silent record.

D. Stewart's Right to Counsel Did Not Depend on a Request.

The State urges this Court to distinguish the present case from *Escobedo* on the ground that Stewart made no request to consult with counsel and Escobedo did. Petitioner's Opening Brief 33, 36-38. This argument conflicts sharply with established constitutional principles and should be rejected by this Court just as it has been rejected by many courts interpreting and applying *Escobedo,*

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[28] *E.g., United States* ex rel. *Russo* v. *New Jersey,* 351 F.2d 429, 437 (C.A. 3); *Collins* v. *Beto,* 348 F.2d 823, 830 (C.A. 5); *Wright* v. *Dickson,* 336 F.2d 878, 882 (C.A. 9); *United States* ex rel. *Netters* v. *Rundle,* 246 F. Supp. 540, 542 (E.D. Pa.); *United States* ex rel. *Kemp* v. *Pate,* 240 F. Supp. 696, 707 (N.D. Ill.); *Galarza Cruz* v. *Delgado,* 233 F. Supp. 944, 948 (D.P.R.); *People* v. *Dorado,* 62 Cal. 2d 338, 398 P.2d 361, *cert. den.* 381 U.S. 937; *State* v. *Hall,* 88 Id. 117, 129-31, 397 P.2d 261, 268-69 (concurring opinion); *State* v. *Neely,* 239 Ore. 487, 500-03, 398 P.2d 482, 486-87; *State* v. *Dufour,* 206 A.2d 82, 85 (R.I.); Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure,* Criminal Justice In Our Time 79-81 (1965); Comment, 53 Calif. L. Rev. 359-361 (1965); Note, 78 Harv. L. Rev. 143, 219 (1964); see also Comment, 73 Yale L.J. 1000, 1053 (1964). It has been suggested that those cases in which *Escobedo* is distinguished on

and by various commentators.[28] The California Supreme Court correctly interpreted *Escobedo* when it stated: "[T]he constitutional right does not arise from the request for counsel but from the advent of the accusatory stage itself." *People* v. *Dorado,* 62 Cal. 2d 338, 357, 398 P. 2d 361, 373.

Escobedo established the assistance of counsel as a constitutional requirement once the accusatory stage is reached. And as the Court said in *Carnley* v. *Cochran,* 369 U.S. 506, 513, " . . . it is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." See also *Uveges* v. *Pennsylvania,* 335 U.S. 437. And the teaching of *Gideon* v. *Wainwright,* 372 U.S. 335, is that an accused who is indigent must be provided with appointed counsel whenever he has a constitutional right to retain counsel. *Cf. Griffin* v. *Illinois,* 351 U.S. 12; *Douglas* v. *California,* 372 U.S. 353.

To make the right to counsel turn on a request, as the State urges, would favor the professional criminal over the amateur, the sophisticated and the financially able over the ignorant and the poor. The California Supreme Court made the point eloquently:

> "Finally, we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional

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the absence of a request probably represent a basic disagreement with this Court's decision and its underlying rationale. Note, *The Curious Confusion Surrounding* Escobedo *v.* Illinois, 32 U. Chi. L. Rev. 560, 561 (1965). And see Kamisar, *supra* at 57-58.

> rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status had fortuitously prompted him to make it." *People* v. *Dorado,* 62 Cal. 2d at 351, 398 P. 2d at 369-70.

A request might bear on the question of knowing waiver because it indicates knowledge of the right to counsel. See *Wright* v. *Dickson,* 336 F. 2d 878, 882 (C.A. 9). As already mentioned, Escobedo's request to consult with his lawyer complicated the waiver issue in that case; but when, as here, there is no evidence that the accused knew of his right to the assistance of counsel, his silence cannot be used as evidence of a knowing waiver.

In conclusion, *Escobedo* v. *Illinois,* when coupled with *Carnley* v. *Cochran,* provides ample authority for affirming the judgment of the California Supreme Court reversing Stewart's conviction.

E. The Contention of Petitioner and Others That Escobedo and Its Progeny Will Unduly Impede Law Enforcement Has No Demonstrable Support.

Petitioner, along with many public officials, has sounded the alarm that this Court's decisions vindicating safeguards of individual liberty will shackle the police and send crime rates soaring. Petitioner's Opening Brief 46-48. See the remarks of District Attorney Hogan quoted at New York Times, Dec. 2, 1965, p. 1, col. 2; Parker, *A Lawman's Lament,* 40 L.A. Bar Bull. 603 (1965). We submit that such contentions cannot withstand careful scrutiny.

As Professor Sutherland has observed, the statistics offered as evidence of an increasing "crime rate" are susceptible of many interpretations, not the least plausible of which is that in recent years the methodology of the record keepers has shown marked improvement. Sutherland, *Crime and Confession,* 79 Harv. L. Rev. 21, 32-34 (1965). Moreover, whether the "crime rate" is or is not increasing, determining the causes of crime presents one of the most complex problems faced by society; whether the decisions of this Court or of any court have any discernible effect upon the incidence of crime is an imponderable question. *Id.* at 34.

If one considers only the narrower question of the impact of *Escobedo* upon the rate of conviction of accused persons, one finds the evidence no more compelling. Law enforcement officials are in sharp disagreement as to the importance of confessions in criminal prosecutions.[29]

Finally, it may be that the supposed restrictions on legitimate police practices may prove more illusory than real. Perhaps some of the concern arises from too broad a read-

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[29] Compare the views of Professor Inbau (Inbau, *Law Enforcement, the Courts, and Individual Civil Liberties,* CRIMINAL JUSTICE IN OUR TIME 100-17 (1965)) and Dean Barrett (Barrett, *Police Practices and the Law—From Arrest to Release or Charge,* 50 Calif. L. Rev. 11 (1956)) with those of Judge Edwards (New York Times, Dec. 7, 1965, p. 33, col. 6). Nor is there agreement on the question whether the presence of lawyers during police interrogations would impede criminal investigation or would facilitate the criminal process. See Comment, 73 Yale L.J. 1000, 1049 (1964). It may also be that information produced under such circumstances might be more reliable than that produced by the methods described with remarkable candor by Messrs. Inbau and Reid. See Professor Sutherland's discussion of the confessions obtained in the *Whitmore* case, Sutherland, *supra* at 37-39. Inbau and Reid, *Criminal Interrogation and Confessions* (1962), is a comprehensive manual of modern interrogation techniques.

ing of the Court's opinion in *Escobedo*. That case does not, it would seem, prohibit the admission of spontaneous confessions. See Mr. Chief Justice Traynor's discussion of the "compulsion to confess" in *People* v. *Garner,* 57 Cal. 2d 135, 163, 367 P.2d 680, 697 (concurring opinion). A confession made at the scene of the crime to the husband of the victim may be admissible. *People* v. *Cotter,* 63 Adv. Cal. 404, 405 P.2d 862. Similarly, where a defendant calls the police to offer a confession, such confession apparently is not rendered inadmissible by a failure to advise defendant of his right to counsel. *People* v. *Jacobson,* 63 Adv. Cal. 335, 405 P.2d 555. *Escobedo* may not prohibit police officers from asking persons found in suspicious circumstances to explain their presence and conduct. *United States* v. *Konigsberg,* 336 F.2d 844 (C.A. 3). Perhaps the most crucial prerequisite to the operation of the *Escobedo* rule is that the police be engaged in a process of interrogation that lends itself to incriminating statements. Thus, statements made in the course of conversations which are not essentially adversary proceedings may be admissible. *People* v. *Modesto,* 62 Cal. 2d 436, 398 P.2d 753.

Admittedly, it may not always be easy, at least until the guidelines become more detailed, for the police or for the courts to determine when such a process of interrogation begins. Some difficulties may be presented in defining with precision when an investigation begins to "focus" on a particular suspect and under what circumstances an interrogation is designed to elicit a confession. Enker & Elsen, *Counsel for the Suspect:* Massiah *v.* United States *and* Escobedo *v.* Illinois, 49 Minn. L. Rev. 47, 69-77 (1964); Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure,* CRIMINAL JUSTICE IN OUR

TIME 58-63 (1965). However, as the courts proceed to amplify the doctrine, as the California Supreme Court did in the present case,[30] many of these uncertainties will disappear.

Moreover, there are available to law enforcement authorities effective procedures which are compatible with the constitutional command of *Escobedo.* One feasible alternative is to provide counsel for accused persons held in custody. Public defender systems might be expanded to provide counsel for indigent suspects at the time they are taken to a police station. In other cases suspects may knowingly and intelligently waive the right to counsel and the right to remain silent. Probably the most satisfactory procedure would be promptly to take the suspect before a magistrate and initiate formal judicial proceedings. This procedure would bring state practice into line with the federal practice under the so-called *McNabb-Mallory* rule. *McNabb* v. *United States,* 318 U.S. 332; *Mallory* v. *United States,* 354 U.S. 449. It has long been recognized that the federal practice has not impeded substantially the efficacy of federal law enforcement agencies. See Hoover, *Civil Liberties and Law Enforcement: The Role of the FBI,* 37 Iowa L. Rev. 175, 180-82 (1952). See also the discussion of Mr. Justice Tobriner in *People* v. *Dorado,* 62 Cal. 2d 338, 355-56, 398 P.2d 361, 372.

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[30] After concluding that the requirements of "focus" on a particular suspect and holding the suspect in "custody" would normally be satisfied under California practice when a suspect is arrested, the California Supreme Court continued, "To determine if the police are carrying out 'a process of interrogation that lends itself to eliciting incriminating statements' " it would be necessary to consider "such factors as the length of the interrogation, the place and time of the interrogation, the nature of the questions, the conduct of the police and all other relevant circumstances." 62 Cal. 2d at 577-579, 400 P.2d at 101-102.

By promoting such police procedures, *Escobedo* should discourage abuses of police power, a prime example of which is the unlawful five-day detention of Roy Stewart and the four others arrested with him. Furthermore, if the presence of counsel in the jailhouse would serve to inhibit the intimidations and subtle coercions which require the exclusion of "involuntary" confessions, a by-product of the *Escobedo* rule may be the elimination of the murky inquiry into the effect of subtle psychological pressure brought to bear on accuseds of low intelligence and little education. See, *e.g., Haynes* v. *Washington,* 373 U.S. 568; *Culombe* v. *Connecticut,* 367 U.S. 568; *Spano* v. *New York,* 360 U.S. 315; *Leyra* v. *Denno,* 347 U.S. 556.

Critics of *Escobedo* claim that its force will be to render certain criminals unconvictable. *E.g.,* District Attorney Hogan's remarks, New York Times, Dec. 2, 1965, p. 1, col. 2. Perhaps the loudest cries of anguish come from those critics who have as yet little experience operating under *Escobedo.* Federal law enforcement agencies have operated for many years under similar requirements (Hoover, *supra*), and many foreign jurisdictions have long accepted comparable requirements as essential to the operation of a civilized judicial system. See Mr. Justice Frankfurter's discussion in *Culombe* v. *Connecticut,* 367 U.S. 568, 587-98; Devlin, *The Criminal Prosecution in England* 31-50 (1958). Indeed, even some staunch critics of recent court decisions have been forced to admit that the *Escobedo* rule is not as burdensome as had been feared.[31]

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[31] Mr. Richard Sprague, of the office of the district attorney of Philadelphia, has commented, "I hate to admit it but on the basis of our early reports we haven't lost a single confession, except to racket men and hardened criminals, who never talk anyway." New York Times, Nov. 20, 1965, p. 1, col. 5. See also the remarks of the Los Angeles County District Attorney. Los Angeles Times, Oct. 2, 1965, p. 1, col. 3.

Far more important, however, is that even if the operation of the *Escobedo* rule does permit some criminals to go unpunished, such a result is not adequate justification for ignoring constitutional safeguards. As Mr. Justice Clark said in *Mapp* v. *Ohio*: "The criminal goes free, if he must, but it is the law that gets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." 367 U.S. 643, 659. The authors of the Constitution wisely struck the balance in favor of individual liberty in sensitive areas involving the awesome power of the state. The occasional release of the guilty is the price gladly paid to preserve the blessings of our constitutional system of government.

II.

The Respondent's Confession Was Inadmissible Because It Was Elicited While He Was Being Deprived of His Liberty Without Due Process of Law.

As an alternative ground for affirming the judgment of the California Supreme Court, we urge that the incarceration of Stewart for five days constituted a detention without legal authority and was, therefore, a deprivation of liberty without due process of law in violation of the Fourteenth Amendment. As such, it renders inadmissible the confession elicited from Stewart during the illegal detention.

The authority of police officers in California to hold a person in custody following arrest is sharply limited. They must "in all cases" take such a person before a magistrate "without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays

. . . ." California Penal Code § 825. See also § 849. An officer, moreover, "who willfully delays to take such person before a magistrate . . . is guilty of a misdemeanor." California Penal Code § 145.

The record in this case shows that Stewart and four other persons were arrested and jailed for five days. Only on the fifth day, after the police had elicited from Stewart a confession to one of many crimes about which he had been interrogated, was Stewart taken before a magistrate and the other four released. The detention was thus a brazen violation of the California statutes limiting police authority to detain arrested persons. We submit that such illegal incarceration deprived Stewart of his liberty without *any* process of law, much less without due process of law. The Fourteenth Amendment expressly and unambiguously proscribes such an abuse of state power.

The unconstitutionality of the police detention in this case is not dependent upon a recognition of the so-called *McNabb-Mallory* doctrine (*McNabb* v. *United States,* 318 U.S. 332; *Mallory* v. *United States,* 354 U.S. 449) as a principle of constitutional dimension. Nor do we question the constitutionality of the California statute authorizing police to detain arrested persons for a limited period.[32] Our contention is simply that where, as here, the police exceed all authority—constitutional, statutory or otherwise —to detain a suspect, such unauthorized police action, depriving a person of his liberty, runs afoul of the Fourteenth Amendment.

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[32] The standards established in *McNabb* and *Mallory* may, of course, be helpful in determining the constitutionality of a state statute authorizing police detention of accuseds beyond a certain minimum period. Compare Rule 5(a), Fed. R. Crim. P.

To many suspects subjected to prolonged detention, the impression must necessarily be conveyed that their incommunicado imprisonment will continue until such time as the interrogating officers obtain the cooperation they seek. *Cf. Malloy* v. *Hogan,* 378 U.S. 1, 8. See Enker & Elsen, *Counsel for the Suspect*: Massiah *v.* United States *and* Escobedo *v.* Illinois, 49 Minn. L. Rev. 47, 84 (1964). It seems indisputable that as the period of detention and interrogation lengthens the psychologically coercive potentialities are enhanced. Any incriminating statements elicited in such a hostile atmosphere are both inherently coercive and antipathetic to a system that looks unfavorably upon practices characteristic of the "third degree." *McNabb* v. *United States,* 318 U.S. 332, 343-44.

Once it is recognized that the unauthorized five-day detention of Stewart deprived him of his liberty without due process of law, it necessarily follows that the only effective deterrent to such unconstitutional police behavior is to exclude any inculpatory statement elicited during the period of unlawful detention. This Court in the landmark case of *Mapp* v. *Ohio,* 367 U.S. 643, 656, recognized that "the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' *Elkins* v. *United States, supra* at 217." This Court has reaffirmed the exclusionary rule in both federal and state criminal proceedings. *Wong Sun* v. *United States,* 371 U.S. 471; *Escobedo* v. *Illinois,* 378 U.S. 478; *Traub* v. *Connecticut,* 374 U.S. 493; *Ker* v. *California,* 374 U.S. 23.

The result sought here is compelled by this Court's decision in *Wong Sun* v. *United States,* 371 U.S. 471. See also

Traub v. *Connecticut,* 374 U.S. 493. In *Wong Sun* federal narcotics agents broke into petitioner's [Toy's] house and arrested him without probable cause, and, while still in his bedroom, elicited from him certain incriminating statements. This Court reversed the conviction of the trial court, which had accepted into evidence the bedroom statements, holding, *inter alia,* that those statements were constitutionally inadmissible at trial because they were the product of an illegal arrest of the accused. In the present case, the confession of Stewart was clearly the product of an illegal detention.

In both cases, then, the statements of the accused were the fruits of illegal police conduct. Surely, the unlawful imprisonment of Stewart is no less repugnant to our constitutional system of government than the unlawful invasion of Toy's privacy. Our system of criminal justice cannot countenance illegal police conduct, regardless of form, without inevitably undermining the rule of law. As Mr. Justice Brandeis, dissenting, said in *Olmstead* v. *United States,* 277 U.S. 438, 485:

> "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

The evils sought to be avoided are well illustrated in the present case. For the entire five-day period of incarceration Stewart had no available means to secure his release. He had no opportunity to obtain temporary release through bail procedures prior to appearing before a court or magistrate. It is, in addition, implausible to impute to Stewart,

unrepresented as he was, a workable knowledge of his right of habeas corpus, which is guaranteed by Article I, section 9 of the Constitution.

Recognition of unauthorized police detention as a deprivation of one's liberty without due process, rendering inadmissible any confession elicited during the unlawful period, should raise the level of state police treatment of criminal suspects to the minimum procedural standards now demanded in the federal courts as a result of *McNabb* and its progeny. It should deter excessive detention on the basis of mere suspicion, an intolerable invasion of the citizen's fundamental right to liberty and freedom from unlawful seizure. It should deter mass arrests, such as occurred in the present case. It should minimize the opportunity and temptation for law enforcement officers to resort to inquisitorial methods we have long since rejected. It should reinforce our commitment to a federal system of government by eliminating the undermining effect of the arbitrary differences in treatment accorded federal and state defendants. See *Mapp* v. *Ohio,* 367 U.S. 643, 657-58; *Elkins* v. *United States,* 364 U.S. 206, 221; Broeder, *Wong Sun* v. *United States: A Study in Faith and Hope,* 42 Neb. L. Rev. 483, 588-93 (1962). Mr. Justice Douglas, in his concurring opinion in *Watts* v. *Indiana,* 338 U.S. 49, 57, forewarned that prompt arraignment must be a safeguard of constitutional proportion:

> "Detention without arraignment is a time-honored method for keeping an accused under the exclusive control of the police. They can then operate at their leisure. The accused is wholly at their mercy. He is without the aid of counsel or friends; and he is denied the protection of the magistrate. We should unequivocally condemn the procedure and stand ready to outlaw

> . . . any confession obtained during the period of unlawful detention. The procedure breeds coerced confessions. It is the root of the evil. It is the procedure without which the inquisition could not flourish in the country."

MOTION

The Writ of Certiorari Should Be Dismissed Because the Judgment Below Is Not "Final."

The jurisdiction of this Court has been invoked under the provisions of 28 U.S.C. § 1257(3), which provides for review by this Court, by writ of certiorari, of certain "final judgments or decrees" rendered by the "highest court of a State in which a decision could be had." It is submitted that the judgment presented for review here is not a "final judgment or decree" within the meaning of that section of the Code.

The California Supreme Court simply and without qualification "reversed" the judgment of the trial court. As this Court observed in *Gospel Army* v. *Los Angeles,* 331 U.S. 543, 546, "In California an unqualified reversal, 'that is to say, without direction to the trial court,' is effective to remand the case 'for a new trial and places the parties in the same position as if the case had never been tried.' [Citations omitted.]" That continues to be the law in California. *E.g., People* v. *Murphy,* 59 Cal. 2d 818, 833, 382 P.2d 346, 356; *Hall* v. *Superior Court,* 45 Cal. 2d 377, 289 P.2d 431; 4 Cal. Jur. 2d, Appeal and Error, §§ 683-684.[33]

[33] *Richfield Oil Corp.* v. *State Bd. of Equalization,* 329 U.S. 69, does not state any different California rule. "Although the Supreme Court [of California] reversed the judgment of the trial

Where, as here, "the effect of the state court's direction is to grant a new trial, the judgment will not be final" for purposes of review in this Court. *Gospel Army* v. *Los Angeles, supra* at 546. See also *Southern Pac. Co.* v. *Gileo,* 351 U.S. 493, 496; *Laclede Gas Light Co.* v. *Public Service Comm.,* 304 U.S. 398; *Cincinnati Street R. Co.* v. *Snell,* 179 U.S. 395. When a defendant in a criminal case is seeking appellate review, the rule of finality is sometimes articulated in terms of whether the proceedings have yet reached the point at which the accused has been sentenced and his sentence, or at least his conviction, is subject to no further direct review below. *Berman* v. *United States,* 302 U.S. 211; *Parr* v. *United States,* 351 U.S. 513, 518; *Brady* v. *Maryland,* 373 U.S. 83, 85 n.1. When it is the prosecution seeking the appellate review of a criminal case, that rule would seem to translate into terms of whether the proceedings have yet reached the point at which the accused has been acquitted and the acquittal is subject to no further direct review below. See, *e.g., Pennsylvania* v. *Nelson,* 350 U.S. 497, *affirming Nelson* v. *Commonwealth,* 377 Pa. 58, 104 A.2d 133; *cf. Andrews* v. *United States,* 373 U.S. 334. In the present proceedings, the judgment of the California Supreme Court, neither in words nor effect, directs an acquittal; it rather puts both the accused and the prosecution "in the same position as if the case had never been tried." *Erlin* v. *National Union Fire Ins. Co.,* 7 Cal. 2d 547, 549, 61 P.2d 756, 757.

It is, of course, recognized that the Court gives the finality provision of 28 U.S.C. § 1257 a "practical rather

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court without direction, its decision controls the disposition of the case" because "the facts have been stipulated and the Supreme Court of California has passed on the issues which control the litigation . . . . " 329 U.S. at 73. See also *Pope* v. *Atlantic Coast Line R. Co.,* 345 U.S. 379, 382.

than a technical construction." *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546. And see *Local No. 438* v. *Curry,* 371 U.S. 542; *Radio Station WOW* v. *Johnson,* 326 U.S. 120. Those and other related cases recognize the concept that there are some judgments which fall into "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Industrial Loan Corp., supra* at 546.

But this is not such a case.[34] The claim of the State that Stewart's confession is admissible into evidence, if it be a "claim of right" at all, is not one which has yet been "finally determined" by the California courts. The state courts have not yet even given their "final word" (*Market Street R. Co.* v. *Railroad Commission,* 324 U.S. 548, 551) on the question whether or not the confession is admissible against Stewart under the doctrine of *Escobedo* and *Dorado.* Upon retrial the prosecution may be able to establish that Stewart waived his right to counsel before he confessed. See *People* v. *Aranda,* 63 Adv. Cal. 542, 552, 407 P.2d 265, 270; *People* v. *Bilderbach,* 62 Cal. 2d 757, 401 P.2d 921.

Moreover, even if the California Supreme Court erred in interpreting the constitutional teachings of *Escobedo,* that court has not "finally determined" whether Stewart's confession was nevertheless inadmissible because involuntary. The court below did not "probe the problem raised by

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[34] "The only decision of this Court applying to a criminal case the reasoning of *Cohen* v. *Beneficial Loan Corp.* . . . held that an order relating to the amount of bail to be exacted falls into this category. *Stack* v. *Boyle,* 342 U.S. 1." *Carroll* v. *United States,* 354 U.S. 394, 403.

Jackson v. *Denno* (1964), 378 U.S. 368," but rather chose to leave the issue of the involuntariness of the confession to further proceedings upon re-trial.[35] 62 Cal. 2d at 576 n.3, 400 P.2d at 100 n.3. See also *People* v. *Aranda, supra.*

Thus, while the questions presented here by the State may be "serious and unsettled question[s]" (*Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 547), this Court's ruling on them at this time is not "fundamental to the further conduct of the case" (*United States* v. *General Motors Corp.,* 323 U.S. 373, 377). Nor are the State's questions "independent of, and unaffected by" (*Radio Station WOW* v. *Johnson,* 326 U.S. 120, 126) what may transpire upon re-trial.[36] Indeed, they can be "mooted" (compare *Brady* v. *Maryland,* 373 U.S. 83, 85 n.1) by the further state court proceedings if, for example, Stewart prevails on the reserved issue of the involuntariness of his con-

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[35] The trial court did not make a determination in the absence of the jury that Stewart's February 5 confession was voluntary. The record shows that the court heard the tape recording of the confession outside the presence of the jury and found it to be "intelligible and discernible" and that the transcription of the tape was "accurate" (Rep. Tr. 361, 728-730). Apparently the defense counsel made no objection to the admission of the confession into evidence (Rep. Tr. 728-745). The record shows that outside the presence of the jury the prosecuting attorney stated to the court that the contention was being made by the defense that the confession was "induced by certain promises made by the Sergeant" (Rep. Tr. 876). The trial court instructed the jury that it should not consider "any admission or confession of the defendant unless such statement was voluntarily made" and gave instructions on definitions of confession and admission and when an admission or confession is involuntary (Supp. Clk. Tr. 11-13).

[36] *Cf. DiBella* v. *United States,* 369 U.S. 121, 127; *Cogen* v. *United States,* 278 U.S. 221, 223.

fession,[37] or the prosecution establishes that Stewart made a knowing and intelligent waiver of his right to counsel.

Furthermore, the fact that petitioner *may,* ultimately, *finally* lose in the state courts on the issue of the admissibility of Stewart's confession does not render the present judgment "final." That is so even if the inadmissibility is established in the context of a re-trial ending in an acquittal, and the State's present claims thereby are "swallowed up in the sanctity of the jury's verdict." *Carroll* v. *United States,* 354 U.S. 394, 406. See also, *DiBella* v. *United States,* 369 U.S. 121, 130. In *Carroll,* this Court held that a federal district court order granting a defense motion to suppress evidence in a criminal case was not appealable to the court of appeals because not a "final" order.[38] There the Government argued, "as it offered to stipulate below, that the effect of suppressing the evidence . . . will be to force dismissal of the indictment for lack of evidence on which to go forward." 354 U.S. at 405. The Court responded by observing that "appeal rights cannot depend on the facts of a particular case"; that "Congress necessarily has had to draw the jurisdictional statutes in

[37] In this connection, it should be noted that petitioner's statement of each of the questions presented for review here involves an assumption that the prosecution has prevailed on that issue. Petitioner's Opening Brief 2.

[38] See also *DiBella* v. *United States,* 369 U.S. 121.

In *Carroll* and *Di Bella,* the Court was dealing with the question of the jurisdiction of the federal courts of appeals under 28 U.S.C. § 1291. The "final judgment" requirement of 28 U.S.C. § 1257, which is involved in the present case, has been treated by this Court as involving at least as much "finality" for purposes of this Court's jurisdiction over state court proceedings as the "final decision" requirement of 28 U.S.C. § 1291 involves for purposes of the jurisdiction of the courts of appeals over district court proceedings. See, *e.g., Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. 120, 123-124.

terms of categories"; and that the order suppressing evidence held by the prosecution did not fall into the statutory category of a "final decision." The holding of the California Supreme Court in the instant case is less "final" on the issue of admissibility of Stewart's confession than was the holding of the District Court in the *Carroll* case on the issue of the admissibility of the prosecution evidence there involved. Here, the prosecution may yet prevail on that issue and, in any event, may yet convict Stewart, whereas in *Carroll,* the Court assumed that the suppressed evidence would be unavailable to the Government and that the accused would be acquitted without such evidence.

It appears, therefore, that the judgment below is not "final" within the meaning of 28 U.S.C. § 1257(3).

Conclusion

For the foregoing reasons, the writ of certiorari should be dismissed as improvidently granted, or, in the alternative, the judgment of the California Supreme Court should be affirmed.[39]

Respectfully submitted,

WILLIAM A. NORRIS
Attorney for Respondent

Of Counsel:

TUTTLE & TAYLOR

February 3, 1966

[39] Should this Court decide to remand the case to the California Supreme Court, still a further constitutional question would be presented under *Griffin* v. *California,* 380 U.S. 609. The prosecutor commented to the jury on Stewart's failure to testify on the counts charging him with robbing Mrs. Miyauchi, Mrs. Dixon and Miss Ramirez (Rep. Tr. 1107-1108, 1111). *Griffin* v. *California* was decided after the California Supreme Court decided *Stewart.*

APPENDIX

APPENDIX A

Statutory Provisions Involved

California Penal Code:

"§ 189. All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree."

"§ 825. The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; provided, however, that when the two days prescribed herein expire at a time when the court in which the magistrate is sitting is not in session, such time shall be extended to include the duration of the next regular court session on the judicial day immediately following.

"After such arrest, any attorney at law entitled to practice in the courts of record of California, may, at the request of the prisoner or any relative of such prisoner, visit the person so arrested. Any officer having charge of the prisoner so arrested who willfully refuses or neglects to allow such attorney to visit a prisoner is guilty of a misdemeanor. Any officer having a prisoner in charge, who refuses to allow any attorney to visit the prisoner when proper application is made therefor, shall forfeit and pay to the party aggrieved the sum of five hundred dollars ($500), to be recovered by action in any court of competent jurisdiction."

"§ 849. (a) When an arrest is made without a warrant by a peace officer or private person, the person arrested, if not otherwise released, must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person, must be laid before such magistrate.

(b) Any peace officer may release from custody, instead of taking such person before a magistrate, any person arrested without a warrant whenever:

(1) He is satisfied that there is no ground for making a criminal complaint against the person arrested. Any record of such arrest shall include a record of the release hereunder and thereafter shall not be deemed an arrest but a detention only.

(2) The person arrested was arrested for intoxication only, and no further proceedings are desirable.

(3) The person arrested was arrested for a misdemeanor, and has signed an agreement to appear in court or before a magistrate at a place and time designated, as provided in this code."